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INTERNATIONAL LAW COMMISSION
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REPORT OF THE INTERNATIONAL LAW COMMISSION ON
THE WORK OF ITS THIRTY-EIGHTH SESSION (1986)

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

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INTRODUCTION

1. At its forty-first session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 20 September 1986, to include in the agenda of the session an item entitled "Report of the International Law Commission on the work of its thirty-eighth session" 1/ (item 130) and to allocate it to the Sixth Committee.
2. The Sixth Committee considered the item at its 27th to 34th, 36th to 44th and 51st meetings, held between 29 October and 14 November and on 24 November 1986. 2/ At its 51st meeting, on 24 November, it adopted without a vote draft resolution A/C.6/41/L.18, entitled "Report of the International Law Commission", which it recommended to the General Assembly for adoption.
3. The General Assembly, at its 95th plenary meeting, on 3 December 1986, adopted resolution 41/81 as recommended by the Sixth Committee. By paragraph 12 of the resolution, the General 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 forty-first session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate. It may be noted that the Commission, because of lack of time, was unable to give consideration to the topic on "Relations between States and international organizations (second part of the topic)". The Sixth Committee was therefore not able to make substantive comments on this topic.
4. The Sixth Committee decided to consider item 130 (Report of the International Law Commission on the work of its thirty-eighth session) together with item 125 (Draft Code of Offences against the Peace and Security of Mankind), on the understanding that delegations wishing to make a separate statement on item 125 should do so towards the end of the period allocated to the two items. 3/ Thus, section E (Draft Code of Offences against the Peace and Security of Mankind) of the present topical summary has been prepared taking into account the views expressed in the Sixth Committee during its consideration of items 130 and 125.

TOPICAL SUMMARY

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

5. A number of representatives congratulated the International Law Commission on the work it had accomplished at its thirty-eighth session. Gratification was expressed that the Commission had been able, despite the financial crisis, to implement all the decisions taken at its thirty-seventh session and fully to comply with the recommendations contained in General Assembly resolution 40/75, in particular the adoption in first reading of draft articles on two topics on its agenda. Despite the reduction in the length of its session caused by that crisis, the Commission's 1986 session had been exemplary in terms of results and the business-like utilization of the available time and facilities.

6. Concern was expressed, however, that further progress had not been made in the work on certain topics, such as State responsibility, and that certain issues had not been dealt with in greater detail, owing to the shortening of the session.

7. Certain representatives stressed that international law had a vital role to play in contemporary international relations. The correct understanding of the relationship between international politics and international law was a fundamental component of the new thinking in the nuclear age. In the nearly 40 years of its existence, the International Law Commission had greatly contributed to strengthening the role of international law. In order for it to fulfil its function in the modern world, priority attention should, it was urged, be paid to those of its tasks concerned with guaranteeing peace and security. The modern world required all States strictly to respect the rules of international law and called for the qualitative development of international law in the interest of universal security; the work of the Commission was therefore of primary importance. It was frequently forgotten that peace and harmonious co-operation among States could be achieved only through law. Efforts should be concentrated on reversing the trend towards anarchy in international relations and the reign of force, on the basis of an integrated approach to the development of international law.

8. It was stressed that respect for international law and the fulfilment by States of their international obligations were increasingly vital to the task of maintaining international peace and security. International co-operation buttressed by juridical norms was indispensable to countries striving to promote economic development and the well-being of their peoples. Moreover, it was said that the codification and progressive development of international law were the supreme expression of the civilized development of States; the human being took on a new and fundamental dimension in international life as the ultimate goal and subject of international law.

9. A number of representatives stressed their intention to participate constructively in the legislative activities of the United Nations and to maintain their fundamental position of relying on legal mechanisms in the conduct of foreign relations. In addition, it was said that harmonious co-operation between the Sixth

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Committee, the International Law Commission and the International Court of Justice would greatly enhance the possibility of more importance being attached to international law, the only alternative to international anarchy.

10. However, it was pointed out that only 1.7 per cent of the regular United Nations budget was allocated to activities related to international law. The efficiency of the multilateral lawmaking process was threatened by further financial restrictions. The hope was expressed that the financial problems facing the United Nations would not have a negative effect on future work regarding the progressive development of international law and its codification.

11. As to the role of the Commission, it was said that it was to a large extent the focal point for the expectations of the international community concerning the progressive development of international law and its codification. The observation was made that contemporary lawmaking was a dynamic process which sought to harmonize the interests of a diverse community of States. It was essential to give due consideration to the various claims made, so as to arrive at principles and rules corresponding to the legitimate expectations of States. The field of international law was characterized by flux and change. The Commission faced the challenge of bringing about the progressive development of international law while reconciling the pressures for change with the fundamental values of stability, certainty, predictability and equity. The crucial role the Commission played in the international community was valued, and consistent reliance on the treaty-making process within the United Nations, especially that of the Commission, was urged.

12. It was emphasized that the Commission's significant accomplishments during the 38 years of its existence must not be disregarded. It had produced fundamental texts which had been adopted by States and, with the assent of the General Assembly, had not hesitated to combine elements of lex lata and lex ferenda in the preparation of draft articles on particular topics in response to the changing needs of the international community. If the Conventions elaborated by the Commission had not all entered into force or had not all been widely accepted, it was not the Commission's fault. It was for the General Assembly to encourage Member States to become parties to those conventions in the formulation of which they had themselves participated. In addition, it was remarked that the recent, successfully concluded Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations had demonstrated that States still had the spirit of commitment and the political will to continue the process of codification and progressive development, in response to the new challenges and needs of the times.

13. Furthermore, it was said that as the term of the existing membership of the International Law Commission was coming to an end and new members were to be elected by the General Assembly at its current session, it seemed a good time to note that, in the past five years, the Commission had achieved definite results in the codification and progressive development of international law. The task had not been easy, given the extreme diversity of social, legal and cultural systems in the contemporary world. The Commission, in which the main forms of civilization and the principal legal systems of the world were represented, could perform its

codification work only by seeking a balance among those systems and by bearing in mind contemporary realities and the interests of all sides. The legal instruments prepared by the Commission would meet with a warm reception and general support from all States, especially the small- and medium-sized countries, as long as its work was pursued in that spirit.

14. One representative stressed that the International Law Commission should fully exercise its role in the process of building a generally accepted international legal order. The Commission had contributed significantly to international law by laying the foundations of an international legal system during its first two decades. However, multilateral treaties were only part of those foundations. The Commission had, in the past, preferred to codify, or at most to itemize, rules already recognized, rather than actually develop the law. Perhaps for that reason, there was a growing incoherence in the United Nations legislative system as a whole. In order to strengthen the concept of peace and co-operation through law, it was indispensable to identify the international community's needs in the development of international law from the point of view of the maintenance of international peace and security and the promotion of friendly and mutually beneficial co-operation among States, as well as to enhance the coherence and efficiency of the lawmaking process within the United Nations system. It would be useful to set up a comprehensive computerized system covering States' legislation and treaty relations, in order to enhance knowledge of the current state of legal regulations and to facilitate the identification of problem areas and the formulation of legal norms. It would also be helpful to provide for better co-ordination of activities in the lawmaking process, by conducting a comprehensive survey of the activities of international organizations and institutions over the entire spectrum of public international law. The Commission's mandate could be broadened to include responsibility for co-ordinating such activities. Information on substantive aspects of the work of such institutions as the European Committee on Legal Co-operation, the Inter-American Juridical Committee or the Asian-African Legal Consultative Committee could be included in the section of the Commission's report relating to its co-operation with other bodies. The United Nations Juridical Yearbook might also include a review of such activities. While the aforementioned steps would facilitate the development of international law and make it more efficient and more responsive to the needs of a changing world, they were only technical instruments. The decisive factor in the success of the process would be the will and determination of all States to develop a stable and comprehensive international legal order.

15. Another representative said that the Commission should operate within the existing international legal framework. To some extent the current situation was a result of the Commission's having been assigned topics involving less codification and much more progressive development of the law than had been the case earlier. He believed that the Sixth Committee should refer to the Commission only such topics as were well developed in State practice; topics on which there were entrenched political divergences should be avoided.

16. One representative emphasized in particular the Sixth Committee's essential role as an international political lawmaking body. In the past years, he said, the International Law Commission's productivity had diminished, largely because the

process of codification of international law had been completed in many areas - to a considerable extent thanks to the Commission's own efforts - and attention was shifting to the progressive development of international law. That was a highly complex task requiring the harmonization of many different State interests and the co-ordination of the political will of States to assume obligations in the interests of the international community as a whole. The Commission, its notable achievements and the great competence of its members notwithstanding, could not, as a purely legal organ, perform that task. It was for the Sixth Committee to do so. The numerous international conventions drafted within the Committee bore witness to the Committee's experience in that field. His delegation therefore took the view that the Committee's directly law-making activities in major areas of progressive development of international law should be given prominence in the future. The Committee's annual consideration of the report of the International Law Commission should also be highlighted as a means of acquainting the Commission's members with the positions of Governments and thus helping them to produce drafts of a really viable nature.

17. When introducing the report of the Commission on the work of its thirty-eighth session before the Sixth Committee, the Chairman of the Commission stressed the importance of the links of communication between the Commission and Member States, particularly representatives in the Sixth Committee. He said that the comments made each year on the report of the International Law Commission by the members of the Sixth Committee as representatives of sovereign States provided the Commission, a body of legal experts, with the necessary guidance for continuing its work. He urged all representatives to express their views, for that was the best assurance and the best encouragement to the Commission in its role of promoting the codification and progressive development of international law. He also urged Governments to respond to the Commission's requests for comments and observations on draft articles adopted on first reading.

18. Several representatives also referred to the importance of the relationship between the Commission and Member States and their representatives in the Sixth Committee. It was said that the views to be expressed in the Sixth Committee would facilitate the adoption of new general multilateral conventions to supplement and strengthen the legal structure built by the United Nations in the quest for world peace through law. Indeed, one of the reasons for the success of the work of the International Law Commission was the exchanges of views between the Commission and Governments, which ensured that research and creative thinking were combined with a recognition of political realities. What the Commission needed and was entitled to receive from the Sixth Committee was political guidance and as clear-cut answers as possible to the questions which it raised on such politically sensitive issues as the draft Code of Offences against the Peace and Security of Mankind and the topic of State responsibility, as well as on specific issues where it occasionally found itself deadlocked. The prevailing feeling among the representatives of States in the Sixth Committee could be the determining factor in breaking such deadlocks. Moreover, statements before the Committee should be confined to guidance specifically requested by the Commission. The Sixth Committee was not the forum for detailed examination of the various topics; that should be the function of written replies and comments addressed to the International Law Commission. In that connection, certain representatives indicated their Government's intention to

submit written comments and observations on the two sets of draft articles adopted on first reading in 1986, as requested by the Commission.

19. The fundamental point to be grasped, it was maintained, was that the annual consideration of the Commission's report was not a mere routine task, but a very important phase in the process of the codification and progressive development of international law. It also provided an opportunity to engage in the dialogue and consultations characteristic of multilateral diplomacy. The codification and progressive development of international law constituted a democratic process taking place within a democratic international community, through which all States ought to participate in the technical elaboration and political adoption of any instrument intended to govern international relations.

20. It was observed, however, that the comments of a number of delegations reflected a profound feeling of uneasiness and dissatisfaction regarding both the Commission's programme and methods of work and the Sixth Committee's conduct of the debate on the Commission's report. It was stated that the procedure by which the Sixth Committee annually devoted a good part of its time to considering the Commission's report did not seem to be the most effective way of helping it accomplish its task. The discussions of the report should be rationalized. It was hoped that the question would receive all the attention which it deserved and that agreement would be reached on the best ways for the members of the Commission to benefit from the observations made in the Sixth Committee.

21. One representative in particular addressed the question of the manner in which the Sixth Committee conducted its debate on the Commission's report. He said that in preparing for the debate, his delegation had wondered whether the traditional method of dealing with the item was really efficient, especially in the light of the Organization's constrained budget situation. The item was an extremely time-consuming one, involving many lengthy statements to which Committee members could not always give adequate attention. It was often more convenient to study a transcript of a statement than to follow its delivery. At the same time, although the statements might cover many pages, they were not always detailed in substance and hardly ever comprehensive, so that the Commission did not always receive the detailed political and legal guidance it was entitled to expect.

22. His delegation strongly supported the proposals of the Asian-African Legal Consultative Committee contained in document A/41/437 and endorsed the proposal to the effect that comments on the Commission's report might be supplied in writing directly to the Commission and distributed as General Assembly documents. The advantage of that proposal, which was applied in document A/41/406, was that the comments would be prepared in the respective capitals especially for the benefit of the Commission, a procedure which would facilitate a more detailed review within the competent ministries, whose findings could then be set out in an informal, succinct and business-like manner. A slight disadvantage of the method he was proposing was that it would take some time to collect the comments of Governments and issue them as a United Nations document. However, his delegation saw no obstacle to deciding on a closing date for the submission of comments, for example, during the month of December. Individual Governments could also, should they so desire, circulate their comments on their own initiative.

23. His proposal was that a more concentrated and strategic debate should be held on the various issues dealt with by the Commission and the Sixth Committee in order to give more guidance on the possibilities and prospects of the various items on the two bodies' respective agendas. The debate should be held at a time decided well in advance and concentrated in such a way as to allow members of the Commission, chief legal advisers and heads of the legal departments of the foreign ministries of Member States to participate in the entire debate. A procedure along those lines would certainly not mean cancelling the Sixth Committee's debate on the Commission's report. On the contrary, it would mean holding a different kind of debate - a real debate, devoted basically to providing the Commission with guidelines of a general nature for its future work. Such a debate would be much more interesting and useful and, at the same time, much shorter. It would also allow for a general consideration of the work done by the Sixth Committee and the Commission and the distribution of issues between them and various ad hoc committees, with a view to achieving maximum efficiency in the work being done in the legal field as a whole.

24. His delegation saw little point in devoting a considerable amount of the Committee's time to discussing, at the current session, the two sets of draft articles on which comments had been requested. The best way in which the Committee could help to improve the efficiency of the administrative and financial functioning of the United Nations was by following the procedure of submitting written comments and observations by a certain date. In fact, he would go so far as to suggest that a Committee debate on any topic on which the Commission had adopted a full set of draft articles in first reading should be banned, pending the submission of written comments within the time-limit set by the Commission.

25. In conclusion, he stressed that all the proposals he had just made were in line with the recommendations of the Asian-African Legal Consultative Committee, as well as with proposals and statements made by representatives of many delegations belonging to different groups. There was no lack of good ideas aimed at making the Committee's work more efficient. Perhaps the point at issue was merely a matter of co-ordinating what was already in the spirit of all delegations. At any event, in his delegation's view, the time had come to act in order to steer the work of the Committee and the Commission along a more efficient path.

26. The suggestions made by that representative as related in the preceding paragraphs were endorsed by certain representatives. It was said that those suggestions aimed at improving the cost-effectiveness and "time effectiveness" of the discussion of the Commission's report were very appropriate. They could be implemented with some flexibility to allow for the position of smaller States; many of them did not have adequate resources to present written submissions in a timely fashion. Also, it was noted that with regard to the relationship between the Sixth Committee and the Commission, improvements in methods of work of one body would succeed only if there were parallel improvements in the methods of work of the other. For the codification process to work, there must be a symbiotic relationship between the Commission and the Committee on substance and on methods of work as well. The Commission could help the Committee by making clear the areas in which it required the Committee's comments, but the Committee must also realize the need for improvements. There must be some self-discipline. Committee members

should undertake in 1987 to conduct a rationalized debate on the report of the Commission, and to work harmoniously with it.

27. Another representative emphasized the interrelationship between the Sixth Committee's debate on the Commission's report and the programme and methods of work of the Commission. He stressed that in order to achieve the desired goals of the progressive development of international law and its codification, the functional structures for the Commission's operation and for the debate of its report in the Sixth Committee should be kept under constant review. The need to improve those structures, however, was balanced by the need to enable the widest and most detailed dialogue and consultations possible to take place both in the Commission and between it and Member States. There should be no weakening of the links between the Commission and Member States in the Sixth Committee and their Governments, which ensured the complementarity that was one of the vital components of the process of codification and progressive development of international law.

28. It was obvious, he said, that, after 38 years of existence, the changes in international life and the financial constraints that weighed upon the Commission's work called for a comprehensive review and assessment. The Committee must take the initiative in the search for improvements. In that connection, when considering the Commission's choice of topics, methods of work and degree of success, it must be borne in mind that the Commission, which was under its statute an organ of the General Assembly, normally followed the directives laid down in the resolutions adopted each year by the Committee. Article 16 of the statute allowed the Commission to select topics for codification and submit recommendations to that effect to the General Assembly. In fact, the proposals for the progressive development of international law were not initiated by the Commission but referred to it by the General Assembly and, in accordance with article 17, by Member States or other authorized organs, agencies or bodies.

29. He stressed that the Sixth Committee should readily acknowledge that management of the Commission would not be efficient unless the Committee itself was ready to improve, change or even discard some of the established traditions if necessary. His delegation attached special importance to rationalization of the Committee's procedures and had made an important contribution in that area. Among other things, it had worked with the Asian-African Legal Consultative Committee to that end, and the work produced had been recorded in documents A/C.6/38/8 and A/40/726, circulated in 1983 and 1985, respectively. His delegation recognized, in particular, that the manner in which the Committee debated the Commission's report did not provide sufficiently clearly detailed political and legal guidance that the Commission needed in order to produce results within a reasonable span of time. If a real debate was desired, in which dialogue and consultations took the place of statement-making, certain prerequisites must be fulfilled.

30. To begin with, the Commission should perform the pivotal role of considering the proposed improvement of its methods of work so that it could bring into sharper focus the questions on which it desired concrete political and legal guidance. In that connection, it would be useful to include in future reports a special section on the questions raised with regard to each topic on which views and guidance were sought.

31. With regard to the Sixth Committee, he said that the planning of the debate was essential, as was restraint in the length of statements. The proposal that the Commission's report be considered chapter by chapter, with delegations making more frequent but shorter statements, was particularly interesting. The proposal that, before the end of each session of the General Assembly, written submissions on opinions of a more technical or detailed nature should be presented was attractive, but he doubted its feasibility given the time needed by Conference Services to produce documents. His delegation welcomed the proposal to ban debate on any topic on which draft articles had already been adopted in first reading and recommended to Governments for comments. One should not, however, lose sight of the fact that a general exchange of views in the Sixth Committee would help delegations from developing countries to gain a feel of the overall situation and consequently to submit written views of a more technical and detailed nature before the deadline. It was noticeable that even countries with highly developed legal services expressed difficulties in attending to their legal tasks. The question of the costs involved in that procedure must also be scrutinized.

32. Lastly, once the Sixth Committee had completed its task, the Codification Division must make the necessary effort to report the results back to the Special Rapporteurs and the Commission. That was the least of his delegation's worries, for the Codification Division and the Office of the Legal Counsel had always shown a high standard of competence and efficiency.

33. Further observations or suggestions made by representatives concerning the Commission's methods of work and how improvements or changes therein would constructively help structure the Sixth Committee's debate on the Commission's report are summarized below in section H.1.

34. Turning to the question of broader dissemination of international law, one representative said that his delegation wished to congratulate the Commission on the seminars and conferences it had sponsored. His delegation had already stressed the need to publish the judgments and advisory opinions of the International Court of Justice in official United Nations languages other than the official Court languages of English and French. Such a step would contribute to the universal effectiveness and broader dissemination of international law, and would be extremely useful to the Commission, the Court itself, States, their officials, including diplomats, and to experts, professors and students of international law throughout the world. It was therefore with the greatest satisfaction that his Government had received the report of the Joint Inspection Unit entitled "Publications of the International Court of Justice" (A/41/591). His Government gave the report its full and enthusiastic support and planned to submit a concrete proposal in that connection to the General Assembly at its next session.

35. The great achievement of the report was, he said, its identification of specific formulas for the translation and publication of the Court's judgments and advisory opinions in the other official United Nations languages without incurring additional costs. The Inspectors responsible for the report should be commended for their skill in finding viable alternatives. It would be inexcusable not to take advantage of the possibility being offered of achieving important objectives at no additional cost. His delegation therefore hoped that both the Commission and

the General Assembly would urge the Joint Inspection Unit to produce the final version of its study, spelling out the implications of its recommendations in specific economic terms, to serve as a basis for the draft resolution which his delegation wished to submit to the General Assembly at its next session. The draft resolution would be based on the following recommendations, which would lead to savings of at least 50 per cent of the Court's actual publication costs: the Court should consider limiting the number of copies of its judgments published in French/English. It should also consider publishing separate copies in each of those languages, according to need; it should consider publishing a compilation of all its judgments in paperback edition and in each of the official languages of the United Nations; efforts should be made to lower the Court's printing costs through competitive bidding procedures and by the use of new technology in the printing process; the Court should utilize the savings generated by the implementation of certain recommendations to defray the costs of others; as the principal judicial organ of the world, the Court should also study how to reach the largest possible audience for its work; the Secretary-General should provide necessary measures to facilitate the translation and printing of the Court's judgments and advisory opinions in the other official languages, if so desired by the Court. His delegation would work enthusiastically to have the recommendations adopted in the interest of the Organization, all its Members, and a more promising future for international law and the administration of justice.

36. Another representative emphasized that all members of the Sixth Committee, the International Law Commission, the other legal committees of the United Nations, and university professors and legal researchers the world over were working to establish the rule of law as the principle of civilized coexistence within the community of nations. Everything which helped to increase understanding of the law of nations and to facilitate its application was in their interest. Therefore, his delegation also supported the general thrust of document A/41/591 and the recommendation that the judgments and advisory opinions of the International Court of Justice should be printed in separate French and English versions, and that they should be published in paperback in each of the official languages of the United Nations. Such a measure would be fair, because all the languages of the United Nations must be treated equally. It would be practical, because it would permit a wider distribution of international law and would give legal scholars better access to the Court's rulings. Yet another representative said that the recommendations of the Joint Inspection Unit were of great importance in the effort to ensure that the work of the highest legal body of the United Nations was known throughout the world. (After the conclusion of the debate on this item, the comments of the Secretary-General and the observations of the International Court of Justice on the above-mentioned report of the Joint Inspection Unit were circulated in document A/41/591/Add.1.)

37. Concerning the election to be held during the forty-first session of the General Assembly of the 34 members of the Commission, certain representatives viewed as beneficial the 1981 enlargement of the Commission which had been done in order to take account of the various legal systems in the world. The hope was expressed that broader participation and the consideration of different legal systems and experiences would enable the Commission to achieve even more successful results. One representative said that the need for balanced representation in the

International Law Commission of the main forms of civilization and the principal legal systems of the world should be borne in mind in electing members to serve on the Commission for the next five years. Another representative felt that, in arrangements for future elections to the Commission, the applicable rules for nominations, time-limits for the submission of candidatures, and the like should be adhered to so as to ensure order and fairness. Free competition and a maximum range of choice were to be encouraged, and the existing rules, unless revised or modified, should be observed in the future.

B. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

1. General observations

38. A number of representatives referred in their statements to the practical importance of the topic of the jurisdictional immunities of States and their property. The work of the Commission on the topic was, it was said, of great concern to the international community as it sought to reconcile differences between legal systems and resolve practical problems in international life.

39. The complexity of the topic, in the view of some representatives, was due to the fact that international customary law in the area was fairly limited, existing conventions had not been totally successful, and national laws diverse and often the outcome of jurisprudence in national courts where views were susceptible to change.

40. The complexity of the topic, it was said, could not be underestimated in the light of increasing economic development and interdependence, and varying State practice among industrialized, socialist and developing countries. National court decisions on the scope and application of the existing law on State immunity caused friction in international relations. The topic lent itself to various political approaches and touched on public as well as private law.

41. The comments of States on the draft articles prepared by the Commission were, it was said, of great importance and it was essential for the Commission, setting aside purely doctrinaire considerations, to take fullest possible account of such comments and seek out solutions that were likely to command general agreement.

42. The work of the Commission in the preparation of the draft articles had been, representatives stated, substantial, and appreciation was expressed for the considerable contributions made by the Special Rapporteur, Mr. Sompong Sucharitkul.

43. A number of representatives, before proceeding to comment on the provisions of the draft articles, expressed general views on the subject of the jurisdictional immunities of States and their property.

44. The view was expressed by some representatives that the immunity of States from the jurisdiction of the courts of other States was based on the sovereign equality of States, a principle whose universality and importance were self-evident. A State might, of course, in the exercise of its sovereignty consent

to submit to the jurisdiction of a court of another State; but such consent should be clearly expressed either with reference to a particular case or through an international agreement between the States concerned. The legal nature of the immunity of one State from the jurisdiction of the courts of another State was based, it was said, on the generally recognized and long-standing principles "par in parem imperium non habet".

45. The view was expressed by one representative that the development of the activities of States in fields outside the usual framework of State activity suggested that some adjustments in the application of the traditional concept of absolute immunity would be appropriate. Yet some national statutes and some decisions of national courts had gone too far in failing to recognize the immunity of States and had seemed lightly to dismiss the basic principle of the sovereign equality of States. A chaotic situation had been created and the international community needed a compendium of basic rules in order to re-establish some order in a domain of utmost importance. That could be done only by striking a careful balance between long-standing practices and emerging needs.

46. The point was also made that it often proved difficult in practice to distinguish between the activities of States in the exercise of their sovereign authority (acta jure imperii) which would be covered by immunity, and activities of States similar to private commercial entities (acta jure gestionis) when States, it was stated, should not enjoy immunity. Some attempts, he stated, had been made at the regional level to resolve such difficulties, as in the 1972 European Convention on State Immunity, and it was to be hoped that the draft articles now being prepared by the Commission would eventually lead to the adoption of universally acceptable rules.

47. The point was made by one representative that the precise delimitation of State activities enjoying immunity did not yet seem to be fully determined; and existing customary international law was, he said, increasingly interpreted to mean that acta jure gestionis were excluded from immunity.

48. The functions of States, another representative observed, which had traditionally been confined to political and diplomatic matters, had extended to a variety of economic and trade activities. This had, understandably, given rise to the question of equal treatment for all entities, whether governmental or non-governmental, engaged in such activities. The element of profit-making was undoubtedly of relevance; yet it was also true that a State, in its efforts to meet the needs of its people, may under certain circumstances engage in commercial activities that in fact did not involve any profit-making; and such commercial activities might arguably be regarded as a State function deserving of jurisdictional immunities.

49. The statement was made by another representative that his delegation continued to believe that the concept of absolute immunity had little relevance when State activities increasingly exceeded the conventional scope of government functions. Thus, the distinction between acta jure imperii and acta jure gestionis should be retained, though the formulation of the provisions of the draft articles should, if necessary, be kept somewhat flexible.

50. There were, in the opinion of one representative, clearly two different approaches to the topic, but there was little point in claiming that one of those approaches was favoured by common-law countries and the other by civil-law countries, in establishing a dichotomy between developed and developing countries or even in stating that the common-law countries or the advocates of more limited immunity had more precedents on their side. A questionnaire seeking information on the subject had been sent to all States Members of the United Nations in 1979, and the documentation received in reply had been submitted to the Commission. The existence of two different approaches did not mean that the Commission's work could not have successful results or that the scope of such results was bound to be very limited. It was not impossible to adopt a neutral position midway between those two approaches.

51. The view was expressed by another representative that the topic of the jurisdictional immunities of States and their property was clearly a delicate one, since it hinged on the relationship between the development of international practice in the field and the traditional theory of absolute State immunity. The national legislation of some States and the practice of their courts with regard to the property of other States did not take account of the principle of immunity which was, of course, linked to the principle of the sovereign equality of States. It would be difficult, in his view, particularly in the light of complex problems of a practical rather than a theoretical nature, to arrive at a compromise formula which would achieve a satisfactory balance between new and established practices.

52. No one doctrine, in the consideration of another representative, should serve as a point of departure. The draft articles should be acceptable to all States; and thus, he said, an attempt should be made to reconcile the interests of all States, including those of the developing countries. Despite, he said, the theoretical tendency to favour the concept of restrictive immunity, it was the concept of absolute immunity that was invoked by most States in cases of litigation. It seemed clear that progress still had to be made before a generally acceptable formula was found.

53. The view was also expressed by another representative that in his view, doctrinal differences should be of less concern than the achievement of practical results; and it was important that the law should develop on the basis of pragmatic compromise between the two conceptual approaches (the concept of absolute immunity and the concept of restrictive immunity) through a spirit of realistic adjustment to contemporary requirements.

2. Observations on the draft articles as a whole

54. A number of representatives, before expressing their views on particular provisions of the draft articles, provisionally adopted by the Commission on first reading, commented in general terms on the structure and nature of the draft articles as a whole.

55. Some representatives stated that they considered the draft articles to be a good basis for future work in the preparation of an international instrument on the

subject, though they may not be entirely satisfied with all the provisions of the draft articles.

56. The view was expressed that the task of the Special Rapporteur had not been easy. The difficulties inherent in attempting to translate varying and sometimes divergent State practice into a single, uniform international instrument could not be overstated. One example, referred to in the commentary to part IV, was that measures of constraint known in the practice of States varied considerably and, as such, it would be difficult, if not impossible, to find a term which covered each and every possible method or measure of constraint in all legal systems. That difficulty was compounded by the fact that in the absence of decisions by international tribunals and given the scarcity of diplomatic practice, such varying practices had, of necessity, to provide the main part of the source material for the codification and progressive development of the law of State immunity. The Special Rapporteur's success in producing the draft articles adopted in first reading was therefore all the more impressive.

57. The view was also expressed that the Commission's approach to the topic, which was to state the principle of immunity and to define and delimit such principle by means of the establishment of certain exceptions, was acceptable. It was necessary to identify certain cases in which a State should not have immunity. Many States had set up machinery designed to prevent the State as such from carrying out acta jure gestionis. Such a course was likely to be conducive to a solution of the problem of immunity along the lines of the approach taken by the Commission in the draft articles.

58. The subject of the jurisdictional immunities of States and their property was, it was said, of interest to all States - those whose agencies were engaged in commercial activities as well as those in whose territory proceedings were instituted against foreign entities. The prevalence of mixed economies in the world meant that most States could fit into either category. The Special Rapporteur, in seeking to determine where the general rule of the immunity of the State would not be applicable, had relied in part on the developing practice of restrictive immunity. Future practice would continue to favour that basically fair approach in dealings between Governments and private individuals or commercial entities. Where such a practice was emerging, the draft articles should aim to facilitate the process, and that consideration should guide the Commission in its further work on the topic.

59. The view was expressed by some representatives that, in view of the divergencies of positions between States on the subject of the jurisdictional immunities of States and their property, the topic was a contentious one as was clear from the square brackets placed around alternative texts in the draft articles. Thus, much more work, in their view, was needed on the draft articles before an international convention on the subject acceptable to the entire international community could be finalized.

60. The view was expressed by another representative that the topic was of a sensitive nature, as it hinged on the relationship between the development of international practice in the field and the traditional theory of absolute State

immunity. The national legislation of some States and the practice of their courts with regard to the property of other States did not take account of the principle of immunity which was linked with the principle of the sovereign equality of States.

61. Some representatives considered that the draft articles were unacceptable as a basis for the codification or progressive development of international law on the topic. The draft articles, in their view, were inconsistent with the fundamental principle of the sovereign equality of States which made it clear that no State could exercise jurisdiction with respect to another State without the latter's consent. The draft articles were based on the concept of limited or functional State immunity, and on an artificial distinction between acta jure imperii and acta jure gestionis. Many of the draft articles proceeded, it was said, from the view that a State, depending on the functions it performed, could act in different capacities and, accordingly, enjoy or not enjoy immunity. The draft articles separated State actions into actions of a public law and those of a private law nature. Such a premise was unacceptable and was contrary to the principle of the sovereign equality of States in all spheres of their activities. The draft articles attempted, it was said, to single out and set aside so-called commercial activities on the pretext that they were not State activities proper, and that was clearly not acceptable.

62. The view was expressed by one representative, in this connection, that a State, and the authority of a State, was one and indivisible. All organs of a State acted on the basis of the authority of the State within the limits of their rights and obligations as established by the State. No State organ could be separated from the general system, singled out or opposed to other organs. A State's trade mission acted, like other State organs, on behalf of the State, and enjoyed immunity from foreign jurisdiction. A State's economic activities, including those carried out through commercial contracts, were not less important to the State than other forms of activity. The State engaged in economic activities, not as a private individual, but as a sovereign entity. A State sector of the economy existed in all countries. In socialist countries, it was the predominant sector; in many newly independent States, it was developing more and more strongly.

63. The point was made, by the same representative, that it was inadmissible for a court to consider the activities of a foreign State and to qualify them in one manner or another without regard to that State's own opinion. That in itself constituted unacceptable interference in the internal affairs of States. It was wrong to equate the State with physical persons by denying it immunity in respect of actions which, allegedly, could also be performed by private individuals. In concluding a transaction in civil law, the State acted as a special subject of civil law in that it did not act in the interest of personal profit of private individuals, but in the interest of the State and the economic and social development of its people.

64. The draft articles, it was also said by one representative, should be based on the concept of full immunity and not on limited or functional immunity. Such an approach was required by the principle of the sovereign equality of States, a fundamental principle of international law. The consistent use of the concept of

full immunity in the drafting of all the articles was an important prerequisite if the future convention was to have meaning and be generally acceptable to States with different socio-economic systems. There was, he said, a tendency to use the concept of limited State immunity in the text of specific draft articles. Another general shortcoming of the draft articles was that insufficient account was taken of the legislation and experience of socialist and developing countries. The view was also expressed by another representative that the draft articles were not on the whole very satisfactory. The draft articles had been formulated in the direction of functional State immunity based on an artificial distinction between acta jure imperii and acta jure gestionis. The Commission had not taken sufficient account of the comments and objections that the socialist States and some developing countries had made.

65. The draft articles, it was said by another representative, had provided for so many exceptions to the principle of State immunity from jurisdiction as to turn the principle into a juridical fiction. The draft articles should have been based on the generally recognized principles of absolute immunity of States and should have dealt only with a limited number of exceptions acceptable to a broad majority of States, leaving it to the discretion of States to decide on the question of waiving their immunity in each specific case.

66. One representative stated that in his view the draft articles should be considered in the light of the divergencies that existed in the positions of States with respect to the subject of State immunity and in the light of the divergencies in national practice. For States whose basic principle was, he said, that each State exercises sovereignty over its territory, the immunity of States was an exception and must be interpreted restrictively. For other States, immunity was the point of departure, and cases in which jurisdiction could be exercised were exceptions which had to be spelt out in detail. The former approach prevailed in the developed States of the West and the latter in the socialist States, while the developing States were represented in both groups because of the diversified practice. Only two general ideas seemed to be held by all States: first, that there were some cases in which States enjoyed immunity from jurisdiction, and, second, that at least in some cases such immunity did not apply. Such an observation seemed to be confirmed by the tendency, some evidence of which could be found in draft article 28 of the draft articles, to give importance to reciprocity on the basis of which States were often ready to modify their attitude towards immunities. This, in his view, underlined how few and weak were the rules, and seemed to confirm a restrictive view of immunities. By and large, the only aspect to which all States subscribed was that a State should not be subject to the jurisdiction of another State for acts relevant to the conduct of its business as a subject of international law. In his view, the draft articles were a reasonably well-balanced compromise, even if they did not correspond fully to what he would have liked. The basis of the compromise seemed to be threefold: first, immunity from jurisdiction should be the basic rule, the general principle, corresponding to the position of the proponents of absolute immunity, especially the socialist States; secondly, limitations or exceptions to that general principle should be reasonably numerous and spelt out in full detail in keeping with recent and less recent trends in developed Western States and some developing States; thirdly, immunity from measures of constraint in respect of property should be defined in

fairly wide terms with only limited exceptions, thereby providing an indispensable safeguard, especially to the developing countries, in judicial proceedings in those States that took a restrictive view of State immunity from jurisdiction. His delegation believed that on the basis of such a compromise, further work on the subject could be usefully pursued by States and by the Commission.

67. The view was expressed by another representative that, in his opinion, the draft articles were rightly based on the principle of par in parem imperium non habet, but it was uncertain whether that was a reference to existing customary international law or a constituent provision of the draft articles. The precise delimitation of State activities enjoying immunity did not yet seem to be fully determined. Existing customary international law was increasingly interpreted to mean that acta jure gestionis were excluded from immunity, the determining criterion being the nature of the act and not the motive or purpose of the State activity.

68. The view was expressed, by another representative, that the Commission's general approach to the subject of the jurisdictional immunities of States and their property, which assumed the existence of a rule of public international law requiring all States to grant immunity from the jurisdiction of their courts to all other States and which therefore limited the Commission's work to the identification of agreed exceptions to that rule, was a source of difficulties because it tended to reduce to a minimum the number of such exceptions. Both the doctrine and the case-law of many States attested to the fact that the existence of a general rule of immunity was far from being recognized by the majority. One must not be misled by such maxims as par in parem imperium non habet, which furthermore dated only from the fourteenth century. If the myth of a general rule of immunity were abandoned, it would be easier to reach agreement on a truly restrictive approach to immunity such as that reflected in multilateral conventions and in a great deal of recent national legislation.

69. One representative expressed the view that the international community lacked a general instrument on the jurisdictional immunities of States, and in recent years States promulgated laws which restricted jurisdictional immunities. The evolution from the doctrine of absolute immunity towards that of restricted immunity reflected the interests of developed, market-economy countries. In the elaboration of international legal norms, however, it was important to bear in mind all the factors involved: legislative precedents, traditional practice and the interests of all States, particularly the developing countries. His delegation was therefore concerned that the Commission had chosen a system of very extensive exceptions to the sovereign immunity of States. Still, it was not too late for the developing countries - in which the State sector, because of a dearth of private capital, had to take on a whole range of activities in the area of international economics and trade relations - to ensure that the instrument being drafted was more in accordance with their interest and their economic realities.

70. The view was expressed, by another representative, that the draft articles required further study and revision so that a more just and reasonable basis could be found, and in order that a legal instrument could be developed that would be acceptable to all members of the international community.

71. The view was expressed by one representative (who recalled that the purpose of the Commission was the codification and progressive development of international law) that identification of State practice, in the process of codification, was fraught with difficulties. This was relatively easy in the case of common-law States, whose law was based on case decisions, and in the case of States which had already enacted statutes on immunity. It was also relatively easy in the case of States with a restrictive approach to the subject. Also it should be noted, he said, that there were more complete records of judicial precedents in countries where sovereign immunity was controversial, as a result of restrictions which they placed on immunity, than in countries where State immunity was observed. The majority of countries, particularly with civil law systems, were, he felt, in the latter category, where the principles and procedures they applied in cases involving immunity virtually precluded the formation of evidence as to judicial precedents. The practice of such countries should also be considered.

72. As to the process of progressive development, he continued, it would be interesting to know what constituted such development in the work done by the Commission; namely, to what extent the Commission should be involved in aspects of sovereign immunity not yet regulated by international law or on which there were no sufficiently developed norms. Work on these aspects would also be complicated by the diversity of State practice. Notwithstanding such diversity, there was, he felt, a generalized trend towards according State immunity, except when the State acted as a private entity, particularly in the area of trade. The Commission, he felt, might wish to consider also the work done by the Organization of American States on a draft regional convention on State immunity which had been prepared on the basis of the extensive practice of States.

73. The point was made, by another representative, that given the divergencies of positions between States, it seemed necessary that the Commission should make a choice between, on the one hand, the drafting of minimum rules that could achieve agreement and serve as a common denominator for all State legislation and practice and, on the other, the drafting of exhaustive rules covering every question raised by immunity and its exceptions. The Commission, in the spirit of realism, appears to have chosen the first option, but in doing so it had also sought to achieve compromises in difficult areas, as was evident from the provisions placed in square brackets in the draft articles.

74. One representative stated that it was not surprising that the draft articles on jurisdictional immunities of States and their property contained a number of provisions in brackets. The reservations in question were the result of ideological, conceptual and policy differences. From the ideological standpoint, the question of whether jurisdictional immunities of States should be treated as a general principle of international law or as an exception to the more fundamental principle of territorial sovereignty had yet to be settled. The principle of the sovereign equality of States was in fact the very foundation of international law, which signified that all States had equal rights and duties. Since rights and duties were interdependent, the concept of sovereign equality could not be considered in its strictest sense in situations involving conflicts of sovereignty between States caused by the presence of one sovereign authority within the jurisdiction of another. In such situations, the conflict had to be settled in a

manner that respected the law of the jurisdiction in question, failing which the equality of States in respect of duties would be impaired. Conceptual differences centred principally on safeguards that would duly accommodate the concerns and needs of the developing countries and give reasonable protection to their sovereign right to pursue policies commensurate with their economic and social development objectives. In international relations, every State was both a grantor and beneficiary of jurisdictional immunities; the question that arose, then, related to the balance to be struck in a given set of circumstances involving a conflict of sovereignties. The acceptability and durability of that balance depended on its responsiveness to the actual needs of the vast majority of the members of the international community. He was of the view that the Commission had made a good attempt at striking a balance between the various interest involved, though improvements could still be made in certain areas: the drafting of certain articles was sometimes cumbersome; the commentary on some draft articles was occasionally brief and, accordingly, difficult to comprehend immediately; a clearer distinction should be made between acta jure imperii and acta jure gestionis; and there was an over-abundance of square brackets.

75. The view was also expressed by another representative that the sovereign equality of States was the very basis of public international law. However, in case of conflict of sovereignties, the immunities accorded to States were a matter of comity and reciprocity in the light of the realization that without a minimum enjoyment of immunity, the international legal order based on sovereign equality of States might suffer irreparable damage. Faced with the restrictive interpretation of sovereign immunities on the part of some States and the upholding of absolute immunity on the part of others, the Commission had been quite successful in charting a delicate course.

76. One representative considered that the draft articles should contain clearer provisions on State immunity. Referring to the draft as a whole, he said that a clearer definition should be given of State immunity in respect of activities carried out and property used in the exercise of diplomatic and consular functions. At a more general level, account should also be taken of the fact that States were engaging ever more frequently in economic activities within the framework of intergovernmental agreements and ought to enjoy complete jurisdictional immunity in respect of such activities. Exceptions to State immunity did not justify proceedings being brought against a State or its property in respect of contracts concluded or activities carried out by a State enterprise having a legal personality and a capital of its own.

77. The point was made by one representative that the Commission had not, it would seem, considered the question of how a State was to invoke its immunity before the courts of another State or what authority would settle disputes as to whether there was or was not immunity in a particular case. The practice followed by some States was for such questions to be determined by the courts of the forum State. It was his view that such questions involved, in fact, international disputes and should be dealt with in accordance with their international nature.

78. One representative, in commenting on the draft articles as a whole, referred particularly to the question of the settlement of disputes and noted that the

Special Rapporteur had in his 1986 report included provisions for the settlement of disputes. Such provisions were desirable and necessary, he said, as in the case of the Convention on the Law of the Sea where specialized technical matters could not always be addressed appropriately through existing mechanisms for the settlement of disputes; and where, as in that Convention, not only had rules to be applied by States been set out but a complete régime of interdependent rights and obligations had been established. It was essential for that régime to have its own institutions for the settlement of disputes, reflecting the particular characteristics of the régime. However, the situation was different in areas within the traditional category of codification, where the objective was merely to clarify the rights and obligations of States rather than to create a new régime. In such circumstances, interpretation of the rights and obligations under the new draft articles could readily be left to existing mechanisms for the settlement of international disputes. New mechanisms should be established when necessary. However, non-essential additional and alternative bodies diminished the stature of the existing institutions involved in the settlement of disputes, such as the International Court of Justice. The Commission must carefully consider whether new procedures for the settlement of disputes should be created or whether it sufficed to remind State of the obligation to settle disputes peacefully, using existing mechanisms.

79. A number of representatives stated that their observations, or their further observations, on the draft articles would be submitted by their Governments in writing at a later stage.

3. Comments on specific provisions of the draft articles

80. The draft articles on jurisdictional immunities of States and their property, provisionally adopted by the Commission on first reading, were arranged in five parts as follows: part I (Introduction); part II (General principles); part III (Limitations on) [Exceptions to] State immunity); part IV (State immunity in respect of property from measures of constraint); and part V (Miscellaneous provisions).

(a) Comments on draft articles in part I (Introduction)

Article 1. Scope of the present articles

81. One representative noted with satisfaction that the scope of the draft articles was restricted to immunity from the jurisdiction of the courts of a State, and did not also extend to immunity from the executive or administrative branches of a State.

82. The view was expressed by another representative that the title of the draft articles should clearly reflect the scope of the draft articles; namely that the draft articles only concerned the question of the immunity of States and their property in relation to the courts of another State. The national courts of a State were, of course, only one of the national authorities capable of taking action that may affect the immunities of another State.

Article 2. Use of terms

83. The view was expressed by some representatives that an article containing definitions of terms was particularly useful, as terms used in the articles may have differences in meaning under different international instruments and under national laws.

84. Some representatives considered that the provisions of draft article 2 (Use of terms) and the provisions of draft article 3 (Interpretative provisions) should be merged into a single article. Other representatives, however, made reference to what they considered to be the differences in the purposes of the two draft articles. (See the observations noted under articles 2 and 3 below.)

85. Paragraph 1. The view was expressed that the provisions of subparagraph (b) of paragraph 1 of draft article 2 (which define a "commercial contract") should be placed in draft article 11 (Commercial contracts), as it was only in draft article 11 that the expression "commercial contract" was used in the draft articles.

86. The point was made that both subparagraph (b) (i) of paragraph 1 (which referred to "any commercial contract or transaction for the sale or purchase of goods or the supply of services") and subparagraph (b) (iii) of paragraph 1 (which referred to "any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons") repeated the term "commercial" in their provisions, and this was not advisable in a definition of the expression "commercial contract".

87. The point was made by one representative that to define a contract of a "commercial" nature as a "commercial" contract, as subparagraph 1 (b) of draft article 2 did, would not really shed any more light on the problem any more than the provisions of paragraph 2 of draft article 3 would do. It was unfortunate, he said, that the Commission had not, during its discussion of paragraph 2 of draft article 3, considered a revision of the definition of a "commercial contract" in subparagraph 1 (b) of draft article 2.

88. A number of representatives drew attention to the relationship between paragraph 1 (b) of draft article 2; paragraph 2 of draft article 3; and draft article 11. (See the observations noted below under paragraph 2 of draft article 3 and under draft article 11.)

89. Paragraph 2. The point was made by one representative that the provisions of paragraph 2 of draft article 2 were welcome, if their purpose was to confine the definition of terms in paragraph 1 of draft article 2 to the context of the articles on jurisdictional immunities, as such terms might have different meanings under other international conventions or under the national law of countries.

Article 2. Use of terms; and article 3. Interpretative provisions

90. The suggestion was made by some representatives that the provisions of draft articles 2 and 3 might be merged into a single article, as it was at that time unclear what their difference in purpose was.

91. The view was expressed by another representative, however, that the purpose of draft article 3 was to facilitate the interpretation of the other draft articles and to avoid semantic difficulties in the interpretation of terms. Interpretative provisions were a precise indication of the will of the contracting parties. There were two categories of interpretative provisions: synthesizing clauses and regulating clauses. A synthesizing clause formulated, in conformity with the will of the contracting parties, the meaning of a particular term. The purpose of a synthesizing interpretative provision was to establish, for a particular instrument, the meaning of a term having several connotations. A synthesizing provision could, thus, confer on a term a degree of precision which might ordinarily be lacking in common usage. A regulating clause sought to clarify an expression whose meaning might be vague, such as by providing an interpretative direction.

92. The provisions of paragraph 1 of draft article 3 which seemed to constitute a definition of the term "State" might have been included, it was said, in paragraph 1 of draft article 2.

93. The view was also expressed, however, that there had been no intention to define the term "State" in paragraph 1 of draft article 3. This would have been both impossible and pointless. The purpose in draft article 3 was, it was said, to indicate as clearly as possible when proceedings were to be considered as proceedings against a State for the purpose of the application of the rules of immunity.

94. The point was made, by another representative, that interpretative provisions, such as those in draft article 3, should be drafted as precisely and as clearly as definitional provisions, such as those in draft article 2. An interpretative provision in a treaty constituted, he said, an agreement between the parties on the interpretation of provisions, and there would frequently be recourse to such interpretative provisions. He was of the view that the term "State" was rather vaguely defined in the interpretative provision in paragraph 1 of draft article 3. It was only in paragraphs 1 (b) and (c) of draft article 3 that a State was defined as an entity entitled to perform acts in the exercise of the sovereign authority of the State.

95. The view was expressed by one representative that in the Spanish version of the draft articles there were certain questions of language that arose: the word "mercantil" was not in current use in his country, where the word "comercial" was preferred; and the words "ante un tribunal competente de otro Estado" would be preferable to the wording "ante un tribunal de otro Estado, por lo demás competente" in draft article 16; and the word "incoación" used in draft article 24 was not in current use in his country.

Article 3. Interpretative provisions

96. Paragraph 1. The provisions of paragraph 1 of draft article 3 (concerning the use of the expression "State" in the draft articles) were vague and unclear, in the opinion of some representatives. Such detailed provisions were also, it was said,

unnecessary. The point was made that paragraph 1 of draft article 3 should merely specify the organs representing a "State" in international relations, namely those against which a proceeding may be instituted in a court of another country.

97. The view was expressed by one representative that provisions of paragraph 1 of draft article 3 seemed tautological. The provisions of paragraph 1 should also, it was said, be harmonized more fully in its language versions in the course of the second reading of the draft articles by the Commission.

98. The point was made, by one representative, that there ought to be a separate paragraph on the immunity of sovereigns and other heads of State.

99. The view was expressed, by another representative, that aside from the term "State" there were other expressions in the draft articles which were susceptible of different interpretations, such as the expressions "State property" and "interest". The question of the utilization of uniform and precise terminology throughout the draft articles should be reviewed by the Commission in the course of the second reading of the draft articles. The view was also expressed, in comments on the provisions of draft article 21, that there was perhaps a need to include in the draft articles an interpretative provision concerning the term "property".

100. As to the provisions of subparagraph (a) of paragraph 1 of draft article 3 (which provides that the expression "State" should be understood as including "the State and its various organs of government"), the view was expressed that they were not sufficiently precise and could lead to different meanings in different countries. If no wording could be found to clarify precisely what the expression "State" was intended to mean in the draft articles, it would be useful, it was said, to clarify the term "organs of government" further.

101. The view was expressed by one representative that the provision "the State and its various organs of government" in subparagraph (a) of paragraph 1 would not assist in determining what was meant by "organs of government"; and that consideration should be given to including in subparagraph (a) the clarification given in subparagraphs (b) and (c) of paragraph 1 regarding the "entitlement to perform acts in the exercise of the sovereign authority of the State".

102. The view was expressed by another representative that the provisions of subparagraphs (a) and (d) of paragraph 1 were acceptable, since only government agencies were empowered to exercise the sovereign authority of the State; however, care should be taken to ensure that entities with a legal personality of their own, such as self-contained economic units, could not be regarded as included within the meaning of the term "State" in the draft articles.

103. As to the provisions of subparagraph (b) of paragraph 1 (which would provide that the expression "State" should be understood as including "political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State"), the point was made by some representatives that the expression "the State and its various organs of government" in subparagraph (a) of paragraph 1 seemed sufficiently broad also to cover "political subdivisions".

104. The provisions of subparagraph (b) of paragraph 1 were considered particularly inappropriate and of a theoretical nature by one representative, who felt that the process of codification would be unnecessarily complicated by such provisions. He was of the view that the expression "entities empowered to exercise elements of governmental authority" used in article 7 of part one of the draft articles on State Responsibility would be a more appropriate formulation.

105. The view was expressed by some representatives that in subparagraphs (b) and (c) of paragraph 1, the expression "prérogatives de la puissance publique de l'Etat", in the French text, and the expression "sovereign authority of the State", in the English text, were not equivalent in meaning and could lead to serious differences of interpretation. The French expression, it was said, seemed intended to refer to public institutions and to distinguish them from private institutions. There were several types of "prérogatives de la puissance publique" and some were related to the sovereignty of a State. He would therefore have preferred to see the expression "prérogatives de l'Etat en tant que puissance publique" used.

106. The view was expressed by another representative that subparagraph (b) of paragraph 1 could be in The difference, he said, between the English and French versions of the text seemed to involve a difference of approach on a fundamental question: i.e., one could maintain either that only the political subdivisions of States which performed acts in the exercise of sovereignty (in other words, the federated States in federations or confederations) should enjoy jurisdictional immunity at the international level, as the English version would suggest; or that jurisdictional immunity extended to the autonomous territorial collectives which in unitary States exercised the prerogatives of public authority, a notion close to the French text, and one which his delegation would prefer.

107. As to the provisions of subparagraph (c) of paragraph 1 (which would provide that the expression "State" should be understood as including "agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State"), see the observations noted above under subparagraph (b).

108. As to the provisions of subparagraph (d) of paragraph 1 (which would provide that the expression "State" should be understood as including "representatives of the State acting in that capacity"), the view was expressed by one representative that such provisions seemed to be unnecessary.

109. Paragraph 2. A number of representatives referred in their statements to the relationship between the provisions of paragraph 1 (b) of draft article 2 (which would provide that for the purposes of the present articles "a commercial contract" means (a) "any commercial contract or transaction for the sale or purchase of goods or the supply of services", (b) "any contract for a loan or other transaction of a financial nature, including any obligation or guarantee in respect of any such loan or of indemnity in respect of any such transaction", (c) "any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons"); the provisions of paragraph 2 of draft article 3 (which would provide that "in determining whether a contract for the sale or purchase of goods or the supply of services is commercial,

reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if in the practice of that State that purpose is relevant to determining the non-commercial character of the contract."); and the provisions of draft article 11 (which would provide for the non-applicability of immunity to cases which involved "commercial contracts").

110. The view was expressed by one representative that as the expression "commercial contract" was only used once in the draft articles, and that was in draft article 11, the appropriate course would be to include the provisions of paragraph 1 (b) of draft article 2 and paragraph 2 of draft article 3 in draft article 11. Such a course, he said, would conform to the procedure already followed by the Commission in the 1963 Vienna Convention on Consular Relations where the definition of the expression "official correspondence" was to be found in the article to which it was exclusively linked, and not in article 1 devoted to definitions in general.

111. The provisions of paragraph 2 of draft article 3 were, in the view of some representatives, appropriate and acceptable. They noted that under paragraph 2, in determining whether a contract was commercial, account was to be taken not only of the nature of the contract but also of its purpose. The point was made, in this connection, that the purchase of basic commodities, such as food and medicine by third-world countries, was conducted for public purposes rather than for profit and deserved to be protected.

112. One representative (who noted that under the provisions of paragraph 2 of draft article 3 the criterion of "commercial contract" would not in itself determine the areas not enjoying immunity, and would be supplemented by the criterion of the "purpose of the contract") was of the view that, as every government activity had a public purpose, if the criterion of purpose were used, the immunity accorded by the articles would be very extensive. State-trading countries, he said, would then have an advantage over those countries whose economic activities were largely privately organized.

113. Furthermore, the point was made that the provisions of paragraph 2 of draft article 3, which would take into account the purpose of a contract in determining whether it was commercial or otherwise, ignored the position of a considerable number of important trading nations (the Congress del Partido case was an example cited) and might reduce the general acceptability of the draft articles. The Commission would, it was hoped, reconsider the provisions and realize that the compromise which paragraph 2 of draft article 3 represented was not satisfactory, and did not necessarily serve the interests of the developing countries as they, like other countries, were sometimes defendants and sometimes plaintiffs.

114. Some representatives were of the view that the criterion of purpose should be predominant in determining whether a contract was commercial or otherwise. The point was made that in the case of the developing countries, while their contracts might appear to be commercial, their activity served a public purpose.

115. The view was expressed by some representatives that a fairer balance than was currently reflected in the provisions of paragraph 2 of draft article 3, between

the criterion of the nature of the contract and the criterion of the purpose of the contract should be sought. The provisions of paragraph 2, it was said by one representative, provided that the primary test for determining whether a contract was commercial was the nature of the contract: this approach, he said, reflected the philosophical starting-point that when a sovereign trades he should submit to the rules of the market. On the other hand, the purpose test, which was given only a secondary role in determining whether a contract was commercial, was a reflection of the other, equally legitimate, starting-point that the protection and advancement of the welfare of the people was a manifestation of imperium. He was of the view that a fairer balance between those opposing starting-points could be struck by giving equal weight to the two tests of "purpose" and "nature".

116. The view was expressed by some representatives that in formulating the provisions of paragraph 2 of draft article 3 special consideration should be given to the interests of developing countries which were called upon to conclude contracts which, while appearing to be commercial, actually served a public purpose, and should therefore not be treated as commercial. Examples of such contracts would be those relating to the procurement of food supplies to feed a population in times of famine, or of medicine to combat an epidemic. He was of the view that equal weight should be given to the purpose and the nature of the contract. For that reason, he said he was not entirely satisfied with the present formulation of paragraph 2 of draft article 3 in terms of which the two criteria were to be applied successively, the second criterion of purpose being resorted to only when it appeared that the nature of the transaction was commercial. At that stage, he said, it would be for the State concerned to show that the contract was to be treated as non-commercial because of its public purpose. In such a case, the burden of proof fell on the State concerned. A fairer solution would be to consider that where the purpose of the contract was clearly public and governmental, the transaction was non-commercial. Thus, the paragraph could be redrafted to read: "In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made to the nature of the contract and, to that end, due account shall be taken of its purpose."

117. The point was made by another representative that it may also be useful, in the consideration of the provisions of paragraph 2 of draft article 3, to examine whether other criteria may not also be used, as it seemed clear that the term "commercial contract" needed further clarification. States sometimes, he said, engaged in certain activities which might apparently be considered commercial in nature but which could not in reality be bracketed together with generally known commercial activities. Some developing countries faced such a problem, since in order to achieve some measure of economic development, they had adopted a mixed-economy system and established corporations with a view to undertaking specific activities in the interest of the State. Such cases should be considered from a different standpoint. This may require further elaboration of the concept of "commercial contract" with reference to certain other criteria such as profits or commercial gains.

118. The opinion was expressed that the concept of what constituted a "commercial contract" probably differed from jurisdiction to jurisdiction and the only way of establishing whether immunity should or should not apply, in a particular case,

would probably be through express provision in the contract between the parties. The point was made by one representative that draft article 11 was a critical article setting forth a major limitation of or exception to a general principle of State immunity. Under that draft article the State could not invoke immunity in a proceeding arising out of a "commercial contract" entered into by it with a person or entity not bearing its nationality. The scope of "commercial contract" was clearly of critical importance. The provisions of draft article 2.1 (b) (i) and (iii) used the same term in describing contracts intended to be covered. Subparagraph (i) implied that there could be contracts of a non-commercial type for the sale or purchase of goods or the supply of services. The draft articles did not offer criteria for distinguishing commercial from non-commercial contracts in the context of the jurisdictional immunities of States. However, they appeared to permit reference to whatever criteria might exist in the internal law of the State of the forum. Draft article 3, on "interpretive provisions", referred to the "nature of the contract" and, somewhat secondarily, to the "purpose of the contract". His delegation submitted that the wording "nature of the contract" might be too abstract and general to afford guidance in determining whether immunity should or should not apply in a given case. Also, the "nature of a contract" could not be considered separately from the "purpose of a contract". In any case, the concept of "commercial contract" probably differed from jurisdiction to jurisdiction. His delegation hoped that further consideration would be given to clarifying in what disputes, concerning what kinds of contract, jurisdictional immunity should be available to a State. As the draft articles stood, it seemed to him that the only reliable way of establishing an intention to invoke or waive the right to immunity was by explicit contractual stipulation in terms of draft article 11.2 (b), on whether the contract was to be characterized as "commercial" or "non-commercial".

119. The view was expressed by yet another representative that in his country recently enacted legislation had established that immunity from jurisdiction accorded to foreign States did not extend to the commercial or non-governmental acts of States. The kind of transactions to which immunity would not apply was specified in the legislation, and thus difficulties involved in allowing the motive behind a State's action to determine immunity were avoided.

120. The expression "practice of that State" in the latter part of the provisions of paragraph 2 of draft article 3 (which read: "but the purpose of the contract should also be taken into account if in the practice of that State that purpose is relevant to determining the non-commercial character of the contract") was also the subject of comment by some representatives.

121. The view was expressed by one representative that two questions seemed to arise, namely: which State was referred to in the phrase "in the practice of that State"; and what was meant by "practice". As to the first question, either the State claiming immunity or the State from whose jurisdiction immunity was claimed may be intended. One had to resort to the commentary to the 1983 draft articles to learn that the reference was to the State claiming the immunity; and, he said, the text of paragraph 2 should itself make the matter clear and specify that the State referred to was the State claiming the immunity. (The commentary, he said, should not be used as a substitute for a provision which should be in the text. He noted

in this connection that, under the terms of article 32 of the Vienna Convention on the Law of Treaties, recourse might be had to the commentary on an article only to confirm an interpretation or to determine the meaning of a term. The commentary had a useful but limited role to play.)

122. The statement was also made by one representative that it seemed to him that what was referred to as the "practice" of the State in paragraph 2 of draft article 3 was a misnomer in the case of a socio-economic system in which the State concluded commercial contracts as part of its public functions. The Commission may wish to re-examine the matter in its second reading.

123. The point was also made that the provisions of paragraph 2 of draft article 3 should, in clarifying the meaning of the term "practice", include words to the effect that the "practice" in question was that of the State's concluding contracts or transactions for public ends.

124. The view was expressed by another representative that the provisions of paragraph 1 (b) of draft article 2 and the provisions of paragraph 2 of draft article 3 had not clarified sufficiently what was to be regarded as a commercial contract. Paragraph 2 of draft article 3 did stipulate that, in determining whether a contract was commercial, reference must be made not only to its nature but also to its purpose if that purpose was relevant in the practice of the State concerned. The Commission had added in its commentary that the latter expression referred exclusively to the State claiming immunity and not to the State of the forum, but he wondered whether allusion solely to the practice of the State invoking immunity was satisfactory, and whether the wording selected might not be too elliptical.

125. One representative, though recognizing the undoubted usefulness of the "interpretative provisions" in draft article 3, was of the opinion that the provision which referred to the practice of the State claiming immunity in order to judge whether the purpose of the contract was relevant to determining its non-commercial character, could give rise to disputes. It would, also, introduce an element of judgement external to the contract, and such a course seemed inappropriate.

126. The point was also made that paragraph 2 of draft article 3 should also specify that its "interpretative provisions" applied not merely to a contract for the sale or purchase of goods or the supply of services, but also to other types of contracts as defined in draft article 2, such as a contract for a loan.

Article 4. Privileges and immunities not affected by the present articles

127. The view was expressed that the provisions of draft article 4 (which would provide, in paragraph 1, that the articles were to be without prejudice to the privileges and immunities enjoyed by a State with respect to its diplomatic missions, etc.; and, in paragraph 2, that the articles would be without prejudice to the privileges and immunities "accorded under international law to heads of

State ratione personae") were incomplete. The privileges and immunities accorded to other officials exercising functions comparable to those of a head of State, such as a Prime Minister, a Minister of Foreign Affairs, and the General-Secretary of the party in power in certain States, should likewise, it was said, not be affected by the articles.

128. One representative was of the opinion that the provisions of paragraph 2 of draft article 4 (according to which the draft articles were without prejudice to the privileges and immunities accorded under international law to heads of State ratione personae) should be extended to include all high-ranking persons, in the sense of article 50 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

129. The view was also expressed that an explanation in the commentary to draft article 4 on why the immunity of heads of State, and similar officials, were specifically provided for in the draft articles, would have been in order.

(b) Comments on draft articles in part II (General principles)

Article 6. State immunity, and title of part III ([Limitations on] [Exceptions to] State immunity)

130. A number of representatives referred, at the same time, in their comments to the provisions of draft article 6 (which read: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles [and the relevant rules of general international law]"), and to the title of part III (namely "[Limitations On] [Exceptions To] State Immunity").

131. Comments of a specific nature were made on, among other matters, the words "jurisdiction of the courts of another State", the words "subject to the provisions of the present articles", and the words "[and the relevant rules of general international law]" in draft article 6; and on the alternative expressions "[Limitations on]" and "[Exceptions to]" in the title of part III.

132. Article 6, it was said by a number of representatives, would state the principle on which the whole structure of the articles would be based.

133. Some representatives were of the opinion that the provisions of draft article 6 were generally satisfactory. The view was expressed by one representative that the new provisions of draft article 6 represented progress in the search for an acceptable compromise between two opposite concepts. The fusion of the principle of State immunity and expressly defined exceptions to that principle was a well-balanced idea which would become a solid foundation for the future instrument, though, he noted, further questions had to be resolved with respect to the formulations placed in square brackets.

134. One representative expressed the view that the provisions of draft article 6, without the words in square brackets, was satisfactory but he would have preferred

a general formulation of the principle in the following terms: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of another State". Such a formulation would not have excluded the possibility of providing for a certain number of carefully drafted and clearly limited exceptions.

135. As to the words "jurisdiction of the courts of another State" in draft article 6, the observation was made, by one representative, that the intention of the Commission appeared to be to reduce the scope of the draft articles, as the Commission would certainly have been aware that the immunity of a State might be disregarded not only by the courts but also by the administrative authorities of another State.

136. As to the words "subject to the provisions of the present articles" in draft article 6, the observation was made by one representative that the Commission had, at its thirty-second session, adopted a version of draft article 6 which had provided that a State was immune from the jurisdiction of another State "in accordance with the provisions of the present articles". Such a formulation could be interpreted as an affirmation of the general principle of immunity, and that was his understanding. However, it had also become clear that a different interpretation was possible, namely, that immunity would not exist except as a creation of the present articles. The Commission had, therefore, he said, sought to dispel any possible doubts and according to the new and present text of draft article 6 the State would enjoy immunity not "in accordance with" but "subject to" the present articles. It would be clear that immunity existed independently of the present articles as a basic rule of international law and the present articles, thus, would merely set out the conditions for the application of the basic rule of immunity.

137. The view was expressed, by another representative, that the Commission's general approach, which assumed the existence of a rule of public international law requiring all States to grant immunity from the jurisdiction of their courts to all other States, and which would limit the Commission's work to the identification of agreed exceptions to that rule, was a source of difficulty because it tended to reduce to a minimum the number of such exceptions. The doctrine and the case law of many States, he said, attested to the fact that the existence of a general rule of immunity was far from being recognized by the majority.

138. As to the words "[and the relevant rules of general international law]" in draft article 6, the view was expressed by some representatives that the words should be retained in the draft article, without square brackets, as their retention would be consistent with the position that international law seemed to be evolving towards a more restricted immunity. The retention of such words would make it clear, it was said, that the rule of State immunity would be subject to the future development of international law. The future development of State practice, it was also said, should be left unfrozen and undeterred by the formulation of the present articles.

139. The view was expressed in this connection by one representative (who felt it necessary and not impossible for a middle ground to be achieved between the two approaches that existed on the subject of the jurisdictional immunities of States

and their property) that the provisions of draft article 6 as provisionally adopted at the 1980 session of the Commission (which stated, in paragraph 1, that "a State is immune from the jurisdiction of another State in accordance with the provisions of the present articles", and, in paragraph 2, that "effect shall be given to State immunity in accordance with the provisions of the present articles") was an example of such a compromise. However, the present version of draft article 6 as adopted by the Commission in first reading appeared to have moved away from such middle ground and would, he said, leave it altogether if the words in square brackets were now to be deleted.

140. Some representatives were of the view that the words "[and the relevant rules of general international law]" should be deleted as the purpose of the present articles, they said, was to codify the rules of international law and if the words were retained in draft article 6 they would render the codification futile, as a loophole would be created which would allow agreed provisions to be breached. The words in question could be interpreted as covering customary norms of international law based on State judicial, executive and legislative practice which, if admitted, would be inconsistent with the purpose of codification.

141. The view was expressed by one representative that the words "and the relevant rules of general international law" enclosed in square brackets appeared reasonable at first sight, since the very assertion of State immunity was made by a "relevant rule of general international law". But the term "subject to" implied limitations or exceptions, and a reference to "relevant rules of general international law" in that context might be interpreted as admitting limitations and exceptions which might be found in rules of international law other than those contained in the articles themselves. The usefulness of the codification effort which the articles represented would thus be considerably weakened, if not destroyed. The articles would not be as clear as was desirable, and there would be a risk of reverting to the present situation of uncertainty and doubt. His delegation was therefore strongly in favour of omitting the words in question from the draft.

142. If there was to be provision for the evolution of international law in the field and for future concerns of States, the final instrument should, it was said, contain clauses on revision and modification. It was also said that the natural relationship between the present articles and customary international law need not be expressed in a specific provision of the article. One would expect States parties to a convention to ensure that their practice conformed to the convention; and a periodic review of the articles at a conference of the parties to the Convention could be provided. It would also be important, it was said, for a convention to contain a provision obliging States to take the necessary legislative and other measures to implement the convention. One representative stated that inclusion of the words in question in draft article 6 would mean that there could be further restrictions on State immunity in addition to the exceptions set out in the draft article.

143. The point was also made by one representative that the words "and the relevant rules of general international law" should be omitted, as the draft articles would take precedence over pre-existing general international law to the extent that they changed it; and draft articles that did not modify general international law would

simply coexist with it. To assume that draft article 6 referred to the development of subsequent norms of general international law inconsistent with the draft articles could, he said, raise questions relating also to jus cogens.

144. The view was also expressed that retention of the words "and the relevant rules of general international law" in draft article 6 might give rise to pointless arguments as to the very sources of such law. If it was really a matter of international custom, there was no mention, in addition to practice, of the second fundamental element of customary rules, namely "opinio juris sive necessitatis", nor recognition of such practice by other subjects of international law which raised the problem of harmonizing national legislation.

145. The point was made by another representative that there seemed to be no necessity for inclusion of the reference to rules of general international law in draft article 6 because of the absence of any precise State practice in the field. He was doubtful whether a compromise formula could be devised allowing a balance to be achieved between new and established practices in the light of complex problems of a practical rather than a theoretical nature.

146. The view was expressed by yet another representative that her delegation had some sympathy for those who advocated the omission of the reference in draft article 6 to "the relevant rules of general international law". The inclusion of such words seemed to undercut the usual purpose of the process of codification; and her delegation's view would depend ultimately on the final form of the completed draft articles.

147. One representative, who stated that he could accept the retention of the words "and the relevant rules of general international law", raised the question whether reference should not be made simply to "international law" rather than to the "relevant rules of general international law". Another representative suggested that the word "general", which obfuscated the meaning of "international law", should be deleted.

148. One representative stated that it was his view that the draft articles represented a laudable effort to codify the law in a particularly sensitive and uncertain area. The retention in draft article 6 of the words "and the relevant rules of general international law" would cast doubt on the usefulness of formulating a set of draft articles with such a reduced scope. If the inclusion of such words should be necessary to ensure the adoption of the articles, it would mean that the subject was not yet amenable to codification. It was to be hoped therefore, he said, that future work on the draft would proceed to a successful conclusion which would include the deletion of the words in question from draft article 6.

149. One representative drew attention to the fact that the wording of draft article 6, in the Arabic version of the text, needed to be amended: the words preceding the square brackets in question should refer not to the need to avoid contravening the provisions of the articles but to the need for conformity with the provisions of the articles.

150. As to the title of part III of the draft articles, namely the words "[Limitations on] [Exceptions to] State immunity", some representatives were of the view that the more appropriate title was "Exceptions to State immunity". They were of the view that State immunity was a general principle long established in international law and that any derogation therefrom must be regarded as an exception. The view was also expressed that as State immunity was a unitary principle, the expression "Exceptions to" better reflected the concept of State immunity as an integral unitary principle rather than as a set of independent rules.

151. Some representatives were of the view that the wording "Limitations on State immunity" was the preferable formulation, as the law on State immunity was developing and such development had not as yet been completed.

152. Some representatives who had expressed themselves in favour of a deletion of the words "and the relevant rules of general international law" in draft article 6, stated that they had no particular preference for either of the two alternatives "Limitations on" or "Exceptions to" in the title of part III. The point was made, in this connection, that use of either alternative should not affect the general rule of State immunity.

153. The view was expressed by one representative that it seemed possible in theory to elaborate draft articles which would establish a clear distinction between cases in which there would be State immunity and cases in which there would not be State immunity. There was, however, the practical difficulty of obtaining world-wide agreement among States with respect to the exact dividing line between immunity and non-immunity. He noted in this connection that the European Convention on State Immunity, adopted by a much smaller group of States, namely, the members of the Council of Europe, did not provide such a distinction. It would, he stated, be at least a great step forward in the codification and progressive development of international law if on the world-wide level, States could reach agreement on a number of situations in which immunity did apply and on a number of situations in which immunity did not apply, while leaving a grey zone of situations for the further development of State practice, in particular, the practice of national courts. Such considerations, he said, explain why the provisions of draft article 6 contained within square brackets the reference to "the relevant rules of general international law" and why the title of part III of the draft articles placed within square brackets the alternatives "limitations on" and "exceptions to". If, he stated, the draft articles were to establish a clear distinction between cases where immunity would apply and cases where immunity would not apply, the reference to "the relevant rules of general international law" should be deleted, he said, and the title of part three should read "Exceptions to State immunity". On the other hand, if it was the intention in the draft articles not to establish such a clear distinction and thus to provide for a grey zone of situations for further development in State practice, he was of the view that the words "the relevant rules of general international law" should be retained in draft article 6 and that the title of part three should read "Limitations on State immunity".

154. The same representative, continuing with his comments, stated that if such a grey zone was left in the convention, there might be cases in which the courts of

one State party did not recognize immunity whereas the courts of another State party had recognized or would recognize it. In such a situation, the principle of reciprocity might be invoked by the latter State for a change in its practice, including court practice, in respect of the former State. If the case in question fell within the "grey zone", it would not be a question of a "countermeasure" of the latter State in response to an internationally wrongful act of the former State. The admissibility of such reciprocal treatment was, he stated, addressed in paragraph 2 (a) of draft article 28 of the draft articles, but from an entirely different angle, that of non-discrimination between foreign States. Indeed, that provision presupposed the possibility that a restrictive application of the articles by a State party would be responded to by a restrictive application by another State party with regard to the former State party. That would obviously result in a discrimination in treatment as between foreign States. It was equally obvious, however, that in a dichotomy approach there could, strictly speaking, be no restrictive application: the rule was applied or not applied, and the legal consequences of non-application were a matter of State responsibility, including the question of the admissibility of "countermeasures" by way of reciprocity; and "countermeasures" necessarily discriminated between a State which had committed an internationally wrongful act and a State which had not done so. There were obviously good reasons for not treating divergent interpretations of rules in the field of State immunity as involving State responsibility, provided the "hard core" of immunity for acta jure imperii was respected. In effect, that meant that a "grey zone" was accepted and that draft article 6 and the title of part III should be drafted in accordance therewith. In any case, the matter should be looked into and clarified in second reading.

155. Another representative, commenting on a similar question, stated that the draft articles presented two instances of persistent differences within the Commission attributable to doctrinal disagreement. The first was the title of part III, as evidenced by the phrases in square brackets, "Limitations on" and "Exceptions to". The second was the inclusion in square brackets of the words "and the relevant rules of general international law" in article 6. The problem of the words in square brackets had also been seen by some representatives, he said, as the consequence of the "dichotomy" approach, on the one hand, and the "grey zone" approach, on the other. The problem arose from the difficulty of obtaining agreement between States on the dividing line between acta jure imperii, in which case immunity should be given, and acta jure gestionis, in which case it should be denied. The fact that it was unrealistic to expect such agreement left, it had been said, a grey zone which should be regulated by the inclusion in draft article 6 of the phrase "and the relevant rules of general international law". However, he was not totally convinced by that argument. An approach based on strict dichotomy was impossible in practice because even if agreement between States on the dividing line could be obtained, there would always be room for different interpretation in good faith, in addition to the fact that it would be impossible, in fact, to elaborate the areas to which that dichotomy would apply. However, he said, what was at issue was whether the draft articles should openly provide for the development of other rules (which, given the divergent trends of national legislation, would mean in practice that the twilight zone would be enlarged, ultimately endangering the force of the draft articles) or whether the draft articles should be the central point and standard which would regulate the law of State immunity.

Article 7. Modalities for giving effect to State immunity

156. See the observations made by one representative, noted below under draft article 21 (State immunity from measures of constraint), with respect to the relationship between, on the one hand, the provisions of paragraph 2 of draft article 7 (which would provide that a proceeding shall be deemed to have been instituted against another State if, among other cases, the proceeding seeks to compel that other State "to bear the consequences of a determination by the Court which may affect the property, rights, interests or activities of that other State") and, on the other, the provisions of draft article 21.

157. The view was expressed by some representatives that the provisions of paragraph 3 of draft article 7 (which provide that a proceeding shall be considered to have been instituted against a State "when the proceeding is instituted against one of the organs of that State, or against one of its political subdivisions or agencies or instrumentalities in respect of an act performed in the exercise of sovereign authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative") seemed repetitive and unnecessary in light of the similar provisions included in paragraph 1 of draft article 3 (Interpretative provisions).

158. The view was expressed, by one representative, that a comprehensive formulation, such as "the State and its various organs of government", could perhaps make the expressions "political subdivisions of the State, etc." unnecessary both in paragraph 1 of draft article 3 and in paragraph 3 of draft article 7.

Article 8. Express consent to exercise of jurisdiction

159. The provisions of draft article 8 (which provide that a State cannot invoke immunity from jurisdiction if it has expressly consented to such jurisdiction "(a) by international agreement, (b) in a written contract, or (c) by a declaration before the court in a specific case") were also the subject of some comment.

160. The suggestion was made, with respect to paragraph (a), that it would be useful if paragraph (a) were to also specify that the international agreement was "in force".

161. The suggestion was made, with respect to paragraph (b), that there may be circumstances which fundamentally alter the situation prevailing at the time a written contract was made, and that the provisions of paragraph (b) should be appropriately amended through inclusion of a provision to deal with such an eventuality.

162. The suggestion was also made, with respect to paragraph (c), that it should be made explicit that the declaration before court ought to be in writing.

(c) Comments on draft articles in part III ([Limitations on] [Exceptions to] State immunity)

Article 11. Commercial contracts

163. See the observations noted above under paragraph 2 of draft article 3, with respect to the expression "commercial contract" and with respect to the relationship to draft article 11 of the provisions of subparagraph 1 (b) of draft article 2 (which define a "commercial contract") and the provisions of paragraph 2 of draft article 3 (which set out criteria for determining whether a contract is "commercial").

164. The point was made with respect to the provisions of paragraph 1 of draft article 11 (which provide that "if a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding") that as the expression "cannot invoke immunity from jurisdiction" was also found in other provisions of the draft articles, the words "is considered to have consented to the exercise of that jurisdiction", appearing earlier in paragraph 1, should be deleted.

165. The view was expressed that the provision in paragraph 1 to the effect that questions as to the jurisdiction of a State should be determined "by virtue of the applicable rules of private international law" seemed unsatisfactory, as rules of private international law may differ from country to country and lead to uncertainties and difficulties of application. The point was made that such a provision seemed to be inconsistent with the general principle that such questions should be determined first by international law.

166. One representative questioned why draft article 11, which provided that immunity would not apply to a "commercial contract", did not require that, for the exercise of jurisdiction, a close connection should exist between the commercial contract and the territory of the forum State. Such a connection should, he said, be provided for in draft article 11; particularly since in the case of the other exception in the area of contracts, in draft article 12, "Contracts of employment", it was clearly indicated that the basis of jurisdiction was the close connection between the contract and the territory in which the services were to be performed.

Article 12. Contracts of employment

167. The point was made, by one representative, with reference to the provisions of draft article 12 (which provide for an exception to State immunity where the contract of employment related to services performed or to be performed in the forum State and the employee has been recruited and is covered by the social security provisions of the forum State) that as some countries may not provide for

social security, the provisions of draft article 12 referring to the social security provisions of the forum State may be inoperative.

Article 13. Personal injuries and damage to property

168. As to the provisions of draft article 13 (which provide that unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before the court of another State in case of injury to a person or damage to property occurring in whole or in part in the State of the forum, if the act or omission which caused such injury or damage "occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission"), one representative was of the opinion that they required some further consideration. The proposed exclusion of immunity under draft article 13 was, he said, very extensive in that no qualification was introduced as to the nature of the cause of injury or damage (namely, whether such activity was jure imperii or jure gestionis). Also, it may be inferred from the provisions of draft article 13 that all cross-frontier damage was not covered by draft article 13 and thus enjoyed immunity. The Commission, it was said, should examine the relationship between these two points and existing customary international law.

169. The view was expressed, by another representative, that the provisions of draft article 13 were in their present form contrary to international and national law. No State, it was said, could establish criteria as to the responsibility of another State for injury or damage to property; nor could a national court do so. Where injury or damage was caused by the actions of organs of a foreign State, the person harmed could count on the protection of the State of which he is a national; and, thus, should not be entitled to sue a foreign State.

Article 15. Patents, trade marks and intellectual or industrial property

170. The view was expressed with reference to paragraph (b) of draft article 15 (which provides that unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State with respect to "an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) of draft article 15 which belongs to a third person and is protected in the State of the forum") that in practice a "third person" in terms of paragraph (b) of draft article 15 would usually be a transnational corporation, and the State using a foreign patent or other form of intellectual or industrial property would be a developing country. The provisions of paragraph (b) of draft article 15 would therefore, it was said, be likely to jeopardize the interests of developing countries.

Article 16. Fiscal matters

171. The view was expressed that the provisions of draft article 16 (which provides that, unless otherwise agreed between the States concerned, the immunity of a State

cannot be invoked in a proceeding relating to "the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes, or other similar charges") would result in a substantive departure from the rules of immunity in customary international law because taxes imposed by a public authority, and not charges for services rendered, were being referred to. The suggestion was made, therefore, that the provisions of draft article 16 either be substantially reworded or deleted.

172. One representative stated that he expected that the provisions of draft article 16 would be without prejudice to the rules of international diplomatic law.

Article 18. State-owned or State-operated ships engaged in commercial service

173. Paragraphs 1 and 4. Some representatives were of the view that the expression "non-governmental" which was placed within square brackets in paragraphs 1 and 4 of draft article 18 (which provides that unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in "commercial [non-governmental] service" cannot invoke immunity from jurisdiction before a court of another State ... provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for "commercial [non-governmental] purposes") should be retained and not placed in square brackets.

174. One representative stated that he was not insensitive to the argument of some developing countries that there may be cases in which the commercial operation of a ship, or the commercial use of property, did not necessarily imply use for non-governmental purposes, and that, in such cases, immunity should be recognized. He would not, he said, object to a formulation capable of satisfying such concerns.

175. The view was stated by one representative that foreign courts should not exercise jurisdiction over State-owned or State-operated ships engaged in commercial non-governmental activities.

176. The view was expressed by one representative, that the placing of the expression "non-governmental" in square brackets in draft article 18, and similarly in draft articles 21 (State immunity from measures of constraint) and 23 (Specific categories of property), reflected the position that State immunity should be of a limited nature; namely, that when an activity was of a commercial nature, the fact that it was undertaken by a State organ should not serve as a basis for State immunity from foreign jurisdiction. This was not a view his delegation could share. A state, in his view, fulfilled all functions, including "commercial" activities, in its governmental capacity and must enjoy immunity from the jurisdiction of other States. A vessel belonging to a State could be used for commercial purposes. If the vessel was operated by a juridical or physical person having separate status, any suit could be brought against the operator of the vessel.

177. The view was expressed by another representative, who seemed to favour the deletion of the words "non-governmental", that the Commission should also take

account, not only of the provisions of the 1926 Brussels Convention for Unification of Certain Rules Relating to the Immunity of State-owned Vessels, but also of article 9 of the 1958 Convention on the High Seas and of article 96 of the 1982 United Nations Convention on the Law of the Sea, where the expression used was "government non-commercial service".

178. Paragraph 7. The view expressed by another representative was that it was unclear in paragraph 7 of draft article 18 (which concerns the evidence to be provided as to the "government and non-commercial character of the ship or cargo") whether the certificate referred to in paragraph 7 would constitute conclusive or rebuttable evidence of such a character.

179. One representative noted that the expression "commercial [non-governmental] service" was used in some parts of draft article 18 while the term "government and non-commercial" was used in paragraph 7 of draft article 18, and the reasons for use of the two different expressions was not made entirely clear.

Article 19. Effect of an arbitration agreement

180. One representative was of the view that the title of draft article 19 was misleading as the basic purpose of an arbitration agreement, it could be said, was to avoid the jurisdiction of courts.

181. The view was expressed with reference to the provisions of draft article 19 (which would provide that "if a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State", etc.) that the expression "commercial contract" which was also used in draft article 11 should be retained without square brackets, and that the expression "civil or commercial matter" should be deleted.

182. The point was made by another representative that the provisions of paragraph (c) of draft article 19 (which read "(c) the setting aside of the award") should be amended to read "(c) the recognition and enforcement or the setting aside of the award".

183. One representative stated that he failed to understand the logic of draft article 19 since, in his view, an arbitration agreement between a Government and a natural or juridical person did not automatically mean a waiver of State immunity from court jurisdiction, even in the cases referred to in the draft article. Such an arbitration agreement only meant that the State in question accepted arbitration as a way of settling a dispute out of court; no waiver of immunity from court jurisdiction was to be implied.

Article 20. Cases of nationalization

184. Some representatives stated that they concurred in the provisions of draft article 20 (which provides that the articles "shall not prejudge any question that

may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual").

185. The view was expressed by one representative that the provisions of draft article 20 would require further review. The draft article, he said, came under part III of the draft articles dealing with exceptions to or limitations on State immunity, namely, cases in which, in the language of draft articles 11 to 19 in part III, "the immunity of a State cannot be invoked". Such language, however, was not employed in draft article 20, and the commentary further compounded the problem by referring to the exercise by a State of its sovereign authority, thus implying that matters arising out of measures of nationalization would be protected by State immunity. The Commission, in his view, had in that connection to resolve three questions. First, were matters arising out of measures of nationalization covered by State immunity? If they were covered, there was no need for draft article 20. Secondly, if such matters were not covered by immunity, draft article 20 should be brought into line with the language of draft articles 11 to 19 and clearly indicate that State immunity could not be invoked. Thirdly, if the aim was not to have the draft articles pass judgement on that question, draft article 20 in its present form should be considered a saving provision that would be more appropriately placed at the end of the draft articles. The latter solution would be, he believed, the best compromise approach, and the phrase "extra-territorial effects" in draft article 20 should then be deleted.

186. The view was also expressed by another representative that the provisions of draft article 20 should be considered for placement elsewhere in the draft articles, as their content did not seem to be limited to part III of the draft articles.

(d) Comments on draft articles in part IV (State immunity in respect of property from measures of constraint)

General comments

187. Some representatives, referring to the title of part IV (State immunity in respect of property from measures of constraint) stated that the expression "measures of constraint" was an appropriate term as such measures took many different forms in different judicial systems and a general formulation was necessary to cover all possibilities. The Commission had been wise, one representative observed, to refer to "measures of constraint" in general and to refer to "measures of attachment, arrest and execution" as examples. A number of representatives were of the view that the provisions of part IV were generally satisfactory, though there were questions that needed to be resolved, and provided a good basis for further work.

188. The view was also expressed, however, by one representative that the expression "measures of constraint", in the titles of draft articles 21 and 22, was unclear and should be replaced by the more precise terms "attachment and execution".

189. One representative stated that the provisions of part IV were an example of resort in the draft articles to satisfactory and useful compromise as a means of reconciling not only conflicting State interests but also doctrinal differences. Thus, he said, the more liberal régime for the enjoyment of State immunity from measures of constraint in part IV was justified by the reference, in paragraph (2) of the commentary to article 21, to the fact that the practice of States had evidenced several theories in support of immunity from execution as separate from and not interconnected with immunity from jurisdiction. The different treatment for part IV was also justifiable from another angle, namely the need to protect developing countries from the growing practice of private litigants seeking satisfaction through the attachment of property owned by those countries. From a third angle, the liberal régime in part IV was justifiable because part IV took care of the needs of a group of States and was therefore part of an overall balance, although there might be disagreement as to whether part IV could of itself redress the imbalance in other parts. But it was an example of a case in which compromise was permissible: it did not undermine the logical consistency of the draft.

190. The point was made, by one representative, that the recognition in part IV that it was possible to execute against State property in certain circumstances was a significant clarification of the law in that area.

191. The point was made by another representative that he had no objection to part IV as a whole as it provided an essential counterweight to the possibility that the jurisdictional immunities of States may be limited. The view was expressed by another representative that the provisions of part IV were important in view of the growing practice on the part of private litigants including multinational corporations, seeking relief through attachment of property owned, in the possession of or used by developing countries.

192. A number of representatives were of the view that the provisions of part IV were unacceptable. The provisions of part IV had, it was said, been based to a large extent on the growing tendency in the national legislation of some countries to limit the immunity of States from jurisdiction. A consistent implementation of the principle of the immunity of State property from measures of constraint was essential, it was said; and the draft articles should be carefully worded to preclude any possibility of the provisions being used to justify measures of constraint with respect to the property of a State without its explicit consent. An imprecise wording of such articles could lead to serious complications in relations between States.

193. The view was expressed by one representative that the approach adopted in draft article 21 opened the way to measures of constraint and to arbitrary restrictions directed against the property of other States. The article, it was said, should reaffirm the general principle of the immunity of States from measures of constraint, without including the exceptions set out in its subparagraphs (a) and (b). His delegation also did not see any need for draft article 23, the provisions of which restricted the interpretation of the rule of State immunity and may create confusion and abuse in the general application of the rule.

194. One representative questioned whether it was appropriate to try, as was currently done in part IV, to regulate through a convention the matter of State immunity with respect to execution. The provisions of draft article 1 (Scope of the present articles) made it clear, he said, that the draft articles applied to immunity in respect of jurisdiction, and immunity in respect of execution as different in scope. Moreover, as soon as one sought to define the exceptions that should apply to immunity in respect of execution, one found oneself in a sensitive area of relations between States and it was particularly awkward to establish, in the abstract, general rules to be followed in practice. The Commission may be running the risk of delaying completion of its work on the main topic of immunity from jurisdiction. The particular provisions proposed for inclusion in part IV also seemed, he said, to raise difficulties.

195. The view was also expressed, by another representative, that the provisions of part IV deserved special attention from a juridical point of view; immunity from measures of constraint was much more strict than the jurisdictional immunity of States; and, from the point of view of international practice, attachment and compulsory execution could have serious consequences and jeopardize relations between States.

196. One representative stated the view that the introductory provisions of part IV should, in the first instance, stress unequivocally that immunity from execution was distinct from immunity from jurisdiction in the proper sense of the term. The validity of such a concept, which was confirmed by international practice and widely recognized by jurists, should not depend on a State's consent to the exercise of jurisdiction by foreign courts. Thus, he found the provisions of draft articles 21 and 23 unacceptable.

197. The point was made, by another representative, that further clarification may be necessary on whether immunity from measures of constraint was separate from jurisdictional immunity. The commentary on paragraph 1 of draft article 21 (State immunity from measures of constraint), he stated, explained that, theoretically, immunity from measures of constraint was separate from jurisdictional immunity in the sense that the latter concerned, exclusively, immunity from the adjudication of litigation. This, however, was not appropriately reflected in the draft articles. If immunity from measures of constraint was not separate, but rather derived from jurisdictional immunity, then the rules on immunity from measures of constraint should be set out in part II (General principles) of the draft articles which set out general principles and the general rule of State immunity. If this was done, part IV of the draft articles would, of course be unnecessary.

198. One representative considered that the right to decide on measures of constraint in respect of State property did not form part of the general jurisdictional powers of courts. If a State consented to the jurisdiction of a court, an express and clear declaration to that effect was necessary in order to enable the court to take such measures. The principle was an important one in practical and political terms and should be more clearly reflected in the draft articles.

199. The view was expressed, by another representative, that he had earlier expressed doubts of a technical nature as to the need for a separate part IV to deal with the question of immunity from measures of constraint. However, as the provisions of the relevant draft articles had been modified to eliminate or clarify certain points (former draft article 21 which his delegation had found superfluous had been deleted and draft article 23, former draft article 24, had now been given a proper meaning), he could now agree with the proposals of the Commission.

200. One representative made the point that the question of execution only arose after the question of jurisdictional immunity had been decided by the court in the negative and judgement entered in favour of the plaintiff. It should be made clear, he stated, that consent by a State to the jurisdiction of a court did not imply consent to execution.

201. The point was made by one representative that it should be made clear that the provisions of draft article 21 on the immunity of State property from measures of constraint were applicable in enforcement proceedings in commercial arbitration, as well as in pre-arbitration injunction proceedings.

Article 21. State immunity from measures of constraint

202. A number of representatives commented on the expression "[or property in which it has a legally protected interest]" which was placed in square brackets in the chapeau of draft article 21 (which provided for State immunity from measures of constraint "on the use of its property or property in its possession or control [or property in which it has a legally protected interest]" except in the cases mentioned in subparagraphs (a) and (b) of the draft article). It was noted that the expression "or property in which it has a legally protected interest" was also placed in square brackets in paragraph 1 of draft article 22.

203. The statement was made by one representative that the provisions of draft article 21 highlighted the difficulties which the Commission faced in taking account of the various concepts, definitions and mechanisms of the judicial systems of different countries. Measures of constraint were often of such a specific nature that an analytical, enumerative, flexible approach was necessary. The draft articles must make it possible to identify State property without unduly expanding or restricting the definition of such property. In draft articles 21 and 22, the purpose of the reference to property in which the State had a legally protected interest was to further identify that concept.

204. The view was expressed by another representative that both formulations, namely, property in the "control" of a State and property in which it has a "legally protected interest", were extremely vague, and while it might be clear what was meant by an interest, it was harder to see what was meant by the legal protection of such an interest.

205. Some representatives stated that they favoured the inclusion of the expression in question, without square brackets, in the draft article so as to identify any interest which a State might have in property.

206. The point was made by one representative that retention of the words in question were worthwhile provided it was made clear that they referred only to measures of constraint on property which affected the status of the interests involved. A State seeking immunity for its interest in property would be responsible for providing evidence of its interest in the property.

207. The point was made by another representative that the expression "or property in which it has a legally protected interest" referred in fact to interests that were specified, inter alia, in draft articles 14 and 15 and that the inclusion of the words in question in draft articles 21 and 22 was, therefore, justifiable. Another representative stated that her delegation would support the extension of a State's immunity to cover property not only in its possession or control, but also in which it had "a legally protected interest".

208. Some representatives were of the view that the inclusion of the expression in question in draft article 21 would be unwise as such a formulation would extend, unreasonably, the scope of State immunity. The interest of a State in a property might be so limited, it was said, as to remain unaffected by a measure of constraint. The view was also expressed that the expression was vague and, while it might be clear what was meant by an interest, it was harder to see what was meant by the legal protection of such an interest.

209. The point was made, by one representative, that he believed it to be right that a State's immunity should extend to the legal interest it might have in property, which was neither in its possession, nor under its control. The articles should, he said, cover the case without, however, extending the immunity to persons or bodies not entitled to such immunity. However, to formulate a precise wording for the matter would not be easy. The suggestion was made that the expression in question might perhaps be replaced by wording along the following lines: "or affecting a legally protected interest it has in property".

210. The view was expressed by one representative that the principle of State immunity from measures of constraint should be simply stated, and the latter part of draft article 21, beginning with the words "unless the property" in the chapeau of the draft article, should be deleted.

211. The suggestion was made, by another representative, that it would perhaps make matters clearer if the words "or property in which it has a legally protected interest" were retained, but together with additional words which would say that immunity should not apply if the measures of constraint did not substantially affect the State's legally protected interest.

212. The view was expressed by one representative that there was a relationship between the expression in question in draft article 21 and the provisions of paragraph 2 of draft article 7 (which provided that a proceeding shall be deemed to have been instituted against another State if, among other cases, the proceeding seeks to compel that other State "to bear the consequences of a determination by the court which may affect the property rights, interests or activities of that other State"). Accordingly, he stated, when a proceeding of the kind referred to in draft article 21 was instituted against an entity which was the owner of a

particular property, or which had the property in its possession or control, but which was not a foreign State, the proceeding may also be deemed to have been instituted against a foreign State in view of paragraph 2 of draft article 7 (namely a proceeding which "in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of that other State"). Such an interpretation of paragraph 2 of draft article 7 would not, of itself, create an immunity for the foreign State which would also benefit the entity which was not a State, because the matter is also addressed in draft article 21. The wording of the two provisions should be carefully reviewed together and fully reconciled. When paragraph 2 of draft article 7 applies, it would seem that immunity depends on the status of the "affected" property rights, interests or activities of the foreign State. The mere fact that a foreign State had a legally protected interest in the property did not seem to justify an immunity, which would also benefit the non-State owner of the property who was subject to the jurisdiction of the court. It would be useful to look at other situations in which a foreign State, by its own volition, entered into what could be called a situation of common interest with a non-State, subject to the jurisdiction of the court. In that sense, draft articles 14, 15 and 17 might also be relevant, inasmuch as they also dealt with mixed situations.

213. Paragraph (a). A number of representatives commented on the expression "[non-governmental]" which was placed in square brackets in paragraph (a) of draft article 21 (which would provide that a State would not enjoy immunity from measures of constraint with respect to property that "is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed").

214. One representative noted that the Commission had been unable to decide whether reference should be made to property used only for "commercial purposes" or to property used for "commercial non-governmental purposes". The question had already been raised in connection with draft article 18, which dealt with the use of ships (see above). His delegation, he said, was not insensitive to the arguments of some developing countries that there might be cases in which commercial operation of a ship or the commercial use of property did not necessarily imply use for non-governmental purpose, and that in such cases immunity should be recognized. He would not object to a formulation capable of satisfying the countries concerned.

215. Some representatives were of the view that the expression "[non-governmental]" should be retained, without square brackets, in paragraph (a). The protection of governmental property from measures of constraint was at issue, they said, in these provisions and retention of the expression "non-governmental" would make it clear that the purpose was to exclude, from immunity, property that was in commercial and profitable use. The point was made by some representatives that developing countries in the performance of public duties entered into contracts which may seem "commercial" but which were, strictly speaking, not intended for commercial purposes.

216. A number of representatives commented on the words "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" in paragraph (a) of the draft article 21. The view was expressed by one representative that should the words in question be omitted, this would to a large extent render illusory the protection of State property against measures of constraint.

217. Some representatives stated that they had difficulties with the inclusion of such words in paragraph (a). The view was expressed by one representative that the inclusion of such words greatly limited the possibility of enforcement measures against property that served commercial non-governmental purposes. There did not seem to be, in the opinion of one representative, a legal or philosophical justification for limiting measures of execution to property which has a connection with the object of the claim. The view was also expressed by another representative that the underlying assumption of the doctrine of restrictive immunity was that foreign States should be treated in the same way as other entities in the market-place. The right to execute should not, he said, be limited to property related to the particular transaction; it should apply to all property in use or intended for use in commercial activities.

218. The point was made, by another representative, that the requirement of "connection with the object of the claim" was strange because a claim was usually not connected with a certain object. The difficulty was reduced, it was said, by the alternative of a connection "with the agency or instrumentality against which the proceeding was directed", but the difficulty was not eliminated because it remained unclear what connection the agency or instrumentality must have with the holder of the right.

219. The point was made by another representative that it would be useful to know whether the requirement that property subject to execution must not only be in use or intended for use for commercial purposes but, also, have some connection with the object of the claim was really consistent with the general approach of the draft articles. The proposition that a State had no immunity in respect of its commercial activities rested on the principle that by engaging in such activities, the State was acting as if it were a private individual with commercial interests and objectives similar to those of other private individuals. Such a concept was equally applicable to a State's property. A State might engage in commercial activities or in non-commercial activities; it might have property intended for commercial activities and property not intended for such use. If a State had no immunity with regard to any of its commercial activities, none of its property in use or intended for use for commercial activities should be immune from execution.

220. The view was expressed by another representative that the requirement of paragraph (a) of draft article 21, that the property in question have a connection with the agency or instrumentality against which the proceeding was directed, was difficult to understand as the "agency or instrumentality" might have a juridical personality separate from that of the State.

221. The view was also expressed, by one representative, with reference to paragraph (a) of draft article 21 that there seemed to be no reason why all

property used for commercial purposes and belonging to the foreign State in the relevant jurisdiction should not form a common fund against which judgement creditors might proceed in execution.

222. One representative stated that he was not in favour of subparagraph (a) as it would impose on courts the unreasonable task of determining the intentions of States and open the way to arbitrary restrictions and measures of constraint against the property of States.

223. Subparagraph (b). The view was expressed by one representative with respect to the provisions of paragraph (b) of draft article 21 (which would provide that a State would not enjoy immunity from measures of constraint with respect to property which "has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding") that it would seem to be sufficient to require merely that the property in question "had been allocated for the payment of debts incurred by the State".

Article 22. Consent to measures of constraint

224. One representative stated that the provisions of draft article 22 (which would provide that a State cannot invoke immunity from measures of constraint with respect to property if it has expressly consented to the taking of such measures with respect to such property) were unclear on the question as to whether the "consent" referred to in draft article 22 only concerned property covered by immunity under draft article 21. If this were so, consent would under no circumstances be necessary with respect to properties that were not covered by immunity under draft article 21, namely, the properties referred to in paragraphs (a) and (b) of that draft article. Clarification of this matter was, in his view, important because the availability of execution would determine the reality of any rights against a foreign State.

Article 23. Specific categories of property

225. Some representatives considered the provisions of draft article 23 (which listed the categories of State property that would be exempt from measures of constraint) to be justifiable in view of what they regarded as an alarming trend in certain jurisdictions to attach or freeze the assets of foreign States.

226. The view was expressed by one representative that it may be useful to include in draft article 23 still further provisions providing for the immunity of other types of State properties which were similar to the categories currently enumerated in paragraph 1 of the draft article, as certain further categories of State property may in the future be considered properly immune from measures of constraint.

227. The view was expressed, by one representative, that, strictly speaking, the enumeration of categories of property in paragraph 1 of draft article 23 (which listed categories of property not to be considered as property in use or intended

for use for commercial purposes) was unnecessary and should not be considered. The significance of draft article 23, he said, really lay in its paragraph 2, which provided that measures of constraint could be applied against the categories of property listed in paragraph 1 only in two cases: if the property had been "allocated or earmarked" in terms of draft article 21 by the State in question, or if State consent to the measures of constraint had been given in terms of draft article 22.

228. Some representatives considered that a listing of such categories of properties, as proposed in paragraph 1 of draft article 23, could create difficulties in the application of the draft articles. The general rule that State property was immune from measures of constraint, as well as an indication of the forms of property that were not protected by the general rule, was, they stated, already contained in draft article 21 (State immunity from measures of constraint). A further enumeration in draft article 23 of categories of property not subject to measures of constraint would, they stated, raise doubts as to the application of the general rule of immunity in draft article 21 and may lead to the conclusion that any form of State property not listed in draft article 23, as immune from measures of constraint, would be subject to measures of constraint.

229. One representative stated that he wondered whether it would be wise in draft article 23 to list the property permanently immune from enforcement measures, unless otherwise expressly agreed by the State concerned. This, he thought, would run the risk of forgetting to include certain categories of property in the list. Perhaps the list should, he said, be offered as indicative of "public property earmarked for public service" and thereby entitled to the status in question.

230. The point was made by one representative with respect to the provisions of subparagraph (a) of paragraph 1 of draft article 23 (which included, in the list of properties that would be immune from measures of constraint, "property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organisations, etc.") that he would expect the provisions of subparagraph (a) of paragraph 1 would apply to all property destined for the "purposes of the diplomatic mission of the State", including the general activities of the mission which might in turn include commercial activities. He was unable, therefore, to concur in the views expressed in the commentary on subparagraph (a).

231. A number of representatives commented specifically on the provisions of subparagraph (c) of paragraph 1 (which included in the list of properties that would be immune from measures of constraint, "property of the central bank or other monetary authority of the State which is in the territory of another State"). Some representatives expressed agreement with such a provision. The view was expressed that the provision was of special interest to many developing countries since such a provision was essential for ensuring that the restructuring of the foreign debt of a country's public or private sector was carried out in an orderly manner. The view was also expressed that central banks or monetary authorities of a State were exempt from the jurisdiction of foreign States because they represented governmental purses and any action against them would subject the Government of a

country to undue pressure; though if Governments traded through separate juridical entities their activities would not normally be covered by immunity, even though they may be government-owned entities. The view was also expressed that if measures of constraint were permitted against the property of central banks or State monetary authorities, it would cause insecurity in the international financial system and there seemed to be no basis in the legal practice or legislation of countries for such a provision.

232. Some representatives considered the provisions of paragraph (c) of paragraph 1 unacceptable in their present form as it would grant immunity to the assets of central banks without restricting such immunity to property utilized for central bank purposes. The question was raised as to why if property was in the hands of a central bank or monetary authority and was in fact used or intended to be used in commercial activities such property should be immune from execution. In that regard, subparagraph (c), it was said, stood in contrast with the other subparagraphs of paragraph 1, which based the immunity of property from measures of constraint on the nature of the use of the property, and not on the nature of the institution possessing the property. The underlying rationale for the absence of immunity from adjudication in the case of commercial activities, and from execution in the case of property in use or intended for use in commercial activities, was that participation in commercial activities negated any justification for special privilege or immunity. Clarification was needed, it was said, on why it was necessary to make an exemption merely because the property was in the hands of a central monetary authority.

233. The view was also expressed that the provisions of subparagraph (c) of paragraph 1 seemed to run counter to the current trend of not granting immunity to the property of central banks or other monetary authorities of a foreign State situated in the territory of another State when such property was in use or intended for use in commercial transactions.

(e) Comments on draft articles in part V (Miscellaneous provisions)

Article 24. Service of process

234. Paragraph 1. The view was expressed that paragraph 1 of draft article 24 (which listed in subparagraphs (a) to (d) the means by which "service of process by any writ or other document instituting a proceeding against a State shall be effected") seemed to establish a hierarchy for the methods of service of process; and it seemed desirable that the competent court should at least be given the opportunity of freely deciding as to which particular method was appropriate in a particular case.

235. As to the provisions of subparagraph (a) of paragraph 1 (which provided that service of process shall be effected "in accordance with any special arrangement for service between the claimant and the State concerned"), the point was made that under the national laws of some countries arrangements between parties as to the service of process would be irrelevant.

236. As to the provisions of subparagraph (c) of paragraph 1 (which provided for the service of process "by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned"), the point was made that such service of process would only be possible if permitted by the law of the State of the forum and the "State concerned". A similar requirement, it was noted, was to be found in subparagraph (d) of paragraph 1.

237. The view was expressed that the provisions of subparagraph (d) (iii) of paragraph 1 (which provided that service of process, if permitted by the law of the State of the forum and the law of the State concerned, shall be effected "by any other means") seemed ambiguous and could result in an unreasonably broad application.

238. Paragraph 4. As to the provisions of paragraph 4 of draft article 24 (which provided that any State that enters an appearance on the merits in a proceeding instituted against it, may not thereafter assert that there was no proper service of process), the view was expressed that they seemed unduly restrictive. It seemed preferable, it was said, to adopt the provisions that had been earlier proposed for paragraph 4 of draft article 24 by the Special Rapporteur in terms of which fault in the service of process could be later remedied regardless of whether a State against which a proceeding had been instituted had entered an appearance on a purely procedural question or on the merits of the case.

Article 25. Default judgement

239. The view was expressed, by one representative, that it seemed necessary to consider whether, in draft article 25 (which concerned procedures to be followed in entering a default judgement against a State), a provision recognizing that a default judgement could be rendered because the court had jurisdiction in the case should be included in the draft article.

240. One representative noted that the provision in paragraph 1 of draft article 25, stating that no default judgement shall be rendered against a State until the expiry of a period of not less than three months from the date on which service of writ or other document instituting proceedings was effected, was particularly welcome as it provided for a clear time-limit. The view was expressed, by the same representative, that, as he understood it, the purpose of paragraph 2 of draft article 25 was to ensure that under the articles a foreign State would have at least three months to proceed against a default judgement; and it was not merely that the time-limits prescribed in the civil procedure of the forum State were to be extended by another three months simply because the defendant was a foreign State. This, he said, should be reflected in the commentary on draft article 25.

Article 27. Procedural immunities

241. One representative stated that he concurred with the provisions of draft article 27 as he shared the view that, for reasons of security or domestic law,

States might sometimes not be in a position to submit certain documents or information to a foreign court.

Article 28. Non-discrimination

242. The view was expressed that draft article 28 (which provided, in paragraph 1, that the articles "shall be applied on a non-discriminatory basis as between the States parties", and, in paragraph 2, that discrimination shall not however be regarded as taking place "(a) where the State of the forum applies any of provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned, or (b) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles") required careful consideration as it concerned the question of the scope of the articles; there should be no confusion on the matter. Forms of application not in keeping with the intended purpose of the articles which was to harmonize the rules of State immunity should, it was said, be avoided.

243. One representative stated that he had reservations with respect to the provisions of draft article 28, which might lead to erroneous conclusions regarding the application of the articles. International law recognized, he said, the principle of reciprocity and the right of States to conclude agreements on all matters affected by reciprocity.

244. The point was made by some representatives that the provisions of draft article 28 reflected a compromise reached after prolonged debate and the provisions were, in their view, acceptable. The final version of the draft article as proposed by the Commission was designed, it was said, to lessen the danger of a unilateral interpretation which would limit the application of the immunities recognized by the draft articles.

245. A number of representatives commented specifically on the provisions of paragraph 2 of the draft article.

246. One representative stated that the two subparagraphs of paragraph 2 should be converted into separate paragraphs: one dealing with the restrictive application of provisions of the draft articles, and the other with the extended application of the provisions of the draft articles.

247. As to the provisions of subparagraph (a) of paragraph 2 of the draft article (which would provide that discrimination shall not be regarded as taking place "where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned"), the suggestion was made that, in the course of the second reading of the draft articles, the Commission should give consideration to the question of how restrictive applications by other States should be evaluated by a State party to the articles.

248. The view was expressed by another representative that subparagraph (a) of paragraph 2, which implied the possibility of unilateral application of provisions of the articles could raise difficulties. This possibility was deemed all the more disturbing because the draft articles made no provision, for the time being, for the settlement of disputes.

249. The view was expressed by one representative that the provisions of subparagraph (a) of paragraph 2 seemed to permit a restrictive application of the provisions of the draft articles even though such application might amount to a breach of the convention. The term "restrictive application" might be deemed to be nothing more, he said, than a euphemism for a breach. To avoid that interpretation, there should be a provision allowing States parties a certain freedom in the implementation of the rules in the draft articles; because in the absence of such a provision, a restrictive application could be said to constitute a breach of the convention. He referred, in this connection, to the commentary on article 47 of the 1961 Vienna Convention on Diplomatic Relations. The Commission, he said, might consider including an observation along those lines in the commentary to draft article 28, to make it clear that draft article 28 did not sanction a restrictive application of a provision that would be tantamount to a breach of that provision.

250. As to the provisions of subparagraph (b) of paragraph 2 of the draft article (which would provide that discrimination shall not be regarded as taking place "where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles"), the view was expressed by the same representative that they should be brought into line with paragraph 2 (b) of draft article 6 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier which took account of the object and purpose of the articles as well as the interest of third States, and was consistent with article 41 of the Vienna Convention on the Law of Treaties.

C. STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

1. General observations

251. A number of representatives referred in their statements to the importance of the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier to communications between States and their representatives abroad, as well as to the desirability of a codified international régime on the diplomatic courier and the diplomatic bag as a supplement to the provisions of existing conventions on diplomatic and consular relations. Such an international instrument would, they said, harmonize and strengthen existing rules, and settle questions not hitherto covered in conventions.

252. Appreciation was expressed to the International Law Commission for its adoption on first reading of draft articles on the topic, and to the Special Rapporteur, Mr. Alexander Yankov, for his conscientiousness and diligence in seeking generally acceptable solutions to sensitive and difficult matters.

253. Several representatives considered the draft articles a sound basis for the preparation of a future international instrument on the topic.

254. The view was expressed that the draft articles generally respected the balance between the rights and duties of the sending, receiving and transit States, and included provisions necessary to ensure the safety of diplomatic communications. The Commission had made great efforts to find compromise solutions on the various issues and had struck a reasonable balance between the requirements of codification and amplification of the law and States' interest in security and free communication. The draft articles, in the opinion of one representative, constituted a model for the formulation of practical provisions which accommodated the interests of sending, receiving and transit States. Articles 4 (Freedom of official communications), 18 (Immunity from jurisdiction), 19 (Exemption from personal examination, customs duties and inspection) and 20 (Exemption from dues and taxes) gave a diplomatic courier the privileges and immunities accorded to regular diplomatic officials, which appeared essential for the efficient and unhampered manual carriage and delivery of official communications between a State and its diplomatic and other missions abroad. Such privileges and immunities were balanced by a corresponding obligation on the part of the sending State to refrain from uses of the bag incompatible with the basic objective of freedom of official communications, and by the duty of the courier to respect the laws and regulations of the receiving and transit States and to refrain from interfering in their internal affairs. The receiving or transit State could terminate at any time the functions of the courier or declare a particular courier unacceptable. Basic protection was also accorded to the diplomatic bag, as the authorities of the receiving or transit State were prohibited from opening or detaining the bag.

255. The draft articles, in the view of another representative, in order to enjoy universal acceptance, must be founded on three basic criteria: each State had the potential of being a sending State, a transit State and a receiving State; the bag was meant to be used for official communications; and, the inviolability of the bag was intended primarily to maintain the confidentiality of official communications. Such criteria had been reflected in the draft articles, and to a large extent a balance had been achieved between the interests of the three categories of States, but certain articles did need further examination. The draft articles extended the same privileges and immunities to the courier as were extended to a diplomatic agent under the 1961 Vienna Convention on Diplomatic Relations. Such privileges and immunities were essential for the efficient performance of the duties of the courier who, in return, was quite logically required not to interfere in the internal affairs of the receiving State or to violate its laws.

256. The purpose of the draft articles should, it was said by one representative, be threefold: to consolidate existing provisions of the relevant conventions; to unify the rules so as to ensure the same treatment for all diplomatic couriers; and to develop rules to deal with practical problems not covered by existing provisions. He welcomed the compromises reached at the 1986 session concerning the diplomatic bag and diplomatic courier and hoped that the Commission would proceed in due course to the next stage in the finalization of its work on the topic, which was broad enough to include communications of international organizations and of recognized national liberation movements. Though many of the specific issues were

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already covered under the relevant multilateral conventions, the effort currently under way was, he said, timely and necessary in supplementing and harmonizing the existing international legal instruments.

257. Some representatives, though acknowledging the usefulness of and need for the draft articles and the quality of the work of the Commission, were of the view that not all the draft articles met the necessary conditions for desirable codification. The view was expressed by one representative that the draft articles could provide a sound basis for a future multilateral instrument provided that, in the course of the second reading of the draft articles by the Commission, the provisions of paragraph 1 of draft article 18 (Immunity from jurisdiction) were improved and the questions giving rise to differences of opinion on the provisions of paragraph 2 of draft article 28 (Protection of the diplomatic bag) were satisfactorily resolved.

258. Another representative was of the view that several provisions of the draft articles, and in particular those of draft articles 18 and 28, would weaken the present status of the diplomatic courier and the diplomatic bag, and would hardly be acceptable in their present form. The inviolability of the diplomatic bag, the confidentiality of its contents and national security interests could be adequately safeguarded only on the basis of the generally recognized principles of diplomatic law. The future instrument should codify all the immunities and privileges that were indispensable for the independent and unimpeded exercise of the diplomatic courier's functions, which were directly derived from the sovereignty of the sending State. On the other hand, possible control and restrictive measures on the part of the receiving or transit State would have to be strictly limited to measures directly protecting such State's legitimate national security interests. As they stood, the draft articles did not meet that basic requirement in every respect.

259. One representative stated that although the paramount question to be dealt with by the draft articles was that of the diplomatic bag itself, it should not detract from the importance of protecting the courier and affording him certain minimum guarantees. The bag should be inviolable but not sacred, and the diplomatic courier should have adequate protection for the proper exercise of his functions; however, his personal inviolability, the inviolability of his temporary accommodation and of his means of transport as well as his immunity from jurisdiction, exemption from personal examination and inspection, and exemption from dues and taxes should be based on functional necessity so as to avoid abuse. His country took that view partly because the final draft articles must be such that they would be acceptable to the large majority of States, and partly because in his country, as in many small developing countries, special diplomatic couriers were rarely used, and it was therefore natural to be especially sensitive and somewhat circumspect in extending excessive privileges and immunities to the diplomatic couriers of other States.

260. The view was expressed, by some representatives, that the Commission may wish in due course, in the finalization of its work, also to consider the communications of international organizations and of recognized national liberation movements.

261. Some representatives stated that they wished to reaffirm their misgivings with respect to the need and usefulness of elaborating draft articles on the present topic. One representative recalled his country's long-felt reservations as to the need for the topic to be considered at all by the Commission. Implementation and observance by States of existing international law were more important than writing new texts. Of the four conventions cited by the Special Rapporteur, only the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations were a good basis for work on the topic, since they were widely accepted. His delegation would have preferred the Special Rapporteur to have followed a more inductive approach. It was disappointing that no majority study of State practice had as yet been undertaken, which would have helped to determine whether State practice had developed, beyond article 27 of the 1961 Vienna Convention on Diplomatic Relations, in such a way as to require either codification or progressive development of international law in the area.

262. One representative noted that from the outset his delegation had expressed misgivings as to the need or even the usefulness of elaborating a set of draft articles on the topic. While he appreciated the serious work done, for which he wished to thank the Special Rapporteur, he continued to have doubts as to whether it was appropriate to attach such priority to that topic.

263. The point was made by one representative that the Commission, in its work of devising a uniform régime to govern the status of the diplomatic courier and the diplomatic bag, encountered difficulties whenever the new provisions exceeded the limits of the existing rules of the Vienna Conventions. That was particularly true of draft articles 17, 28 and 33, dealing, respectively, with the inviolability of the temporary accommodation of the courier, the protection of the bag, and optional declarations of applicability of the draft articles.

264. One representative recalled that, 10 years earlier, when the Commission had taken up the topic his delegation had expressed the view that caution should be exercised in dealing with matters touching the 1961 Vienna Convention on Diplomatic Relations. Nevertheless, it was possible that intensification of diplomatic relations and international communications justified more detailed regulation of questions relating to the courier and the bag. The nature of the new instrument and the form it ought to take - a protocol to the 1961 Vienna Convention or a new convention - remained open to question. He hoped that the Commission would, on its second reading of the draft articles, take care in formulating as clear and concise a text as possible.

265. As to the future of the topic, one representative was of the view that, following the submission of written comments by Governments and the Commission's second reading of the draft articles, the adoption of the draft articles could take place within the framework of the Sixth Committee.

266. Another representative underscored that the draft articles were a signal contribution to the establishment of generally acceptable rules to facilitate the proper functioning of an important instrument of communication between a State and its missions abroad. The Commission had considered its task to be one of codification; in trying to formulate general rules applicable to all categories of

couriers and bags used for official communications, it had been at pains to adhere to existing laws as set forth in existing conventions relating to couriers and bags. In his delegation's view, the Commission might have gone a little further and taken emerging practices and needs more fully into account. For example, it was regrettable that the draft failed to cover couriers and bags of international organizations. Nevertheless, the draft was an achievement which did honour to the Commission.

267. Several representatives considered the draft articles as an excellent basis for a future international binding instrument on the topic.

268. Various aspects of the set of draft articles were referred to in a general evaluation of its contents by several representatives.

2. Comments on specific provisions of the draft articles

269. The draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provisionally adopted by the Commission on first reading, were arranged in four parts as follows: part I, General provisions; part II, Status of the diplomatic courier and the captain of a ship or aircraft entrusted with the diplomatic bag; part III, Status of the diplomatic bag; and part IV, Miscellaneous provisions.

(a) Comments on draft articles in part I (General provisions)

Article 3. Use of terms

270. The view was expressed by one representative that the relationship between the draft articles, on the one hand, and the four multilateral conventions referred to on diplomatic and consular law in draft article 3 (namely, the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963, the Convention on Special Missions of 8 December 1969 and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975), on the other, seemed clearly stated in draft article 3. The systems provided for by the four conventions should, he said, be harmonized.

271. The point was made, by another representative, that the provisions of paragraph 1 (8) of draft article 3, which defined "delegation", seemed to state the obvious.

Article 4. Freedom of official communications

272. One representative considered the principle set out in draft article 4 to be of particular importance. (The draft article provides that the receiving and the transit States shall permit and protect the official communications of the sending State effected through the diplomatic courier on the diplomatic bag.)

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

273. One representative, expressing basic agreement with the provisions of draft article 5, considered that the provisions of the draft article should be formulated in such a manner as to achieve a harmonious balance between the "functional immunities" of the courier and the interests of the States concerned.

274. Another representative stated that the principle set out in draft article 5 was one of particular importance.

(b) Comments on draft articles in part II (Status of the diplomatic courier and the captain of a ship or aircraft entrusted with the diplomatic bag)

Article 9. Nationality of the diplomatic courier

275. With reference to paragraph 2 of the draft article (providing that the diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of the State, which may be withdrawn at any time), one representative stated that although the expression "at any time" was consistent with the provisions of draft article 12, it posed a problem to the extent that it could provide legal grounds on which a receiving State, which had consented to allow the sending State to appoint a diplomatic courier from among persons having the nationality of the receiving State, could arbitrarily withdraw its consent once the courier had begun his mission. A provision should, he stated, be inserted in draft article 9 to prevent that from occurring.

Article 11. End of the functions of the diplomatic courier

276. The opinion was expressed by one representative that the draft articles should make it clear that the functions of a courier commenced, with respect to each receiving State, each time he entered the State in question, and ended each time he departed from the State, without any form of notification being necessary. However, he said, when considered in light of draft article 7 (Appointment of the diplomatic courier), the provisions of draft article 11 seemed to convey the impression that a courier's functions began at the time of his appointment and ended with the notifications provided for in draft article 11, which applied, however, to exceptional situations. He noted that the difference between the professional diplomatic courier and the courier ad hoc caused a certain difficulty. The professional courier did not have to belong to a specific department of a State's civil service and travelled routinely to transport bags, whereas the courier ad hoc only transported bags on occasion. It might be said that the professional courier travelled in order to transport the bag, whereas the courier ad hoc transported the bag when he was travelling.

Article 12. The diplomatic courier declared persona non grata or not acceptable

277. The point was made by one representative, who stated that he was unable to agree with the current formulation of draft article 12, that a courier was not accredited to the receiving State or transit State, and may not even be a national of the sending State, and could not, therefore, be declared persona non grata.

Article 16. Personal protection and inviolability

278. One representative, referring to draft article 16 (which provides that the diplomatic courier shall be protected by the receiving State or by the transit State in the performance of his functions, that he shall enjoy personal inviolability and shall not be liable to any form of arrest or detention) as well as to draft articles 17 and 18, considered that a distinction should be made between a case where the courier had the bag in his charge and a case where he did not have the bag in his charge. The protection, inviolability and immunity provided for in the draft articles should be accorded only in the first case. A courier should not enjoy privileges and immunities as broad as those accorded to diplomatic representatives accredited to the receiving State.

Article 17. Inviolability of temporary accommodation

279. One representative was of the view that there seemed to be a contradiction between paragraphs 1 and 3 of draft article 17. Paragraph 1 provided for the absolute inviolability of the temporary accommodation of the courier, while paragraph 3 provided for its inspection under certain circumstances.

280. Another representative considered that the provisions of the draft article should be retained in their present form, as they contained, he stated, one of the essential components of the measures required to ensure protection of the diplomatic courier and the inviolability of the diplomatic bag.

Article 18. Immunity from jurisdiction

281. A number of representatives stated that they were unable to agree with the approach adopted in paragraph 1 of draft article 18, which would accord a diplomatic courier immunity from criminal jurisdiction only in respect of acts performed in the exercise of his functions, and would grant a diplomatic courier limited, functional immunity rather than complete immunity. They made reference to the preamble to the 1961 Vienna Convention on Diplomatic Relations which made it clear, they said, that the purpose of privileges and immunities was not to benefit individuals but to ensure efficient performance of the functions of diplomatic missions as representing States.

282. It was essential, they said, that in order to ensure an efficient performance of the functions of a diplomatic courier (namely, custody, transportation and

delivery of the diplomatic bag) the diplomatic courier should be protected from pressure of any kind on the part of the receiving or transit State. One of the most serious forms of pressure was, it was said, the threat of criminal proceedings. Since the diplomatic courier's functions were not less important or less confidential than those of the administrative and technical staff of a mission, it was clear that the scope of the diplomatic courier's immunities should not be less than the scope of the immunities of administrative and technical staff. In terms of article 37, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, members of the administrative and technical staff of a diplomatic mission enjoyed the same privileges and immunities as diplomatic agents.

283. Guarantees, they said, against abuse of a diplomatic courier's privileges and immunities were duly provided for in draft article 5 of the present draft articles which provided for the diplomatic courier's respect for the laws and regulations of the receiving or transit State, and the duty of the sending State to ensure that the privileges and immunities accorded to its diplomatic courier were "not used in a manner incompatible with the object and purpose of the present articles".

284. The point was made by some representatives that the inclusion, in paragraph 1 of draft article 18, of the words "in respect of all acts performed in the exercise of his functions" was not a compromise but a departure from international practice as reflected in the 1961 Vienna Convention on Diplomatic Relations. Such a provision could, it was said, cause difficulties of interpretation, as there was no agreement on which State (the sending, the receiving or the transit State) was entitled to differentiate between acts performed in the exercise of the functions of the courier and other acts. The point was also made that, although the possibility of abuse and protection of the interests of the receiving and transit States were advanced in argument against a grant of full immunity to the diplomatic courier from the criminal jurisdiction of such States, in practice, abuse of immunity was the exception rather than the rule. Norms intended to be universal should not, it was said, be based on the exception to the general rule. If a diplomatic courier abused the protection accorded him by his status, the sending State was under an obligation to deprive him of that protected status. The language of draft article 18, it was also said, seemed to assume bad faith on the part of the diplomatic courier or the sending State as the point of departure, and this was unacceptable. The provisions of draft article 16, which provided that the diplomatic courier "shall enjoy personal inviolability and shall not be liable to any form of arrest or detention", could not be said to constitute adequate protection for the diplomatic courier. It was particularly important, it was also said, to determine whether refusal to extend full immunity to the diplomatic courier was not a derogation from generally recognized norms and treaty practice.

285. The view was also expressed by one representative that the extent of the protection to be accorded the diplomatic courier in the performance of his functions was linked with the need for a just balance between the interests of the sending State in ensuring the confidentiality of its communications and the security interests of the transit State. He was of the opinion that, on the one hand, the status of the diplomatic courier could not be the same as that of diplomatic agents and, on the other, that the privileges and immunities should be sufficient to enable the courier to perform his functions, and thus ensure freedom of communication between the sending State and its accredited missions.

Article 19. Exemption from personal examination, customs duties and inspection

286. The view was expressed by one representative that the provisions of draft article 19 (which provides for the exemption of the diplomatic courier from personal examination, customs duties and inspection) were unnecessary in view of the provisions of draft article 15 on personal inviolability.

Article 21. Duration of privileges and immunities

287. One representative stated that the provisions of draft article 21 were generally satisfactory.

288. The point was made by another representative that the moment when a courier "begins to exercise his functions" was not made sufficiently clear in the draft article, and different interpretations were possible. He was of the view that, notwithstanding the distinction made in the draft article between the regular diplomatic courier (whose privileges and immunities would cease on his departure from the territory of the receiving or transit State) and the diplomatic courier ad hoc (whose privileges and immunities would cease on his delivery of the diplomatic bag), the two couriers were, in practice, on the same footing: namely, they both, in practice, left the territory of the receiving State within a short period of time. He wondered whether it would be possible to grant the courier ad hoc only a minimum of privileges and immunities and to reserve the full set of privileges and immunities envisaged in the draft articles for the regular courier.

Article 22. Waiver of immunities

289. The view was expressed by one representative that the provisions of paragraph 5 of the draft article (which provide that if the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case) should be made stronger; and they should not, he said, merely require that the best endeavours of the sending State be made "to bring about a just settlement of the case".

Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag

290. One representative was of the view that it would be more appropriate for the provisions of draft article 23 also to include any member of the crew of an aircraft in commercial service, as had been done at an earlier stage in the Commission's work. The provision of draft article 30 clearly showed, he said, that the earlier wording of draft article 23 was preferable. The only specific international obligation imposed on the receiving State was, he said, to permit a member of the relevant diplomatic mission to have unimpeded access to the aircraft.

(c) Comments on draft articles in part III (Status of the diplomatic bag)

Article 25. Contents of the diplomatic bag

291. The observation was made by one representative that paragraph 1 of draft article 25 (which provides that the diplomatic bag may contain only official correspondence and documents or articles intended exclusively for official use) set out the basic principle with respect to the purpose for which the diplomatic bag was to be used and what its content should be. The principle, he said, was based on the provisions of draft article 3 which defined "diplomatic bag" and the provision of draft article 4 which stated that the bag was to be employed for "official communications". Although the expression "articles intended exclusively for official use" in paragraph 1 of draft article 25 was not the same as the expression "official communications" in draft articles 3 and 4, the present language in paragraph 1 of draft article 25 seemed acceptable; but use of the word "may" in paragraph 1 of draft article 25 completely eroded, he said, the restrictive nature of its provisions. The suggestion was made, therefore, by this representative that the provisions of paragraph 1 of draft article 25 should begin with the words "The diplomatic bag shall not contain" and would thus, he said, express more clearly the basic intention in the paragraph.

292. The point was made by another representative that the provisions of paragraph 2 of the draft article (which lay down that the sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1) should make it incumbent on the sending State to ensure that the contents of the bag conformed to the requirements of international law.

Article 27. Facilities accorded to the diplomatic bag

293. One representative, who agreed with the principle set out in draft article 27 (which states that the receiving State or the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag), suggested that for practical reasons the expression ", as permitted by local circumstances," should be inserted after the word "shall".

Article 28. Protection of the diplomatic bag

294. Most delegations stressed the key importance of draft article 28 within the set of draft articles and commended the efforts of the Commission in trying to achieve a compromise solution. They regretted, however, that it had not yet been possible to come to a general agreement on certain substantive provisions, which were placed within square brackets.

295. Paragraph 1. A number of representatives commented on the provisions of paragraph 1 of draft article 28 (which provides that the diplomatic bag shall [be inviolable wherever it may be, it shall] not be opened or detained [and shall be exempt from examination directly or through electronic or other technical devices]).

296. Some representatives, who were of the view that concept of the inviolability of the diplomatic bag should be stated in the draft articles, considered that the words "[be inviolable wherever it may be, it shall]" should be retained in paragraph 1 and that the square brackets around such words should be deleted.

297. The view was expressed that, although the word "inviolable" was not used with respect to the bag in the [existing conventions], the archives and documents and the official correspondence of a diplomatic mission were "inviolable" under paragraph 2 of article 27 of the 1961 Vienna Convention on Diplomatic Relations. As the main contents of the bag were, in practice, diplomatic or other official correspondence, it was normal that the bag itself should be considered inviolable. The inviolability of the bag would not be inconsistent with a fair balance between the interests of the sending State and those of the receiving State and the transit State. Inviolability, as a privileged status accorded to diplomatic missions, consular premises or the person of diplomatic agents, was a well-balanced concept and there was no reason why it should not be applied to the bag. The concept did not imply that the receiving State had a purely passive role and did not exclude guarantees against abuse of the bag.

298. The point was made that the inviolability of the bag was a corollary to the obligation, placed on a receiving State, under draft article 4, to permit and protect the official communications of the sending State, and was a concept that was derived from the principle of the inviolability of the documents contained in the bag.

299. The concept of the inviolability of the bag would not be inconsistent, it was said, with the need for a just balance between interests of the sending State and those of the receiving and transit States; and reference was made to the provisions of draft article 5, which, it was noted, would require the sending State to ensure that the bag was not used in a manner incompatible with the object and purpose of the present articles.

300. The suggestion was made that the inclusion in draft article 5 of a provision specifying the measures to be taken against the sending State, where it was shown that the sending State had not met such an obligation, would be helpful in ensuring a just balance and in lessening differences of opinion with respect to the provisions of draft article 28.

301. The view was expressed that there was no doubt that the diplomatic bag was inviolable and could not be opened or examined by any means. Any modification of that principle would undermine the confidentiality which was the bag's *raison d'être*. Abuses of the diplomatic bag existed, and reasonable measures to prevent such abuses could be taken provided that the basic principle of the inviolability of the bag was respected.

302. The view was also expressed, however, that the words "[be inviolable wherever it may be, it shall]" in paragraph 1 of draft article 28 were unnecessary. The inviolability of the bag, it was said, was already covered in a more specific manner by the words "shall not be opened or detained" in paragraph 1, and by draft article 30 on protective measures in case of force majeure or other circumstances.

303. Some representatives were of the view that the square brackets that were placed around the words "[and shall be exempt from examination directly or through electronic or other technical devices]" in paragraph 1 of draft article 28 should be removed and that the words in question should be retained in paragraph 1.

304. The view was expressed that the evolution of technology had created sophisticated means of examination which could result in the violation of the bag's confidentiality and undermine the principle of inviolability. The principles of freedom of communication and strict respect for the confidentiality of diplomatic correspondence were indispensable conditions for the normal functioning of diplomatic and consular missions and had long been consecrated by international practice.

305. The point was also made that sophisticated electronic means and other technical devices were not readily available to third-world developing countries and should electronic or other technical examination be permissible they would be placed at a disadvantage.

306. The security interests of receiving and transit States would not, it was said, be affected by the retention of the words in question in paragraph 1. This would be clear if the provisions of draft article 28 were considered as a whole. As under paragraph 2 of the draft article if the authorities of a receiving State and, possibly, also, of a transit State, had serious reason to believe that the bag was being improperly used, they were entitled to request the sending State to open the bag. If that request was denied, they could require that the bag be returned to its place of origin. Such a course of action was already provided for in paragraph 3 of article 35 of the 1963 Vienna Convention on Consular Relations. There was considerable merit in applying it to all types of bags. It was the 1963 Vienna Convention system, rather than the admissibility of examination through electronic or other technical devices, which would strike a reasonable balance between the security interests of the receiving State and the confidentiality interests of the sending State.

307. Some representatives were of the view that the words "[and shall be exempt from examination directly or through electronic or other technical devices]" should not appear in paragraph 1 of draft article 28 and should be deleted.

308. The view was expressed that electronic screening of diplomatic bags was admissible in security checks at international airports; and the risk of transporting diplomatic bags without previous electronic examination could not be imposed on airlines. The view that examination of a diplomatic bag by electronic devices might affect the confidentiality of its contents was, it was said, difficult to understand. The possibility of electronic screening by highly sophisticated means which may affect the confidentiality of the official correspondence and documents of a sending State seemed much too remote. The suggestion was made that a possible compromise may be the inclusion in paragraph 1 of draft article 28 of a provision requiring the presence of an authorized representative of the sending State in case of examination of the bag by electronic or other technical means.

309. The observation was made by one representative that preventing improper use of the diplomatic bag was a problem as old as diplomacy. Violations of the bag today were occasionally quite serious and must be discouraged, since the security of the receiving State was at stake. It was for that reason that his country had decided to subject diplomatic bags to radiogenic inspection; and that was fully consistent with paragraphs 2 and 3 of article 27 of the 1961 Vienna Convention on Diplomatic Relations. The radiogenic inspection was limited to the detection of metallic masses and did not permit the reading of correspondence. Such a position was legally sound, he stated, and did not infringe contemporary international law. The rule that the diplomatic bag should not be opened or detained was well established and thus relevant to the codification process. The use of radiogenic inspection was related to progressive development. Current events had demonstrated the need for such inspections. Once the words placed within square brackets were deleted, paragraph 1 of draft article 28 would read: "The diplomatic bag shall not be opened or detained", and such a provision would be sufficient; and would then be fully compatible with the 1961 Vienna Convention on Diplomatic Relations since such a provision would then be identical to paragraph 3 of article 27 of the Vienna Convention.

310. Paragraph 2. A number of representatives commented on the provisions of paragraph 2 of draft article 28 (which read as follows: "Nevertheless, if the competent authorities of the receiving [or the transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or the transit] State may require that the bag be returned to its place of origin.").

311. Some representatives considered the provisions of paragraph 2 of draft article 28 satisfactory. The paragraph, it was said, reflected existing international law and the practice of States and was based on the principle of the inviolability of the bag, the confidentiality of the sending State's diplomatic correspondence and the sovereignty of the receiving and the transit States. A fair balance had been achieved in paragraph 2, it was felt, through the provision allowing the bag to be opened by an authorized representative of the sending State or returned if suspected of use for an illegal purpose. Even should the exercise of such rights by a receiving or transit State aggravate a dispute, there was no alternative approach that would satisfy the interests of all the parties concerned. The exceptional situation referred to in paragraph 2 was, it was also said, regulated by customary international law and subsequently incorporated in the conventions on diplomatic and consular relations.

312. The wording of the paragraph, in the opinion of one representative, seemed to reconcile the inspection provision with the conflicting rights of States, since inviolability would be protected if the sending State was asked to have the bag returned to its place of origin. The provision was an adequate safeguard against

abuse of the freedom of communication. The provision that a bag believed to contain something other than correspondence, documents or articles referred to in draft article 25 should be subject to examination through electronic or other technical devices was acceptable, because if the bag was returned to its place of origin, the routine utilization of the bag would be hindered.

313. The view was expressed that the Commission had made great efforts to achieve a balance between the interests of the sending State and those of the receiving State, in a case where there were serious reasons to believe that the diplomatic bag contained objects other than those referred to in draft article 25. The extension of the régime provided for in the 1963 Vienna Convention on Consular Relations to all types of bags could provide an acceptable solution, and the adoption of reciprocal measures would be a sufficient guarantee against abuse of the options afforded under paragraph 2 of draft article 28.

314. Some representatives stated that they were unable to agree with paragraph 2 of draft article 28 which, they said would extend the régime applicable to consular bags, under the 1963 Vienna Convention on Consular Relations, to other bags. Such an extension would, it was said, diminish the status of the diplomatic bag as established by the 1961 Vienna Convention on Diplomatic Relations and interfere with normal communications between a sending State and its diplomatic missions.

315. They were of the view that the provisions of draft article 28 should be based on existing norms applicable to the diplomatic bag, and should stipulate that the bag should not be opened or detained and should be exempt from examination directly or through electronic or other technical devices. The problem of possible abuse of the bag for the dispatch of articles other than those intended exclusively for official use could be solved only through legal guarantees against abuse, as provided in draft article 5 and through scrupulous respect by States for their international obligations. Also, receiving and transit States were in a position to prevent transmission of prohibited articles and, in general, to prevent abuse of immunities and privileges, as, in the event of such abuse, there could be appropriate action within the framework of the international responsibility of States for internationally wrongful acts.

316. They were of the view that institutionalization of the return of diplomatic bags, if the sending State refused a request to have it opened, could enable a receiving State to impede courier service, as a request to have the bag opened would be refused by many States as a matter of principle or on practical grounds involving confidentiality. The provisions of paragraph 2 of draft article 28 constituted, they said, in effect a proposal that the provisions applicable to the diplomatic bag should be different from those set out in diplomatic conventions in force. The purpose of the present articles was to supplement the relevant provisions of the conventions in question and not to modify the status of the diplomatic bag under such conventions.

317. The provisions of paragraph 2 of draft article 28 were also, it was said, inconsistent with the provisions of draft article 32, which provided that "the provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them". The legal régime being

elaborated must be based, it was said, on the principle of the voluntary fulfilment by States of their international obligations.

318. Some representatives, while not objecting to paragraph 2 of draft article 28 in its entirety, expressed reservations with regard to some of its aspects or formulated suggestions for its improvement. The view was expressed by one representative that the provisions of paragraph 2 of draft article 28 could be interpreted as permitting the examination of the contents of diplomatic bags in any case of suspected abuse, and if the limits of the absolute inviolability of the diplomatic bag were to be defined by a legal provision, such limits should be more clearly described. Public security and the safety of individuals, he felt, should be the basic criteria in such exceptional situations. If there was strong suspicion or evidence that the contents of a diplomatic bag might endanger security, the receiving or transit State could take action, by virtue of the right of self-defence or of the duty to protect human life; and the sending State should be kept informed and granted an opportunity either to dispel the suspicion or agree to any mutually acceptable verification measure. Any possibility of resulting amendment of existing provisions of the 1961 Vienna Convention on Diplomatic Relations should be very carefully reviewed and avoided.

319. The view was expressed by one representative that the right of a receiving State to require that the diplomatic bag be returned to the sending State should be subject to certain safeguards: suspicion as to the contents of the diplomatic bag should be based on sufficient grounds; the parties should endeavour to negotiate a solution; and the sending State may, on its own initiative, present written documentation to confirm the contents of the bag, or of its own free will accept examination by electronic devices. It remained to be seen, he said, what the most appropriate solutions were in the light of the importance of ensuring the safety of the diplomatic courier and the diplomatic bag.

320. The Commission should, another representative considered, continue its search for acceptable provisions on this difficult matter.

321. One representative, stating that he considered the principles underlying paragraph 2 of draft article 28 acceptable, but noting that some members of the Commission had expressed concern lest the exception provided for in paragraph 2 be abused, made the following suggestions: the commentary on paragraph 2 should specify that the words "serious reasons" in the first sentence of the paragraph should be interpreted as meaning reasonable grounds; the word "[consular]" in the first sentence of paragraph 2 should be deleted and the provisions of paragraph 2 should apply to all bags dealt with in the four multilateral conventions on diplomatic and consular law; and the words relating to the examination of the bag through electronic or other technical devices, currently placed within square brackets, should be retained with one amendment - namely, the right to request that the bag be opened should be reserved for cases where a sending State had refused to allow such examination but not for cases where such examination had not satisfied a receiving State.

322. The suggestion was made by some representatives that should no non-permissible article be found in a bag, after a sending State had consented to its examination

by any procedure, the receiving State should be required to make appropriate amends to the sending State.

323. One representative stated that much of paragraph 2 of draft article 28 conformed to existing practice. The Commission, in paragraph 2, had introduced a reference to examination by electronic or other technical devices, doubtless to take account of latest developments in inspection equipment. Yet such a reference had not met with consensus in the Commission. He was of the view that, should recourse to such examination be subject to prior agreement of the sending State, a proper balance of interests would be achieved in the provisions of paragraph 2. Then there would also, he said, be an appropriate balance with respect to methods of examination, which was necessary in view of present inequalities between States in techniques of examination, an imbalance which could increase in the future. It should be for the receiving State, he said, to choose the most suitable method of examination, provided there was not a succession of inspections.

324. Another representative was of the view that the words relating to examination of the bag through electronic or other technical devices currently placed in square brackets should be deleted. This suggestion, he noted, was not in conflict with his view on the permissibility of radiogenic inspections merely intended to detect objects, which was not in violation of general international law as embodied in the 1961 Vienna Convention on Diplomatic Relations, and there was consequently no need to mention them specifically in the present draft articles. He considered that any valid solution should balance the interests of all the States concerned.

325. A number of views were expressed with respect to the words "[or the transit State]" which were placed within square brackets in paragraph 2 of draft article 28.

326. Some representatives were of the opinion that the rights accorded a receiving State, under paragraph 2 of draft article 28, ought not to be extended to a transit State. The reference to the transit State in paragraph 2 of draft article 28 should, they considered, be omitted. The authorities of the transit State were not, they said, mentioned either in the 1961 Vienna Convention on Diplomatic Relations or in the 1963 Vienna Convention on Consular Relations, and the transit State could not be affected in the same way as a receiving State by the contents of the bag. Thus, the reference to the transit State in paragraph 2 was not justifiable and was likely to introduce additional difficulties.

327. The point was made by another representative that the role of the transit State should be one of strict neutrality. Should it have misgivings concerning the contents of the bag it might inform both the sending and the receiving State and they should be responsible for such further measures as they may deem necessary.

328. Some representatives considered that the rights accorded a receiving State under paragraph 2 of draft article 28 should be extended to a transit State. They were of the view that the reference to a transit State in paragraph 2 should be retained. A weapon could also, it was said, be removed from a bag at a transit airport. It seemed fair to give the transit State similar protection.

329. The observation was made by one representative that the negative views that had been expressed on the question of the transit State seemed to ignore the purpose of the control to be exercised by the transit State. Such control was not for the protection of interests in the territory of the transit State as the bag would be leaving the transit State, but rather in the interest of the State of final destination. It was in the common interest of all the States concerned that the transit State should exercise the control of passage through its territory. It seemed unwarranted to deprive the transit State of a means of control which the State of final destination would enjoy.

330. The view was also expressed that the right to open the bag should not normally be accorded a transit State unless it could show that the interests of the transit State were threatened.

Article 29. Exemption from customs duties, dues and taxes

331. One representative considered that the provisions of draft article 29 reflected State practice and international law and should be adopted. (The draft article provides that the receiving or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit and departure of the diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and related charges other than charges for storage, cartage and similar services.)

332. One representative questioned the necessity of including in the draft articles a provision exempting the diplomatic bag from customs duties and other dues and taxes. It was, he said, contemporary State practice not to levy dues to taxes on diplomatic bags and the practice would continue even in the absence of a provision to that effect.

(d) Comments on draft articles in part IV (Miscellaneous provisions)

Article 30. Protective measures in case of force majeure or other circumstances

333. A number of representatives expressed their agreement with the provisions of draft article 30.

334. The point was made by one representative that paragraph 1 of draft article 30 used the expression "force majeure or other circumstances", while paragraph 2 of draft article 30 only used the expression "force majeure". He noted that the four multilateral conventions on diplomatic and consular law adopted under the auspices of the United Nations referred to in paragraph (5) of the commentary on draft article 30 used only the expression "force majeure". He was of the view, however, that account should also be taken of situations which were not, strictly speaking, cases of force majeure, but rather cases of distress. He was of the view, therefore, that the expression "due to force majeure or other circumstances" should be used in both paragraphs 1 and 2 of draft article 30.

Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations

335. A number of representatives were of the view that the provisions of draft article 31 (which state that the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under the draft articles shall not be affected either by the non-recognition of the sending State or of its Government or by the non-existence of diplomatic or consular relations) should be re-examined by the Commission in the course of the second reading of the draft articles. The wording of the draft article gave rise, it was said, to doubts as to the real scope of its provisions. The explanatory observations contained in the commentary on the draft article, which clarified the scope of the draft article and the intentions of the Commission, should be incorporated, it was said, in the text of the draft article.

336. The point was made by one representative that it would be untenable to contend that a State which did not recognize another State or its Government was bound to apply the articles fully to the diplomatic couriers and bags of that other State. The same could be said in most cases where there was non-existence of diplomatic or consular relations. If a State had no missions or consular posts in another State, the latter could not be a receiving State in respect of the former. The question whether the latter State should be a transit State would be left to its own discretion. The real purpose of the provisions of draft article 31, it was said by the same representative, lay in the case of a State in whose territory an international organization had its seat or office, or in which an international meeting or conference was held. In such a case, protection under the articles should be accorded to the diplomatic courier or bag of a State not recognized by the host State or with which the host State had no relations. Such was the purpose of article 82, paragraph 1, of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The provisions of draft article 31 should, therefore, he said, be more precisely worded. Aside from the question of host States, the provisions of draft article 31 should also, it was said, provide for the case of special missions. Special missions may be exchanged between States which did not recognize each other or had no relations; in fact, it was not uncommon for special missions to be dispatched for the very purpose of negotiating recognition or establishment of relations. The couriers and bags of such missions should, of course, be protected under the articles.

337. One representative considered that draft article 31 should make it clear that it did not relate to the de facto effects of non-recognition or absence of diplomatic and consular relations.

338. Another representative, questioning the usefulness of the draft article, wondered whether there were any clear examples of the non-recognition of the sending State or of its Government.

339. Another representative was of the view that if in second reading, the Commission could not devise acceptable wording for the draft article, then the draft article should perhaps be omitted. While it might be the case, he said, that

States which hosted international organizations or conferences had to accept the presence on their territory of representatives of States which they did not recognize, bilateral relations were, he said, quite another matter.

340. One representative, who considered the provisions of draft article 31 to be generally satisfactory, was of the view that the case of partial diplomatic representation should also have been considered.

Article 32. Relationship between the present articles and existing bilateral and regional agreements

341. Some representatives, although supporting in principle the draft article (which states that "the provisions of the present draft articles shall not affect bilateral or regional agreements in force as between States parties to them") or expressing their understanding as to the reasons which led the Commission to the present wording of the draft article, expressed some misgivings regarding the formulation actually adopted.

342. One representative, for example, pointed out that his delegation accepted the principle behind the draft article, but felt that the Commission should perhaps clarify the fact that the present articles would merely supplement existing codification conventions for States parties to such conventions.

343. The question of the relationship between the present articles and existing bilateral and regional agreements was, one representative stated, familiar and had inspired article 30 of the 1969 Vienna Convention on the Law of Treaties whose provisions were later incorporated in the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations. He wondered, however, whether the provisions of draft article 32 were entirely appropriate. The draft article stated that "The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them"; and it might be argued that the provisions of the present articles did affect multilateral conventions, and especially the 1961 Vienna Convention on Diplomatic Relations, whose integrity must be preserved. The problem was complex and it was to be hoped that the written observations of Governments would lead to a solution.

344. The question as to how the relationship between the present articles and the four multilateral conventions on diplomatic and consular law should be adopted under the auspices of the United Nations provided for was referred to by a number of representatives.

345. One representative stated that he was not entirely satisfied with the provisions of draft article 32 as it failed to make it sufficiently clear that the present articles should be viewed as having a special character and as complementing the existing norms of international law in the field of diplomatic and consular law. He was of the view that the present articles should be adopted in the form of a convention finalizing the process of codification and progressive development of diplomatic and consular law, by filling existing gaps in the law relating to the status of the diplomatic courier and the diplomatic bag. /

346. The point was made by another representative that the Commission in its second reading should consider including, in draft article 32, a reference to the complementary relationship between the present articles and the four multilateral conventions on diplomatic and consular law adopted under the auspices of the United Nations.

347. One representative was of the view that the relationship between the present articles and the four multilateral conventions on diplomatic and consular law adopted under the auspices of the United Nations which were referred to in draft article 3 could be expressed by excluding, either explicitly or implicitly, the four conventions from the scope of draft article 32. The Commission had chosen to do so implicitly but the formulation chosen was not felicitous as the meaning of the expression "regional agreements" in draft article 32 seemed unclear. The expression "regional agreements" was similar to the expression "regional arrangements" used in Article 52 of the Charter of the United Nations, and was generally used to denote agreements concluded between States of the same geographic region. The expression should not be used in a different sense in the present articles.

348. The point was made by one representative that if the expression "regional agreements" was intended to mean any non-bilateral agreement on the matters to be covered by the present articles (other than the four multilateral conventions on diplomatic and consular law referred to in draft article 3), that should be stated explicitly. The view was expressed by another representative that draft article 32 required rewording, as it was only from the commentary on the draft articles that it could be learned that the expression "regional agreements" was intended to mean any non-bilateral agreement on the same subject-matter (other than the four multilateral conventions on diplomatic and consular law referred to in draft article 3).

349. One representative was of the view that the provision of draft article 32 might be construed as meaning that the four multilateral conventions on diplomatic and consular relations were affected or modified by the present articles. Questions could also arise, he said, with respect to the treaty relations between States which were or might become parties to the four multilateral conventions and to a future convention based on the draft articles. The Commission should, in his view, consider the redrafting of the provisions of draft article 32 along the lines of the United Nations Convention on the Law of the Sea, which provided, inter alia, that that Convention should not alter the rights and obligations of States parties which arose from other agreements compatible with the Convention.

350. One representative stated that he preferred the previous provisions of the draft article, which had ensured the preservation of the codified law of the multilateral conventions.

351. The point was made, by another representative, that the commentary on draft article 32, which stated that the main purpose of the draft article was the establishment of a coherent and uniform régime which would govern the status of the courier and the bag, and would complement the provisions of the four multilateral conventions, was appropriate and should be maintained in its present form.

Article 33. Optional declaration

352. Some representatives were of the view that the provisions of draft article 33 constituted a satisfactory compromise. It would in principle be preferable, they said, to achieve uniform rules; but if the draft articles as a whole were to command general acceptance, a provision such as that contained in draft article 33 was, they felt, necessary. Some States may not be prepared to accept the applicability of the articles to all couriers and bags, and an optional declaration as envisaged in draft article 33 appeared to be the necessary course.

353. The view was also expressed that the provisions of draft article 33 introduced a measure of flexibility into the draft articles and this was necessary as several States were not parties to all four multilateral conventions on diplomatic and consular relations, one of which, the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, had not as yet entered into force. The Commission, it was said, had agreed that in view of the different legal régimes governing diplomatic and consular bags and the various categories of diplomatic courier, and as not all States were parties to all the conventions enumerated in draft article 3, the possibility of optional exclusions would have to be considered.

354. The view was expressed by another representative that, although the establishment of a coherent, uniform and generally acknowledged régime for all categories of couriers and bags (based on the 1961 Vienna Convention on Diplomatic Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character) would have been preferable, he was prepared to endorse the concept in draft article 33. The possibility of adopting a flexible approach should not be viewed one-sidedly, he said, and it should be recognized that States would have the option under draft article 33 of using and applying the weaker régime in respect of all categories of couriers and bags or of applying the régime providing for a wider scope of privileges and immunities to all categories of couriers and bags, including consular couriers and bags. The legal régime normally applied to the diplomatic courier and diplomatic bag, in the narrow sense, was frequently, he said, adopted on a bilateral basis in the practice of consular relations among States.

355. Some representatives, though recognizing the reasons for the elaboration of draft article 33 in its present form, expressed serious reservations as to its viability and usefulness, particularly as it may, they said, hinder the establishment of a coherent and uniform régime for the status of the diplomatic courier and bag. The draft article seemed, it was said, to be a step backwards. It would be preferable to make further efforts to find a satisfactory solution to the problem, which also arose, it was said, in the case of draft article 28 (Protection of the diplomatic bag), in order that a single régime applicable to all bags could be achieved.

356. The opinion was also expressed by one representative that, although the new wording of the draft article 33 was an improvement over previous versions of the draft article and was more in keeping with efforts to standardize the régimes of

different categories of couriers and bags, there would hardly be any change in practice. On the one hand, the draft article would permit States to become parties to the future instrument even if they were not parties to the four multilateral conventions on diplomatic and consular law; and, on the other, it would result in a plurality of régimes, which was hardly compatible with the original objective of standardization. The international practice thus created would be likely to diminish the results of the codification efforts made hitherto.

357. The creation of a plurality of régimes, in the view of some representatives, would call into question the usefulness of the entire exercise and, furthermore, there were enormous practical difficulties in having to apply different legal régimes in different countries to the same courier or bag.

358. The view was expressed by one representative that the object of the draft articles should not be to make present law uniform, but rather to fill such gaps as there may be in the present law. To establish uniform rules with respect to the diplomatic bag and the person entrusted with the bag seemed unnecessary when uniformity was not, and could not be, achieved in other areas of diplomatic law. Moreover, unification of the applicable rules may cause serious problems for States like his own which were parties neither to the 1969 Convention on Special Missions nor to the 1975 Vienna Convention on the Representation of States and their Relations with International Organizations of a Universal Character. It would be illogical, he said, if the draft articles sought to oblige States that had not ratified such Conventions to accord privileged treatment to the bags and couriers of missions covered by such Conventions, when they were not obliged to accord such treatment to the missions themselves. Accordingly, it would seem that the Commission, cognizant of such difficulties, had provided in draft article 33 for an optional declaration procedure which allowed a State to specify any category of diplomatic bag to which it would not apply the draft articles. The provisions of draft article 33 clearly gave the draft articles a useful flexibility. Yet it was not a satisfactory solution because it was likely to introduce, under such a system, confusion in the applicable law. The status of the diplomatic bag would in each case depend on the position adopted by the sending State, the transit State and the receiving State; and accordingly, the status of the diplomatic bag could vary in the course of a single transmission which may seriously complicate diplomatic communications. Accordingly, the Commission should, he said, limit itself, in second reading, to a study of the status of the diplomatic courier stricto sensu and of the diplomatic bag not accompanied by diplomatic courier. The Commission should take care in doing so not to prejudice the rules set out in the 1961 Vienna Convention on Diplomatic Relations and should restrict itself to expanding them only in so far as seemed strictly necessary.

359. Some representatives were of the opinion that the provisions of draft article 33 should not be included in the draft articles. The point was made by one representative that although the commentary on draft article 33 explained that the optional declaration was the implementation of an agreed option and did not constitute a reservation, it seemed to his delegation that, terminology notwithstanding, the result was similar, since the aim was to limit the effect of the Convention with respect to some of the States Parties to the Convention. The draft article introduced, also, what amounted to a general reservation concerning

the very aim of the present articles as set forth in draft article 1 (Scope of the present articles), when such a reservation would normally be prohibited under the Vienna Convention on the Law of Treaties. Article 298 of the United Nations Convention on the Law of the Sea, referred to in the commentary on draft article 33, could not serve as an analogy, because article 298 envisaged a right of choice only with respect to dispute settlement procedures, and such a right of choice had been sanctioned by the treaty practice of recent years. Moreover, the option offered by draft article 33 could lead a State to waive the application to itself of customary rules, something which was formally ruled out by the Vienna Convention on the Law of Treaties. Thus, there were certain difficult questions, raised by draft article 33, whose full implications should be considered by the Commission in the course of its second reading of the draft articles, in order that the draft articles may be brought more into line with the requirements of general international law.

360. The point was made, by a number of representatives, that it was not desirable to permit States to designate categories of bags and couriers to which they did not intend the articles to apply. The exercise of such an option would be a source of confusion and would lead to a number of régimes applicable to the courier and bag, which was contrary to the essential objective of the draft articles. The draft articles were already sufficiently comprehensive and should be examined further only to the extent that it was necessary to achieve uniformity. An optional declaration may open the way, it was also said, for States to modify unilaterally the legal régimes established by the four multilateral conventions on diplomatic and consular law adopted under the auspices of the United Nations and may lead to the application to the diplomatic courier or the diplomatic bag of the restrictive rules laid down in the 1963 Vienna Convention on Consular Relations.

D. STATE RESPONSIBILITY

1. General observations

361. A number of representatives referred in their statements to the fundamental importance to international law of the topic of State responsibility. A proper elaboration of articles on the topic was essential, it was said, to relations between States and international co-operation.

362. Appreciation for the valuable contributions made by the Special Rapporteur, Mr. Willem Riphagen, to the work of the Commission was expressed.

363. The Commission, it was said by a number of representatives, should make every effort to complete its work on the topic at the earliest possible date. The slow progress of the Commission's work was, it was felt by some representatives, unwarranted and gave grounds for concern. The observation was made, in this connection, that although the Commission had decided to refer draft articles 1 to 5 of part three of the draft articles to its Drafting Committee, the texts of such draft articles would require further consideration and, moreover, the draft articles of part three could not be really considered until work on part two of the draft articles had been completed. The fact that more time had not been devoted to

the topic by the Commission at its thirty-eighth session, was, in the view of some representatives, regrettable.

364. The view was also expressed that the Commission had, in fact, continued to make progress on the topic. The length of time the Commission had devoted to the topic was, it was said, a measure of its conceptual and practical difficulty. The topic was particularly complex and controversial.

365. It would be desirable, it was said, if the Commission could complete the first reading of parts two and three of the draft articles as soon as possible, and thus finalize the entire set of draft articles in first reading. The Commission could then, after receiving the comments of Governments, proceed to a second reading of part one of the draft articles, bearing in mind the relationship of the three parts of the draft articles to one another.

366. One representative stated that it may be useful if the General Assembly were to reaffirm the priority character of the topic of State responsibility and if Governments were invited to submit written comments on relevant draft articles.

367. The observation was also made that the difficulty of the subject-matter of the topic made it necessary for the Drafting Committee of the Commission to devote considerable time to each draft article and the Commission should consider how sufficient time could be made available to the Drafting Committee.

368. The view was expressed by one representative that the complexity of the subject of State responsibility required that the Commission adopt a thorough, step-by-step approach in its work on the topic. A hasty reference of draft articles by the Commission to its Drafting Committee was not conducive to progress and, on the contrary, moved substantive discussion in the Commission, reflective of State practice, from plenary meetings to meetings of the Drafting Committee. It was important, he said, that the main trends of the views expressed in the Sixth Committee should guide the work of the Commission. The topic of State responsibility required a carefully balanced and all-embracing codification approach. Elements of progressive development of international law were also involved and such progressive development should depend on State action and consent and not on a purely scholarly basis. For example, he said, the present provisions of draft article 5 of part two of the draft articles were still unsatisfactory and, together with the Drafting Committee's inability to complete its work on the provisions of draft articles 6 to 16 of part two, were reflective of an inappropriate approach.

369. One representative considered that the work of the Commission would be expedited, and the study of issues more comprehensive, if draft articles were accompanied by a greater number of comprehensive commentaries.

370. A general question to be resolved, it was said by another representative, was what direction the Commission should take in its work on the topic. He believed that the Commission should continue to follow the trend in contemporary international law which attached considerable weight to international public order and obligations erga omnes, responding, thereby, to the legitimate expectations of

the international community and remaining in the mainstream of public international law.

371. One representative considered that codification in the area of State responsibility should be as flexible as possible, so as not arbitrarily to restrict the right of States to adapt their responsibility according to the nature of their relations and particular situations. The Special Rapporteur had, it was noted in this connection, emphasized the residual character of the draft articles he had proposed.

372. The point was made by another representative that the topic of State responsibility, which had been under study for more than 30 years, had developed beyond the framework of traditional international law on State responsibility, whose scope had been originally restricted to the protection of aliens. The draft articles on the topic now differentiated between international delicts and international crimes, and the principle of proportionality in the implementation of State responsibility had been established.

373. One representative was of the view that a main purpose of the draft articles on State responsibility was to define in the form of a convention the special responsibility incurred by States which committed international crimes such as acts of aggression, colonial domination, genocide, apartheid or acts aimed at unleashing a nuclear conflict.

374. Another representative stated that the work of the Commission on State responsibility should be guided by the following general principles: first, whenever an obligation established under international law was violated, a new relationship was established between the author State and the injured State; secondly, failure to honour a commitment entailed an obligation to provide compensation; thirdly, a wrongful act must have resulted in harm or injury, not merely the risk of harm or injury; fourthly, it was not necessary for there to be criminal intent, and only the objective conduct of a State should be taken into consideration; and fifthly, the international responsibility of a State could even be involved as a result of acts of its legislative or judicial organs, the unauthorized acts of its officials, and violation of the rights of nationals of a State.

375. Some representatives stated that it was important that the Commission continue its work on a convention on State responsibility even though such a convention might not be ratified at an early date by a large number of States. A convention on State responsibility would, it was said, influence the conduct of States and constitute a text of reference for international tribunals.

376. One representative, while stating that he concurred with the general approach adopted by the Special Rapporteur, had difficulties with the emphasis placed on the residual character of the draft articles in so far as they seemed to admit of "soft law" between individual States even if the international community as a whole had established jus cogens. It was surely, he said, one of the aims of the draft articles, besides providing a compendium of international obligations, to establish a method whereby "soft law" was transformed into jus cogens.

377. A number of representatives noted the interrelationship between the three parts of the draft articles.

378. A number of representatives referred to the relationship between the topic of State responsibility and other topics on the agenda of the Commission, such as the draft Code of Offences Against the Peace and Security of Mankind, and international liability for injurious consequences arising out of acts not prohibited by international law.

379. One representative, referring to what he felt was the joint responsibility of the Sixth Committee and the Commission to avoid topics which were likely to cause the Commission to become completely bogged down, stated that his delegation had in the past supported the work being done on State responsibility. However, the question now arose as to whether there was, after so many years of endeavour in the Commission, any real chance of a convention on State responsibility being drafted, adopted and ratified, and whether better use might not be made of the Commission's resources.

2. Comments on specific provisions of the draft articles

(a) Comments on draft articles in part one

380. One representative stated that it was unfortunate that the Commission had not been able to commence, at its thirty-eighth session in 1986, the second reading of part one of the draft articles and expressed the hope that the Commission would do so at its thirty-ninth session in 1987. Another representative observed that the comments made by Governments on part one of the draft articles would merit careful consideration, in the ongoing effort to make the draft articles on State responsibility more widely acceptable.

(b) Comments on draft articles in part two

381. The view was expressed by one representative that, although the proposed draft articles provided a sound basis for future work, there were some draft articles, including draft articles 6 to 13 but more especially draft articles 14 and 15, which were still in need of considerable improvement.

382. One representative stated that the Special Rapporteur had, in his view, given adequate weight to the concepts of jus cogens and of international crime and, particularly, to the legal consequences of aggression, while paying due attention to the more traditional aspects of State responsibility. There was, of course, room for drafting improvements. The new version of draft article 5, particularly its new paragraph 3, was an improvement. He would also wish to emphasize that while flexible on matters of drafting, he was strongly in favour of retaining the substance of paragraph 3 of draft article 5, and of draft articles 12 (b), 14 and 15 as well as the other progressive notions with respect to international crime in article 19 of part one of the draft articles on State responsibility.

383. Another representative stated that in the draft articles of part two a clear distinction should be drawn between State responsibility for internationally wrongful acts and State responsibility for international crimes. The potential consequences of the two categories of acts may be different in nature and scope, and an international crime gave rise to relations of responsibility not only between the offending State and the injured State but also between the offending State and the organized community of States. Special attention should also be given, in the light of the functions of the Security Council under Chapter VII of the Charter of the United Nations, to the question of the legal consequences of acts representing threats to peace, breaches of the peace or acts of aggression.

384. The point was made by one representative that in part two of the draft articles consideration had not as yet been given to the question of the weight to be attached to the injury caused by an internationally wrongful act. The Commission had been more concerned with identifying acts involving State responsibility and with possible responses to such acts than with the question of eliminating consequences of wrongful acts. While that approach was understandable in connection with so-called "secondary rules" of State responsibility, the question of the injury caused, whether moral or material, could not be avoided when dealing with the issue of reparation. Unfortunately, by reason of the shortening of its thirty-eighth session, the Commission had been unable to give proper attention to the matter. The imbalance might usefully be redressed at the next session.

Article 3

385. The point was made, by one representative, with reference to draft article 3 that the Commission's point of departure was that State responsibility arose from an internationally wrongful act of a State and that rules of customary international law should continue to govern those legal consequences of an internationally wrongful act that were not set out in part two of the draft articles. However, he said, such a provision could in practice conflict with the norms of domestic law, and agreement must be reached as to when a customary rule was binding at the international level.

Article 5

386. The view was expressed by one representative that the general rule was set out in paragraph 1 of draft article 5 and that paragraph 2 of draft article 5 should contain clearly defined principles to ensure the application of the general rule.

387. The point was made by another representative that it was essential, in draft article 5, to identify the injured State either by saying simply that an injured State was a State whose right had been infringed, or by specifying the source or nature of the law by virtue of which a State was to be considered an injured State in a particular case. The provisions of draft article 5 seemed, it was said, to combine these two approaches in its paragraphs 1 and 2.

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388. As to paragraph 3 of draft article 5, he stated, because an international crime was always an internationally wrongful act, it was entirely proper that in the event of an international crime, all States should be entitled to exercise rights deriving from draft articles 6 and 9; however, whether and to what extent those rights should be subject to the limitations embodied in draft articles 14 and 15 was a matter for further consideration.

389. The view was expressed by another representative that, aside from its first sentence, the provisions of draft article 5 were inadequate. There were, this representative stated, essentially three categories of breach or infringement: the bilateral situation, the multilateral situation, and the erga omnes situation, such as in the case of international crimes. Only these three categories of situation should, he stated, be listed in draft article 5. Any reference to sources, primary rules or details as are now found in paragraph 2 of draft article 5 would give rise to unnecessary problems. Draft article 5 should not, he said, seek to set out a primary rule, and the impression should not be created that draft article 5 would provide an independent basis for response to a wrongful act. The point was also made, by the same representative, that if subparagraph 2 (a) of draft article 5 was formulated in broader terms, then subparagraphs 2 (b), (c) and (d) as well as subparagraphs 2 (e) (iii) and 2 (f) could be deleted.

390. The point was made by one representative that the expression "injured State" in draft article 5 presupposed that an internationally wrongful act would cause actual harm and not merely create a threat of potential damage, and that it was unclear what would be regarded as actual harm.

391. The view was expressed that the provisions of draft article 5 did not clearly distinguish between the State directly injured and States that suffered only indirect injury and this was a question of great importance in subsequent articles.

392. The point was made that the provisions of paragraph 2 (e) (iii) of draft article 5, which referred to the protection of human rights and fundamental freedoms, and the provisions of paragraph 3 of draft article 5, which referred to the question of an internationally wrongful act that constituted an international crime, should be linked to the provisions of the draft Code of Offences Against the Peace and Security of Mankind.

Articles 6 and 7

393. The view was expressed by one representative that draft article 6 covered the full spectrum of claims to reparation and, thus, seemed sufficiently comprehensive, subject to any clarification in wording that seemed necessary. For instance, he said, in subparagraph 1 (a) of draft article 6 the words "to release and return the persons and objects held through such act" should be deleted; the provisions of subparagraph 1 (b) should be deleted; and measures of satisfaction could be expressly mentioned in subparagraph 1 (d) of draft article 6.

394. The point was also made, by the same representative, that the provisions of draft article 7 should be deleted.

Articles 8 and 9

395. The view was expressed by one representative with reference to draft article 8 (which concerns countermeasures by way of reciprocity) and draft article 9 (which concerns countermeasures by way of reprisal) that the two forms of countermeasure were unilateral reactions of an injured State, and were admissible legal responses through which an injured State could exert pressure on the author State to ensure compliance with the obligation breached. The necessary element in both forms of countermeasure was proportionality and, except in case of certain emergency situations, could be said to be aimed at materializing a claim for reparation.

396. The view was expressed that the question of countermeasures by way of reprisal caused concern as it involved the implicit danger of escalation to illegality, including the unlawful use of force.

397. The view was also expressed that the Commission should endeavour to establish time-limits within which recourse to reprisal would be lawful.

398. The point was made, by one representative, that it would be more appropriate to place the provisions of draft article 9 concerning reprisal in part three of the draft articles, as reprisal constituted a means of restraint employed with the view to implementing international responsibility.

399. The point was made, by another representative, that it was imperative to disallow reprisals involving armed force.

400. The modalities of the use of armed force, it was said by another representative, was a question that concerned the implementation of international responsibility and, thus, was a matter to be dealt with in part three of the draft articles.

Articles 10 and 11

401. The view was expressed by one representative that draft articles 10 and 11 could be deleted if draft article 5 were formulated more narrowly, as proposed in paragraph 389 above, and if all matters relating to claims and enforcement were systematically covered in part three of the draft articles. Such matters would include cases of special urgency implicit in paragraph 2 (a) of draft article 10 and special procedures, under treaties, referred to in paragraph 2 of draft article 11.

402. The point was made, by the same representative, with reference to the provisions of draft articles 10 and 11, that he did not believe it would be correct to narrow too much an injured State's entitlement to take countermeasures. The primary rules had to be taken into account, and it was incorrect only to consider compulsory third-party procedures as effective in dispute settlement. Such an approach was incompatible with State practice.

Articles 14 and 15

403. Some representatives were of the view that the provisions of draft articles 14 and 15 were inadequate. The view was expressed that the legal consequences of international crimes were not sufficiently covered and that, thus, the fundamental distinction between international crimes and international delicts was not adequately made.

404. The specific legal consequences of international crimes, in so far as they went beyond the legal consequences of international delicts, should, it was said by one representative, be comprehensively codified; and, in this connection, it was essential to deal separately with aggression as the most severe international crime and to provide for self-defence as a specific legal consequence. Another representative considered that such wrongful acts as aggression, racial discrimination, genocide, apartheid, colonialism, the use of mercenaries, international terrorism and the militarization of outer space must be included among the international crimes for which a State was responsible.

405. The view was expressed that the supplementary consequences of international crimes, as opposed to international delicts, especially the "collective right" of all injured States and "such rights and obligations as are determined by the applicable rules accepted by the international community as a whole", required some clarification. Considering that an international crime was defined as a violation of an obligation that was "essential for the protection of fundamental interests of the international community", and having regard to the weakness of the community mechanisms that might come into play, the protection of such fundamental interests depended, it was said, largely on the number of States qualifying as injured States (under draft article 5 of part two of the draft articles) who should, even if they were not directly injured, concur in the denunciation of the wrongful act and take measures to ensure cessation of the wrongful act and reparation.

406. Some representatives were of the opinion that special attention should be given, in the light of the responsibilities of the Security Council under Chapter VII of the Charter of the United Nations, to the question of the legal consequences of acts constituting threats to the peace, breaches of the peace, or acts of aggression.

407. The point was made, by another representative, that a question arose as to the relationship between judicial procedures and the procedures set out in the Charter of the United Nations for the maintenance of international peace and security. He was of the view that paragraph 3 of draft article 14 could give rise to different interpretations, and that it was interesting to know whether it meant that once the Security Council had intervened in the matter, judicial procedures should be initiated. (See also the observations noted under draft article 4 of part three below.)

408. The view was expressed by another representative, with reference to paragraph 3 of draft article 14, that the legal consequences of an internationally wrongful act should not be determined exclusively by reference to the provisions and procedures of the Charter, and that the Commission should endeavour to

formulate an exhaustive - at any rate a more detailed - definition of the legal consequences of such an act.

(c) Comments on draft articles in part three

General comments

409. A number of representatives stated that they considered it necessary that the draft articles on State responsibility include a part three on the implementation of international responsibility and the settlement of disputes.

410. Some representatives were of the view that consideration of the draft articles of part three would not be possible so long as the draft articles of part two had not been examined further by the Commission. Some representatives expressed misgivings with respect to the decision of the Commission to refer the draft articles proposed by the Special Rapporteur for part three to the Drafting Committee. The matters dealt with in part three could, in their view, be properly considered only after part two of the draft articles had been completed, and they were of the view that the Commission itself should then re-examine the draft articles proposed for part three.

411. Some representatives expressed concurrence with the general lines of the proposals made by the Special Rapporteur for part three. The view was expressed that the proposals (which included, it was said, claim notifications to a party alleged to have committed a wrongful act, expiry of a certain period of time before further steps were taken, notification of intention to have recourse to countermeasures, and reference to the duty of parties to seek peaceful settlement under Article 33 of the Charter of the United Nations) set out appropriate measures for preventing escalation through countermeasures. It was essential, it was said, to regulate such a complex issue as precisely as possible.

412. The view was expressed that the draft articles of part three were welcome in view of the necessity, particularly in relation to article 19 of part one of the draft articles, of there being an effective procedure for the settlement of disputes.

413. One representative, while considering it premature at the present stage to comment on the draft articles proposed by the Special Rapporteur for part three, stated that the draft articles seemed to build in a sophisticated and world order-oriented manner on the earlier draft articles proposed by the Special Rapporteur as well as on the approach to the matter of the settlement of disputes taken in the Vienna Convention on the Law of Treaties and in other comprehensive contemporary instruments. They reflected, he stated, a perception of dispute-settlement machinery as a means not only of resolving disputes but also of avoiding a vicious circle of action and reaction.

414. Some representatives considered the approach reflected in the draft articles proposed by the Special Rapporteur for part three to be unacceptable. A practical approach should be adopted by the Commission, it was said by one representative, to what was an intricate problem, and it should be borne in mind that the world

community of States was reluctant to accept compulsory third-party dispute-settlement procedures. The Vienna Convention on the Law of Treaties and the Convention on the Law of the Sea differed, they said, in nature and scope; and the question of the implementation of international responsibility and the settlement of disputes, in the present draft articles, should be considered without drawing an analogy with such Conventions.

415. The present draft articles of part three, the same representative stated, gave rise to the impression, particularly with respect to international crimes, that there would be no responsibility, and entitlement to countermeasures, except in cases where the International Court of Justice so determined. Such a system would in effect retroactively introduce, for all treaties and conventions, a general compulsory third-party procedure which would not have been agreed to when the primary rules were established. Compulsory third-party procedure was not a panacea, he stated, for suppressing escalation and internationally wrongful acts. The decisive requirement was a readiness on the part of States to co-operate, and it was this that would determine which dispute-settlement procedure was selected.

416. The point was made, by the same representative, that escalation of a conflict might also arise where the possibilities of response by an injured State to a wrongful act were inadequate, and the draft articles proposed for part three had narrowed such possibilities for response as the draft articles had provided for a procedure that would extend over a period of two years.

417. One representative, while expressing agreement with the Special Rapporteur on the need to prevent international disputes from escalating, stated that such escalation could be caused either by excessive reaction on the part of the injured State or by persistence in the wrongful act by the author State. Thus it would be unfair, he noted, to provide only for the obligations of the injured State. The draft articles should also, he stated, set out the obligations of the author State.

418. Another representative, while agreeing that it should be made clearer that the provisions of part three were residual, suggested that the Commission might consider whether part three should also apply to disputes where the settlement-of-dispute provisions of an existing treaty did not contain certain minimum provisions to ensure the effectiveness of the dispute-settlement procedure.

419. Some representatives suggested that it be made clearer that the provisions of part three would apply equally to parts one and two. It was noted by one representative that it may be too early to consider, however, how exactly to express the point, as the Commission had yet to consider the comments of States on part one and was still a long way from completing work on part two.

420. The point was made that the draft articles proposed by the Special Rapporteur for part three seemed to focus on the entitlement to take countermeasures rather than on the commitment of an internationally wrongful act. A State might, it was said, allege that an internationally wrongful act had been committed and seek redress without availing itself of its entitlement to take countermeasures, and it should be made clear that in such a situation a notification to the other party

would be in order and a dispute recognized to exist which should be solved by the means envisaged in the draft articles.

421. One representative, drawing attention to the Special Rapporteur's emphasis on the residual character of the draft articles on State responsibility, pointed out that it was his understanding that it was intended that the unilateral actions referred to in part two of the draft articles were residual and that the draft articles of part three were intended only as a means of limiting the danger of escalation from unilateral actions under part two. However, he said, a dispute arising from unilateral actions under part two might involve questions arising from a violation of the primary rules in part one of the draft articles. The question of the scope of the draft articles of part three should, therefore, be reviewed.

422. The point was made, by one representative, that part three of the draft articles should really cover all enforcement and dispute-settlement issues and that, thus, enforcement issues in relation to countermeasures that were placed in draft articles 10 and 11 of part two of the draft articles should be moved to part three.

423. Another representative noted the connections between the three parts of the draft articles and the indivisibility of the three parts as a whole, which were reflected, he said, in the limits placed by the Special Rapporteur on the provisions of part three. The goal, he observed, was not to provide for a settlement-of-disputes procedure that was binding in all cases, but simply to draw up a procedure to be applied in the context of part two alone and to avoid escalation in the taking of measures and countermeasures under part two.

424. One representative stated that international practice showed that parties to a dispute usually tended to resort, first, to direct negotiations, and it would be advisable for part three of the draft articles to refer not only to the notifications currently envisaged in draft articles 1 and 2 of part three, and the means referred to in Article 33 of the Charter of the United Nations, but also to bilateral negotiations.

425. Another representative was of the view that the dispute-settlement procedures envisaged for the topic of State responsibility should be harmonized with the implementation procedures to be adopted within the framework of the related topics on the draft Code of Offences against the Peace and Security of Mankind and on international liability for injurious consequences arising out of acts not prohibited by international law. The view was also expressed, however, by another representative that he would prefer the dispute-settlement procedures to be handled separately and not linked to the other topics.

426. One representative stated that he had misgivings with respect to the Special Rapporteur's use of the expression "soft law", which was ambivalent and misleading in the context of norms between States. The question of the freedom of States to establish norms different from the standards of the proposed convention should be carefully considered.

Articles 1, 2 and 3

427. The view was expressed by one representative that the word "alleged" should be included in the second sentence of draft article 1 as follows: "The notification shall indicate the alleged rules which were not complied with and the measures required to be taken and the reasons therefor". This, he said, would make it clear that the three parts of the draft articles on State responsibility were interrelated, and that responsibility under part one was a pre-condition to entitlement to a legal response under part three.

428. The point was made that the Commission might wish to examine the time-frame stipulated in draft articles 1 to 3 more closely, since under the present formulation the prescribed period for moving from the first step of notification under draft article 1 to the final stage of dispute settlement under draft article 4 seemed too long.

429. The provisions of draft articles 1 and 2, in the consideration of some representatives, were not reflective of State practice and appeared to require an excess of notifications.

430. One representative was of the opinion that the provisions of draft articles 1 and 2 of part three required an excess of notification, and that the particular provisions of draft articles 1 and 2 relating to the steps an injured State should take under part two of the draft articles ought to be included in part two. Accordingly, he was of the view that the provisions of draft articles 1 and 2 should be re-examined. An injured State, he said, should in the case contemplated in draft article 1 of part three, rather than notifying the the alleged author State of intention to invoke the provisions of draft article 6 of part two, demand of the alleged author State cessation of the wrongful act, restitutio in integrum, or any other form of reparation. It was only after such demand was denied by the alleged author State that the injured State should be in the position, now contemplated in draft article 2 of part three, to take the countermeasures envisioned in draft articles 8 and 9 of part two. Accordingly, he was of the view that the only notification that should be required was that currently referred to in draft article 2 of part three. He was of the view that the previous draft article 1 of part three should properly appear as an additional sentence, or as an additional paragraph, in draft article 6 of part two and provide that an injured State should present its claim and its reasons.

431. The point was made by one representative, with reference to the second sentence of draft article 1 (which read: "The notification shall indicate the measures required to be taken and the reasons therefor"), that in practice the first step a Government often took was to deliver a protest in which it reserved all its rights, and that the nature and content of the protest were usually quite sufficient for the other State to know what measures it was being asked to take and why. The requirements as to notification in draft article 1 did not, therefore, seem to reflect State practice.

432. The point was made, by one representative, that when a State made a claim against another State, under draft article 1, it should provide precise data and

facts concerning the wrongful act of the other State and thus avoid disputes in the future.

433. Another representative was of the opinion that the commentary to paragraph 3 of draft article 2 drew an inappropriate parallel with article 65, paragraph 5, of the Vienna Convention on the Law of Treaties, as the Vienna Convention provided for a single notification while the present draft articles provided for two notifications. He was of the view that paragraph 3 of draft article 2 seemed to dispense altogether with the notification under draft article 1 and the stage which that notification introduced. Such a solution did not seem justifiable, and paragraph 3 of draft article 2 thus seemed to require clarification.

434. A number of representatives expressed reservations with respect to the appropriateness of burdening an injured State with the obligation of making several notifications before being entitled to take countermeasures.

435. The representative stated that he was unsure of the desirability of the requirement in draft article 2 which specified a minimum period of three months before the claimant State could invoke the provisions of draft article 8 or draft article 9 of part two of the draft articles. The exception for "cases for special urgency" would probably be too restrictive, he said, and there may be cases not falling within such exception where it would be clear from the reaction of the author State that it had no intention of doing anything in the matter. Though the obligation under Article 33 of the Charter of the United Nations to seek peaceful settlement of disputes existed in respect of all disputes and could not be limited by one convention on State responsibility, it must be ensured, he stated, that paragraph 1 of draft article 3 did not in any way undermine the provisions of draft articles 8 and 9 of part two. The ability to impose reasonable countermeasures, proportional to the gravity of the wrongful act, when combined with an effective compulsory dispute settlement procedure, was, he said, one of the most effective ways not only of resolving international disputes but also of preventing breaches of international obligations.

436. The point was made by another representative that it did not seem appropriate that the taking of countermeasures, by way of reciprocity or reprisal, by a State which had suffered from an internationally wrongful act, should be made dependent on a procedure which could take at least two and a half years, having in view also the provisions of paragraph 1 of draft article 3. There might well be only a few objects, he said, against which countermeasures could legitimately be directed, and to be of any value countermeasures should have immediate effect. Moreover, in case of a refusal by a State to apply a treaty provision, for example, there was no reason why an injured State should be under obligation to continue to apply the treaty for a long period without remedy or compensation. Also, it seemed unwise to base the entitlement to take countermeasures under part two of the draft articles on such a system, since it might become inapplicable in case of reservations by States with respect to the provisions of part three of the draft articles.

437. A number of representatives made reference to the absence of any indication of time-limits for cases of special urgency referred to in paragraph 1 of article 2.

438. The view was expressed by one representative that although flexibility might be necessary, the accommodation of exceptional cases, through the provisions for cases of special urgency, in paragraph 1 of draft article 2, should be examined with great care.

439. The point was made by one representative that the "cases of special urgency" referred to in paragraph 1 of draft article 2 ought to be dealt with separately and thus given more emphasis; that this should be associated with paragraph 2 (a) of draft article 10 in part two of the draft articles, which also referred to a case of urgency; and that draft article 10 of part two should in its entirety be moved to part three of the draft articles. A case would be urgent, he said, should it involve measures of protection taken by an injured State within its jurisdiction with a view to stopping an internationally wrongful act or preventing its effects, or averting irreparable damage; and this could only be achieved through immediate action on the part of the injured State.

440. The same representative was of the opinion that the question should be clarified whether the term "measures", in paragraph 1 of draft article 3 of part three, referred to the measures of protection in situations of urgency dealt with in paragraph 1 of draft article 10 of part two. There might perhaps be a similarity, he said, in the provisions of paragraph 1 of draft article 3 of part three and those of paragraph 1 of draft article 10 of part two; and the latter (namely paragraph 1 of draft article 10) should, it was said, really be included in part three.

441. The view was expressed by the same representative that, in addition to the present paragraph 2 of draft article 3 of part three, there should also be a further and similar paragraph included, as paragraph 3, in draft article 3, which would contain a general reference to special implementation procedures provided for under treaties. Such an additional paragraph would, it was said, ensure under the procedural provisions of part three the primacy of such special implementation procedures over general provisions concerning State responsibility, as had been similarly done in draft article 2 of part two with respect to entitlement to legal response. If such an additional paragraph 3 were to be included in draft article 3 of part three, the procedural provisions, he said, contained in paragraph 2 of draft article 11 of part two which also refers to such special procedures could be deleted.

Articles 3 and 4

442. Some representatives expressed general concurrence with the provisions of draft articles 3 and 4. The point was made by one representative (with respect to the reference in draft article 3 to the means of settlement mentioned in Article 33 of the Charter of the United Nations and to the provision in draft article 4 (c) on compulsory conciliation) that neither recourse to Article 33 of the Charter nor compulsory conciliation was too burdensome an obligation or was incompatible with other conventions. The provisions on the International Court of Justice in draft article 4 (a) and (b) would, he said, apply only in exceptional cases. There was a certain reluctance in the Commission and in the Sixth Committee with respect to

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such provisions. However, he would recall that such provisions, particularly those in draft article 4 (b), constituted a key concept in the development of the law with regard to international crimes.

443. Some representatives made the point that it was clear from international practice that the decisive factor in dispute settlement was not procedures but rather the readiness of the States parties to a dispute to co-operate and to show the flexibility necessary for a solution of the dispute.

444. The view was expressed by another representative that it should be made clear in draft article 3 that States should resort to the means of settlement referred to in Article 33 of the Charter of the United Nations as soon as the first signs of a dispute became apparent.

445. The view was expressed by yet another representative that there was, of course, no objection to the general reference in draft article 3 to the means of settlement mentioned in Article 33 of the Charter of the United Nations. Though such a reference did not go very far towards effective dispute settlement, there did not seem to be any realistic alternative.

446. The point was made by one representative that there seemed to be a technical inconsistency between, on the one hand, the reference in draft article 3 to the means of settlement mentioned in Article 33 of the Charter of the United Nations and, on the other, the establishment in draft article 4 of other dispute-settlement procedures. Such inconsistency could be avoided, he suggested, if draft article 3 were to specify which of the means of settlement mentioned in Article 33 of the Charter would apply.

Article 4

447. Some representatives expressed concurrence with the provisions proposed by the Special Rapporteur in draft article 4, which were based, they pointed out, on the provisions of the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea, and provided for compulsory third-party procedures in only a very limited number of cases, namely, those involving jus cogens or international crimes where the questions at issue were of vital interest not only to the parties but also to the international community as a whole. The view was expressed that it was essential that such disputes be settled at the highest possible judicial level and reference of such disputes to the International Court of Justice was appropriate.

448. The point was made by one representative that as the provisions of draft article 4 seemed to be similar to provisions in the 1969 Vienna Convention on the Law of Treaties, the wording of draft article 4 should be as close as possible to the formulation of recent codification conventions.

449. One representative stated that it was wise for the Special Rapporteur to have drawn on two widely accepted multilateral instruments as the foundation for part three. Such an approach was most likely to elicit support from States for the

proposed dispute-settlement procedures. Important elements were the emphasis on compulsory conciliation as means of preventing the escalation of a dispute, while other options, including judicial settlement and the approaches set out in Article 33 of the Charter of the United Nations were left open as means for the definitive peaceful resolution of a dispute. Although some States had not accepted as obligatory the jurisdiction of the International Court of Justice, his delegation hoped that the principle of choice of means for peaceful settlement of disputes by the parties concerned would not lead to avoidance of such settlement.

450. The view was expressed that it was unlikely that the majority of States would accept a norm such as that contained in article 19 of part one of the draft articles on State responsibility, if they did not have the legal assurance that they would not be accused of having committed international crimes in the absence of an authoritative system to establish the facts and the applicable law.

451. One representative, welcoming the provisions of draft article 4 permitting unilateral recourse to the International Court of Justice, regretted that the Court was only to decide whether countermeasures violated jus cogens or were inadmissible because they constituted international crimes and that the conciliation procedure provided for was only to cover additional questions on the admissibility of countermeasures.

452. The view was expressed, by another representative, that the draft articles on dispute settlement could determine the future willingness of States to accept the draft articles on State responsibility. The Commission should, therefore, work out a formula acceptable to as many States as possible. His delegation concurred with the basic ideas underlying the draft articles, namely, the incorporation of an objective mechanism for dispute settlement such as submission to the International Court of Justice or third-party conciliation.

453. One representative stated that he favoured a limited range of operation for the principle of compulsory jurisdiction. Although the broader question of compulsory settlement of international disputes was a topic which the Commission might suitably take up in another context, its consideration at the present juncture could delay the completion of work on the substantive aspects of State responsibility.

454. Another representative, referring to the important distinction in draft article 4 (between, on the one hand, issues involving jus cogens and international crimes, where recourse to the International Court of Justice was prescribed, and, on the other, disputes concerning interpretation and application, where a compulsory conciliation procedure was called for), stated that it raised broad questions of legal philosophy. His delegation would, itself, prefer to have all disputes arising in the context of the convention settled through a dispute-settlement system that entailed a binding decision of the International Court of Justice, or by a body set up to consider disputes involving international crimes.

455. Some representatives stated that an approach, such as in draft article 4, which insisted on compulsory procedures for the settlement of disputes was

incorrect and unacceptable and that it should not be overlooked that States in current practice rarely referred disputes to the International Court of Justice and even when accepting the compulsory jurisdiction of the Court, excluded cases where vital interests were involved. The examples of the obligatory procedures provided for in the 1969 Vienna Convention on the Law of Treaties and the 1982 Convention on the Law of the Sea, they said, were of a different character, reflecting the specific characteristics of the subjects with which they dealt, and thus should not be followed in the present draft articles.

456. One representative, referring to the importance of procedural issues relating to the settlement of disputes arising from State responsibility, stated that it would be fundamentally incorrect to insist on a compulsory procedure for the settlement of disputes. The draft articles should, he said, leave no doubt as to the principle of freedom of choice of the parties to a dispute to select any means of settlement mentioned in Article 33 of the Charter of the United Nations.

457. The view was expressed, by one representative, that although the compulsory procedures for dispute settlement provided for in part three of the draft articles might only seem to apply to certain limited situations, e.g., the threat of escalation, etc., they could, like the subject of State responsibility itself, extend to all areas of primary rules and thus to the entire field of international law.

458. The same representative, referring to the provisions of draft articles 4 and 5 and the annex to part three of the draft articles, was of the view that the dispute-settlement procedures there envisaged were not only less flexible but also different from similar procedures adopted in universal international conventions. The Vienna Convention on the Law of Treaties, he stated, provided for a dispute to be submitted to the International Court of Justice only if the parties could not agree on submission to arbitration; the conciliation procedures envisaged under other universal international conventions were more flexible, and reservations were disallowed under the present draft articles. The system of the Vienna Convention on the Law of Treaties was more flexible and narrower in scope. The Convention extended only to the validity, termination or suspension of treaties; and, so far as the matter of responsibility was concerned, only responsibility for breach of particular obligations under treaties would usually be involved and the continuance of the treaty itself would not usually be threatened.

459. The concepts reflected in the present provisions of draft article 4 were, the same representative stated, unacceptable as they would result in the legal consequences of international crimes being dependent on a decision of the International Court of Justice. The determination whether an international crime had been committed should not, he said, be in any way contingent on a decision of the Court, as this would mean, for instance, that apartheid would only be found to be an international crime if the International Court of Justice so determined. An international crime, he stated, would usually entail an emergency situation particularly for the directly afflicted State and give rise to the right to an immediate unilateral response. In other cases, he said, United Nations law would be applicable with all its procedural and substantive provisions, and it would be primarily for the Security Council and other United Nations organs and, as the case

may be, also the International Court of Justice to act. Thus, what really ought to be included in part three, with reference to the enforcement of the legal consequences of international crimes, was a reference to United Nations procedures, and such a reference is currently contained in paragraph 3 of draft article 14 of part two of the draft articles.

460. The question was raised by some representatives as to why no reference was made in draft article 4 to the possibility of arbitration. The suggestion was made that paragraphs (a) and (b) of draft article 4, or an additional paragraph in draft article 4, should indicate clearly that a unilateral application for submission of a dispute to the International Court of Justice would be subject to the provision that the parties had not submitted the dispute to arbitration.

461. Another representative, referring to paragraph (b) of draft article 4, said that while it provided for judicial settlement in a case where the alleged wrongdoer disputed a countermeasure as constituting an international crime, it did not seem to provide for judicial settlement where the injured State claimed that the wrongful act itself constituted an international crime. He wondered whether paragraph (b) of draft article 4 could not be extended to cover such a situation as well.

462. The point was raised by one representative as to whether the reference to draft article 12 (b) was necessary in paragraph (c) of draft article 4 in the light of the reference to draft article 12 (b) in paragraph (a) of draft article 4.

463. The view was expressed by one representative, with reference to paragraph (b) of draft article 4 (which, he said, concentrated on the additional rights and obligations referred to in draft article 14 of part two of the draft articles), that further attention should be given to the question of the reaction of other members of the international community in the face of an act of aggression constituting an international crime.

464. Another representative, expressing preference for a system where the means of dispute settlement was a matter for the choice of States, felt that one alternative might be to increase the possibilities in draft article 5 for reservations to all the provisions of draft article 4.

Article 5

465. Some representatives were of the view that draft article 5, on the non-admissibility of reservations, could give rise to controversy and should be left for solution to an eventual codification conference on the draft articles. One representative, while stating that he could accept the present provisions of draft article 5, stated that he saw merit in the suggestion that the question of reservations, being a key provision with respect to the acceptance of the draft articles as a whole, should be left to a future conference.

466. The point was made by another representative that the provisions of draft article 5, containing a prohibition of reservations, would probably not survive a

codification conference, as paragraphs (a) and (b) of draft article 4 which concerned the compulsory jurisdiction of the International Court of Justice were also involved. States could not, he stated, be prevented from making reservations to such a system of compulsory jurisdiction, as was to be seen in the practice of States when becoming parties to the Vienna Convention on the Law of Treaties.

467. The view was expressed, by another representative, that a general prohibition of reservations, as in draft article 5, was contrary to the residual character of the draft articles of part three, which should entail that the provisions of part three could be excluded through special arrangements in treaties, or otherwise through reservations. The provisions of draft article 5, he also stated, were inconsistent with paragraphs 2 and 3 of Article 36 of the Statute of the International Court of Justice which made the compulsory jurisdiction of the Court dependent on a special declaration by the parties to a dispute on the basis of reciprocity, and such declarations had been few and subject to far-reaching reservations. Thus, the system of compulsory jurisdiction in the Statute of the Court appeared, he said, to be in practice too rigorous for States, and a general prohibition of reservations as in draft article 5 would render such a system even more rigorous.

468. One representative, who considered that it should not be forgotten that many countries had adopted a cautious attitude to acceptance of the compulsory jurisdiction of the International Court of Justice and while accepting such jurisdiction had excluded cases where vital interests were involved, stated that the provisions of draft article 5 should be made more flexible.

Annex to part three

469. One representative stated that he agreed with the main lines of the procedural arrangements proposed by the Special Rapporteur in part three including the rules contained in the annex to part three for the implementation of compulsory conciliation, and would leave it to the Drafting Committee of the Commission to prepare the provisions of the final draft articles.

470. Another representative stated that he had reservations with respect to paragraph 9 of the annex to part three (which stated that the fees and expenses of the conciliation commission shall be borne by the parties to the dispute) since small countries which most needed third-party procedures might not avail themselves of such procedures because of their prohibitive cost.

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

1. General observations

471. A number of representatives stated that they attached great importance to the preparation of a Code of Offences against the peace and security of mankind. A code of offences against the peace and security of mankind, in their view, was necessary to prevent the use of force in international relations and would deter

individuals and their régimes from committing grave crimes such as apartheid and other offences involving massive violations of human rights. A code of offences was also viewed as a suitable means of strengthening international peace and security. Elaboration of a code as an instrument of restraint would, it was said, encourage States to behave in a manner consistent with the rules and principles governing relations between States.

472. A number of representatives expressed their satisfaction at the progress that had been made by the Commission at its thirty-eighth session in 1986. They paid tribute to the Special Rapporteur, Mr. Doudou Thiam, whose reports, they said, had enabled the Commission to discuss a number of fundamental questions relating to the Code.

473. The Commission, had, they noted, discussed the tripartite division of crimes into three categories: crimes against peace, crimes against humanity and crimes against war stricto sensu, as well as general principles of international and comparative criminal law.

474. The Commission had also made considerable progress in the identification and more precise definition of the crimes in the three categories, in particular the two major categories, namely, crimes against peace and crimes against humanity. The Commission had also covered further such questions as the minimalist and maximalist approaches for the offences which should be condemned in the Code.

475. The preparation of a code, in the view of some representatives, required in-depth study, since it touched on a relatively new area of international law, international criminal law, and the law of international jurisdiction, which raised many sensitive practical problems.

476. The view was expressed by one representative that he was puzzled at the amount of time that the Commission had devoted to the highly problematic topic of the draft code of offences against the peace and security of mankind, at the expense of other, more promising topics. His delegation continued to have serious doubts as to whether an inherently political topic was a suitable one for the Commission. In view of the lack of agreement at the political level, it was, he said, perhaps not entirely surprising that the Special Rapporteur had chosen to use as his sources conventions that were not widely ratified and General Assembly resolutions adopted by a divided vote. In his view, those sources suggested not what the law was or ought to be, but rather the lack of a sound basis for productive work by the Commission.

477. One representative considered that, rather than endeavouring to include all relevant serious offences in a single code, the Commission should seek to finalize, successively, individual instruments on specific offences.

478. A number of representatives expressed the view that the 1954 draft Code of Offences against the Peace and Security of Mankind constituted a good basis for the current work of the Commission in that area. The point was also made that while basing its work on the 1954 draft Code, it was important that the Commission also establish rules appropriate to contemporary international circumstances.

479. A number of representatives stated that the draft Code should include provisions on a co-operation among States in accordance with the Charter of the United Nations in preventing offences against the peace and security of mankind and punishing individuals found guilty of such crimes.

480. Some representatives expressed the view that the Commission should also be invited to consider the question of penalties, since a code which failed to provide for penalties would not be complete. It was suggested that the Code should also specify the mechanism for trial and punishment of offenders.

481. A number of representatives stated in this connection that an individual accused of a crime should nevertheless enjoy the jurisdictional guarantees accorded to every human being. One representative saw the problem in the need to make jurisdictional guarantees available to the accused, while at the same time to ensure that offences against the peace and security of mankind did not go unpunished.

482. Some representatives also stated that States should be required to include severe penalties for such crimes in their national legislations.

483. A number of representatives expressed the view that, given the considerable legal and political importance of the draft Code of Offences against the Peace and Security of Mankind, the item should continue to be considered as a separate item in the agenda of the Sixth Committee.

484. Other representatives expressed the opposite view that because of the importance of rationalizing the work of the General Assembly, particularly the Sixth Committee, the item should be included with the other topics considered in connection with the Commission's report.

2. Comments of a general nature relating to the scope and structure of the draft Code

(a) Scope of the draft Code ratione personae

485. Some representatives referred in their statements to the question of the scope of the Code ratione personae.

486. A number of representatives expressed agreement with the intention of the Commission to limit its work at the present time to the preparation of the Code on the international criminal responsibility of individuals, without prejudice to subsequent considerations of the question of international criminal responsibility of States.

487. Some representatives were of the view that any attempt to apply the concept of international criminal responsibility of States would be politically disruptive and legally unjustifiable. Criminal law, they stated, punished and incarcerated individuals and the Code should apply to an individual's responsibility for his own behaviour and not his responsibility for the conduct of a State. The question of

the international responsibility of the individual and that of the international responsibility of the State formed two clearly distinct concepts in law. If the international criminal responsibility of the State were to be included in elaborating a Code of Offences against the Peace and Security of Mankind, it would complicate and frustrate the work of the Commission.

488. The view was expressed by one representative that under contemporary international law, a State was not subject to foreign jurisdiction. While it incurred international political responsibility and financial liability, only the individuals who committed the offences were criminally responsible.

489. Some representatives were of the view that the Code should also be extended to include the international criminal responsibility of States, particularly as the definition of aggression proposed for draft article 11 and the proposals made by the Special Rapporteur for war crimes necessarily involved such responsibility. Crimes, such as aggression, apartheid or genocide, it was said, could only be carried out by a State or with its direct or indirect participation, and it remained to be determined whether the responsibility of States for the wrongful acts referred to in draft article 19 of the draft articles on State responsibility was purely civil or political. The Commission should carry out further studies before taking a final decision to reject the concept of the international criminal responsibility of States and other juridical persons. Political expedience alone should not dictate the path to be followed.

490. The view was expressed that while some crimes engaged the responsibility of individuals alone, other crimes though committed by individuals were attributable to a State through a breach of international obligations of a State. Aggression, it was said, was typically a State crime.

491. Some representatives, while confirming their approval of the Commission's decision to concentrate on the international criminal responsibility of individuals, expressed the hope that the General Assembly would give the Commission guidelines with regard to consideration of the problem of the "criminal" responsibility of States. One representative added that the Commission, in the meantime, should make an express reservation concerning the responsibility of States in any draft articles which it adopted.

492. One representative, referring to the question whether the Code should deal with the criminal responsibility of individuals in official positions of authority, or only with private individuals, stated that international crimes might be committed by persons who used State authority for those ends, or might reflect a State's foreign policy. However, the actual perpetrator in every case was an individual.

(b) Scope of draft Code ratione materiae

493. Some representatives referred in their statements to the question of the scope of the Code ratione materiae. A number of representatives expressed the view that offences against the peace and security of mankind might be characterized as acts which seriously jeopardized the most vital interests of mankind, violated

fundamental principles of jus cogens and threatened human civilization and the primordial human right to life.

494. In this connection, some representatives were of the view that the Code should only cover crimes of a very serious nature falling within one of the categories of crimes against peace, crimes against humanity and war crimes, and should be determined by reference to a general criterion and to the relevant conventions and declarations.

495. Some representatives were of the view that the enumerative method employed by the Special Rapporteur in his attempt to define offences was acceptable.

496. The view was expressed that the content of the Code ratione materiae should be limited to offences based on treaty law or customary international law, and that it should not cover offences which had been recognized only in non-legally-binding instruments such as resolutions. The point was made by some representatives that in elaborating a catalogue of offences, the Commission should avoid including every conceivable violation of international law. The basis for identifying an international crime should be a general definition covering specific characteristics of such a crime. The proposed Code not only should reflect the present level of consciousness of the international community, but should be a pointer for the evolution of international law.

497. A number of representatives expressed support for the "minimum content" approach which, they said, would ensure the effectiveness of the Code. One representative, referring to the criterion set out in draft article 19 of the draft articles on State responsibility, considered that it was essential that the range of offences covered should reflect contemporary trends in international practice and international law. Some representatives felt that the provisions of the Code should as far as possible be precise and leave no room for uncertainty or misunderstanding. A detailed enumeration of crimes may prove incomplete and, moreover, may freeze international law and hamper the codification of new rules and new offences in the future. A general definition illustrated by a non-exhaustive enumeration was, in their view, the least acceptable as it ran the risk of imprecision which would have serious adverse consequences for the Code.

(c) Question of the categorization of crimes against humanity, crimes against peace and war crimes

498. Some representatives referred in their statements to the tripartite categorization of offences proposed by the Special Rapporteur, namely crimes against humanity, crimes against peace and war crimes. The view was expressed by some representatives that the question of such a categorization of offences was clearly fundamental to the Commission's work; there could not, however, be a clear-cut dividing line between the three concepts, and overlapping was unavoidable.

499. One representative expressed the view that the tripartite categorization of offences proposed by the Special Rapporteur should be manageable, provided that the

consequences of the various crimes were dealt with in a similar manner. Humanitarian law which punished war crimes, on the one hand, and the law of human rights whose infringement constituted a crime against humanity, on the other, were two different bodies of law, in terms of both of their sources and of their judicial elements. Humanitarian law, he said, was based on concepts of power and protection, whereas the law of human rights was based on rights and duties. The report of the Commission seemed to overlook these considerations and the Commission might, he thought, wish to examine whether such considerations were irrelevant to or should, in one way or another, be reflected in the provisions of the Code.

500. Another representative, noting that the Special Rapporteur had reviewed the evolution of the notion of crimes against humanity, which had long been linked to the concept of war crimes, stated that it was evident that at the current stage the two questions should be treated separately, as the Commission had decided. It would also be appropriate, however, he said, to study acts which were both war crimes and crimes against humanity. One representative considered that the distinction between crimes against peace, crimes against humanity and war crimes did not really help to isolate the acts which merited the description of crimes against peace and security of mankind. He felt that much time would instead be wasted in deciding what act belonged in what category but that, in the final analysis, the matter was of little importance.

501. A number of representatives supported the idea of providing a definition of what constituted a crime against humanity and of listing such crimes in the Code. It was also pointed out that such a definition should, however, be couched in certainty.

502. The view was expressed by some representatives that the Commission should think carefully about the consequences that would flow from characterizations of offences as offences against the peace and security of mankind. Traditionally, such offences had been imprescriptible and their perpetrators had been brought before international courts. The Special Rapporteur was, it was said, thinking of dispensing with that rule and replacing it with the universal competence of States. While such a development was not opposed, its consequences should however be carefully weighed, because many serious offences, such as counterfeiting, hijacking of aircraft and certain terrorist acts committed in the air, were clearly international crimes entailing universal competence, without thereby being offences against the peace and security of mankind or imprescriptible. The two concepts were different, and the possibility of establishing an international judicial body, through an extension of the Commission's mandate, should, it was suggested, be studied.

3. Question of acts that should be included within the categorization of crimes against humanity, crimes against peace and war crimes

(a) Crimes against humanity

503. One representative stated that the definition of crimes against humanity appeared to include both an objective element of substance and a subjective element

of intent or motive on the part of the perpetrator. While this approach was acceptable, he said, he hoped that a further requirement would be carried out with regard to each type of crime against humanity under consideration, particularly genocide and apartheid.

504. Genocide. Agreement was expressed with the Special Rapporteur's proposal that genocide should be included in the Code as a crime against humanity.

505. The view was expressed by some representatives, with respect to the identification of the crime of genocide, that the elements of "mass" and of "motive" were essential components. The point was made by one representative that an offence of that nature should form, part of a systematic pattern or plan directed against a human group or groups on grounds, for instance, of racial or religious hatred.

506. One representative was of the view that the element of "mass" was important but not essential, but that, on the other hand, the element of "motive" seemed essential in the definition of a "crime against humanity". He did not believe that it was necessary that the acts form part of a systematic plan.

507. Some representatives felt that neither the element of "mass" nor the gravity of the act constituted an adequate criterion. The question was, one representative said, which yardstick the gravity and the element of "mass" of the act should be measured against. The key element that distinguished crimes against humanity from ordinary crimes was the fact that the former were committed with the tacit agreement or upon the orders of the State. The element in all crimes against humanity was that they constituted a threat to international peace and security.

508. Aggression. Several representatives were of the view that aggression should be included in the Code as a crime against humanity. The view was expressed by one representative that the Code should reaffirm the principle that "the first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression", as inclusion of such a principle would have far-reaching consequences in the identification of an aggressor. The suggestion was made that the threat of aggression, and the planning and preparation of threats of aggression, including propaganda which incited aggression, should also be listed among the elements of aggression, as a failure to follow such an approach would, it was said, constitute a departure from the principles enunciated in the Charter of the International Military Tribunal, and would considerably weaken the effectiveness of the Code.

509. One representative stated that the threat of aggression should not be included as a crime in the Code. If this were done, he said, it would entail the exercise of the right of self-defence. The right of self-defence, he pointed out, could be exercised under Article 51 of the Charter of the United Nations before the matter was reported to the Security Council.

510. In connection with the unanimously adopted General Assembly recommendation on the definition of aggression, there seemed to be an inclination to ignore its central element, namely, the preservation of the role and discretion of the

Security Council. The extent to which the definition of aggression could be said to have eliminated the problems that had caused the abandonment of the 1954 draft Code was debatable. Yet it seemed, he said, that some would argue that it opened a way to success, which had not existed in 1954, and that its central element could be ignored. This, he said, was not merely wrong, but dangerously destabilizing.

511. Apartheid. Several representatives stated that apartheid should be included in the Code as a crime against humanity. Apartheid, it was said, had already been defined as a crime against humanity in the International Convention on the Suppression and Punishment of the Crime of Apartheid in General Assembly resolution 3068 (XXVIII) of 30 November 1973.

512. The point was made that 90 States have become parties to the 1973 Convention and that those who were not as yet parties to the Convention have not necessarily opposed it. The view was also expressed that the International Court of Justice has condemned apartheid on numerous occasions, and that such condemnation was a typical in the case of jus cogens.

513. Serious damage to the environment. A number of representatives expressed agreement with the Special Rapporteur's view that the Code should include as a crime against humanity, breach of an international obligation of essential importance for the preservation of the environment.

514. Despite the difficulty of determining with the necessary precision the conditions that must be present in order for acts resulting in serious damage to the environment to be considered crimes against humanity, it was said, every effort should be made to ensure its proper place in the draft Code.

515. Some representatives took the view that an act to breach an obligation of essential importance for the preservation of the environment could be regarded as a crime only if it were committed with intent to violate the relevant treaties and conventions.

516. One representative expressed the view that the element of seriousness should apply not only to the damage caused but also to the initial breach of the relevant treaties and conventions.

517. It was considered that the pollution of the environment by radioactive fallout or toxic substances constituted a serious breach of international rules, for which sanctions should be established in international legislation.

518. The view was also expressed by one representative that the inclusion of serious damage to the environment under the category of crimes against humanity required much more reflection. There was indisputably a duty to preserve the environment, a breach of which created international obligations. The question, he said, was at what point such breach became not only an international crime under the topic of State responsibility, but a crime against humanity under the Code.

519. The point was made by another representative that care should be exercised in qualifying serious damage to the environment as a crime against humanity, as it

would first have to be established that damage had been caused deliberately and that a State had violated international obligations.

520. Terrorism. Several representatives stated that terrorism should be included in the Code as a crime against humanity. The type and frequency of terrorist acts which had recently been committed, it was said, had highlighted the pressing need to address that issue in the international sphere.

521. Some representatives expressed the view that not all terrorist acts should be considered offences against the peace and security of mankind, but only those which were assisted by one or more States and were intended to undermine the security of another State. The view was expressed that some States had made terrorism an instrument of their foreign policy, and terrorism constituted a new form of aggression and an act of war. The view was also expressed that international terrorism usually launched direct attacks against the political independence of States by fomenting civil strife and subversion and undermining the political process of a State.

522. One representative was of the view that the Commission should give some further thought to the definition of terrorist acts, because inclusion in the Code of an ill-defined concept would detract from the effectiveness of the future instrument.

523. One representative considered that terrorism should be regarded as a crime against peace where it was instigated and perpetrated by one State against another State.

524. Another representative considered that further thought should be given to whether international terrorism should be included in the Code both as a crime against humanity as well as a crime against peace.

525. The view expressed by one representative that the text to be adopted on the question of international terrorism should make it clear that terrorism did not include the struggle of national liberation movements and peoples under colonial domination.

526. Drug trafficking. A number of representatives stated that international drug trafficking should be included in the Code as a crime against humanity. The point was made in this connection that the Commission should provide a clear definition of what constitutes the production of and traffic in narcotic and psychotropic substances.

527. Violation of the right of peoples to self-determination. Some representatives expressed the view that crimes against humanity should include any acts intended to prevent people from exercising their inalienable right to self-determination and to deprive peoples of human rights and fundamental freedoms. The view was expressed by one representative that such acts constituted an international crime for two closely related reasons. First, there was the non-conformity of the régime in question with the sacred principle of free choice by all peoples of their political, economic and social system. Secondly, such régimes gave rise to the

most serious threats to the territorial integrity and political independence of another State, and thus to the peace of mankind as a whole.

528. Another representative considered that violation of the right of peoples to self-determination should be viewed within the meaning ascribed to that concept in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Any extension of that denominator, it was said, might adversely affect the application of other fundamental principles of international law, such as those of sovereignty, territorial integrity and non-intervention in the internal affairs of States.

529. Trafficking in women and children. Some representatives expressed the view that though not included in the 1954 draft Code of Offences against the Peace and Security of Mankind, trafficking in women and children should be included in the Code as one of the offences. One representative considered that the crime of trafficking in women and children should only be included in the Code if it was State-instigated or had State consent.

530. Slavery. Some representatives considered that the crime of slavery should also be included in the category of crimes against humanity. One representative thought that slavery should be included as a crime against humanity only where such a crime was committed with the active participation or consent of the State.

531. Mercenarism. A number of representatives supported the inclusion of mercenarism in the list of offences. Some, however, considered the definition of the term "mercenary" proposed by the Special Rapporteur to be unsatisfactory.

532. Colonial domination. Some representatives supported the inclusion of colonial domination as an offence against the peace and security of mankind because, they said, the system of colonial domination was abominable and was still continuing.

533. Economic aggression. Some representatives supported the inclusion in the Code of economic aggression as an offence. One representative cautioned against its inclusion because powerful States, he said, might invoke economic aggression as an excuse for military aggression which they would say was in the exercise of the right of self-defence. Moreover, he said, it would be difficult to establish an objective criterion for the definition of the concept.

534. Violation by the authorities of a State of the provisions of a treaty designed to ensure international peace and security. One representative stated that the Commission should be cautious with respect to the inclusion of the violation of a treaty designed to ensure international peace and security and should consider, in particular, the risk of providing powerful countries with a pretext to intervene and use force against a weaker State.

(b) Crimes against peace

535. The view expressed by some representatives that contemporary international law tended increasingly to safeguard the rights and fundamental freedoms of the

individual. The protection and safeguarding of human rights were provided for in the United Nations Charter and those rights were themselves set forth in many instruments, in particular the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Inter-American Convention on Human Rights and the African Charter on Human and Peoples' Rights. Those instruments showed how high human rights had risen in the hierarchy of contemporary international law, where until fairly recently they had been the subject of only marginal references and had been accompanied by no guarantees or obligations. In that connection, they said, it should be noted that the 1948 Universal Declaration of Human Rights provided the frame of reference for the development of norms in that area.

536. It was noted that development had thus gradually led to the confirmation of so-called "first generation" rights, namely, civil and political rights, and "second generation" rights, namely, economic, social and cultural rights. A third generation of human rights was not emerging, which included the right to peace, the right to a safe environment, the right to development and the right to the enjoyment of the common heritage of mankind. The rights in the first two generations would remain incomplete unless they were guaranteed by the third generation rights, foremost among which was the right to peace which was an essential pre-condition for the exercise of other rights.

537. In that regard, therefore, it was thought essential that the preamble to the future Code of Offences against the Peace and Security of Mankind should set forth the right to peace, which embodied all the fundamental rights of the human person, as a legal norm. That Code would fall within a different theoretical framework purely by virtue of the fact that its preamble mentioned the right to peace not only as a desirable objective but also as a subjective right, without which it would be difficult to guarantee the exercise of the other rights. To define offences against the peace and security of mankind precisely, it was said, it was first essential to recognize that peace was not simply an ideal, or even the raison d'être of the United Nations, but the content of a veritable subjective right and the supreme value to which not only positive law but also the activities of all the organizations of the international community must be devoted.

538. It was felt that to include the right to peace in the preamble to the future Code not only would be in keeping with the spirit of the Charter, but would also clearly show that until peace was elevated to the rank of a legal norm and an individual and collective subjective right, efforts to promote and safeguard human rights would remain incomplete. That was true also for other United Nations instruments and declarations, and the inclusion of the right to peace as a positive norm in the preamble to the Code could become a criterion applicable to other international declarations. In order to define offences against peace, it was stated, it was essential to recognize that peace was not only a form of existence of peoples, but an essential pre-condition for mankind's survival which justified the preparation of a Code of Offences against the Peace and Security of individuals and nations.

(c) War crimes

539. Some representatives expressed agreement with the view that the traditional terms "war crimes" and "violations of the norms and customs of war" should be retained even if war had become a wrongful act under international law.

540. Other representatives stated that the concept of "war" had changed, and currently encompassed not only inter-State relations but also any armed conflict which pitted State entities against non-State entities. In their view, it would therefore be appropriate to replace the term "war" with the words "armed conflict".

541. One representative was of the view that the word "war" should be retained provided it was understood that it was to be used in its material sense of armed conflict and not in the traditional sense of inter-State conflict.

542. The view was expressed by some representatives that the term "laws and customs of war" was commonly understood. The objective of those laws and customs was humanitarian and that if the term "armed conflict" was to be used, in keeping with the current state of international law, the wording should cover cases which were pertinent in the light of the relevant humanitarian conventions.

543. The view was expressed by some representatives that there appeared to be three forms of definitions of war crimes: a general approach, as used in the 1954 draft Code; an enumerative approach regarding existing laws and customs of war; and a combination of the two. From the standpoint of the progressive development of international law and in the light of practical difficulties that may otherwise be encountered, these representatives were more inclined to support the combined approach.

544. Another representative found unacceptable the conclusions on the question of war crimes, contained in paragraph 104 of the Commission's report concerning the use of the terms "laws and customs of war" and "war crimes". He preferred a definition of war crimes which enumerated such crimes on the basis of codified rules, while leaving open the possibility of applying other current rules of international law not yet codified, which, according to him, included the crime of a nuclear first strike.

545. A number of representatives expressed their agreement with the Special Rapporteur that overlapping of concepts was fairly common in both internal and international law.

546. One representative stated in this connection that while a war crime and a crime against humanity were distinct, they might overlap. But they did not have the same content or scope. A war crime could be committed only in times of armed conflict and against enemies.

547. The view was expressed with respect to the problem of methodology that a general or combined definition should be adopted, for not all violations of the laws and customs of war, but the grave breaches, constituted war crimes.

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548. On the question of nuclear weapons, a number of representatives expressed their support for the inclusion in the Code, of a State's first use of nuclear weapons. It was stated by some that the use of nuclear weapons was regarded as the gravest crime against the peace and security of mankind. Some representatives believed that it was important to include in the list the testing of such weapons since they endangered the very survival of mankind.

549. According to one representative, the question should be asked whether the distinction between first use and response should be embodied in the draft Code. For the international community, he said, the consequences of nuclear response to a nuclear aggression were as disastrous as those of the initial attack. The Commission, he said, should take that point into account in its consideration of this problem.

550. Some representatives expressed doubts about the advisability of including the use of nuclear weapons as a crime in the draft Code in the absence of a general convention prohibiting the use of such weapons. If and when there was such a convention, it was said, the violation of such prohibition would constitute a war crime. It was thought that for the Commission to venture into the mine-field of nuclear strategy, and in the absence of a universal treaty to declare the use of nuclear weapons to be a war crime, might not be the most advisable course for the Commission. It was thought that it would be futile in practice and might even be counter-productive for the fate of the Code as a whole.

(d) Other offences

551. A number of representatives were of the opinion that "complicity", "complot" and "attempt" should be included in the Code as separate offences. Some representatives expressed the view that particular care should be given to the consideration of the concepts of "complicity", "conspiracy" and "attempt" as such offences could be extended to engage the responsibility of an indefinite number of persons. The draft Code, it was said, should apply only to the particularly despicable acts, and there could be no question of the automatic engagement of responsibility of certain groups of persons.

552. Some representatives stated that they favoured an extended interpretation of the three concepts in international law in view of their exceptional seriousness.

553. One representative considered that to speak of "complicity", "complot" and "attempt" as distinct offences was in line with the modern trend in criminal law to abandon the concept of accessory responsibility and to consider such acts as principal offences, in so far as there was criminal intent. This had been the position adopted by the Commission in 1954.

554. Some representatives were of the opinion that only "complot" was a truly autonomous offence. They were of the view that "complot" should be included in the Code as a crime against peace or even as a crime against humanity on the assumption that the extended definition of complot was retained. "Complicity" and "attempt", however, needed to be precisely defined, along with all their constituent elements.

555. The point was made that the concept of "complot" should apply not only to crimes against a State, but also to crimes against ethnic groups and peoples, and that "complot" could entail collective responsibility.

556. One representative stated that while he could accept an expanded definition of "attempt" he could not accept the idea of "conspiracy", because that virtually involved the concept of collective responsibility.

557. One representative suggested that "Other offences" might perhaps be amended in the French language to read "Autres crimes" or "Autres actes constituant des crimes contre la paix et la sécurité de l'humanité".

4. General principles

558. A number of representatives expressed their satisfaction at the far-reaching discussion on general principles the Commission had held at its thirty-eighth session. They stated that this approach was in conformity with the view consistently maintained that an introduction containing general principles should be discussed by the Commission as a priority item in parallel with, or even prior to, the listing of crimes.

559. Principles relating to the juridical nature of the offence. Some representatives expressed the view that it was important not to confuse crimes under internal law with offences under the Code. Offences under the Code, some representatives stated, were directly defined by international law, independently of national law. The fact that an act might or might not be permissible under internal law, it was said, did not concern international law. The principle of non bis in idem, it was said, was of paramount importance. The introduction, according to these representatives, should address in detail the question of the application of this principle - non bis in idem - so as to exclude the risk that a person might be prosecuted twice for the same act, once under internal law and once under international law.

560. The suggestion was made by one representative that it may often be the case that acts considered criminal under international law would also be considered criminal under the internal law of a State. He wondered whether it would be possible to indicate which of the two legal orders should have priority in the exercise of jurisdiction. It may be simpler, he felt, to provide that whenever one of the jurisdictions had been exercised, the other should take into account the penalty already applied. The Commission would, however, need, he stated, to consider the question further.

561. Principles relating to the official position of the offender. The point was made that since it had been agreed that for the time being only the criminal responsibility of the individual would be addressed, it was fair to state that any individual guilty of a crime under international law was subject to punishment.

562. Principles relating to the application of the criminal law in time. A number of representatives considered that it would hardly be conceivable not to include

the principle of non-retroactivity in the Code of Offences. The principle of non-retroactivity of criminal law was widely accepted in international conventions and internal laws and thus merited inclusion in the Code of Offences. The principle nullum crimen sine lege, nulla poena sine lege, it was maintained, was one of the main foundations of criminal law and that there seemed to be no valid reason not to apply it in the Code. The principle, it was pointed out, was already enshrined in article 11, paragraph 2, of the Universal Declaration of Human Rights. According to one representative, the only issue to be decided was whether the principle should be asserted in its entirety or whether some flexibility should be introduced.

563. Some representatives expressed agreement with the view that the rule of non-retroactivity was not to be limited to formulated law. It related also to natural law and overriding considerations of justice. The decisive factor, it was maintained, was that the concept of justice prevailed over the letter of the law. They expressed agreement with the Special Rapporteur's conclusion that in that context the word "law" must be understood in its broadest sense.

564. One representative stated that it would appear difficult to accept that a person could be tried under the Code for an action or omission which at the time of commission was criminal according to the general principles of international law. He expressed reservations about recognition of general principles of international law or established customs as sources of international criminal law. It should be remembered in that connection, he said, how much criticism had been voiced after the First and Second World Wars, of the decision to bring individuals to trial for acts which had not previously been defined as crimes.

565. Another representative considered that the question of the enumeration of the crimes concerned had not yet been settled and that, as was implied by the principle nullum crimen sine lege, it might be useful to consider the advisability of embarking upon an enumeration of the crimes in question. Apart from the fact that some of the acts envisaged, such as terrorism, mercenarism or drug trafficking, were still being discussed or in the process of being codified, he said, international law needed to be able to evolve in response to the threats to and violations of the peace and security of mankind that arose. He suggested that in the circumstances it would perhaps be wiser to work out a general renvoi to the law already in force, in line with the approach adopted in the Vienna Convention on the Law of Treaties in respect of the definition of jus cogens. The same problem, he said, arose in connection with war crimes, which would be more suitably covered by a simple renvoi to the law already in force, as set forth in the Geneva Conventions of 1949 and Additional Protocols of 1977.

566. A number of representatives stated with respect to statutory limitations that such a principle should not be recognized under the Code. On criminal law in general, it was said, the system of limitations was tied to the seriousness of the offence. The offences under the Code were all of a most serious nature. They therefore expressed agreement with the proposal of the Special Rapporteur to include the principle of non-applicability of statutory limitations among the general principles in the Code of Offences.

567. Principle relating to the application of the criminal law in space. A number of representatives stated that given the current state of international relations they could support the Special Rapporteur's decision to opt for a system of universal jurisdiction while reserving the possibility of establishing an international criminal jurisdiction. Crimes against humanity, it was said, transcended the boundaries of States because they involved universally shared values. Furthermore, it was said, experience had shown that the principle of universal jurisdiction offered the only effective means of dealing with such crimes.

568. Several representatives expressed doubts about the effectiveness of such a system. It was pointed out in this connection that while the universal system would have the advantage of flexibility, it might, in view of the diversity of national jurisdiction, undermine the unity of the Code.

569. The point was made that while national supreme courts ensured the uniformity of judicial practice at the national level, there was nothing to guarantee the uniformity of universal practice.

570. One representative expressed the view that if individuals, including high-ranking political leaders of a State, were to be prosecuted before criminal courts, it seemed difficult to foresee that an objective and fair trial would be held in a domestic court of another State.

571. Another representative pointed out that neither the Nürnberg and Tokyo Tribunals nor the Convention on the Prevention and Punishment of the Crime of Genocide suggested universal jurisdiction on the part of national tribunals.

572. According to one representative, universal competence was not the rule in current international relations and should not necessarily always be equated with the principle aut dedere aut punire. He suggested that the Commission could begin by confirming the concept of universal competence where it existed and in the light of its specific aspects under different conventions. It could then consider universal competence or co-operation between States for other offences.

573. A number of representatives considered that a Code unaccompanied by a competent criminal jurisdiction would be ineffective. The Code, in their view, would ideally be implemented through an international criminal court. An objective and fair trial of individuals accused of committing offences against the peace and security of mankind could be ensured only through the establishment of an international criminal court. It was maintained that an international jurisdiction would also offer more guarantees that the prescribed penalties would be applied and would promote uniformity of legal practice. The suggestion was made in this connection that the Commission's mandate should be regarded as extending to the preparation of an international criminal jurisdiction competent to hear cases brought against individuals. The creation of such a jurisdiction to prosecute individuals, it was pointed out, would be less difficult than in relation to States.

574. Some representatives considered that the General Assembly should pronounce itself on the issue of establishing an international criminal court and other approaches concerning implementation of the draft Code without further delay. The

General Assembly, it was said, should indicate that the Commission's mandate extended to the preparation of the statute of a competent international jurisdiction. The Assembly should add that the preparation of the statute would be without prejudice to the exploration of alternative systems for the application of the Code, such as the system of universal jurisdiction. This pronouncement by the Assembly would, it was said, facilitate the adoption of a final decision on this question.

575. Some representatives expressed the view that they were not convinced of the feasibility of establishing an international criminal court, even though, from a technical point of view, the establishment of an international jurisdiction to apply the Code might seem essential. It was pointed out that given political realities, a draft Code which included an international criminal jurisdiction might not receive sufficient acceptance by States. One representative suggested that a model law might suffice at the current stage.

576. One representative supported the system of territoriality and was of the view that the universal system should constitute an exception subject to contemporary international law.

577. Another representative recalled, with respect to the question of universal jurisdiction in relation to the application of the criminal law in space, that the powers of the anti-Hitler coalition had adopted the principle of territoriality of the criminal law giving jurisdiction to the courts of the place of the crime. Offences committed against several countries, he said, could be punished jointly by the States concerned on the basis of an agreement. This approach, he said, was embodied in the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity which were adopted by the General Assembly in 1973 in resolution 3074 (XXVIII). He proposed that the relevant provisions of that resolution should be duly incorporated in the Code. In connection with the question of an international criminal jurisdiction, he stated that the principle of criminal responsibility of States did not exist in international law, and proposals for supranational judiciary procedures or tribunals were inconsistent with the principle of State sovereignty. The idea of the establishment of a permanent international criminal court, in his view, did not appear constructive or practical; but special ad hoc international criminal courts could, he said, be established, if necessary, by agreement between States to try individuals accused of committing international crimes against several countries. The suggestion was made in this connection for the Code to include a provision encouraging Governments to incorporate its definition of offences against the peace and security of mankind in their national criminal codes and to provide for the severest punishment of such offences.

578. Principles relating to exceptions to criminal responsibility. Some representatives expressed agreement with the analysis of the principles relating to exceptions to criminal responsibility, namely coercion, state of necessity, force majeure, error, superior orders, self-defence and reprisals.

579. One representative stated that the concepts of "coercion" and "state of necessity" were more difficult to define than that of "force majeure", which should be included in the list in so far as the author had been subjected to an irresistible and unforeseen external force. "Coercion" could be admitted as a defence if a threat to the life or to the personal safety of the author had been established. On the contrary, he said, a state of necessity should not be admitted as a defence.

580. The point was made concerning the question of superior order that while this was accepted as a justifying fact where such order was legal, in some national penal codes, the nature of offences against the peace and security of mankind was such that no order for their commission could be considered legal. It was considered that the provision proposed by the Special Rapporteur to the effect that the order of a Government or superior did not relieve the perpetrator of responsibility, unless a grave, imminent and irremediable peril existed, addressed the question of coercion and not that of superior order. For this reason, it was said, the order of a superior should not be included in the Code as a defence.

581. This representative suggested that in addition to the proposed exceptions the defences of age and insanity should be added to the list of exceptions to be included in the Code.

5. Comments on specific provisions of the draft articles

582. The draft articles submitted by the Special Rapporteur in his fourth report submitted to the Commission at its thirty-eighth session were arranged as follows:

583. Chapter I (Introduction): part I (Definition and characterization): article 1, Definition; article 2, Characterization; part II (General principles): article 3, Responsibility and penalty; article 4, Universal offence; article 5, Non-applicability of statutory limitations; article 6, Jurisdictional guarantees; article 7, Non-retroactivity; article 8, Exceptions to the principle of responsibility; article 9, Responsibility of the superior.

584. Chapter II (Offences against the peace and security of mankind): article 10, Categories of offences against the peace and security of mankind; part I (Crimes against peace): article 11, Acts constituting crimes against peace; part II (Crimes against humanity): article 12, Acts constituting crimes against humanity (first and second alternatives); part III (War crimes): article 13, Definitions of war crimes (first and second alternatives); part IV (Other offences): article 14, First and second alternatives.

(a) Comments on draft articles in chapter I (Introduction)

Chapter I (Introduction); part I (Definition and characterization)

585. Article 1 (Definition). The point was made that draft article 1 (which provided that "the crimes under international law defined in this draft Code constitute offences against the peace and security of mankind") should provide a

general definition of offences against the peace and security of mankind, with reference to individuals. The present draft article 1, it was said, failed to meet those essential requirements.

586. The view was expressed that the proposed definition of offences in draft article 1 was too concise and almost a truism. The first alternative, or even the second alternative, of the definition proposed in draft article 3 of the Special Rapporteur's third report which provided for a definition of an offence against the peace and security of mankind was preferable since it implied the existence of a moral element (the commission of an act), a material element (the violation of an international obligation) and a causal element (the fact of endangering international peace and security or the right of peoples to self-determination).

587. Article 2 (Characterization). The point was made concerning the relationship between the draft Code and international law that draft article 2, which in its first sentence provided that "the characterization of an act as an offence against the peace and security of mankind, under international law, is independent of the internal order", implied that individuals had international obligations which went beyond their national obligations. It was noted that the 1950 Commission text had referred to the independence of international law with respect to penalties. Consequently, it was said, if an international tribunal existed, it could pronounce a sentence independently of similar sentences under internal law. The term "characterization" had been used because, for the time being, the concern was to qualify the offence.

588. One representative wondered whether the use of such a formula could settle the various questions relating to the relationship between relevant international law and internal law, because it was also necessary for harmony to exist between international law and internal law. Many of the offences mentioned in the draft Code, he said, were already in existence, and it would therefore be useful to refer to their treatment in internal law.

589. One representative stated that draft article 2 failed to resolve the difficulties involving the principles of non bis in idem in instances where there were competing jurisdictions.

590. A number of representatives found the provisions of the first sentence of article 2, noted above, to be satisfactory.

591. The proposal was made by one representative that the second sentence of draft article 2 (which provided that "The fact that an action or omission is or is not prosecuted under internal law does not affect this characterization") should be redrafted to read: "The fact that an action or omission is or is not a crime under international law does not affect this characterization." This would leave open the question whether the draft articles should contain a provision incorporating the rule non bis in idem.

592. Another representative proposed that the second sentence of draft article 2 be based on article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The second sentence would thus read as follows:

"All States parties shall ensure that all acts which under this draft Code constitute offences against the peace and security of mankind are characterized in their criminal legislation equally and in the same terms as those provided here for offences by any person. The same shall apply to any attempt to commit such offences and to any act by any person which constitutes complicity or participation in such offences, in conformity with the provisions of part IV of this draft Code."

593. Such a formulation, in his view, would provide an additional legal basis for prosecuting such offences by fully embodying the concept of universal jurisdiction.

Chapter I (Introduction); part II (General principles)

594. Article 3 (Responsibility and penalty). The point was made by one representative that draft article 3 (which provided that "any person who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment") was taken from article 1 of the 1954 draft Code of Offences against the Peace and Security of Mankind and could therefore be supported. Another representative expressed the view that although the Commission had decided for the time being to limit draft article 3 to the criminal responsibility of individuals, he foresaw difficulties with that approach. Human rights and the norms of international law, he said, were closely bound together. Such a relationship, in his view, was particularly important for the formulation of the draft Code, since there were a number of human rights which could not be described as individual rights, but belonged to the category of collective rights. They included the right to self-determination of peoples, the right of material, ethnic, racial or religious groups to exist, the right of a racial group not to be subject to pressure from another racial group and the right of minority ethnic, religious or linguistic groups to maintain their identity.

595. One representative stated that the first alternative of draft article 2 (which provided that "individuals who commit an offence against the peace and security of mankind are liable to punishment"), contained in the third report of the Special Rapporteur, had been omitted from the fourth report, and also that its spirit and letter had not been faithfully reflected in draft article 3. In the French text, he said, the word "auteur" was not specific enough; it was subject to various interpretations, thereby introducing an element of confusion. Consequently, he said, he would prefer a return to the original term, "les individus", in place of the word "auteur"; for it was in fact individuals - whether acting in their personal capacity or representing a State - who could be found guilty of an offence. The main point, he said, was that individuals having a specific legal status, and not the State they represented, were the ones who must be punished.

596. One representative, while agreeing with the idea embodied in draft article 3, proposed that it be amended to read: "Any person is responsible for an offence against the peace and security of mankind and liable to punishment therefor."

597. Article 4 (Universal offences). Some representatives expressed the view that the principle of universal jurisdiction contained in paragraph 1 of draft article 4 (which provided that "An offence against the peace and security of mankind is a

universal offence . . .") was correctly connected to the principle of aut dedere aut judicare. In the absence of an international criminal jurisdiction, which, they said, was not ruled out in draft article 4, the approach reflected in the draft article was considered to be the correct one.

598. The point was made by one representative that, out of regard for the constitutional systems of certain countries, modern international law applied the principle aut dedere aut punire by imposing the obligation not to try or to prosecute, but to submit the case to the competent authorities for prosecution. The Code, in his view, would be more effective if it functioned under an international criminal jurisdiction which, he said, would give a greater impression of objectivity than a domestic court.

599. One representative stated that the question of the application of the Code in space was a complicated one. The application of the Code, in his view, should be as universal as the international instrument of which the Code would be part, in the sense that each State party would recognize the offences under the Code.

600. Another representative stated that while the proposed draft articles gave an overview of the proposed system of punishable offences, the principle of universality contained in draft article 4 needed further clarification. A prosecution in a country completely unconnected with the offence concerned, he said, might give rise to considerable conflict.

601. Some representatives believed that until Governments had responded adequately to the crucial problem of the scope ratione personae, and, more specifically, the problem of the criminal responsibility of States, it would not be possible to decide on the competent jurisdiction. Paragraph 2 of draft article 4 (which provided that "the provision in paragraph 1 . . . does not prejudge the question of the existence of an international criminal jurisdiction"), it was said, left open the question of the existence of an international jurisdiction. One representative proposed in this connection that the question of competence should be dealt with in a sector relating to jurisdiction.

602. One representative stated that if the provisions of draft article 6 (which provided that "any person charged with an offence against the peace and security of mankind is entitled to the guarantees extended to all human beings and particularly to a fair trial on the law and facts") were read together with draft article 4, it would become clear that there was a need for a more precise definition of a fair trial and of situations in which extradition should not be granted. Furthermore, he said, the obligation to extradite had been limited in recent conventions by the provision for an alternative course, namely "extradite or punish". The establishment of a universal jurisdiction, in his view, was bound to give rise to disputes regarding the interpretation and application of the Code, especially in view of the fact that beyond a general recognition of the primacy of territorial jurisdiction, there was no clear hierarchy governing the basis on which jurisdiction could be established. It would therefore, he said, be advisable for draft article 4 to draw on the models provided in those recent conventions, and to endeavour to minimize the possibility of conflicting jurisdictional claims by providing some indication as to that hierarchy.

603. Article 5 (Non-applicability of statutory limitations). A number of representatives expressed concurrence with the provisions of draft article 5 (which provided that "no statutory limitations shall apply to offences against the peace and security of mankind, because of their nature"). Such a provision, in their view, was in line with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity adopted by the General Assembly in its resolution 2391 (XXIII) of 26 November 1968. One representative expressed the view that the principle of non-applicability of statutory limitations was a rule of positive law binding on the international community as a whole.

604. Certain representatives, while expressing concurrence with the provisions of draft article 5 as a whole, considered that the words "because of their nature" should be deleted. It was inappropriate, in their view, to justify the provision in the text of the provision itself.

605. Another representative proposed that consideration might be given to the inclusion of an article in the Code stating clearly that States should not grant asylum to persons when there was good reason to suspect that they had committed crimes against peace, crimes of war, or crimes against humanity. The denial of asylum in such cases, he said, appeared to be consistent with article 2 of the Declaration on Territorial Asylum adopted by the General Assembly in its resolution 2312 (XXII) of 14 December 1967 and with principle 7 of the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity adopted by the General Assembly in its resolution 3074 (XXVIII) of 3 December 1973.

606. Article 6 (Jurisdictional guarantees). Some representatives expressed concurrence with the provisions of draft article 6 (which provided that "any person charged with an offence against the peace and security of mankind is entitled to the guarantees extended to all human beings and particularly to a fair trial on the law and facts").

607. The point was made by one representative that the Commission might consider how the provisions of draft article 6 might be formulated to make it clear that such jurisdictional guarantees would also apply to the collective offenders, such as States, organizations, institutions and groups of persons.

608. Another representative was of the view with respect to principles relating to the official position of the offender that the relevant provisions of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights should be incorporated in draft article 6.

609. Reference to article 6 was made in connection with draft article 4 (see above).

610. Article 7 (Non-retroactivity). As to the provisions of paragraph 1 of draft article 7, the view was expressed that the content of the paragraph (which provided that "no persons shall be convicted of an action or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind") was acceptable as it sought to protect the individual against the excesses of power.

611. The suggestion was made by one representative that paragraph 1 of draft article 7 would be made clearer if it were redrafted to read as follows: "No person shall be convicted of an offence against the peace and security of mankind on account of any action or omission which, at the time it took place, did not constitute an offence against the peace and security of mankind."

612. As to the provisions of paragraph 2 of draft article 7 (which provided that "The [provision of paragraph 1] does not, however, preclude the trial or punishment of a person guilty of an action or omission which, at the time of commission, was criminal according to the general principles of international law"), a number of representatives considered the provisions of the paragraph confusing, and unnecessary in an instrument which was specially concerned with crimes against the peace and security of mankind and which was not of a general nature as was the case with, for example, the European Convention on Human Rights. Moreover, it was said, paragraph 2 referred to "general principles of international law", while the provision in the European Convention on Human Rights, which was referred to, spoke of "general principles of law". The notion of "general principles of law", one representative said, was much too wide and controversial to serve as a basis for the establishment of jurisdiction over such an offence.

613. The point was made that paragraph 2 seemed inconsistent with the principle that for an act to be described as criminal it had to correspond precisely to an offence defined under the applicable norm. Analogy, he said, did not apply in criminal law and a general principle, precisely because it was general, lacked the necessary precision to be included in a penal code.

614. One representative expressed the view that reference to the "general principles of international law" as constituting the basis for the establishment of an act or omission as an offence was contrary to the principle of nullum crimen sine lege, the general recognition of which was stressed in paragraph 139 of the report of the Commission.

615. Article 8 (Exceptions to the principle of responsibility). The view was expressed by one representative that he interpreted the provisions of draft article 8 (which provided in the chapeau that "apart from self-defence in cases of aggression, no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind") to mean that the victim of aggression should not be placed in a position similar to that of an aggressor.

616. Another representative expressed the view that the phrase "in principle" in paragraph 1 of draft article 8 was inappropriate for a penal provision; an accused person must know with certainty what exceptions to the principle of responsibility could be invoked, he said.

617. The view was expressed by one representative that the words "does not relieve the perpetrator of criminal responsibility" employed in subparagraphs (a) to (d) should perhaps be avoided. Another representative said that as to the exceptions to the principle of responsibility set forth in subparagraphs (b) to (e), he believed that, in the light of the experience of the Nürnberg trials, no such exceptions should be admissible in principle. Certain circumstances, however, such as superior order, could at least be considered as an extenuating circumstance.

618. One representative considered that the categorization of exceptions would have been clearer if they had been grouped separately, since non-responsibility related to the author of an act, whereas the justifying facts were of an in rem nature. Thus coercion and error, he said, were causes of non-responsibility, whereas a state of necessity, force majeure and the order of a Government were justifying facts. Furthermore, it was proposed that insanity should be added to the first group of exceptions.

619. The view was expressed by one representative that the enumeration of exceptions, applicable to offences against the peace and security of mankind, should be reviewed with great care.

620. Subparagraph (b). As to the provisions of subparagraph (b) of draft article 8 (which provided that "coercion, state of necessity or force majeure do not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril"), one representative stated that "coercion", "state of necessity" or "force majeure" should be precisely defined perhaps in the commentary, because domestic laws might differ in nuance, or even in important aspects. The stipulation that there must in all cases be a threat of a grave, imminent and irremediable peril would depend on the definitions. The adjectives qualifying the peril seemed to refer particularly to a state of necessity in which the person faced the dilemma of perpetrating a crime or sacrificing a legally protected asset, such as his property or freedom. However, that element, he said, seemed to constitute a repetition.

621. Subparagraph (c). As to the provisions of subparagraph (c) of draft article 8 (which provided that "The order of a Government or of a superior does not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril"), one representative stated that superior order could not serve as an exculpatory plea, though it might be taken into consideration in deciding punishment.

622. Subparagraph (e). As to the provisions of subparagraph (e) of draft article 8 (which provided that "in any case, none of the exceptions in subparagraphs (b), (c) and (d) eliminates the offence if: (i) the fact invoked in his defence by the perpetrator is a breach of a peremptory rule of international law; (ii) the fact invoked in his defence by the perpetrator originated in a fault on his part; (iii) the interest sacrificed is higher than the interest protected"), one representative stated that he concurred with the provisions set out in subparagraph (e) of draft article 8 as they set out well-known principles of general law.

623. Another representative stated that at a later stage the draft should provide specific criteria for the application of the provision set forth in subparagraph (e) (iii) of draft article 8 which, in his view, would otherwise remain too vague.

624. Article 9 (Responsibility of the superior). One representative stated that he concurred with the provisions of draft article 9 (which provided that "The fact that an offence was committed by a subordinate does not relieve his superiors of

their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence"). He said that those provisions set out well-known principles of general law.

(b) Comments on draft articles in chapter II (Offences against the peace and security of mankind)

625. Article 10 (Categorization of offences against the peace and security of mankind). The view was expressed by some representatives that draft article 10 (which provided that "offences against the peace and security of mankind comprise three categories, crimes against peace, crimes against humanity and war crimes, or [crimes committed on the occasion of an armed conflict]") was acceptable because it was in line with the spirit underlying the elaboration of the offences under the Code. It was, however, believed that some degree of overlapping was likely in the characterization of an offence, and any decision on the matter should be taken after careful consideration.

626. One representative stated that the reasons for establishing legal terminology for "non-war hostilities" included: the desire of States to avoid any implication that they were infringing their obligation not to go to war; the desire to prevent States not involved in a conflict from adopting restrictive rules of neutrality; and the desire to keep the conflict local in character. The formulation provided in the second alternative of draft article 13 (which provided that "any serious violation of the conventions, rules and customs applicable to international or non-international armed conflicts constitutes a war crime") was not sufficiently comprehensive. It was essential, this representative stated, that it should contain a reference both to war as such, and to international and non-international armed conflicts and other hostile relations. He proposed that the provisions of draft article 10 might be amended to read "... and war crimes, including in that latter category crimes committed during an armed conflict or in other hostile relations". Another representative proposed that the words "war crimes" appearing in draft article 10 should be retained.

Chapter II. Part I (Crimes against peace)

627. Article 11 (Acts constituting crimes against peace). A number of representatives stated that they were in agreement with the structure and content of draft article 11 proposed by the Special Rapporteur relating to crimes against peace.

628. Paragraph 1. As to the provisions of paragraph 1 of draft article 11 (which stated that "the commission by the authorities of a State of an act of aggression" constitutes a crime against peace), and which then proceeded to define aggression and to enumerate acts constituting aggression, some representatives expressed the view that the paragraph should conform to the provisions of the Definition of Aggression adopted by the General Assembly in its resolution 3314 (XXIX) of 14 December 1974. This, they said, would be preferable to the adoption of a new definition, which was likely to lead to endless debates. One representative

considered that the Definition of Aggression adopted by the General Assembly could be of value to a Court since it attached a certain evidential value to the first use of armed force by a State.

629. In the view of one representative, the acts constituting aggression were clearly set out in subparagraph (b) of paragraph 1 of draft article 11, and that this was important and correct as an act could be characterized as an act of aggression, regardless of whether or not there had been a declaration of war.

630. Paragraphs 2, 3 and 4. As to the provisions of paragraph 2 (which provided that "Recourse by the authorities of a State to the threat of aggression against another State" constitutes a crime against peace), paragraph 3 (which provided that "Interference by the authorities of a State in the internal or external affairs of another State, including: (a) fomenting or tolerating, in the territory of a State, the fomenting of civil strife or any other form of internal disturbance or unrest in another State; (b) exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantage of any kind" constitutes a crime against peace), and paragraph 4 (which provided that "the undertaking, assisting, encouragement by the authorities of a State of terrorist acts in another State, or the toleration by these authorities of activities organized for the purpose of carrying out terrorist acts in another State" constitute crimes against the peace), some representatives stated that those provisions were open to serious criticism as being too abstract or not precise enough.

631. A number of observations were made with reference to the use of the expression "the authorities of a State". Some representatives expressed the view that despite objections raised in the past, those paragraphs again referred to "the authorities of a State" instead of defining actions by individuals or groups of individuals which constituted a specific offence. The retention of those words, they said, increased the doubts regarding the scope of application of the eventual Code, especially as draft article 3 (above) did not explicitly define the persons to be covered by the Code. At the present stage, they said, there could be no question of establishing criminal liability for a State in the future Code. Moreover, in their view, such a régime would run counter to State Sovereignty, which entitled a State to deny an international court jurisdiction over its sovereign integrity. They expressed preference, therefore, for a wording which specified activities by individuals the consequences of which would entail material liability for the State whose individuals it represented.

632. As to the specific acts identified in draft article 11, the view was expressed by some representatives that most of the specific acts identified were not regarded as offences against the peace unless they were committed by the authorities of a State. This was understandable in the case of crimes such as aggression, but much less so in the case of offences such as terrorism in an age, they said, when so many acts of terrorism were committed by private individuals. They wondered whether it was to be concluded that such individuals were not guilty of offences against the peace and security of mankind. Furthermore, such a restrictive approach, in their view, posed problems if it was considered that the actions listed in subparagraph (b) (iii) of paragraph 4 of draft article 11 (which defined

terrorist acts as including "Any act calculated to endanger the lives of members of the public through fear of a common danger, in particular, the seizure of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity") were already covered by international conventions which did not deal only with their commission by State authorities.

633. If the term "authorities of a State" had been chosen in preference to "State" to avoid the notion of criminal responsibility of a State, they said, the choice was not very persuasive. As the authorities of a State acted on behalf of the State, in their view, some criminal responsibility redounded on the State. This, in their view, was an additional reason for establishing an international criminal jurisdiction.

634. Paragraph 2. As to the provisions of paragraph 2 of draft article 11 (noted above), one representative expressed the view that paragraph 2 of draft article 11 should include the preparation of a war of aggression as an offence under the Code in order to strengthen the preventive effect of the Code.

635. Paragraph 3. A number of representatives expressed support for the provisions of paragraph 3 of draft article 11 (noted above).

636. Some representatives expressed particular satisfaction with the provisions of subparagraph (a), paragraph 3 (noted above), which incorporated fomenting or tolerating, in the territory of a State, the fomenting of civil strife or any other form of internal disturbance or unrest in another State, into the category of crimes against peace.

637. One representative, while supporting the provisions of paragraph 3 of draft article 11, pointed out the danger of abuse of the provision in subparagraph (a) which dealt with fomenting or tolerating, in the territory of a State, the fomenting of civil strife or any other form of internal disturbance or unrest in another State. He cautioned the Commission to examine that provision objectively so as to obviate any chance of making it a handy tool that could be used by a stronger State against weaker States.

638. Some representatives expressed particular satisfaction with the provisions of subparagraph (b) of paragraph 3 which covered economic aggression. These representatives were of the view that economic aggression had been specifically condemned by the General Assembly as a crime against humanity and as being contrary to fundamental principles of international law.

639. Paragraph 4. One representative expressed the view that the provisions of paragraph 4 of draft article 11 which dealt with acts of terrorism should be maintained within the category of crimes against peace. The provisions of General Assembly resolution 40/61 of 9 December 1985 dealing with terrorism, he said, should be taken into account when finalizing the provisions of paragraph 4 of draft article 11.

640. Another representative expressed doubts with respect to the present formulation of paragraph 4 of draft article 11. In his view, not every terrorist act may properly be said to constitute a crime against the peace and security of mankind. He stated that only acts which were designed to undermine the sovereignty, territorial integrity, security and stability of another State could be said to constitute crimes against peace.

641. The view was expressed by one representative that the definition of terrorist acts contained in subparagraph (a) of paragraph 4 of draft article 11 was too vague. In his view, it would perhaps be preferable not to give a definition but to enumerate the acts constituting terrorism.

642. The definition of terrorist acts as contained in paragraph 4 of article 11, in the view of one representative, was not satisfactory because it confined the scope of perpetrators to "the authorities of a State". Although it was desirable that the draft Code should also cover terrorist acts perpetrated by a State or its authorities, everyday life, he said, showed that the acts enumerated in subparagraph (b) of paragraph 4 (noted above) were also committed by groups and organizations as well as by individuals, for a wide variety of motives. He proposed that the provisions of paragraph 4 may need to be supplemented accordingly.

643. Paragraphs 5 and 6. Some representatives expressed concurrence with the provisions of paragraph 5 (which provided that "A breach of obligations incumbent on a State under a treaty which is designed to ensure international peace and security, particularly by means of: (i) prohibition of armaments, disarmament, restrictions or limitations on armaments; (ii) restrictions on military preparations or on strategic structures or any other restrictions of the same kind" constitutes a crime against peace), and with the provisions of paragraph 6 (which provided that "A breach of obligations incumbent on a State under a treaty prohibiting the deployment or testing of weapons, particularly nuclear weapons, in certain territories or in space" constitutes a crime against peace).

644. One representative noted that, in so far as the provisions of paragraphs 5 and 6 related to obligations of the State, the draft articles appeared to provide for the international criminal responsibility of States. The view that the matters covered by paragraphs 5 and 6 should not be dealt with in the Code because they properly belonged to another forum was not an argument with which he could agree.

645. Paragraphs 5, 6 and 7. One representative stated that the provisions of paragraphs 5 and 6 (noted above) and of paragraph 7 of draft article 11 (which provided that a crime against peace include "the forcible establishment or maintenance of colonial domination") still required further elaboration.

646. Paragraph 6. One representative expressed the view that the provisions of paragraph 6 of draft article 11 (noted above) showed a clear indication that the Special Rapporteur was proceeding in the right direction. However, he said, the Code should not be concerned merely with the codification of existing norms, but should also contribute to the progressive development of international law. It should make complete prohibition of nuclear-weapon tests a peremptory norm of international law. Of no less importance, he said, would be the assumption of the obligation by all nuclear-weapon States not to be the first to use nuclear weapons.

647. Paragraph 7. One representative stated that the provisions of paragraph 7 of draft article 11 (noted above) clearly required some further elaboration.

648. Paragraph 8. Some representatives stated that though they could support the provisions of paragraph 8 of draft article 11 (which dealt with mercenarism as a crime against peace), the definition of the term "mercenary" given in paragraph 8 did not go beyond that given in Additional Protocol I to the 1949 Geneva Conventions. Though not opposed to the incorporation of the provisions from Additional Protocol I to the 1949 Geneva Conventions, they believed that the definition should also reflect the opinions voiced in the Sixth Committee and the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The Ad Hoc Committee, they said, had devoted two articles to the definition of the term "mercenary", one in the context of armed conflict and the other in the context of peace.

649. Some representatives were of the opinion that there was no necessity to include a clause on the nationality of mercenaries.

650. One representative stated that the definition of a mercenary had proved to be one of the most difficult issues facing the Ad Hoc Committee, and that the present definition did not resolve that issue.

651. The suggestion was made by one representative that some re-examination seemed necessary of the basic assumption that the criminality of "mercenarism" derived from such factors as the presence of "desire for private gain" rather than from the nature of the objectives sought through the use of mercenaries. The question may also be asked, he said, whether mercenaries should be treated as instruments of combat and whether when a determination as to the lawfulness of their use is being made, the rules on permissible weapons and modes of hostilities should be applied.

Chapter II. Part II (Crimes against humanity)

Article 12. (Acts constituting crimes against humanity)

652. Paragraph 1. A number of representatives expressed concurrence with the inclusion in the Code of the provisions of paragraph 1 of draft article 12 (which provided that "genocide, in other words any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) imposing measures intended to prevent births within the group; (v) forcibly transferring children from one group to another group" constitutes a crime against humanity). They stated that genocide was the quintessential crime against humanity, and that it had been condemned by virtually all States.

653. Paragraph 2. A number of representatives expressed concurrence with the inclusion in paragraph 2 of draft article 12 of apartheid as a crime against humanity. The point was made by one representative that the wording of paragraph 2

should be such that it would cover the crime of apartheid wherever it occurred. A number of representatives recalled that the General Assembly had condemned apartheid on numerous occasions as a crime against humanity.

654. Paragraph 2 (second alternative). A number of representatives expressed their preference for the second alternative of paragraph 2 of draft article 12 which tried to define the crime of apartheid by combining a descriptive approach with the enumeration of the acts that constituted the crime of apartheid, since in their view that approach drew the necessary distinction between common crimes and crimes against humanity.

655. One representative stated that for the purpose of uniformity in terminology, the draft article should use the definition adopted by the General Assembly in the 1973 International Covenant on the Suppression and Punishment of the Crime of Apartheid in its resolution 3068 (XXVIII), especially as 90 States were currently parties to the Convention and not only had therefore accepted its definition, but also would have incorporated the text in their national legislation.

656. Paragraphs 3 and 4. One representative stated that substantial work was still required in respect of paragraph 3 of draft article 12 (which provided that "inhuman acts which include, but are not limited to, murder, extermination, enslavement, deportation or persecutions, committed against elements of a population on social, political, racial, religious or cultural grounds" constitute a crime against humanity), and paragraph 4 of draft article 12 (which provided that "any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment" constitutes a crime against humanity).

657. Paragraph 3. The view was expressed by one representative with respect to paragraph 3 of draft article 12 (noted above) that it would be more appropriate to speak of "other inhuman acts" rather than of "inhuman acts", since genocide and apartheid, which formed the subject of the preceding paragraphs, were also inhuman acts. He was of the view that in defining "other inhuman acts" the Commission should take into account international instruments adopted since 1954, such as the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted by the General Assembly in its resolution 31/72 of 10 December 1976. The definition of acts constituting war crimes should, he said, include the use of nuclear weapons, and the Commission should take account of the Declaration on the Prevention of Nuclear Catastrophe adopted by the General Assembly in its resolution 36/100 of 9 December 1981.

658. Paragraph 4. One representative concurred in principle with the inclusion in the Code of the provisions of paragraph 4 of draft article 12, dealing with "serious breaches of an international obligation of essential importance for the safeguarding and preservation of the human environment" as a crime against humanity. He was of the view that it was, however, unnecessary to qualify such a breach as "serious". He suggested that the meaning of "safeguarding and preservation" should be spelt out so as to leave no room for varying interpretations.

Chapter II. Part III (War crimes)

659. Article 13 (Definition of war crimes). One representative expressed the view that both alternatives of draft article 13, dealing with the definition of war crimes, referred to "international or non-international armed conflict". He observed that Article 39 of the Charter of the United Nations did not refer to war, but to "any threat to the peace, breach of the peace, or act of aggression". He noted that the General Assembly had made a distinction between the outbreak of war and the start of hostilities, in its resolution 378 (V) of 17 November 1950 entitled "Duties of States in the event of the outbreak of hostilities", which referred to "armed conflict", as did the 1949 Geneva Conventions and the 1977 Additional Protocols thereto. The 1949 Geneva Conventions and the 1977 Additional Protocols thereto, he said, had established a distinction between "international armed conflict" and "non-international armed conflict". The General Assembly in its resolutions 2444 (XXIII) of 19 December 1968 and 2597 (XXIV) of 16 December 1969, which were both entitled "Respect for human rights in armed conflicts", also referred to "armed conflicts", as did the 1963 Vienna Convention on Diplomatic Relations.

660. First alternative. One representative stated with reference to the first alternative of draft article 13 (which provided that "any serious violation of the laws or customs of war constitutes a war crime" and that "within the meaning of the present draft Code, the term 'war' means any international or non-international armed conflict as defined in article 2 common to the Geneva Conventions of 12 August 1949 and in article 1, paragraph 4, of Additional Protocol I of 10 June 1977 to those Conventions"), that the reference to the "laws and customs of war" was a self-contradiction and seemed to legitimize actions and conduct not in conformity with the law.

661. Second alternative. A number of representatives expressed their preference for the second alternative of draft article 13 (which provided that "any serious violation of the conventions, rules and customs applicable to international or non-international armed conflicts constitutes a war crime"). The second alternative of draft article 13 enumerated the acts, in particular, which constitute war crimes:

- "(i) Serious attacks on persons and property, including intentional homicide, torture, inhuman treatment, including biological experiments, the intentional infliction of great suffering or of serious harm to physical integrity or health, the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;
- "(ii) The unlawful use of weapons, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction (in particular first use of atomic weapons)."

662. The view was expressed by one representative that adoption of the second alternative would take into account the progressive development of international law and would offer room for the codification of new offences of such a kind.

663. Another representative expressed the view that a combined approach such as that provided in the second alternative should be used, as it included the elements characterizing war crimes and an illustrative list of acts constituting such crimes. He thought that this definition could be broadened to include a reference to any serious violation of the conventions, and rules and customs applicable to war whether international or non-international armed conflicts, or other hostile relations.

664. Some representatives considered that if the Code were to be a truly effective instrument it should deal with the currently topical issue of preventing nuclear war and that it should, therefore, explicitly state that any State which took the initiative of embarking on nuclear war would be committing the gravest of crimes against humanity. They expressed their concurrence with the provisions of subparagraph (ii) of paragraph (b) of draft article 13 (noted above) and called for the removal of the brackets therein.

Chapter II. Part IV (Other offences)

665. Article 14 (second alternative). One representative supported the ideas expressed in the second alternative of draft article 14 (which provided that acts which constituted offences against the peace and security of mankind included "participation in an agreement with a view to the commission of an offence against the peace and security of mankind", "complicity in the commission of an offence against the peace and security of mankind" and "attempts to commit any of the offences defined in the present Code".

666. Complicity was defined to mean "any act of participation prior or subsequent to the offence, intended either to provoke or facilitate it or to obstruct the prosecution of the perpetrators".

667. The proposed definition of "complicity", according to this representative, contained all the necessary elements of that offence. However, the concept of "attempt", he said, did not appear to have received much attention. The draft article should clearly indicate the conditions and precise stages of the iter criminis that characterized criminal attempt in international criminal law, in order to avoid recourse to the provisions of internal law.

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

1. General observations

668. It was observed that recent ecological catastrophes of unprecedented magnitude had demonstrated the urgent need to define the rights and obligations of States in connection with activities which were not prohibited by international law but which might cause injury to other States. The conduct of injurious activities, whether they related to the use of nuclear energy, the passage of satellites over the territory of a State or the release of industrial waste into rivers, lakes, oceans or the atmosphere, was no longer a matter solely of interest to the State

conducting them. The magnitude of injurious effects of episodic conduct of such activities as well as their cumulative effects had reached the point where the interests of many States became directly involved. Although some international legislation already existed on this area, beyond the province of classical State responsibility, the overall design of liability had not yet become fully discernible. Another important factor substantiated again by recent incidents was the undisputed interdependence among States which in turn had led to co-operation, tolerance and restraint. This brought to mind, it was stated, that there were two sides to the concept of sovereignty: the freedom of every State to undertake or to allow in its territory the activities which it believed most beneficial; and the undeniable right of every other State to see that the use and enjoyment of its territory were not affected by the results of activities undertaken outside its territory.

669. It was observed that States in whose territory activities were initiated which involved risks for other States had the obligation to warn those States, to co-operate with them and to prevent and, if necessary, make reparation for any damage. It was suggested that even in the absence of an agreed régime, the same State had obligations of prevention and reparation. The concept was not entirely novel, as the maxim sic utere tuo ut alienum non laedas which was often quoted in connection with the topic, it was stated, had corresponding maxims in other legal systems, such as for example, in Islamic law. In addition, the principles of good-neighbourliness, co-operation, good faith and the non-abuse of rights, etc., provided a basis for agreed procedures for notification, negotiations, consultations, prevention and compensation. The view was expressed, however, that the maxim sic utere tuo ut alienum non laedas was too broad if taken literally. Many minor inconveniences were tolerated simply through necessity and in the interest of co-operation. But, it was noted, there was a limit to such tolerance, and a number of factors determined the limit of that tolerance.

670. The suggestion was made for there to be a different approach, namely to include lists of clearly identified activities involving risk, such as activities involving radioactive material. Those activities which involved no exceptional risk, such as long-range air pollution, should be treated differently, because all States contributed to air pollution. Therefore, a special régime was needed for the former kind of activity. Thus, when a list of such activities had been established, according to this view, various devices mitigating the effects of liability should also be introduced such as, for example, setting a ceiling on payments for reparation or establishing insurance funds, etc. This approach would make the topic manageable and acceptable to more States.

671. A few representatives disagreed with the general approach to the topic. In their view, under international law liability could only exist on the basis of agreements directly stipulating an obligation on the part of a State party to make reparation for damages to other States parties. In the absence of any treaty arrangements, they found no basis in international law for liability.

672. The approach of the learned Special Rapporteur, Mr. Julio Barboza, in basing his work on the amended version of the schematic outline was welcomed. It was hoped that the Commission would be able to give priority to this topic.

particularly in view of current incidents, which clearly indicated the need for clarification of law and policy in this area. It was also stated that a framework treaty may be useful - a treaty containing general norms which could in turn encourage the conclusion of bilateral or regional agreements.

2. Scope of the topic

673. Several representatives suggested that it would be prudent to confine the scope of the topic to physical activities giving rise to transboundary harm. Some suggested that the topic should not be limited to ultra-hazardous activities. There would be great difficulty in agreeing on the criterion for deciding which activities should be regarded as falling within that category. Instead, any physical activity involving transboundary injury should fall within the scope of the topic.

674. It was also suggested that the topic should include any physical activity involving potential injuries as well. There was no rational reason to wait until the actual injury had materialized before applying the principles of this topic. The view was expressed, however, that before any actual injury had occurred there was no specific legal relationship between the source State and a potential victim State. For example, in the case of a nuclear power plant, any State whose territory was within 2,000 kilometres of the plant could be considered affected in case of accident. It was, according to this view, unrealistic to impose a duty on the source State to negotiate safety rules with every potential victim. In such cases, it was said to be preferable to develop mechanisms centred in certain competent international organizations for reviewing and discussing activities posing risk. Designing complex patterns of conduct involving a number of States could not be done effectively through bilateral relationships.

675. Several representatives agreed that the concept of injury, whether potential or actual, was essential to the topic. At this stage it was unclear whether an injury, however defined, arose only within the national jurisdiction of a State, or also arose in areas beyond the national jurisdiction of States, such as in outer space, on the high seas, etc. Furthermore, it was suggested that the scope of the topic should include activities conducted by private individuals and should not be limited to activities directly undertaken by States.

676. Certain representatives, however, believed that the scope of the topic should not be limited to physical activities, but should be kept broad enough to include economic and monetary activities as well. Some of these activities, it was observed, may cause more serious injuries than some physical activities.

677. In regard to the location of activities involving risk, a suggestion was made that the concepts of "territory" and "control" be clarified. The territorial criterion did not seem to cover the situation of international organizations. So far as the concept of control was concerned, it was mentioned that many corporations established in other countries were in fact under the effective control of the parent corporation; the host country - which in many cases was a developing country - had no real control over them.

3. Concepts of "acts" and "activities"

678. It was generally agreed that the word "acts" in the English text of the title of the topic should be replaced by "activities", as suggested by the Special Rapporteur. This change would bring the English text into line with the French and Spanish versions. Besides, "activities" seemed to be more appropriate because of the nature of the facts of the situations to be dealt with under the topic.

4. Concepts of "prevention" and "reparation"

679. Several representatives agreed that the core of the topic should place equal emphasis both on the principles and procedures for preventing injury and on those for repairing injury once it had occurred. Such a balance was an important contribution that this topic could make in protecting the interests of States involved. Most environmental damage could not simply be erased once it had occurred. Even if a generous payment was made by the source State to compensate for the damage, a loss had been permanently sustained, sometimes by humanity as a whole. In some areas where radioactive processes were concerned, an unforeseen incident might cause damage of such a magnitude that the reparative capacities even of an economically powerful State would be far exceeded. Besides, the international rules setting safety and preventive standards normally proved more effective than the obligation to make good a loss sustained by another State.

680. One representative expressed a view endorsing the emphasis given to the concept of "shared expectations" of the parties as an element which could help them to negotiate a régime of prevention or reparation. This view, however, dismissed the idea of limiting compensation to what was provided for in the internal law of any country, except in so far as internal law was evidence of "shared expectations".

681. It was, however, suggested that the scope of activities relevant to prevention and the scope of activities likely to entail an obligation to make reparation should by no means be considered automatically identical. Prevention must operate on a large scale and be focused not only on activities that actually gave rise to transboundary injury but also on activities that might give rise to such injury. In such cases the source State should be generous to the potentially affected State, since no undue burden would be placed on the former. However, a different assessment was needed in respect of activities that could entail an obligation to make financial reparation, in which case the interests of the source State had to be weighed much more carefully.

682. On the other hand, the view was held that it was doubtful whether it was desirable to bring the concept of prevention into the field of liability. Although it was considered useful to include prevention in some fashion in the topic, it could not be agreed that prevention should be given the same treatment as reparation in the liability topic. Prevention, according to this view, was a general duty through which one sought to avoid harm and, thus, liability. The establishment of a régime of prevention through international co-operation could be useful, but violation of that régime could not entail liability. It was stated that the Special Rapporteur was taking a view, in this respect, different from the

schematic outline, namely that non-observance of the obligation to inform and to negotiate would justify retaliatory action on the part of the affected State.

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

683. Several representatives stressed the importance of the topic of the law of the non-navigational uses of international watercourses. It was viewed as not only complex and sensitive, but also as touching the vital interests of many States. In certain continents, the use of watercourses was vital to the survival of both man and beast. The Commission therefore should, it was said, make every effort to reach acceptable solutions, taking into account the urgency of the problems involved. The topic was considered to be a particularly topical subject in view of the increasing problems of fresh-water supply all over the world. The time was deemed ripe for a comprehensive codification and progressive development of rules of international law in that field; there were many more international conventional régimes relating specifically to international watercourses than to other natural phenomena. It was also emphasized that since political borders did not coincide in most situations with hydrological and geographical unities and since more than two thirds of some 200 international river basins were not yet governed by agreements among the riparian States, there existed the possibility of serious conflict in the sharing of water resources.

684. On the other hand, the view was held that the topic was exceptionally difficult to codify, owing to the tremendous variety of non-navigational uses of watercourses as well as of hydrological régimes, physical and geographical peculiarities and other features.

685. It was said that the second report of the Special Rapporteur, Mr. Stephen C. McCaffrey, contained an important survey of legal materials such as decisions of international tribunals, international instruments including declarations and resolutions, and studies by international organizations. Thus, the Special Rapporteur had been able to link the results of the earlier stages of the Commission's work with the objectives of the resumed study of the topic. Furthermore, the belief was expressed that the extensive citations in part II of the second report and the new articles in part III were a solid basis on which progress could be made.

686. One representative noted with pleasure that considerable progress had been made in codifying the applicable principles and rules on the subject. The contributions made by the previous Special Rapporteurs, including the instructive report of Mr. Evensen, were appreciated. Mr. Evensen's tentative draft convention, consisting of 39 draft articles, enabled Governments and the Sixth Committee to consider the proposed convention in its entirety rather than as individual articles, a procedure which had formerly tended to prolong the debate in the Commission and in the Sixth Committee.

687. On the other hand, according to another view, it was regrettable that, owing to lack of time and the complex legal and technical issues involved, the Commission

had been unable to make sufficient progress on the topic. The Drafting Committee had not completed its work on the articles submitted to it in 1984. The changes of special rapporteur had delayed the work of the Commission. The broad outline drafted by the Commission was supported, but regret was expressed concerning the step backward represented by some of the changes introduced pursuant to the last report of the former special rapporteur.

688. Further progress was awaited on the topic and, in view of the importance of water resources for the economic development of many countries, it was urged that the subject should be given the priority it deserved. Since some members of the Commission had not had an opportunity at the most recent session to comment on the Special Rapporteur's report on the law of the non-navigational uses of international watercourses, it was hoped that sufficient time would be set aside for consideration of the topic at the Commission's future sessions.

689. Certain representatives pointed out that there was a clear need to take into account in the further handling of the topic the work being done by the Commission on the topics of State responsibility and of international liability for injurious consequences arising out of acts not prohibited by international law.

690. It was said that, from a legal point of view, there was a connection between the latter topic and the law of the non-navigational uses of international watercourses. Both involved problems of reconciling a natural unity on the one hand and a politico-legal division of the world into sovereign States on the other. According to another view, the two topics were very similar; indeed, a common question concerned potential conflicts between the sovereign rights of riparian States to carry out freely activities in their own territory, free from any interference by other States. The two special rapporteurs entrusted with the topics of international liability and the law relating to international watercourses considered in both cases that any failure to comply with the prescribed obligations (to prevent, to notify, to negotiate and to make compensation) gave rise to a wrongful act likely to entail the international liability of the State at fault.

1. General approach to the topic

691. Several representatives expressed support for the approach of the Commission and of the Special Rapporteur to the topic. It was noted that there had been general agreement with the Special Rapporteur's proposals concerning the manner in which the Commission might proceed with its work relating thereto.

692. The need was stressed for the draft articles on the topic to be elaborated in a flexible manner and to seek to achieve an equitable balance between the rights of the riparian States concerned.

693. According to one representative, the Commission should continue its efforts to find for each problem a solution capable of receiving widespread and, if possible, general support. The inclusion in the draft of controversial elements that a number of States would not be able to accept would render the exercise futile. The

second report of the Special Rapporteur seemed to follow the correct line. One representative specifically endorsed the recommendation made by the Special Rapporteur not to subject draft articles 1 to 9 to another general debate in the plenary Commission. The Special Rapporteur's plan to follow the structure provided by the previous Special Rapporteur, who had proposed a comprehensive set of 41 draft articles, was also supported. The proposals of the Special Rapporteur would, it was said, serve to expedite the work of the Commission and could form the basis for generally acceptable solutions.

694. Concern was expressed by certain representatives that there would be a reopening of wide-ranging discussions which had already taken place; the Commission should avoid such a reopening. According to one representative, it would be more beneficial to concentrate on a certain number of draft articles, particularly the least controversial ones. Also, it might be useful to accept certain concepts on a provisional basis, and revise them as and when necessary. According to another representative it was particularly desirable to avoid a renewed debate on the definition of international watercourses or on certain concepts. The draft articles submitted by the previous special rapporteur offered a good basis for work in formulating new draft articles based on the fundamental principle of the sovereignty of the State and the principle that no State should exercise its sovereignty in such a way as to cause harm to others. The aim was to ensure equitable use of international watercourses by establishing a basic régime which could be developed or supplemented through co-operation among the States concerned. Equitable use on the basis of the concept of the sovereignty of each State must be clearly differentiated from full co-operation designed to secure optimum use, which in some cases would not be possible.

695. It was said that the most logical approach to the topic would be to elaborate a set of draft articles which established the general principles and rules governing the non-navigational uses of international watercourses, in the absence of agreement among the States concerned, and to provide guidelines for the management of international watercourses and for the negotiation of future agreements. The sovereignty of States, however, should not be imperiled by such new rules, which should strive to achieve a balance between the needs of littoral States and the need to establish international co-operation in the interest of all. The view was also maintained by one representative that the fact that the definitions constituting the pillars of the future legal instrument had changed four times in a short period indicated that even fundamental issues of theory still needed clarification. The theoretical approach should be based on the principle of sovereignty. The greatest difficulty was to find a healthy balance between the sovereign right of States to dispose of the natural resources on their territories, on the one hand, and the need for system States to have regard, on the other hand, for the legitimate interests of other States. Because of those problems, his delegation welcomed the fact that the Special Rapporteur was continuing to try to formulate general rules that would lay down the fundamental principles, would be broadly acceptable and would provide a basis for specific agreements regulating co-operation between riparian States.

696. Several representatives agreed with the Commission's basic approach of preparing a framework instrument which could be supplemented by specific agreements

between the States concerned. The Commission was urged to complete the codification of generally recognized rules of international law on the topic as soon as possible, in order to produce a framework agreement laying down general principles regarding the rights and duties of States which could serve as a basis for the conclusion of bilateral or regional agreements. The Special Rapporteur's view that it would be appropriate to proceed first with the formulation of draft articles and later consider a possible set of guidelines was supported. It was noted that such a framework agreement would consist of general rules and principles to be applied in the absence of agreement and of guidelines and recommendations. The belief was expressed that general rules and principles, especially the principle of equity, could be identified for the purpose of the codification and progressive development of the law in this area. The world community had a duty to formulate at least a "framework agreement" consisting of general principles and rules governing the non-navigational uses of international watercourses.

697. It was observed that since circumstances differed from one international watercourse to another and along the same watercourse, a "framework agreement" should be aimed at. The Special Rapporteur had described the thrust of that approach as being "to elaborate draft articles setting both the general principles and rules governing the non-navigational uses of international watercourses, in the absence of agreement among the States concerned, and to provide guidelines for the management of international watercourses and for the negotiation of future agreements". The first goal addressed existing substantive rules of conduct, and the second addressed future substantive rules of conduct to be laid down in agreements between the States concerned.

698. The view was also expressed that the instrument to be prepared should be a general one, whether termed a "framework agreement" or otherwise, which included the basic norms, organs, institutions, procedures and principles of a law which was fair to all nations and which met the requirements and needs of peoples whose resources included international watercourses.

699. In addition, it was stated that the study of the topic could at best culminate in a framework agreement rather than in a multilateral convention, in view of the large number of States not directly affected by the question of international watercourses and the diversity of problems arising in connection with the use of rivers in different parts of the world. In view of the diversity of international watercourses, in terms of their physical characteristics and of the human needs they served, the "framework agreement" approach was favoured as being the best suited for the elaboration of draft articles setting for the general principles and rules and providing general guidelines to facilitate co-operation among riparian States and the negotiation of future specific agreements relating to particular rivers. One of the characteristics of the framework agreement approach was that the States concerned would still be at liberty to conclude specific agreements relating to particular international watercourses. The aim was to create a framework which interested States could adopt and build upon.

700. One representative stressed that an international instrument on the topic could not be expected to solve all the problems; solutions could come only through bilateral or regional agreements concluded between the countries directly concerned

with a particular watercourse. The idea, now accepted, of a framework agreement seemed a good start. The provisions of such an instrument should be limited to broad principles and general guidelines. The riparian States of a particular watercourse could complement those principles and apply those guidelines through specific agreements.

701. Furthermore, another representative remarked, the drafting of such guidelines, while not strictly required by general international law, would nevertheless be of great practical use in the preparation of régimes governing the uses of specific international watercourses.

702. Certain representatives raised questions with regard to the form the framework agreement would take. One representative welcomed the fact that the Special Rapporteur remained committed to the preparation of a framework instrument that dispensed with unnecessary details. The proposed instrument should serve as a set of guidelines for States for the conclusion of specific treaties on co-operation in the management of a given international watercourse. The question, he said, was whether the codification process should lead to a convention. He also believed that the outcome of further codification work on the law of the non-navigational uses of international watercourses depended largely on whether it would prove possible to develop general principles governing equitable and mutually beneficial co-operation between riparian States, irrespective of their objective inequality where the possibilities for water use and the effects of such uses were concerned.

703. Another representative fully supported the cautious approach of the Commission to the elaboration of the topic. As indicated in the report, the five draft articles submitted by the Special Rapporteur had been the subject of a general discussion which had revealed a number of contradictions in basic terminology. In his delegation's view, contradictions could be overcome if the Commission sought universally acceptable formulations, which should in turn be generalized and simplified as much as possible. As far as the legal force of the document was concerned, it would probably be most appropriate for that problem to be resolved by Governments, he said.

704. Certain representatives were of the view that work on the topic should be aimed at preparing recommendations or guidelines, not a convention. It was maintained that on the whole, negotiation and the conclusion of agreements between the parties concerned constituted the best solution. The proposed articles might be useful in that respect by providing for interested States a guide to the conclusion of co-operation agreements.

705. According to one view, the topic was exceptionally difficult to codify and unsuitable for the drafting of a universal convention, if only because many countries had no international watercourses and would hardly wish to become parties to a future convention. On the other hand, the Commission might usefully draft some general recommendations on the subject which riparian States could subsequently take into consideration when concluding agreements. A legal régime for an international watercourse could be established only on the basis of agreements between the riparian States, and practice in respect of such agreements varied a good deal. The establishment of a single régime might violate the sovereignty of some of the States concerned.

706. Furthermore, it was stressed that legal rules governing the use of a particular international watercourse could and should be established only on the basis of agreements between the riparian States. The Commission could achieve positive results, not by drafting articles for a future multilateral convention or even a so-called framework convention, but by preparing recommendations which watercourse States might use in concluding agreements among themselves concerning a specific international watercourse. Bearing in mind that eventual application, it was urged that the Commission endeavour to draft texts which were simple, concise and readily adaptable to the conditions of different international watercourses.

707. Certain representatives referred to the need to clarify the relationship between the framework instrument to be prepared and existing or future international agreements. The status of the framework agreement should be properly defined with regard to future agreements among watercourse States. The interests of riparian States were usually defined and governed by bilateral agreements which should not be affected by a framework agreement. One representative considered that draft article 4, currently before the Drafting Committee, should be worded in a more general manner so as not to restrict the validity of existing specific agreements or the scope of future ones. According to another representative, the provisions of article "X", provisionally adopted in 1980, applied only to the parties to the treaties in question and in no way affected the rights of third States whose vital interests were or might be affected by treaties concluded between only two or more of the riparian States of an international river regarding the use or apportionment of the waters thereof.

2. Questions posed by the Special Rapporteur

708. It was stated that the Commission had been wise to take an inductive approach to the four general questions on which the Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses had focused the debate: (a) the definition of "international watercourse"; (b) the applicability of the concept of "shared natural resources"; (c) the question whether a draft article should contain a list of factors determining the reasonable and equitable use of the watercourse; and (d) the relationship between the concept of the equitable utilization of a watercourse and the obligation of each watercourse State to refrain from causing appreciable harm to other States using the watercourse. It was welcomed that the Special Rapporteur had chosen to avoid general definitions of principle.

(a) The definition of "international watercourse" (article 1 currently before the Drafting Committee)

709. Several representatives referred to the first question posed by the Special Rapporteur, namely whether the Commission could, for the time being at least, defer the matter of attempting to define the term "international watercourse" and base its work on the provisional working hypothesis accepted by the Commission in 1980.

710. Some representatives agreed with the Special Rapporteur's suggestion that the attempt to define the term "international watercourse" could be postponed to a

later stage. This was considered a wise course in view of the differences of opinion which continued to exist over the matter. Such a deferment followed the traditional practice of the Commission with regard to the definition of terms, which had always been useful as the development of topics had often led to a fuller understanding of their content and to an enhanced ability to define and delimit their scope.

711. Certain representatives also agreed to the suggestion to continue to base Commission work on the topic on the 1980 provisional working hypothesis which utilized the concept of "system". That hypothesis provided an adequate explanation of the meaning of the term "international watercourse". The term "system" was preferred to "international watercourse", which was not a legal term nor, indeed, a scientific one. In that connection, it was suggested that the Commission would be well advised to seek the assistance of experts with a view to arriving at a clear and unambiguous scientific definition. Furthermore, it was highly desirable that the members of the Commission should overcome their primarily political differences concerning the definition of an "international watercourse" and recognize the obvious advantages of the broader concept of the "system".

712. On the other hand, certain representatives, while agreeing to a postponement of the attempt to define the term, stressed that it was not advisable to return to any approach which embraced the "system" concept. It was regretted that the Special Rapporteur had returned to the notion of "system", which had been highly controversial in 1980 and had been abandoned in 1984 by the previous Special Rapporteur. The "system" concept was, it was maintained, very similar to the drainage basin concept and was incompatible with the principle of the sovereign right of every State to use the section of an international watercourse that ran through its territory. Further work on the topic should proceed on the basis of the international watercourse concept, which entailed rivers that crossed or formed the border between two or more States. The fear was expressed that a return to the "system" concept would not be welcomed by many countries, since it was hardly in keeping with the sovereign right of States to use freely the stretches of an international watercourse situated in their territories. Any future definition should avoid reference to the "system" concept, as it would prejudice any attempt to reconcile the competing interests of States.

713. One representative who favoured postponement of defining the term "international watercourse" said that his delegation was ready to accept either "watercourse" or "watercourse system".

714. Certain other representatives, however, expressed doubts concerning a deferment of a definition of the term "international watercourse". The term must be defined at the current stage of work; obligations would vary according to how the term was defined. One representative failed to understand how the Special Rapporteur could so easily reach the conclusion that "the Commission should for the time being defer the matter of defining the term 'international watercourse'". The definition in draft article 1, which was in the hands of the Drafting Committee, should not be temporarily abandoned, for it was flexible enough to dispel any misgivings because, while surface water was emphasized, other relevant components were not ignored and could very well be developed in the commentary to the draft article.

715. Another representative wondered why such an important matter had been deferred, since it formed the basic edifice for the construction of other draft articles. It was the task of lawmakers to overcome difficulties posed by theoretical concepts and to avoid solutions which could not conform to objective facts. Accordingly, his delegation found the conclusion of the Special Rapporteur rather hasty. He believed that the unity of a watercourse in terms of the interdependence of its component parts had to be recognized in the first place. Water resources of an international watercourse should by definition comprise the total quantum of water that flowed into and through it from beginning to end. The international character of a watercourse had to be determined by its geographic expanse and historical flow through more than one State, and not merely by the old and new use of its water. His delegation could not accept the introduction of the idea of relativity in defining the international character of a watercourse for the following reasons: (a) because it was legally unsound and lacked precision; (b) because it was prejudicial a priori to the interests of lower riparian States, as it gave rise to an unequal situation vis-à-vis upper riparian States, assuming the technical feasibility of controlling the flow of water; and (c) because it assumed wrongly that it was theoretically possible for one State to use parts of the water without affecting its use by another State. It would, therefore, be logical to consider an international watercourse as a shared natural resource subject to equitable distribution.

716. The opinion was stressed by one representative that the fact that members of the Commission had failed to agree even on the key concept of "international watercourse" demonstrated the serious difficulties inherent in the topic.

717. Reference was made by another representative to paragraph 2 of draft article 1 concerning the explanation (definition) of the term "international watercourse" currently before the Drafting Committee. He noted that that paragraph brought navigational use within the scope of the draft articles, "in so far as other uses of the waters affect navigation or are affected by navigation". Such uses were by no means exceptional. Furthermore, the question arose as to what was actually covered by the notion of "non-navigational use". The building of bridges over an international waterway could affect navigation and, on the other hand, navigational uses might cause pollution of its waters.

(b) The applicability of the concept of "shared natural resources" (article 6 currently before the Drafting Committee)

718. Representatives also commented on the second point raised by the Special Rapporteur, namely whether the term "shared natural resource" should be employed in the text of the draft articles.

719. A number of representatives agreed with the approach indicated in the Commission report that effect could be given to the legal principles underlying the concept without using the term itself in the text of the draft articles. The elimination of that reference, it was said, produced greater legal certainty and had not caused any harm to the draft as a whole. One representative, who agreed with this approach, commented that draft article 6 as currently worded did not seem to be an adequate means of ensuring the effectiveness of the principle of a shared

natural resource. On the other hand, another representative stressed that care should be taken not to introduce the concept through the back door by trying to build legal principles upon it without using the term itself.

720. Certain representatives stressed that the term should not appear in the text because of its controversial nature and because it was an ambiguous and unsatisfactory term to characterize waters of an international watercourse. The concept was not clear from a legal point of view, nor had it been sufficiently developed so that it could per se indicate the legal consequences attached to it. Moreover, it was stressed, the term was unacceptable as it could give rise to far-reaching allegations and claims. In addition, to reintroduce the concept would give the false impression that legal principles could be automatically deduced from the purely geological meaning of the concept. According to another view, the notion of "shared natural resources" tended to cast doubt on the sovereign rights of States over their natural resources. Its inclusion in the draft articles would result in the adoption of rules of law having ill-defined legal consequences, the mistaken interpretation of which might lead certain States to formulate illegitimate claims. Such a formula was of great concern to States for which an international watercourse constituted a natural frontier and which had concluded treaties definitively establishing the apportionment of water rights.

721. On the other hand, certain representatives supported the explicit mention of the term, as it constituted a premise upon which all the applicable principles in this area of law were based. One representative remarked that there were many cases in which international watercourses were shared for industrial, agricultural or other purposes, and not only for navigation. The legal consequences of that hydrological reality could not be ignored. For example, at the point at which three large Latin American States - Brazil, Argentina and Paraguay - shared a boundary, the Itaipu Dam had recently been constructed, in order to provide the three countries with electrical energy. He asked whether that could not be considered a "shared natural resource".

722. Yet another representative maintained the view that the question posed by the Special Rapporteur was immaterial, because the starting-point and the content would be retained in both envisaged cases. It must not be forgotten that the reciprocal rights and obligations of the States concerned were inevitably centred on their shares. States might have different shares but, in all fairness, they should enjoy equal benefits from the use of the watercourse as a whole. Another representative stressed this point, highlighting that the reciprocal rights and obligations of the States concerned were inevitably centred on the shares which formed the subject of their rights and obligations. As such, any alternative formulation must clearly bring out that equation of rights and obligations.

723. Some representatives referred to the concept of equitable utilization underlying the formulation of paragraph 1 of article 6 currently before the Drafting Committee ("A watercourse State is, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse"). It was recalled that reasonable and equitable use was the general principle governing the development, use and sharing of international watercourses, as provided in draft article 7. As such, it constituted a standard of conduct

conducive to friendly relations between States and the minimization of conflict. Support was also expressed for the principle on the grounds of its being more familiar and generally accepted and having been commended in the 1966 Helsinki Rules of the International Law Association. Agreement was expressed with the Special Rapporteur's conclusion that there was overwhelming support for the doctrine of equitable utilization as a general guiding principle of law for the determination of rights of States in respect of the non-navigational uses of international watercourses. Furthermore, that principle was well established in the practice of States.

724. One representative noted that the Special Rapporteur had concluded that there was overwhelming support for the doctrine of equitable use as a general guiding principle of law for the determination of the rights of States in the area covered by the topic and that the principle of equitable use was well established in the practice of States. On the other hand, its adoption as the basis of the law of international watercourses and, particularly, its practical implementation left several questions unresolved. The Special Rapporteur's decision to evaluate all available evidence concerning the theory and practice of that principle was therefore the appropriate approach.

725. Certain representatives expressed doubts concerning the present formulation of article. According to one representative, it was preferable to speak of "equitable use", meaning any use that caused no harm to another State; the concept of "harm" was considered to be the foundation of the draft articles as a whole. Another representative doubted the appropriateness of using the word "equitable" to limit the use of an international watercourse.

726. One representative proposed that draft article 6 should enunciate the principle of the permanent sovereignty of States over their natural resources and recommend, on that basis, to riparian States that they should make the necessary arrangements for the management of the war resources of international watercourses. The decision as to what form such management should take must be left to the States concerned. Moreover, the treaties referred to by the Special Rapporteur as proof of the universal recognition of the principle of the "reasonable" and "equitable" sharing of water use were confined to questions relating to the quantitative distribution of the available water resources. The applicability of that principle to qualitative demands on water resources, particularly where pollution was concerned, was not documented, he stressed.

727. Another representative noted that in his second report the Special Rapporteur drew an analogy between the concepts of equitable allocation and equitable utilization in determining the distribution of uses and benefits of an international watercourse and the concept of equitable principles developed in the context of maritime boundary delimitation. His delegation believed that the concepts of equitable allocation and equitable utilization as applied to international watercourses covered a broader range of considerations than was implicit in the latter concept as it had been applied in the law of maritime boundary delimitation, and hoped that the Special Rapporteur and the Commission would give further consideration to the matter.

(c) Inclusion of a list of factors for determining the reasonable and equitable use of an international watercourse (article 8 currently before the Drafting Committee)

728. Some representatives referred to the third question posed by the Special Rapporteur, namely whether an article concerning the determination of reasonable and equitable use should contain a list of factors, or whether the factors to be taken into account in making such a determination should be referred to in the commentary.

729. A number of representatives were of the view that it was desirable to include such a list in the text of an article, it being understood that the list would be general and non-exhaustive, as suggested by the Special Rapporteur. It was deemed necessary to consider what the international community's values and priorities were in determining reasonable and equitable utilization of an international watercourse. The view was expressed that the obligation to utilize the waters of an international watercourse in a reasonable and equitable manner would be devoid of content without an indication of its meaning in the form of an indicative list of factors.

730. It was also said that while a list of factors to be taken into consideration in determining what amounted to a reasonable and equitable use of an international watercourse might be useful, it should not be so exhaustive or rigid that it would make the international instrument inoperative. The instrument was to be applicable in diverse regions of the world, where conditions with respect to watercourses and their use might be extremely varied, and it should not be an obstacle to the conclusion of bilateral or multilateral legal instruments. Support was therefore expressed for the flexible approach suggested by the Special Rapporteur.

731. In noting the importance of the general principle of reasonable and equitable use, one representative considered it absolutely essential to provide, in the text of an article, a list of factors governing the determination of reasonable and equitable use so as to enable States to settle any differences that might arise in the process of negotiations. It was not precise to say that those factors did not reflect legal rules and should therefore appear in the commentary: they could be sought in State practice and could, on the basis of technical information, be articulated because it was recognized that the topic comprised a unique physical phenomenon with distinguishing physical characteristics. Moreover, the omission of those factors ran counter to the objective of the Commission's work, namely, the formulation of a framework convention, designed to encourage States to solve their problems in that respect, which involved a measure of progressive development of the law. The merits of the Special Rapporteur's conclusion depended on how the draft article would be worded, because the factors listed might be expressed in such general terms that they would not have any guiding influence on the practice of States. Everything would depend on the eventual balance to be struck between generality and particularity on the basis of the criterion of utility in negotiations between States.

732. Other representatives commented on the contents of an indicative list or on the manner by which such a list should be drawn up. It was stated that the

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solution to determining what constituted a reasonable and equitable share of the uses of an international watercourse had to be based on a perspective broad enough to take into account such factors as geographical features, climate and environment, demography and the economic condition of the entire hinterland of the international watercourse. The objective was to harmonize the needs of all the parties with the overall availability of water resources. Support was expressed for a balance-of-interests approach, taking account of all relevant factors and not of the demographic factor alone. One representative remarked that if such a list was to be included in the text of an article, it should not differ essentially from that contained in article V of the Helsinki Rules, which were a part of the well-established practice of States.

733. One representative drew attention to the fact that in a footnote to his second report the Special Rapporteur had indicated that he considered a pre-existing use of the waters of an international watercourse to be only one of the factors which should be taken into account in the balancing of interests to determine an equitable allocation of the uses and benefits of that watercourse, and not a factor to which preference must be given. He endorsed that view and looked forward to seeing it reflected in future draft articles.

734. On the other hand, another representative stressed that there was a growing conflict between the interests of States that had vested rights in the use of an international watercourse for non-navigational purposes and the interests of other States that might interpret the expressions "shared natural resources" and "reasonable and equitable use of an international watercourse" as meaning that such vested rights should be reconsidered. The conflict would have a negative impact on relations between the States in question if the Sixth Committee failed to solve the problem. In the mean time, the provisions of the relevant conventions must be strictly observed, so as not to prejudice vested rights. An appropriate addition should be made to draft article "X" provisionally adopted in 1980 and concerning the relationship between the articles and other treaties in force, to the effect that the application of the draft articles should not affect in any way the vested rights according to any State in accordance with an existing convention. At the same time, his delegation wished to reaffirm the importance of the equitable distribution of the water of an international watercourse in the light of all relevant factors, as well as the importance of negotiating in good faith and, if necessary, concluding new treaties in order to create an equitable international system that respected the balance between the rights and the duties of States, and thus helped to maintain international stability.

735. In referring to the obligation to refrain from causing appreciable harm to the States (see (d) below), one representative emphasized that that obligation depended on what was meant by equitable utilization. The distribution of uses could be effected by agreement between the States concerned, by decision of the competent international institution, by a form of third-party dispute settlement or by a combination of those methods. In any case, it amounted to a form of management of the international watercourse as a whole. As to the manner of effecting that distribution, a law of international watercourses implied a shift from territorial distribution to functional distribution. There was a double distribution to be made - between different uses and the same uses by different countries; in fact,

this was to be done in one operation. The Commission had taken no definite stand on the matter; simply to state in the framework agreement that distribution must be "equitable" was a rather poor guideline. More substantial guidance was needed. It was probably as important to list factors which should not be relevant as to list factors which were relevant. It might also be possible to establish priorities, mentioning circumstances that were more relevant than others. The question also arose as to how far other factors than the use or non-use of the waters of an international watercourse could be considered relevant.

736. The same representative noted that the concept of equitable utilization tended to lead to an integrated approach to the distribution problem, whether or not the international watercourse system was called a shared natural resource. But in formulating the relevant factors to be taken into account in solving the distribution problem, care should be taken that neither upstream nor downstream States had preferential treatment. That would imply that the length or volume of the "hydrographic components" of an international watercourse situated within the political boundaries of each "system State" (A/41/10, para. 224) was irrelevant for the application of the "equitable utilization" concept. Similarly, existing uses should not have priority over new uses. However, he wondered whether in an integrated approach territorial sovereignty and the maxim qui prior est tempore potior est jure could be completely ignored. He felt that from a procedural point of view management problems required some form of institutional mechanism. There again, legal "principles and rules", being rules of conduct, and "guidelines concerning institutional mechanisms" (para. 242) seemed to be inextricably interwoven.

737. Certain representatives, however, expressed doubts regarding the inclusion of a list of factors in the text of an article. Such a list did not seem necessary in the text of the article itself. It was suggested that the list could be included in the commentary to the article, in an annex or in recommendations attached to the main instrument, as in the case of recommendations which accompanied International Labor Organisation conventions. Moreover, it was maintained that it would not be particularly helpful to list the factors to be taken into consideration in determining reasonable and equitable use of an international watercourse. Experience had shown that each case must be decided on its own, taking into account all the particular circumstances involved. Previous river- and lake-basin agreements had demonstrated that co-operation and mutual accommodation among riparian States had been most effective. Only by agreement between the watercourse states could it be determined what in a specific case was to be understood by the expression "reasonable and equitable share of the uses".

738. Finally, one representative observed that it would have been easier to give his views on the question if a limited, indicative list of general criteria had been proposed.

(d) Relationship between the concept of equitable utilization and the obligation to refrain from causing appreciable harm (article 9 currently before the Drafting Committee)

739. Certain representatives referred to the fourth point raised by the Special Rapporteur, namely whether the relationship between the obligation to refrain from

causing appreciable harm to other States using the international watercourse, on the one hand, and the principle of equitable utilization, on the other, should be made clear in the text of an article. It was noted that the two concepts were interrelated and that that interrelationship not only was formal but must be regarded as an essential part of the entire system of the rights and obligations of watercourse States. Also, it was observed that the Commission as a whole recognized that equitable utilization could not by definition constitute a breach of the obligation to refrain from causing appreciable harm to other States.

740. Attention was drawn to the fact that the Special Rapporteur had pointed out that equitable utilization might entail some factual "harm" without the presence of a wrongful act and that "harm" must be interpreted as "legal injury" in the context of article 9, currently before the Drafting Committee. He had suggested alternative formulations which might help clarify that point.

741. Several representatives believed that a simple reference to the obligation not to cause appreciable harm sufficed. The term "harm" was preferred to "injury" which corresponded, it was said, to a legal concept peculiar to the Anglo-American legal system. It was preferable, moreover, not to make unmet needs the sole criterion.

742. One representative stated that with regard to the question whether the draft should refer to the obligation not to cause "harm" or to the obligation not to cause "injury", States were in any case bound not to cause injury to other States. If a State did so, it was transgressing a legal obligation and its responsibility was engaged. If reference was made in the articles to an obligation not to cause harm, this was tantamount to saying that causing harm corresponded to injury in the legal sense, with all the ensuing consequences. On the other hand, harm, being susceptible to objective verification, was a far better yardstick for determining whether a specific use was inequitable.

743. Another representative shared the Special Rapporteur's concern on this matter, but was convinced that the judicious implementation of the principle of equity could facilitate the elaboration of an acceptable formula. The principle of equitable sharing could be matched by an obligation to negotiate in good faith.

744. According to one representative, it was necessary to reconcile the maxim sic utere ut alienum non laedas - which was a well-established norm of international law - with the sovereign right of States to use freely waters situated within their territory. In that regard, he believed that the text of draft article 9 proposed by the previous Special Rapporteur seemed to provide a good basis for discussion.

745. To one representative, however, the determination of "appreciable harm" could be a source of conflict among States. It might therefore be appropriate to provide that the use of the waters of an international watercourse system should not be detrimental to the other States belonging to the system. Agreements concerning the system should provide for its use, determine the harm that might be caused and establish rules concerning reparation.

746. A suggestion was made that article 9 should require every watercourse State to refrain from and prevent within its jurisdiction such activities as exceeded its equitable and reasonable share of the uses of an international watercourse.

747. One representative observed that the Commission would fulfil its mandate more efficiently by concentrating on the issue of responsibility for any harm done than by engaging in an interminable semantic debate.

748. Some representatives stated that the Special Rapporteur and the Drafting Committee should find an acceptable means of expressing the close relation between the obligation to refrain from causing harm to other States using an international watercourse and the principle of equitable utilization. Agreement was also expressed with the conclusion of the Special Rapporteur noted in paragraph 241 of the Commission's report.

749. Finally, it was remarked that it would facilitate discussion if the Commission would provide a text on the relationship between the obligation to refrain from causing appreciable harm and the principle of equitable or reasonable utilization.

3. Comments on draft articles 10 to 14 proposed by the
Special Rapporteur

750. A few representatives referred to draft articles 10 to 14, proposed by the Special Rapporteur in his second report, concerning procedural rules and to future work on articles dealing with procedural and institutional elements. In connection with the latter, confidence was expressed in the ability of the Special Rapporteur to find formulas which were flexible, simple and capable of satisfying the countries directly concerned, i.e., the riparian States of an international watercourse. It was stressed that international mechanisms - procedural rules and substantive rules - were the expression of international watercourse management.

751. One representative supported the inclusion of provisions concerning the prevention of harm in the use of a watercourse and procedures to be followed in the case of any dispute based on the use of such watercourse, so as to avoid the denial of the use by other States of the watercourse without sufficient justification.

752. According to another representative, the notification procedure and its legal consequences were a very important aspect of the topic. Basically, notification involved the duty of States to inform other watercourse States of planned undertakings. In practice, the notification procedure made unilateral undertakings permissible under certain circumstances. In its future work, the Commission should take into account, in addition to the five draft articles submitted by the Special Rapporteur, other rules and recommendations referring to notification and its legal consequences - the 1961 resolution of the Institute of International Law (articles 5-8), the Helsinki Rules of 1966 (article XXIX) and the set of articles applicable to international water resources recently adopted by the International Law Association at its Conference in Seoul, article 3 of which contained rules on notification and objection. He also said that article 10 of the Special Rapporteur's draft articles established a duty to provide notice if a proposed new

use might "cause appreciable harm" to other watercourse States. In his delegation's view, the period over which that duty existed was relatively long. Moreover, it was stated in the comments with respect to the term "harm" that technically no legal injury was caused unless a State was deprived of its equitable share. That conclusion was confusing, because it seemed to exclude such harmful effects in the territories of other States that were not related to equitable sharing.

753. In the view of one representative, in draft articles 10 to 14 the Special Rapporteur's goal was to develop further the concept of the duty to notify, consult and negotiate. His delegation doubted whether any State practice that could provide a basis for the draft articles actually existed, and had difficulty in following the Special Rapporteur's logic. Draft articles 10 to 14 should be fully revised once again, since they seemed to run counter to the principle formulated in draft article 9. The Commission should confine itself to the principle of the duty of notification concerning certain situations, while recommending to States the adoption of information and consultation mechanisms commensurate with their obligations under special agreements on the management of international watercourses.

754. Finally, one representative said that he would have preferred to see the text of the five draft articles submitted by the Special Rapporteur reproduced in the Commission's report so as to enable delegations to present their comments thereon.

H. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

1. Programme and methods of work of the Commission

755. Representatives expressed satisfaction with the conclusions and intentions of the International Law Commission concerning its procedures and methods of work, as reflected in paragraphs 250 to 261 of its report. Support was expressed in particular for the Commission's decisions on the future organization of its work as reflected in paragraph 250 of the report. The Commission was urged to consider the organization of its work for future sessions with a view to focusing attention on those areas in which most progress could be achieved before the conclusion of the mandate of its members. It was also urged to concentrate at its next session on the most important and pressing items on its agenda and to tackle them in a new, modern spirit. It was felt that the conclusive results of the 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, which had focused on a set of draft articles drawn up by the International Law Commission, would certainly give the Commission a new impetus for its future work.

756. Note was taken of the fact that certain topics previously considered by the Commission had not received the same attention at the thirty-eighth session owing to time constraints as well as changes of special rapporteurs. The hope was expressed that at its next session the Commission would give due consideration to those topics.

757. It was recognized, nevertheless, that in order to make progress the Commission should have priorities for its work. The good results achieved at the thirty-eighth session were due largely to the very sound organization of the Commission's work and to its correct identification of priority issues and topics. It was hoped that in setting priority topics during its next mandate, the Commission would be guided by the same criteria. A differentiated approach to the various topics, taking due account of the specific nature of the subject-matter, was fully justified and should be pursued in the further consideration of the draft articles submitted by the Commission.

758. Several representatives expressed support for the idea of the Commission staggering the consideration of topics on its agenda, so that it could study topics in greater depth and also allow Governments and delegations more time to study them. In addition, by not taking up all the items on its agenda at every session, it should be possible to make faster progress on topics which were closest to completion and in which there appeared to be sufficient agreement among States. It was remarked that the Commission had been unable to give adequate consideration to certain topics at its 1986 session, not only because the duration of the session had been reduced, but also because the Commission's agenda was overcrowded. It was therefore felt that the Commission should not consider more than two or three topics per session.

759. Some representatives referred to the need to make speedier progress on certain topics or to accord priority thereto. Topics mentioned in that regard included the following: State responsibility, the law of the non-navigational uses of international watercourses and international liability for injurious consequences arising out of acts not prohibited by international law. Mention was also made of the need to complete, as soon as comments had been received from Governments, the second reading of the two sets of draft articles whose first reading was completed at the thirty-eighth session. In that regard, it was observed that concentrating on both sets of draft articles at a single session might delay discussion on other matters deserving due attention.

760. Several representatives stressed the importance of the Commission's drawing up a detailed and realistic programme of work for the next quinquennium, providing for some staggering of the consideration of the various topics on its agenda. According to one view, at the beginning of its new mandate, the Commission should deal in greater detail with its programme of work for the next five years and should provide an approximate timetable for the completion of work on issues currently under consideration, with a view to expediting the adoption of draft articles and the holding of diplomatic conferences. It would be a very unwelcome development if the evolution of international law through the United Nations began to decelerate because of the general worsening of conditions in the political field, especially since the Commission could make an important contribution to overcoming those difficulties and to the achievement of even more significant results in the United Nations.

761. One representative maintained that an important aspect of the Commission's work to which special attention should be given during the next five-year period was that, with one exception, the topics remaining on the agenda were all closely

interrelated. This fact should be reflected in the Commission's programme and methods of work. The Commission's decision to consider State responsibility and international liability separately had met with reservations on the part of some jurists on the ground that the latter topic derived from the former, the link between them becoming especially clear in the context of article 35 of part one of the draft articles on State responsibility. The topic of the law of the non-navigational uses of international watercourses was, of course, also related to that of international liability. In his delegation's view, any practical difficulty that might arise from a joint approach to the interrelated topics would be outweighed by the possibility of considering the problems involved within a broader context and finding more comprehensive and harmonious solutions.

762. Certain representatives also believed that the Commission should follow the development of international law and address new needs. In that connection, it would be useful if it carried out a thorough exchange of views on questions related to the needs in the area of the codification and progressive development of international law. Numerous matters in the area of the law of nations remained to be considered in order for the Commission to discharge its task of codification. It was urged that in order to fulfil its mandate, the Commission must become more receptive to the new international challenges and priorities, in particular in the newer areas of law, where a more active attitude should be taken.

763. On the other hand, certain other representatives maintained that it seemed unlikely that the Commission could undertake the consideration of new topics, for that would considerably slow down its task of codifying and progressively developing international law. The important role of the Sixth Committee in refraining from placing new items on the agenda of the Commission unless there was a fair chance of its work on the subject leading to the clarification, development or strengthening of international law was highlighted.

764. Certain representatives stressed the need seriously to consider new methods to expedite the work of the Commission's Drafting Committee. It was maintained that delays in the Drafting Committee were one of the most serious problems hindering the work of the Commission. It was suggested that more time be allocated to the work of the Drafting Committee so as to reduce and, if possible, eliminate the current backlog. In addition, the Drafting Committee should meet at the very beginning of each session and make a substantial contribution to the elaboration of draft articles.

765. Improvements were also suggested with regard to the Commission's documentation. According to one view, the report of the Commission should contain a more scholarly exposition of the relevant international law with respect to each topic rather than a mere compendium of views expressed. It was also suggested to exclude from the report those topics which had not received substantive consideration at that year's session. As to the reports of special rapporteurs, it was urged that in preparing them special rapporteurs should pay close attention to legal sources and issues of special concern not only to the developed countries but also to the third world. The contribution of the newly independent States to the codification and progressive development of international law had been immense, through their active participation in the law-making processes.

766. Concern was also expressed regarding the late appearance of the Commission's report. It was said that the report should be made available, even if only in provisional form, as soon as possible after the conclusion of its sessions, so as to facilitate the thorough preparation by delegations for the debates in the Sixth Committee. Also, it was noted that the members of the Commission living in countries relatively far from New York were still not receiving the reports of the special rapporteurs until after the beginning of the Geneva session. That state of affairs was prejudicial to the quality of their contribution to the discussion of those reports, and it was to be hoped that the Secretariat, which was well aware of those difficulties, would spare no effort to remedy them.

767. With regard to the procedure followed in requesting comments and observations from Governments, it was suggested that in the future, after completing the first reading of a draft, the Commission might perhaps prepare a comprehensive document. Such a document would greatly facilitate work at the national level, where the proposal might have to be sent to a considerable number of agencies and organizations for their opinion. At present, the necessary work of compilation had to be done in each Member State, which hardly seemed an efficient method. It was observed that it would be reasonable if the time allowed for the submission of comments, observations and replies by Governments were determined in the light of the complexity of the subject-matter.

768. Several representatives urged that a comprehensive reappraisal be conducted of the Commission's programme and methods of work with a view to the Commission's functioning as efficiently as possible. It was noted with approval that the Commission intended to continue to review with an open mind its methods of work so as to achieve optimum results. The Commission should embark on a serious and purposeful re-examination of its methods and priorities in the light of growing time and financial restraints. Attention should be paid to the reasons why the International Law Commission had been unable to finalize its tasks in recent years. It was maintained that while a review of the results of the work done by the Commission since its establishment showed an essentially positive record, there had also been some failures due in part to excessively lengthy gestation periods which had blunted the interest manifested initially in the codification of certain topics. The suggestion was made that since it took so much time to draft articles intended to serve as the basis for treaties, the active use of varied working methods such as model rules and legal guidelines, as well as concentration on a five-year agenda, would be helpful in accelerating the Commission's work.

769. One representative stressed that, in view of the changes in international life over the past 38 years and the emerging concern for cost-effectiveness, the time had come to initiate a comprehensive review and assessment of the work of the Commission and to try to anticipate and manage the impact of financial constraints on its role. Such a review would cover the subjects dealt with by the Commission, its methods of work and the degree of success it had achieved in discharging its mandate concerning the codification and progressive development of international law. In the review of the subjects dealt with by the Commission, attention should be paid to the relationship between such subjects and the felt or anticipated needs of the international community, and to the amenability of the chosen subjects to systematic formulation and treatment in normative terms. Attention should also be

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paid to the modes of selecting subjects for the Commission and to the question of whether such modes needed to be changed. A possibly useful approach to a review of the Commission's methods of work would be to compare them with those employed by other institutions, both governmental and non-governmental, with related mandates. A review of the degree of success achieved by the Commission assumed prior clarification of what success should mean for such an institution. A possible line of inquiry would relate to the relevance of the experience of UNCITRAL. The International Law Commission itself should undertake that self-examination under the aegis of the Sixth Committee.

770. As noted above in section A, it was observed that the comments of a number of delegations reflected a profound feeling of uneasiness and dissatisfaction regarding both the Commission's programme and methods of work and the Sixth Committee's conduct of the debate on the Commission's report. (Comments and suggestions made with regard to the conduct of the Sixth Committee's debate are reflected in paragraphs 17-32 above.) But it was stressed that an interrelationship existed between that debate and the programme and methods of work of the Commission. In fact, the work of the Committee and that of the Commission could not be considered separately. The functional structures of the Commission's operation and of the Sixth Committee's debate should be kept under constant review. The Commission, through reviewing and improving its own programme and methods of work, could play a more useful role in helping to structure the debate in the Sixth Committee. As noted above (para. 30), the suggestion was made that the Commission bring into sharper focus the questions on which it desired concrete political and legal guidance. Future reports should include a special section on the questions raised with regard to each topic on which views and guidance were sought.

771. One representative remarked that if acceptance was attained for his proposal that a more concentrated and strategic debate be held in the Sixth Committee on the various issues dealt with by the Commission (see para. 23 above), the Commission itself would be able to make better use of the consultation procedures provided for in articles 16, 17 (2) (b) and 21 of its Statute. Member States would reply to questionnaires and drafts sent out by the Commission. This became particularly important when a special rapporteur had presented his final draft and had requested comments from Governments before a certain deadline. However, if the Commission believed that the most productive way of obtaining advice from Governments on a particular issue was a discussion in the Sixth Committee, it should, of course, have the right to suggest that such a discussion should be held. A debate of that kind, although it might be detailed and prolonged, would be limited to a specific issue of particular interest to the Commission and might therefore be expected to be of real use. Furthermore, concentration on one particular issue would enable delegations to prepare themselves more thoroughly for the debate and would help Governments to compose their delegations in such a way as to provide the most qualified expertise.

772. The same representative also stated that the Commission's work of promoting the progressive development of international law and its codification was bound to be slow; there was no advantage in proceeding too hastily and producing documents which offered but little guidance to the international community. Indeed, such an

approach could well prove counter-productive. It was therefore necessary to pinpoint the issues with which the Commission could deal to good effect. The Commission and the Sixth Committee had a joint responsibility to avoid topics, or parts of topics, which were likely to cause the Commission to become completely bogged down. In that connection he remarked that in the past his delegation had supported the work being done on State responsibility but now, after many years of endeavour in the Commission, it had begun to wonder whether there was any chance of a convention on State responsibility being drafted, adopted and ratified and whether better use might not be made of the Commission's resources.

773. Another representative, in reviewing comments and suggestions made for improving the Commission's programme and methods of work, stressed that in considering those methods, trying to compare it with other governmental or non-governmental institutions was of little value, given the differences in the nature of the process of elaboration and of the subject-matter. The Commission itself had made many suggestions for enhancing the process, including requests for more time and resources. Moreover, during the Commission's term of office, the Planning Group of the Enlarged Bureau had addressed itself in depth to questions of methods of work each year and had considered various proposals. Clearly, the Commission had not been insensitive to the need to consider the functional modalities of its work. It had itself drawn attention to points where there were shortcomings. In that connection, the Sixth Committee should readily acknowledge that management of the Commission would not be efficient unless the Committee itself was ready to improve, change or even discard some of the established traditions, if necessary.

774. The various interrelated questions involved ranged, he said, from the circulation of documentation and the availability of sufficient Secretariat resources to priorities for the consideration of the various topics, the manner in which the various members of the Commission responded to the reports of the Special Rapporteur, and the format of the Commission's report to the General Assembly.

775. Given the current situation, he said, there was absolutely no reason why the various topics should be pitched against each other or why a certain topic should be allowed to mushroom at the expense of the time allotted to the consideration of another topic which had been lagging for years. Similarly, a change of special rapporteurs should not automatically involve a conceptual change of gears, particularly when consideration of the topic was conceptually sufficiently mature. Nor was there any reason why every topic should be discussed at every session; that should not be the criterion for determining the seriousness with which the Commission viewed a topic or the work of a special rapporteur. Similarly, the Commission and the special rapporteurs should not refer draft articles to the Drafting Committee until they had received sufficient in-depth consideration; this was how the backlog in the Drafting Committee was created. In that connection, it was perhaps regrettable that the Commission had abandoned the practice whereby its Chairman summed up the debate and whereby the summing up became instructions to the Drafting Committee. That was what had transformed the Drafting Committee into a negotiating group that required more time than was normally needed for a drafting exercise.

776. Furthermore, he observed that the Commission would soon be reconstituted and the financial crisis of the Organization would definitely have an impact on its work. It was time to encourage the Commission to consider the questions referred to, very early in its session and in plenary, on the basis of a paper prepared by the Secretariat setting out the various suggestions made by the Planning Group of the Enlarged Bureau during the Commission's previous term of office and those presented in the Committee during the same period. The Commission should then seek to establish a plan of work for the total duration of its term of office, in the light of what it perceived to be achievable targets and of the resolutions of the General Assembly.

777. He stressed that a constructive change in the Commission's methods of work would introduce a constructive change in the form of the annual debate on the Commission's report in the Sixth Committee.

778. In its draft resolution submitted to the General Assembly for adoption, the Sixth Committee included a paragraph by which the International Law Commission was requested (a) to consider thoroughly: (i) the planning of its activities for the term of office of its members, bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics; (ii) its methods of work in all their aspects, bearing in mind the possibility of staggering the consideration of some topics; and (b) to indicate in its annual report those subjects and issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work. That draft resolution was subsequently adopted by the General Assembly on 3 December 1986 as resolution 41/81.

779. Some representatives referred to the financial crisis of the Organization and its impact on the work of the Commission. It was said that in spite of that crisis it was essential to ensure the normal functioning of the Commission at its future sessions. The observation was made that notwithstanding support for the measures of economy and rationalization adopted by the United Nations, the important work entrusted to the Commission under Article 13 of the Charter should not be thwarted in any way.

780. With regard to the two-week shortening of the 1986 session, several representatives were of the view that it was regrettable that despite the value of its work, the Commission had been obliged to shorten its session for lack of financial support. It was hoped that that particular development would not become a regular feature and that, given the importance of the work entrusted to it, the Commission would be able to revert to a session of 12 weeks.

781. Some representatives urged a restoration of the customary 12 week session. It was maintained that despite the current financial crisis of the United Nations, Member States attached great importance to the Commission's codification work. The Commission should be given the time needed for consideration of the complex topics on its agenda. Its next session should last at least 12 weeks, and the Commission's meetings should be given the highest priority in the distribution of the available financial resources for 1987. While the imperative need was recognized for the United Nations to exercise fiscal restraint and any measures

were supported which might enable the Commission to improve its effectiveness, it was doubted whether even with the help of such measures the Commission would be able to perform its work adequately if the length of its sessions was reduced. The consequences apparent from the 1986 report of the Commission were serious, and it was urged that every effort be made to allow the Commission a full 12-week session.

782. According to certain other representatives, the matter had to be seen in the overall context. The duration of the sessions of other expert bodies had been reduced to an even greater extent. The better treatment received by the Commission in that respect constituted a recognition of its importance. Furthermore, no United Nations body could stand aside from the effects of the financial situation. The view was expressed that for future Commission sessions, their duration should not exceed 10 weeks.

783. After the conclusion of the debate, the Sixth Committee recommended a draft resolution for adoption by the General Assembly which included a paragraph by which the Assembly took note of the comments of the Commission on the question of the duration of its session (para. 252 of the 1986 report of the Commission) and expressed the view that the needs of the work of codification and progressive development of international law and the magnitude and complexity of the subjects on the agenda of the Commission made it desirable that the usual duration of its sessions be maintained. That draft resolution was subsequently adopted by the General Assembly on 3 December 1986 as resolution 41/81.

784. Those representatives who referred to the matter expressed agreement with the Commission's conclusion concerning the fundamental importance of the continuance of the present system of summary records (para. 253 of the Commission's 1986 report). Those records, as well as other basic documents of the Commission, constituted irreplaceable source material and a crucial requirement for the process of the codification and progressive development of international law. It would be a significant loss to Governments in their endeavours to conduct their affairs in accordance with the rule of law if records of the Commission's debates were not available. According to one representative, it was extremely important to continue the existing system of summary records since in daily legal work relating to the provisions of international conventions prepared in draft by the Commission, it was essential to be able to refer to the travaux préparatoires. According to another representative, while agreeing with the Commission's view that its documentation should not be cut back, it was difficult to concur with the categorization of the summary records of the Commission's meetings as travaux préparatoires. The fact that the draft articles constituting the basic proposal were negotiated by individuals acting in their personal capacity limited the extent to which they could be relied upon to ascertain the intention of the legislators, who were government representatives at a plenipotentiary conference. None the less, it was stressed that the summary records, if not strictly speaking the travaux préparatoires of conventions, did show the train of thought among the eminent lawyers on the Commission and could therefore help in the interpretation of texts which had not been adequately clarified before adoption. The financial circumstances of the United Nations must not lead to the discontinuance of the Commission's summary records.

785. Representatives also stressed the importance of the timely issuance of the Yearbook of the International Law Commission, an extremely valuable aid for the lawmaking process. Efforts aimed at ensuring the regular publication of the Yearbook were welcomed, as it was an important source of material for the study of all aspects of international law.

786. Those representatives who referred to the matter supported the publication of a new edition of The Work of the International Law Commission. The view was expressed that an updated version of that publication was long overdue, in view of its great usefulness and of the adoption of several conventions based upon draft articles prepared by the Commission.

787. Finally, one representative remarked that the 1986 report of the Commission, although carefully prepared, presented many translation difficulties. For example, the word "mercantil", used in the Spanish version, was not in current use in his country, where "comercial" was preferred. The word "incoación", used in the Spanish version of article 24 of the draft on jurisdictional immunities of States and their property, was not in current use either. The Commission had been right to try to avoid formulating definitions. In his opinion, however, definitions were not only inevitable but obligatory in the area of criminal law, which could not dispense with specifying types of offences.

2. Co-operation with other bodies

788. Representatives welcomed and encouraged the strengthening of links of co-operation between the Commission and regional bodies active in the field of international law. The interchange of information among jurists dedicated to promoting the rule of law at the international and regional levels was a sound and useful practice.

789. One representative stated that it would be helpful if the International Law Commission were to broaden and intensify its contacts with other lawmaking bodies dealing with issues in such fields as trade and economic relations, transboundary pollution or even disarmament, which might have implications for items on the Commission's agenda. Through interaction with those other bodies the Commission could both provide and gain insight and encouragement and, in the process, enrich its own work as well as theirs.

790. Another representative paid special tribute to the work of the Asian-African Legal Consultative Committee, which had made an immense contribution in the past three decades to the progressive development and codification of international law, with due regard to the special needs and interests of the developing countries of the Asian and African regions. He pointed out that, at the Eighth Conference of Heads of State or Government of Non-Aligned Countries, held at Harare recently, the Political Declaration included several paragraphs concerning such subjects as the non-use of force and the peaceful settlement of disputes. They should be duly taken into account by the Commission in its future work, as they reflected the considered positions of the large majority of the membership of the international community. An opportunity should also be given to the Commonwealth, although not a

regional organization, to convey to the Commission its views on the topics with which it dealt.

3. International Law Seminar

791. Representatives welcomed the convening of the twenty-second session of the International Law Seminar and expressed appreciation to those Governments which had made fellowships available to a number of participants. The hope was expressed that the Seminar would continue to be held. It had proved to be of great value over the years in enabling young lawyers, particularly from developing countries, to gain first-hand insight into the work of the Commission and to broaden their expertise and experience.

792. Appeals were addressed to all Member States to make generous contributions so that the Seminar could continue to be held.

Notes

1/ Official records of the General Assembly, Forty-first Session, Supplement No. 10 (A/41/10).

2/ Ibid., Forty-first Session, Sixth Committee, 27th to 34th, 36th to 44th and 51st meetings.

3/ Item 125 was considered by the Sixth Committee at its 27th to 34th, 36th to 44th, 49th and 50th meetings, held between 29 October and 13 November, and on 20 and 21 November 1986. Official Records of the General Assembly, Forty-first Session, Sixth Committee, 27th to 34th, 36th to 44th, 49th and 50th meetings.