UNITED NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.431
18 January 1989

ORIGINAL: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-first session
2 May-21 July 1989

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTIETH SESSION (1988)

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

CONTENTS

118 P.

CONTENTS (continued)

/...

CONTENTS (continued)

CONTENTS (continued)

/...

CONTENTS (continued)

/...

CONTENTS (continued)

/...

INTRODUCTION

1. At its forty-third session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 23 September 1988, to include in the agenda of the session an item entitled "Report of the International Law Commission on the work of its fortieth session" 1/ (item 134) and to allocate it to the Sixth Committee.

2. The Sixth Committee decided to consider this item together with another item which the Secretary-General had also decided to include in the agenda of the session and to allocate to the Sixth Committee, namely, the item entitled "Draft Code of Crimes against the Peace and Security of Mankind" (item 130).

3. The Sixth Committee considered the two items at its 25th to 40th, 45th and 48th meetings, held between 31 October and 11 November and on 21 and 25 November 1988. 2/ At the forty-fifth meeting, the Chairman of the Commission at its fortieth session, Mr. Leonardo Díaz-González, introduced the report of the Commission. At the 45th meeting, on 21 November, the Sixth Committee adopted draft resolution A/C.6/43/L.12, entitled "Report of the International Law Commission on the work of its fortieth session", and at its 48th meeting, on 25 November, it adopted draft resolution A/C.6/43/L.21, entitled "Draft Code of Crimes against the Peace and Security of Mankind". Both draft resolutions were adopted by the General Assembly at its 76th plenary meeting, on 9 December 1988, as resolutions 43/169 and 43/164, respectively.

4. By paragraph 14 of resolution 43/169, 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-third session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

5. The document opens with a section A entitled "General comments on the work of the International Law Commission and the codification process". Section A is followed by seven sections (B to H) corresponding to chapters II to VIII of the report of the Commission. As for the final section, which is entitled "Efforts to improve the ways in which the report of the Commission is considered in the Sixth Committee, with a view to providing effective guidance for the Commission in its work", it should be recalled that the resolution on the report of the International Law Commission adopted by the General Assembly at its forty-second session (resolution 42/156 of 7 December 1987) contains a paragraph 6 which reads as follows:

1/ *Official Records of the General Assembly, Forty-third Session, Supplement No. 10* (A/43/10).

2/ *Ibid.*, *Sixth Committee*, 25th to 40th, 45th and 48th meetings.

["The General Assembly]

"6. Recommends the continuation of efforts to improve the ways in which the report of the International Law Commission is considered in the Sixth Committee, with a view to providing effective guidance for the Commission in its work, and to this end decides that the Sixth Committee shall hold consultations at the commencement of the forty-third session of the General Assembly, including, inter alia, consultations on the question of establishing a working group, the character and mandate of which are to be determined, to meet during the debate on the report of the International Law Commission in order to allow for a concentrated discussion on one or more of the topics on the agenda of the Commission".

At the forty-third session of the General Assembly, in the course of the debate on the report of the Commission, a number of delegations commented on the questions referred to in the paragraph quoted above and the Sixth Committee decided to establish an Ad Hoc Working Group as envisaged in that paragraph. The final section of the present document accordingly consists of two subsections, the first of which reflects the relevant views expressed in the Sixth Committee and the second the results of the work carried out by the Ad Hoc Working Group which the Sixth Committee established under paragraph 6 of General Assembly resolution 42/156 and to the chairmanship of which it appointed Mr. Helmut Tuerk (Austria).

TOPICAL SUMMARY

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

6. The Commission was generally congratulated on the achievements of its fortieth session. Thus, it was said that 1988 had been a fruitful year during which substantive progress had been made on a number of major codification projects and sound work done on many of the topics on the agenda. The work of the Drafting Committee and of the Planning Group was also noted with appreciation and the report was praised as being of the usual high standard.

7. A number of representatives commented on the Commission's role - which one delegation described as a pivotal one - in the codification and progressive development of international law. The fortieth anniversary of the Commission was viewed as an opportunity not only to reaffirm the results achieved but also to define further priorities, tasks and responsibilities in the light of contemporary developments in international relations, including the growing interdependence of nations which required that the regulations of rights and responsibilities of all those involved in international relations be increasingly based on the rule of international law. The remark was made in this connection that it was the pre-eminent role of the Commission, and indeed of international law, to promote and strengthen international peace and security and to enhance political, social, economic and cultural co-operation among nations - a role which was all the more important as States continued to use force and to employ prohibited weapons, thereby violating international law and weakening confidence in its effectiveness as well as in the United Nations itself, whose continued relevance and indispensability to world peace had recently been reaffirmed.

8. Against this background, the tasks and responsibilities of the Commission, the General Assembly and the Sixth Committee were viewed as having increased in significance and emphasis was placed on the need to elaborate and adopt generally acceptable provisions aimed at safeguarding international legality and enhancing the rule of law as a regulatory mechanism in international relations. The view was expressed that the international legal community had good reason to feel optimistic about the prospects for the prevalence of the rule of law in international relations, and that the atmosphere for the work of the Commission was a very propitious one as a result of a new attitude favourable to the solution of problems affecting international peace and security, and of a move towards strengthening the role of the United Nations in the maintenance of international peace and security and towards ensuring the genuine pre-eminence of international law. Reference was made in this context to the improvement in East-West relations; the growing recognition of the need for increased effectiveness and greater utilization of the United Nations, as exemplified by the award of the Nobel Peace Prize to the United Nations peace-keeping forces; the change in attitude by both super-Powers towards third-party settlement; the greater utilization of the International Court of Justice as the judicial arm of the United Nations; the increasing tendency towards the peaceful settlement of regional conflicts and the withdrawal of foreign troops; and the greater acceptability of universal human rights norms. Mention was also

made of the comprehensive security system proposed by the Union of Soviet Socialist Republics with a view to establishing a soundly based international legal order founded on the principle of law in politics and inter-State relations.

9. One representative stressed that his country, while it remained confronted with a major problem because of a grave violation of international law as a result of foreign invasion, continued occupation and large-scale violation of human rights, was hopeful that, with the withdrawal of foreign troops from several other parts of the world, there would be sufficient momentum for the application to its situation of the relevant rules of international law and for the early achievement of a solution in accordance with the relevant United Nations resolutions, keeping in mind in particular the possibilities available to the International Court of Justice.

10. While the achievements of the International Law Commission over the past few years were favourably commented upon by many representatives and described by one of them as manifest and praiseworthy, one delegation remarked that the Commission, which had been destined to play a central role in the development of public international law, was being criticized for failing to play that role and for having devoted itself to subjects which were overly theoretical, unnecessary and of little practical value, and that a good many years had passed since the Commission's last acknowledged successes which had been achieved in areas of major importance, in which the common interest of States in having an agreed régime had evidently outweighed any potentially conflicting national interests. In the view of that delegation, many of the areas to which the Commission had devoted its attention since then did not meet that description and it could thus be concluded that the Commission could only assume the role which had been envisaged for it in the development of public international law when it was dealing with a subject of central and direct concern to the majority of States.

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

1. General comments

11. It was noted by many speakers that ecological accidents as well as damage to the environment by continuous emissions or negative by-products of advance technologies demonstrated that all States had an interest in the rapid codification and progressive development of international law in this area. The topic was not just relevant to highly industrialized States. Developing countries were also exposed to pollution. Waste disposal had become a lucrative business and some corporations had, for example, recently begun to sell their waste in developing countries. For that reason the topic should be given priority among the items dealt with by the Commission.

12. Some delegations suggested that in order to arrive at a comprehensive régime of State liability, it would be appropriate to elaborate a framework treaty that would encourage the conclusion of bilateral or regional agreements. The drafting of such bilateral or international agreements relating to particular types of activities not prohibited by international law should in no way impede the drafting of a general framework treaty by the Commission. On the contrary, such a general treaty might usefully draw on elements already contained in existing agreements of limited scope. Besides, a new convention was necessary because the "civil law" approach enshrined in the existing specialized liability conventions seemed fully applicable only among States with comparable legal systems and was, furthermore, inadequate in cases of large-scale accidents. The nucleus of a new convention - the principle of State liability and the mechanism for the settlement of claims - should be based on the provisions of the 1972 Convention on International Liability for Damage Caused by Space Objects. The necessary definitions and provisions relating to the scope of the convention could be based on the Vienna Convention on Civil Liability. Thus it was unnecessary to decide in each case whether or not the provision in question involved the progressive development of international law. However, it was observed that since the draft articles involved some progressive development of international law in that area the Commission should proceed in its deliberations on the topic with considerable care. At the current stage, it would probably be better to concentrate on situations which gave rise to the bulk of the practical problems which needed resolution and to refrain from attempting to grapple with those which theoretically arose but which raised issues of limited practical significance.

13. It was suggested by some that the topic could be successfully concluded only on the basis of a greater infusion of progressive development of the law to the extent which was politically feasible. Such a progressive development of the relevant law called for creativity in drawing upon some analogies from domestic laws and from general principles of law within the meaning of Article 38 of the Statute of the International Court of Justice. It also called for ingenuity in translating maxims embodying concepts of fairness and equity and in transforming into legal obligations the ethical obligations evidenced, for example, by the payment of ex gratia sums to those who had suffered harm. The purpose of the topic was to fill in a gap in international law with regard to situations in which

traditional concepts of international law were inoperative. It would be unjust for innocent victims who suffered as a result of activities which were lawful under international law to have no recourse or be left to rely on purely humanitarian, more or less random compensation, which would depend on the good will of the authors of the acts in question.

14. It was thus stated that the topic should fulfil two essential functions: first, it should have a preventive role by making the authors aware of the risks to which they subjected others, and prompting them to take preventive measures to minimize the effects of any accident; secondly, it should have a role in providing reparation, obliging the author of the activity to repair the damage, not out of humanitarian concerns but by virtue of the obligation of reparation which came into existence as soon as the link between cause and effect had been established. Those tasks required that a régime be designed which could maintain a proper balance between the conflicting interests involved in situations covered by the topic. While it should be remembered that the topic dealt with lawful activities, greater emphasis should be placed on the fact the innocent victim should not be left without reparation.

15. It was suggested that the principle sic utere tuo ut alienum non laedas was the appropriate conceptual basis for the topic and provided a firm foundation for rules on prevention and reparation. The three principles identified in the Commission's report were also endorsed. It was suggested that the articles should establish an effective link between prevention and reparation. Prevention must operate on a large scale and include not only activities that actually gave rise to transboundary harm but also activities that might give rise to such harm. Special attention, in that respect, should be given to the developing countries, taking into account their needs, their level of development, their difficulties in preventing or compensating for harm and the effects in their territory of the activities of transnational corporations.

16. Some speakers pointed out that the concept of due diligence and the State's knowledge of the hazardous activity would make the topic almost indistinguishable from that of State responsibility for wrongful acts. At the same time, however, discussing liability irrespective of those concepts seemed to collapse the topic completely into the contentious realm of strict or absolute liability. What was being examined was the vast "grey area" of inter-State conduct in which States acted without violating their primary obligations, while still causing injury to other States. Standard juridical discussion since the celebrated opinion of the Permanent Court of International Justice in the Lotus case had occasionally fallen victim to the temptation of assuming that international law consisted only of hard-and-fast rules, in the absence of which a State's sovereignty and freedom of action remained unlimited. The International Court of Justice had refuted that view in its important decision in the Anglo-Norwegian Fisheries case, in which it had observed that the absence of clear and specific rules on the drawing of the baselines of the territorial sea did not signify that the coastal State was free to draw such baselines as it wished. The Court had discussed the factors which the coastal State was bound to take into account in a way which was currently referred to as "balancing the interests". The relevant standard had to be constructed by reference to reasonableness and equity.

17. It was pointed out that in many domestic legal systems the law had come to proceed less through clear-cut rules than by way of ad hoc compromise. The great significance of the topic of international liability lay precisely in its orientation towards such a conception of international law. The real subject of discussion was not compensation and damage, or liability in its narrow, technical sense, but rather the principle of good faith and equity which made the topic so important. Whenever a State's action had a bearing upon another State's interests, it could not be up to the former State to decide freely what course it would adopt. Even in the absence of a specific prohibition, a standard must be deemed to exist. Ultimately, the Commission's aim was to give concrete content to the overall duty of good faith and to provide guidelines on how to measure "equity" in that area of international law. However, defining what was equitable in concrete terms was difficult. The Commission had seemed to have opted for a procedural obligation. Thus, "liability" meant a set of procedural obligations faced by States when a conflict of interests emerged in an area of international conduct or where specific rules were absent. Procedural obligations should not be expanded at the expense of substantive rules of liability.

18. As for procedural obligations, some speakers agreed with the Special Rapporteur that States might be confronted with a "compound obligation" of a procedural character if a non-prohibited activity gave rise to transboundary injury, and thus to a conflict of interests. The obligation had four "degrees": first, to prevent or minimize, as far as possible, adverse consequences of the State's acts; secondly, to provide information on the ongoing or planned activities; thirdly, to negotiate a régime with the affected State(s) on the future conduct of such activities, including possible reparation; and fourthly, to set guidelines for settling conflicts in the absence of an agreed régime. The concept of "injury" or "harm" provided the focal point of the topic. It was harm - whether prospective or actual - that triggered the compound obligation. The process was gradual and unfolded without the question of the possible wrongfulness of acts even being raised. The approach had been, wisely, a broad one, in which strict liability was only an element of the overall compounded obligation. It was true that ultimately there could arise an obligation to pay compensation regardless of any subjective fault on the part of a State, but strict liability would be a factor in the overall balance of interests which States should seek through the procedural channels open to them. If damage could not be prevented, clearly the most just solution was that victims should not be without compensation.

19. Serious doubts were expressed as to whether there was a sufficiently established international practice in the matter to enable it to lend itself to codification. According to this view there was no reason to depart from general principles of liability solely because an activity had transboundary effects. This did not, however, imply opposition to the Commission's envisaging the possibility of adopting special rules departing in certain respects from the general principles of international liability. Thus, innocent victims should not have to bear the cost of their losses, although the limitation of this policy to transboundary effects could admittedly lead to reverse discrimination in cases in which the domestic legislation of the State of origin did not provide for compensation. In addition, there was some ambiguity in the manner in which the question was treated by the Commission. While the Special Rapporteur had stated that the object of the

draft articles was to obligate States involved in the conduct of activities involving risk of extraterritorial harm to inform the other State which might be affected and to take preventive measures, 3/ it was not strictly speaking a matter of liability. Such liability could arise only from the failure to respect those obligations, which would then give rise to responsibility for wrongful acts. Perhaps the intention was to ensure that the State continued to be liable even if it had fulfilled all the required obligations. That would lead to objective liability, which would, however, be acceptable to many States only in specific cases for which they had accepted special obligations. It was precisely for such reasons that the text in the process of elaboration by the Commission did not seem appropriate for a convention. The difficulty of establishing its scope alone would be sufficient reason to reject such a convention.

20. In regard to creeping pollution, it was suggested by many speakers that activities causing this type of pollution should be covered by the topic, regardless of whether or not they were prohibited by international law. It was admitted that there were difficulties in dealing with continuous, latent, diffuse, long-range and indirect pollution. However, those problems should not be considered intractable. Exchange of information and data collection and monitoring, for example, should be facilitated by the appropriate international organizations. The problem of attribution and liability where there were many States of origin would undoubtedly prove more difficult to resolve on issues relating to damage to "the commons". That problem might need to be dealt with by specific agreements or conventions, which might require what one member of the Commission had termed the "promotional" or "incentive" approach, aimed more at prevention than at liability.

21. As regards the drawing up of a list of activities covered by the topic, many speakers agreed that such a list would never be exhaustive and a better idea was to identify a set of criteria common to those activities coming under the scope of the topic. This approach, which would lead to the elaboration of a convention of a general nature, seemed the right way to proceed. A general convention could also provide an incentive for States to conclude agreements establishing specific régimes to regulate activities in order to minimize potential damage. A general comprehensive approach would respond in a significant way to the appeal made by the World Commission on Environment and Development (the "Brundtland Commission") in its report 4/ for Governments to strengthen and extend existing international law and make a real contribution. This approach also was attuned to principle 22 of the Stockholm Declaration 5/ in which States were asked to co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities in their jurisdiction or control of States to areas beyond their jurisdiction.

3/ Ibid., Supplement No. 10 (A/43/10), para. 24.

4/ See A/42/27, annex, chap. 12.

5/ See Report of the United Nations Conference on the Human Environment (United Nations publication, Sales No. E.73.II.A.14).

22. On the other hand, in the opinion of some speakers, the international practice demonstrated that States preferred to deal with specific situations causing possible transboundary injury by specific agreements. It was therefore questionable whether a comprehensive convention in this area would be acceptable to a majority of States. Although any list as such was by definition incomplete, it would offer some practical advantages. The list would indicate, for example, by a reasonable process of analogy other activities that could come under the scope of the topic. It could appear as an annex to the convention, and there should be provisions for a flexible review procedure, so that it could be updated from time to time.

23. As regards the issue of harm to the general environment, some speakers agreed with the view that the topic should not deal with that issue. A successful exercise on the topic required a narrower and a more practical approach; otherwise, it would be extremely difficult to draft articles of any practical usefulness.

24. Other representatives felt however that in view of the accelerating deterioration of the environment and the threats connected with that deterioration it would not be proper to exclude the possibility of dealing with liability for harm in areas beyond the limits of the national jurisdiction of any State. Many types of activity covered by the topic were of great importance, not only to the States involved in those activities but also to the world community as a whole. In some cases it would be admittedly difficult to identify who would be the beneficiary of reparation. Perhaps principles could be drawn by analogy from those regarding harmful consequences of activities involving several source States and several injured States.

25. The hope was expressed that the Commission would accord sufficient priority to this important topic. It was also observed that the topic presented the Commission with a choice: it could either assume the role originally envisaged for it or it could further reinforce the perception that it was solely preoccupied with the red tape of international law. Hopefully, the Commission would rise to the challenge and accord priority to the drafting of an effective, broad and comprehensive framework convention to help protect the environment. There was good reason to believe that a generally acceptable outcome on the topic would be possible.

2. Comments on the draft articles submitted to the Commission by the Special Rapporteur in his fourth report

Article 1. Scope of the present articles

Article 2. Use of terms

26. As regards the concepts of risk or harm, some speakers supported the idea of a régime of international liability whose scope would depend essentially on the occurrence of injury arising from an activity involving risk. Technological progress, the handling of dangerous or toxic products and the increasing hazards to human health and the human environment posed by industrialization made it opportune to establish a legal régime independent of the concept of wrongfulness. Thus, risk

and harm were directly interrelated and in the absence of one, the other would most likely not occur.

27. According to this view, if the Commission's approach was to be general in scope, the criterion of harm was inadequate. The draft should cover activities that posed an exceptional risk and could result in harm. It seemed to these speakers entirely unrealistic to expect States to agree to be held liable for transboundary harm when they were not at fault. It was important to remember that the Commission, in respect of this topic, was dealing with activities which were lawful. Liability based on risk would provide a logical basis for the reparation of harm caused by the activity irrespective of whether the State had done everything to prevent the harm. For these speakers, the concept of risk was essential to the whole draft whose purpose was to establish flexible mechanisms for the prevention of transboundary harm through international co-operation.

28. In the same context it was pointed out that the notion of liability based on the occurrence of harm could render the subject-matter too broad and too difficult to manage. Transboundary harm might be caused by activities which normally were not dangerous by nature and did not impose an obligation of diligence when carried out in the territory of a given State. Without an obligation of diligence, there could not be, in the case of an accident, liability. It would seem that the scope should be limited to activities that as a matter of international public policy required strict regulation and entailed liability for risk irrespective of fault. An inherent difficulty in basing liability solely on the occurrence of appreciable harm was that such an approach could conceivably do away with the distinction between activities for which liability was incurred on the basis of fault (wrongful acts, omissions or failure to carry out the obligation of due diligence) and those for which there was objective liability linked to the concept of public policy. Thus, the introduction of the element of risk was helpful in establishing an acceptable framework for the draft articles. While it would be wrong to limit the topic to activities which were ultra-hazardous, it would be equally unwise to try to cover activities which, at the relevant time, were not perceived to carry with them any significant risk. Once risk was established, it was appropriate for certain obligations prescribed in the draft articles to apply, especially those relating to co-operation and prevention.

29. Some other speakers, however, pointed out that the scope of the topic was basically related to the duty to avoid, minimize and repair physical transboundary damage resulting from physical activities within the jurisdiction or control of a State. It was also to be borne in mind that the concept of liability for acts not prohibited by international law related to fundamentally different situations requiring different approaches. One situation had to do with hazardous activities which carried with them the risk of disastrous consequences in the event of an accident but which, in their normal operation, did not have an adverse impact on other States or on the international community as a whole. Thus it was only in the event of an accident that the question of liability would arise. By its very nature, such liability must be absolute and strict, permitting no exceptions. However, the task of the Commission, according to this view, also related to a fundamentally different situation, namely, transboundary and long-range impacts on the environment. In such a case, the "risk" of accident was only one minor aspect

of the problem. It was through their "normal" operation that some industrial or energy-producing activities harmed the environment of other States. Moreover, such harm was not caused by a single, identifiable source as in the case of hazardous activities. For a long time such emissions had been generally accepted because every State was producing them and their nefarious consequences were neither well known nor obvious. The growing awareness of their harmful influence had, however, reduced the level of tolerance. In that regard, liability had two distinct functions: as with hazardous activities, it should on the one hand cover the risk of an accident; on the other, it must also cover - and that was its essential function - significant harm caused in the territory of other States through a normal operation. Liability for risk must thus be combined with liability for causing harm.

30. For some speakers, limiting the topic to activities involving risk was excessively narrow. It did not reflect the commercial and insurance realities confronting the operators of enterprises, nor did it reflect sound policies of liability as embodied in the laws of most States. States were in a position, by licensing operators and by requiring them to have adequate financial resources and operating procedures, to ensure that harm was limited and that compensation was available should it occur. There was no reason why liability should be excluded for transboundary harm caused by physical activities under the jurisdiction of a particular State just because there was no perceived appreciable risk, if there were other elements that would warrant a finding of liability. The basis of liability should not be confined to the foreseeability of risk, especially in the restricted terms envisaged in the draft articles. A more constructive approach would be to widen the provisions relating to scope to cover all cases of transboundary harm but to make risk the criterion for evaluating preventive measures. Account could be taken of the existence of varying degrees of risk, or even of the total absence of risk, in the assessment of reparations. For example, it might be appropriate, under the procedural articles of the convention, to provide for different standards of liability or for different rules of burden of proof depending on whether harm had resulted from a high-risk, a low-risk or no-risk activity. In that connection, the rules of reparation should be flexible and should not set a strict obligation of reparation for all harm in all circumstances.

31. Accordingly, the concept of risk would determine the procedural and substantive régime of prevention and would be only a factor in determining reparation which was triggered by the occurrence of harm. For example, if the risk was not foreseeable the measure of reparation would be lower. The issue of reparation included more factors than just distribution of costs of economic activity in a way that was both financially rational and morally justified. Accordingly, there was no reasonable basis for expecting that the affected State or the innocent victims residing there should bear the costs alone, especially as they did not normally have a share in the profits produced by the activity. That should be a factor in the assessment of an overall equitable solution.

32. Some speakers found the definition of "appreciable" risk in article 2 acceptable. Others, however, found it unclear. For them, the term was too vague to serve as a criterion for determining the scope of a convention; it was

subjective. For in a very literal sense something was appreciable, irrespective of its quantity, if it was detectable or identifiable. But that did not appear to be the intention of the Commission. The intention appeared to refer to risks which were greater than normal. It would be more accurate then to speak of significant risks, or a risk of significant effects, and it would be useful specifically to add that de minimis effects were excluded. The concept further did not appear to cover adequately activities involving risk which although small was possibly sufficent to cause serious damage. It was unclear, for example, whether "appreciable" meant "foreseeable". But if the word "appreciable" was maintained, there should be a uniformity in its meaning in the articles on this topic as well as in those on the non-navigational uses of international watercourses.

33. Additionally, it was suggested that paragraph (a) of article 2 failed to clarify what was meant by "a simple examination", or the situation that would arise if the risk in question was actually known to the States concerned even though it was not evident from such an examination. Similarly, the paragraph stipulated that the "physical properties" of the things concerned must be such that they were "highly likely to cause transboundary injury throughout the process", which appeared to mean that the likelihood should be one which was continuous throughout the process of use. Thus, a use which in normal circumstances was not highly likely to cause transboundary injury except in defined circumstances would appear not to be covered by the paragraph, since the risk did not occur "throughout the process". On that basis, for example, the operation of a nuclear power plant which in normal circumstances was safe but which became acutely unsafe in certain conditions or as a result of some forms of operator error would not be covered by the draft articles. If something went wrong with such a plant and notification became an issue in terms of imminent transboundary injury to other States, such notification, under this formula, would not be required. In addition, it seemed that the risk, which was to be both appreciable and highly likely as well as continuous "throughout the process", must be a risk of transboundary injury. The requirement that the injury must be appreciable, highly likely and continuous seemed also to apply to its transboundary aspect.

34. It was also pointed out that transboundary injury per se did not provide grounds for compensation. In order to do so, it must be on a certain scale. In other words, it must be "appreciable" within the meaning of paragraph (c) of draft article 2. However, the adjective literally meant "capable of being estimated or assessed", which would imply a contrario that unforeseeable injury whose relationship to the dangerous activity could not be estimated would not necessarily be compensable. It did make sense, on the other hand, to refer to "appreciable risk", since that element of general foresight was fundamental to the liability régime proposed. To avoid any kind of ambiguity, perhaps injury should be qualified as "significant" or "substantial".

35. Some speakers supported the replacement of the term "territory" with jurisdiction or control. They agreed that the term "territory" was inherently limited for this topic. The terms "jurisdiction" and "control" were used in other conventions and were better suited for this topic even though they were not completely problem-free. Some preferred to delete the word "effective" before "control", since if a control was not effective it would not be control at all. It

/...

was also suggested to drop the words "under international law" after jurisdiction, since they seemed unclear. Another view preferred to limit jurisdiction to the area in which an activity was taking place, and not cover the activity itself.

36. It was suggested that the concept of jurisdiction would in some situations cover the exercise by a home State of jurisdiction over the activities of a transnational corporation in a host State. In most cases the former was a developed country and the latter a developing country. The formulation of draft article 1 seemed to be advantageous to developing countries because developed countries would be bound by the obligations laid down in the draft articles. It was pointed out, however, that developing countries have resented the exercise of jurisdiction by a home State over the activities of a transnational corporation carried out within their territories; that was one of the problems encountered by the Commission on Transnational Corporations in its work on a code of conduct for such corporations. In completing the formulation of draft article 1 care should therefore be taken not to appear to legitimize the exercise of that kind of jurisdiction.

37. A few speakers saw considerable disadvantage in relying on the concept of jurisdiction to determine the link between the risk-creating activity and the State in question, since the concept lacked clarity. Even within a given State jurisdiction was not a single concept. As stated in paragraph 61 of the Commission's report, the Special Rapporteur felt that jurisdiction included the competence to make law <u>and</u> apply it to certain activities or events. That double condition was one which bore further consideration. If it was to be adopted it needed to be specified clearly in the draft article, since it did not follow automatically from the use of the term "jurisdiction". According to this view, resorting to the concept of jurisdiction the text introduced confusion even in those situations which in practice accounted for the vast majority of occurrences with which the draft articles attempted to deal. Articles which concentrated in clear terms on such areas as activities occurring within a State's territory would deal with most of the practical problems.

38. Some speakers suggested that the criterion of "physical consequences" should be brought back to article 1 on scope.

39. It was pointed out that there were some problems with the definition of injury as applied to the extensive damage to the environment. That was a field in which international law required progressive development in order to meet modern needs. Another difficult issue was the frequent accumulation of causes that together constituted substantial injury, and there was also the problem of attributing liability where there was "intervening causality" as a result of precautionary and protective measures considered necessary by the injured State. Although the Special Rapporteur's comments in his fourth report provided useful guidance in that respect, there was some doubt as to whether it would be possible to establish a general definition of injury covering all hazardous activities. The Commission might discuss that subject, taking into consideration what had already been dealt with under the subject of international watercourses.

40. As regards the definition of other terms in article 2, many speakers preferred to express their views after substantial progress had been made in drafting the remaining articles on the topic. One speaker suggested that the beginning of paragraph (a) of article 2 should read: "'Risk' means the risk occasioned by the use, purposes or location of substances or elements". Another speaker urged the Special Rapporteur to reinstate the word "situation" in the draft, for the simple reason that not everything with potential transboundary harm could be correctly identified as an activity. The term "situation" combined with the term "activities" provided a broader approach and would therefore be more useful.

Article 3. Attribution

41. Some speakers felt that the criterion of prior knowledge should be linked only to the duty to inform, consult and prevent. As soon as a State of origin learned of some potentially harmful activity under its jurisdiction or control it had the obligation to investigate the matter for itself, and to proceed with consultations and negotiations in order to establish the necessary régime. Its duty to pay compensation to innocent victims beyond its territory would then follow in accordance with the balancing of interests principle. It went without saying that, contrary to the situation in the régime of State responsibility, it was immaterial whether the injury had been caused by private or by public acts. Thus liability, in principle, should be independent of the question whether the State had knowledge of activities being carried out under its jurisdiction or control, for otherwise the innocent victim would be made to bear the entire loss. Article 3 should be redrafted to indicate clearly the presumption that the State of origin knew or had means of knowing about the activity, which presumption could be rebutted by the State of origin if it had evidence to the contrary. The article, as currently drafted, created confusion between State responsibility for wrongful acts and State responsibility for lawful acts, for it had shifted the burden of proof.

42. It was also pointed out that the main idea of draft article 3 was that the State should have the obligations under the future convention only if it knew, or had the means of knowing, that an activity involving risk was carried out in areas under its jurisdiction or control. While that idea had some advantages, the Commission should consider it again very carefully, since such a restriction could narrow considerably the concept of liability.

43. A few speakers stated that existing conventions in the field of liability were generally based on the primary liability of the operator. Where it was a question of the liability of a State, as in the case of the Convention on the Liability of Operators of Nuclear Ships, such liability existed only on a subsidiary basis and if the State had failed to perform its duty of control. The cases in which the State was held directly liable when damage occurred were very rare.

44. Other speakers felt that article 3 should take into account the special situations of the developing countries which may not be informed about the activities of multinational corporations in their territories. Accordingly, the State of origin should not be held liable unless it knew or had means of knowledge of the activity being carried out under its jurisdiction.

45. The view was also expressed that perhaps within the context of the article consideration should be given to the desirability of including force majeure and its consequences for the possibility of providing compensation.

Article 4. Relationship between the present articles and other international agreements

Article 5. Absence of effect upon other rules of international law

46. Few speakers commented on the articles. Some preferred to reserve their position on them until further progress had been made on the topic. A reservation was expressed as to the advisability of subordinating the application of the draft articles to other international agreements at such an early stage of the drafting process. Another view, while supporting the principles embodied in articles 4 and 5, found their language vague. As for article 5, some preferred the wording which appeared in paragraph 80 of the Commission's report, which read: "The present articles are without prejudice to the operation of any other rule of international law establishing responsibility for transboundary harm resulting from a wrongful act or omission."

47. It was observed that in recent times the Commission seemed to have been systematically including in its draft articles on various topics a provision based on article 3 of the 1969 Vienna Convention on the Law of Treaties. Article 5 was an example of this. This view expressed uncertainty about the necessity of this article in the draft, since the title of the topic made it clear that it was not devoted to responsibility for transboundary harm resulting from wrongful acts.

Article 6. Freedom of action and the limits thereto

48. Some speakers viewed the article as expressing the most important principle underlying the topic, namely, that each State's freedom must - unless sovereign equality was to be violated - be presumed limited by the equal freedom of other States. However, the formulation of the principle in that article was not without problems. In particular, the reference to activities involving risk limited the scope. As was suggested in the Commission's report, it might be more advisable to construct the article in three sentences which would better bring out the inherent logic of the topic. First, the article should affirm the freedom of the State of origin to engage in any activity in its territory or jurisdiction which it considered appropriate and which was not prohibited by international law. Secondly, it should be reaffirmed that each State had the right to be free from interference in the use and enjoyment of its territory. Those two principles translated, in the classic language of territorial sovereignty, the two sides of principle 21 of the Stockholm Declaration on the Human Environment. 5/ They also reflected the main problem involved, namely, the conflict between equal sovereignties. Thirdly, the article should expressly mention the principle that such conflict should be settled by equitable means, following the procedures and principles set out in the draft. Each of the three elements should be expressly stated, in order better to clarify the rationale underlying the draft.

49. For those speakers who disagreed with limiting the topic to activities involving risk, the article was narrowly constructed. While no one would contest the freedom of States to permit in their territory any human activity that they considered appropriate, it was difficult to see why it was only with regard to activities involving risk that that freedom should be compatible with the protection of other States. The avoidance of harm should be the guiding principle in striking a balance between the reality of interdependence on the one hand and the tenacity of the concept of sovereignty on the other. Moreover, the words "any human activity considered appropriate" could give the impression that prohibited activities were also included.

50. In the opinion of those speakers who preferred to extend the scope of the topic to include the activities which caused harm to the human environment in general, article 6 suffered from the same shortcomings as did the scope of the topic. In that connection, they suggested that it was important to bear in mind the wording of principle 21 of the Stockholm Declaration, which provided that any activity in one State must not damage the environment of another State or of areas beyond the limits of national jurisdiction. The latter aspect was completely excluded in the current draft articles, notwithstanding the importance of areas of the natural heritage which were beyond the limits of national jurisdiction and thus, in some sense, part of the common heritage of mankind.

51. The view was expressed that articles 1 and 6 together seemed to cover the activities carried out by a State in an illegally occupied territory. It should be clear in the text that such occupation was not recognized in international law as lawful. According to another view, the first sentence of the article should be deleted because it was redundant. Still another view was expressed that the draft would perhaps gain in logic and clarity if the order of the provisions were different. The basic principles of the convention should precede the general provisions. The convention would then begin with the current article 6 on freedom of action and the limits thereto. That provision would be followed by the current articles 1 to 3 (on scope, use of terms, and the basis of the obligations imposed) and article 10 (on reparation).

Article 7. Co-operation

Article 8. Participation

52. Some speakers felt that articles 7 and 8 both related to co-operation and participation and should therefore be combined into a single article. Such an article should preferably be more specific and refer, for instance, to the obligations of notification, consultation and prevention, as did the articles on the law of the non-navigational uses of international watercourses. With respect to the view that the State of origin had to bear the main burden both with regard to prevention and in the case of an event which gave rise to liability, the State which reaped the benefits of the activity should not be forgotten either. In addition, co-operation as a principle had to be translated in practice into co-operation between States. The identification of those States, especially in relation to preventive action, required further clarification. Also, the process

in which States likely to be affected should participate was too vague. The intended scope of the obligation to permit participation should be made clear.

53. It was suggested that, without trying to diminish the obligation to compensate and co-operate, the Commission should ensure that the future convention did not impose on any States intending to engage in a new activity a systematic obligation to consult all the States which might potentially be affected. To do so would be to confer on any State which considered itself exposed to risk the right of veto over activities involving risk which had been undertaken in that context in the State of origin.

54. In relation to article 7 the view was expressed that one of the main features of contemporary international relations was the growing interdependence of States, giving rise to the duty to co-operate as reflected in paragraph 3 of Article 1 and Chapter IX of the Charter. It was to be noted that in the context of its work on the topic and on the law of the non-navigational uses of international watercourses the Commission was playing a very creditable role in the development of a corpus of law on the duty to co-operate. The Sixth Committee was working in the same area in its consideration of the items relating to good-neighbourliness and the progressive development of international law relating to the new international economic order. Both the Commission and the Committee must ensure that the duty to co-operate had the body and content of a juridical norm, the breach of which entailed responsibility.

55. According to another view, however, analogies between the content of co-operation principles in the topic on non-navigational uses of international watercourses and those in this topic were misleading. Contrary to the latter, the States that would undertake the obligations in the former were more readily recognizable.

56. With respect to article 8, one speaker wondered whether participation of potentially affected States ought to include input at the planning stage of high-risk projects. Another speaker, in view of the uncertainty about the scope of the topic, had doubts about both articles 7 and 8, which seemed to establish a legal obligation to co-operate. The aim should rather be to encourage a certain course of action. Thus it was difficult to state a priori, without knowing the exact nature of the activity, that "States likely to be affected" - a vague concept - should be invited to "consider" with the State of origin the nature of the activity and its potential risks.

Article 9. Prevention

57. It was noted that article 9, dealing with the important issue of prevention, stipulated, in addition to the various limitations imposed by articles 1 and 2, that the activities should "presumably" involve risk. It had already been stated that the risk should be appreciable on a simple examination, that it should relate to appreciable injury and that it should be highly likely. In such circumstances it was unclear what was added by the word "presumably". As its inclusion in a section dealing with principles suggested, draft article 9 was only a beginning; it

was important, for the Commission to draw on the considerable work it had already done on the duty of co-operation in relation to international watercourses, and that its approach to related issues should be consistent. In this context reference was made to the provisions of the 1982 United Nations Convention on the Law of the Sea. It was pointed out that relating prevention to more objective standards and not merely leaving it to the discretion of the State of origin would constitute major progress in the area of international law under consideration.

58. It was stated that article 9 allowed for a flexible approach by envisaging the possibility that the interested States themselves could specify concrete régimes which required strictly defined measures to be undertaken in connection with certain types of activities. However, the term "reasonable" was not sufficiently precise; perhaps wording such as "the necessary measures" would be better. In the same context it was suggested that the choice of actual preventive measures must be determined by each State according to such specific factors as its capacity, technical know-how and available equipment.

59. It was also suggested that the principles of prevention should be drafted in the light of the possibility referred to in paragraph 92 of the Commission's report, concerning "autonomous" obligations of prevention. According to another view, that obligation further should not, when in any event transboundary injury occurred, serve to make the obligation to compensate relative; to do so would be tantamount to reintroducing the concept of due diligence and therefore that of wrongfulness, a concept which specifically was to be omitted in the performance of the obligation to compensate. For the State was liable either because the harm resulted from a wrongful act or because an injury related to an activity involving risk, which meant that the only exemption from liability was in the case of force majeure. It was difficult to reconcile the two approaches: it would be desirable if the draft articles were to eliminate any uncertainties in that regard.

Article 10. Reparation

60. Some speakers noted that it was difficult to comment in detail on the article since it was dependent on as yet unknown criteria to be laid down elsewhere in the draft articles. Those criteria should deal, inter alia, with the question of the standard of liability and associated questions concerning the permissible defences and exceptions to liability. As the article stood, while the implementation of the duty to make reparation would seem to be a matter for negotiation, the duty itself could be seen to be a matter of strict - or possibly even absolute - liability.

61. Others found no valid reason to limit reparation by specifying that the harm must be "caused by an activity involving risk". The draft articles should specify in what cases and under what circumstances the obligation to make reparation arose, regardless of risk. A further important question was whether a ceiling on the amount of compensation to be paid for a given event should be laid down. Although frequently used, such a solution in principle frustrated the basic aim of liability for acts not prohibited by international law, which was to protect the community at large from the injurious consequences of the activities of a few, and thus required full, not partial, compensation. Such a limitation might nevertheless serve practical purposes, provided the ceiling was set at a realistic level.

62. Thus it had also been suggested that circumstances which would either increase or diminish liability, or exclude it altogether, should be taken into account. However, since the matter under consideration was absolute liability for hazardous or harmful activities which did not presuppose any unlawful act, the admission of circumstances precluding wrongfulness would be pointless. Introducing the idea of "mitigating" or "aggravating" circumstances could be justified only by the pragmatic wish to make a new obligation more acceptable to States. Liability for risk must be combined with liability for harmful activities. With regard to the latter type of liability, it was conceivable that subjective reasons for non-compliance with the required standard, such as lack of access to the latest technology or temporary financial inability to acquire it, could be taken into account as mitigating circumstances when the amount of compensation was to be determined. In any case, it was important to bear in mind that the cost of an activity should not have to be borne by those who received no benefit from that activity. Thus, the substance of reparation should not be sacrified at the expense of procedural matters.

63. On the other hand, it was pointed out that, at the current stage of scientific and technological development and in the light of the emergence of new forms of activities which entailed risk but were of benefit to society, accidents causing transboundary harm were to some extent to be regarded as a common misfortune. Thus, in resolving issues relating to reparation, account must be taken not only of the interests of the affected State but also those of the State in whose territory the accident which gave rise to harmful transboundary consequences occurred. In particular, account must be taken of any safeguards or preventive measures by that State and any contribution to making good the consequences of the accident. It was very important that both the convention as a whole and its individual articles - particularly those relating to the questions of compensation - should in general terms encourage co-operation between States and the provision of assistance to a State which had caused injury, in order to mitigate the effects of the accident. Otherwise, the approach to reparation would amount to automatic application of strict liability principles, a principle not yet acceptable to many States.

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

1. General comments

64. Many representatives stressed the importance and urgency of the topic. It was observed that the ever-growing population and the increasingly intensive use of international watercourses required a constant rethinking of international norms and regulations to enable mankind to deal wisely with those environmental resources. Other factors mentioned as justifying an urgent consideration of the subject included the shortage of water-supply in many developing countries, the negative climatic consequences of the misuse of water, the positive influence of the development of watercourses on socio-economic development and the need for an exchange of data and information about watercourses to predict ebb and flow, to control vector-borne disease and to prevent or mitigate natural disasters.

65. Many representatives held the view that the topic, being one on which the Commission seemed likely to make progress in the short term, should be given priority. Satisfaction was generally expressed with the results achieved so far. Support was also voiced for the proposals of the Special Rapporteur regarding the outline of the future instrument and the schedule of work, as well as for the Commission's intention to complete the first reading of the draft by 1991. Concern was expressed however by one representative that the Commission might let itself be carried away by excessive enthusiasm, as if the intricacies of the topic did not exist or had been entirely resolved. That representative urged the Commission to reflect more carefully on some of the issues involved before actually crystallizing its conclusions on draft articles.

66. A number of representatives commented in general terms on what they viewed as the basic concepts underlying the topic. Varying degrees of emphasis were placed by various delegations on such concepts as the principle of co-operation among States; sovereign equality, territorial integrity and the permanent sovereignty of States over their natural resources and their economic activity; the general obligation of States not to cause serious harm to other watercourse States - which one representative described as linked to the principle of equitable utilization and participation - and the concept of acquired rights. The view was expressed that, taken together, those concepts sought to avoid the problems inherent in unilateral assessments and policies and made it possible to strike a balance between the interdependence of riparian States on the one hand and their sovereign independence and rights to benefit from the natural resources within their territories on the other, between upper and lower riparian States and between the various uses of water. One representative cautioned against attempting to build on the doctrine of "shared resources"; this could have the effect of restricting significantly the guidance which the current work of the Commission could provide to Member States in their current and future efforts and to regulate relations which differed substantially from case to case.

67. As regards the form in which the end-product of the Commission's work should be couched, a few representatives expressed a preference for model rules. Most delegations, however, favoured the "framework agreement" approach. Some, being of

the view that there were no generally binding norms of international law and no uniform State practice on the subject, felt that such a framework agreement should contain residual general rules in which watercourse States could find necessary guidance from which they would be free to depart in specific agreements, depending on the requirements of each case. For other representatives, however, some of the principles laid down in the draft articles were so important that they should be applicable irrespective of the particular characteristics of any watercourse system and should not be derogated from in specific agreements concluded by States. For those representatives, the future "framework agreement" should contain provisions of a binding character and should not be limited to being an instrument of an auxiliary or residual nature. The framework agreement could set forth model rules of a general nature which would be adaptable to other types of agreements or which could serve as models for negotiation, whereas non-binding recommendations, guidelines and other provisions should be included not in the main text but in such additional instruments as annexes, protocols and appendices, whose procedure for amendment could be simplified to allow for the constant updating required by the progress of research and technology.

68. One representative recalled the reservations his delegation had expressed from the outset with regard to the framework agreement approach. He observed that the elasticity of the two concepts of "appreciable harm" and "equitable utilization" and the prominence given to negotiating and concluding agreements among watercourse States left much room for argument and, therefore, for injustice and that while the special nature of watercourses and the requirements for their optimal and equitable utilization called for mutual adjustments a careful balance nevertheless had to be struck between the need for permanent negotiations between States on the one hand and the credibility of international law on the other, a balance which he was not sure had been achieved by the general structure of the draft articles. In his opinion, the faith placed by the draft in negotiations obscured the reality of power disparities between watercourse States, a reality which should be reckoned with through the inclusion of rules with binding force, as well as provisions on fact-finding and dispute settlement.

2. Comments on draft articles provisionally adopted by the Commission on first reading

69. While in commenting on articles provisionally adopted on first reading most delegations focused on the provisions worked out at the most recent session of the Commission, some made observations on the results of the work carried out on the topic at previous sessions.

[Article 1. Use of terms]

70. Several delegations reiterated their satisfaction at the decision of the Commission to postpone taking action on definitions and to work on the basis of a provisional definitional hypothesis. In this connection, some representatives considered the term "watercourse" preferable to "watercourse system"; one of them observed that the latter term covered tributaries which were entirely situated in

the territory of a riparian State and that it was not so obvious that the obligation to co-operate extended to such tributaries. Another viewed the concept of the "watercourse system" unacceptable inasmuch as it was incompatible with the territorial sovereignty of watercourse States. Still another remarked that adoption of the concept of a "watercourse system" would make the implementation of the future convention costly, particularly for the developing countries. Other representatives expressed preference for the term "international watercourse system" but recognized that it was very important to arrive at a consensus on the point and suggested that the best course was to request the assistance of experts in order to work out a clear and concrete, scientific definition.

Article 4. [Watercourse] [system] agreements

71. As regards paragraph 2, one representative remarked that it was unnecessary to specify that a watercourse agreement should define the waters to which it applied and that the matter should be left to the parties. Several representatives expressed doubts on the word "appre e", and one suggested that for the sake of precision and in order to harmoniz agraph 2 with such provisions as article 12, article 18, paragraph 1, and paragraph 2 of the new article 16 proposed by the Special Rapporteur, the phrase "affect, to an appreciable extent" should be replaced by "substantially affect".

72. With respect to paragraph 3, one representative, while welcoming the retention in the draft of the principle of good faith, felt that repeating that principle in article 4, in article 17, paragraph 2, and in article 20 was unnecessary and might give rise to undesirable a contrario interpretations in relation to other provisions of the draft.

Article 5. Parties to [watercourse] [system] agreements

73. The remark was made that the article, as it stood, granted a genuine right of veto to any watercourse State which was opposed to a new use, through its participation in consultations on an agreement, project or programme relating to part of the watercourse, when the use which the said State made of the watercourse might be affected to an appreciable extent by the agreement, project or programme, and that to prevent or at least delay any development project it was sufficient for the State to prove unilaterally that the implementation of a partial agreement to which it was still not a party could affect appreciably its use of the watercourse. Attention was drawn to the difficulties involved in determining at what point a State suffered "appreciable harm", establishing parameters of an economic, biological, ecological, physical or social nature, and determining the threshold of tolerance for each of them. The view was expressed that the question could only be resolved by referring to the characteristics of each region and that article 5 should therefore make it possible for the watercourse State that had originated the project, programme or use at issue to review with the other States, according to regional characteristics, the need for their participation, which would only be justified to the extent that the State that had originated the project, programme or use in its territory would be unable to prevent the consequences appreciably affecting the use of the watercourse.

74. One representative suggested adding the following paragraph 3 to article 5:

"Watercourse States shall refrain from holding the consultations or negotiations or from becoming parties to the agreements provided for in paragraphs 1 and 2 above if any other State whose territory is also affected by the watercourse in question is excluded in a discriminatory manner from such consultations, negotiations or agreements."

Article 6. Equitable and reasonable utilization and participation

75. Most of the remarks made in relation to article 6 concerned the relationship between that article and article 8. They are summarized in the section devoted to article 8 below (see paras. 78-82).

76. Other comments included the observation that the basic principle outlined in article 6 was an important contribution to the development of international law in the field under consideration and the remark that the concept of fifty-fifty sharing represented one formula by which the criterion of equitable utilization could be fully satisfied and might be the most appropriate formula in some instances. It was furthermore suggested that the latter part of the second sentence of paragraph 1 should read: "with a view to attaining the optimum utilization thereof and benefits therefrom which are sustainable and consistent with adequate protection of the international watercourse [system]", and that the following two paragraphs, which were based on articles 300 and 304 of the United Nations Convention on the Law of the Sea, be added at the end of article 6:

"3. Watercourse States shall fulfil in good faith the obligations assumed under the present articles and shall exercise their rights recognized herein in a manner which would not constitute an abuse of rights.

"4. Any provisions of these articles that may entail responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law."

Article 7. Factors relevant to equitable and reasonable utilization

77. The remark was made that some items from the catalogue of factors contained in the 1976 Convention for the Protection of the Rhine against Chemical Pollution might be added to the list contained in article 7, a list which was based on the Helsinki Rules. As regards existing subparagraphs, it was suggested to add at the end of subparagraph (b): ", particularly the needs of the population dependent on the resources of the watercourse in each State"; to eliminate subparagraph (c), which was viewed as redundant; and to include in subparagraph 1 (d) a reference to "historical uses". It was furthermore suggested to add at the end of paragraph 2 the words "and good-neighbourly relations".

Article 8. Obligation not to cause appreciable harm

78. A number of representatives insisted on the importance of the provision. One of them reiterated that in the view of his delegation the obligation not to cause harm was the corner-stone of the law governing the use of international watercourses and that that principle was so basic as to cast doubt on the need to include the principle of equitable and reasonable utilization and participation in the draft. He therefore welcomed the fact that the obligation not to cause appreciable harm had been given its rightful place in the draft. Another representative remarked that the impressive list of illustrations drawn from State practice, international agreements, case law and declarations of international organizations given in the commentary suggested that article 8 reflected a rule of customary international law or that, if it did not, the principle it embodied deserved to be included in the draft articles in keeping with the progressive development of international law.

79. Several representatives however expressed reservations on the current text, which they found unclear. The question was asked whether what was involved was a rule of State responsibility or liability, and the remark was made that since the article did not address the issue of the legal consequences that would arise if a damaging event occured it was bound to lead to a situation of legal insecurity and to conflict between watercourse States rather than promoting stable relationships among them. It was suggested that more consideration should be given to the general rule that every State had the lawful right to use its territory - including the national sections of watercourses - as it saw fit, it being understood that any limit on that use had to be agreed upon between the States sharing a watercourse.

80. A number of representatives expressed the view that the relationship between article 8 and article 6 called for clarification. In this connection the remark was made that, notwithstanding the importance of the principle that a State should not, except in the context of an agreed régime for a watercourse system, cause appreciable harm to the system, it could not be the case, in the context of a resource which was inadequate to cope with the various demands on it, that a State was obliged not to make use of its own reasonable entitlement to the waters of the river if the effect of its doing so would be to cause harm to other States concerned. Emphasis was placed on the need to make it clear that article 8 was subordinated to article 6, in view of the fact that most law experts considered the principle of equal utilization as the cardinal rule. Surprise was accordingly expressed at the statement in the commentary to article 8 that a use of an international watercourse that could cause harm was prima facie inequitable, a statement which seemed to give priority to article 8 to the possible detriment of equitable use. The matter was viewed as calling for further consideration on second reading.

81. Several representatives furthermore questioned the use of the phrase "appreciable harm". One of them expressed the fear that wording forbidding any utilization which might cause "appreciable harm" to other watercourse States might also rule out uses which caused disturbances of a totally insignificant or inconsequential nature, which was certainly not the Commission's intention. He therefore suggested that it would be more realistic to replace "appreciable" by "substantial", an adjective which had already been used in a number of instruments

/...

dealing with the law of international watercourses, in particular by the International Law Association in the Helsinki and Montreal Rules. Another representative proposed that the word "harm" be left unqualified and that article 7, paragraph 2, be drafted in such a way as to reflect the need for States to negotiate specific agreements on scientifically determined levels of permissible emissions as well as the need to determine more objectively when a detrimental activity or effect was below or exceeded the threshold of appreciable harm. The remark was made in this connection that the dangerousness of non-navigational uses of watercourses could not be determined in an abstract fashion, without considering the specific local conditions, and that it would therefore be better to adopt a uniform liability norm, which would be applicable to all forms of utilization and could be concretized by the States involved according to their particular conditions and requirements. Also in connection with the phrase "appreciable harm", as used in article 8, the remark was made that there was a problem of terminology which affected various expressions: in article 5, affected to an appreciable extent; in article 8, appreciable harm; in article 11, possible effects; in article 12, appreciable adverse effect; in article 16 on the pollution of international watercourses as proposed by the Special Rapporteur, detrimental effects; and in article 17 on environmental protection, serious danger. Those expressions were viewed as ambiguous, and it was suggested that the Commission should try to make them more precise.

82. Other comments on article 8 included the observation that the text should be consistent with related texts in the eventual instrument on liability for injurious consequences as well as the remark that the word "utilize" did not express clearly enough the duty not to cause appreciable harm and might be replaced by words to the effect that States "shall prevent and refrain from uses within their jurisdiction and control". It was also suggested adding at the end of the article, "and shall refrain from carrying out activities in the area under their jurisdiction or control that may entail a risk of causing such harm".

Article 9. General obligation to co-operate

83. Several delegations stressed the importance of the obligation enunciated in this article. One of them observed that if the existence or non-existence of a general duty to co-operate could be discussed there was no doubt that such a duty should be recognized in the domain of the law of international watercourses. Another stressed that co-operation was such an essential condition of the effectiveness of article 6 that a third party system for settling differences relating to the discharge of the corresponding duty should be established. Satisfaction was expressed with the proposed text which, according to one delegation, not only stipulated that States had a general obligation to co-operate but also contained explicit formulations covering the nature and goals of such co-operation as well as its relationship to other basic principles of international law and provided in that respect a clear formulation on the interrelationship between a State's sovereignty over the international watercourses within its territory and the obligation to co-operate with other watercourse States. The reference to the principles of sovereign equality, territorial integrity and mutual benefit was viewed as appropriate, since it made for a better understanding of the general obligation of States to co-operate with each other.

84. Some representatives, however, felt that various elements should be added to the text. Thus it was noted that article 9, as currently worded, did not mention the duty of States to act in good faith and contained no reference to the obligation to refrain from causing adverse effects, either to other States or to areas beyond the limits of national jurisdiction. In this connection it was suggested that a provision be added establishing that watercourse States should take into account their responsibility to ensure that activities subject to their jurisdiction or control did not cause adverse effects to the environment of other States or areas. The remark was also made that in identifying the bases of co-operation as much stress should be placed on the element of interdependence as on sovereignty and that consideration could perhaps be given to adding a reference to mutual respect or to one of the other principles identified in paragraph (2) of the commentary, or, alternatively, if it was felt that the addition of those references would make the text too cumbersome, to omitting all references to such bases of co-operation in the text of the article itself and to dealing with the question in the commentary.

85. Concern was furthermore expressed about the practical operation of an article imposing obligations on States, and it was suggested that the Commission might wish to consider whether the concepts of "optimum utilization" and "adequate protection" were measurable in a practical sense and whether in the current draft articles the consequences of failure to attain the required standards were clear.

Article 10. Regular exchange of data and information

86. A number of representatives considered the article to be a central provision of the draft. Thus it was remarked that the regular exchange of data and information was a prerequisite for the preparation of a régime of co-ordinated action and presupposed an in-depth study of the natural characteristics of the watercourse. It was also stated that regular exchange of data and information, as provided in the article, was necessary in order to enhance the equitable and rational use of watercourses by watercourse States and to avoid harm to other States concerned.

87. While satisfaction was expressed by several representatives at what was termed the careful drafting of the article, some delegations felt that the obligations imposed in the text should be made less exacting so that they might be acceptable to a larger number of States. One of those delegations felt it sufficient to establish a general obligation, leaving it up to the States concerned to determine the modalities for putting that obligation into effect. Another stressed that the exchange of watercourse information should be determined mainly by the need of the watercourse States and that if those States did not require information there was no reason to impose an obligation. The same delegation felt that the information to be exchanged should relate mostly to watercourses already in use or expected to be in use and that only relevant data or information should be exchanged, levaving out as a general rule sensitive information relating to national defence and security. Still another delegation suggested replacing "should" by "shall" to make the article less categorical.

88. Several representatives on the other hand noted with some concern that the obligations prescribed in article 10 were more restricted than those laid down by other global instruments. They felt that the obligation to exchange data and information should extend to scientific, technical, commercial and socio-economic information and data relevant to different parts of the watercourse and to environmental aspects outside the ecology of the watercourse, encompass matters which were likely to have an impact on the marine environment and also cover such major changes in national policies and industrial development as were likely to influence the utilization of the watercourse. Another suggestion aimed at expanding the scope of the obligation under article 10 concerned the inclusion of a reference to the transfer of technologies for controlling and reducing emissions into watercourses.

89. The reference in paragraph 2 to data and information "that is not reasonably available" was supported by one representative, who observed that it gave the provision the required degree of flexibility to enable States to conclude specific agreements for the exchange of confidential data and other sensitive information. On the other hand, the phrase "reasonably available data and information" in paragraph 1 was described as rather imprecise. The view was expressed in that connection that consideration should be given to several factors, including the nature of the relevant data, the question of ownership, national legislation on data protection and differing national standards of data protection which might lead to an imbalance with regard to data exchange. The question was raised as to whether the obligation to process, where appropriate, data and information in a manner which facilitated their utilization by other watercourse States meant that such data and information should be computer-compatible and should be translated.

90. One representative observed that in order to obtain the "reasonably available information" it would be necessary to envisage international co-operation through qualified institutions.

Articles 11 to 21

91. Articles 11 to 21, constituting part III of the draft, were considered satisfactory by some delegations. They provided adequately for notification and reply on measures planned by one State for an international watercourse which might have effects, often adverse ones, upon another State. The remark was also made that although the articles did not as a whole constitute customary international law some had a basis in State practice, striking a fair balance between the interests of States planning the measures and States likely to be affected by such measures.

92. A number of delegations however took a cautious approach to part III as a whole. Some viewed it as unbalanced in favour of the notified State, and therefore unlikely to develop co-operation and promote confidence among States. Attention was drawn to the risk that the requirement to reveal all information and data on a proposed use or to consult or negotiate on all uses of international watercourses might be exploited for political objectives and might grant a power of veto to each watercourse State against any measure planned by another watercourse State.

Emphasis was therefore placed on the desirability of limiting the obligation to notify other watercourse States of planned measures to the case where those measures might cause serious harm to other States and restricting the exchange of information among watercourse States to data which would be helpful in determining whether the planned measures in question might indeed result in serious harm to another watercourse State.

93. Part III was furthermore criticized as being too elaborate for a framework agreement. In this connection, the view was expressed that procedural rules would best be left to the discretion of States when they negotiated watercourse agreements, and the remark was made that even if the rules were residual the very fact that they were included in the draft might have a negative influence on the freedom of States. It was furthermore remarked that the very strictness of the régime might result in loopholes, as illustrated by the fact that implementation of planned measures might proceed without any restrictions if the planning State considered that such implementation was "of the utmost urgency in order to protect public health, public safety or equally important interests", and might also unduly restrict the flexibility needed by States in their contacts, for example by imposing on them rigid delays which while serving a very limited purpose could contribute to creating a negative climate in the relations between the States concerned.

94. Another general note of caution struck in relation to part III concerned the need to reduce to the extent possible the burden on developing countries without compromising the fundamental balance between the rights and obligations of the watercourse States concerned.

95. The question whether the procedures laid down in part III should be triggered by the planned measures as such or by planned measures that might have an appreciable adverse effect upon other watercourse States was also raised in relation to part III as a whole. The views expressed in this connection are summarized in the context of article 12 (see para. 98 below).

96. Attention was finally drawn to the need to harmonize the terminology used in part III (as well as in articles 8 to 10) with similar provisions in the United Nations Convention on the Law of the Sea, namely, articles 190 and 202 ("States shall, directly or through competent international organizations ..."). The remark was made that a measure of flexibility, with proper drafting, would not dilute the contents of the envisaged obligations.

97. As regards individual articles in part III, the view was expressed that article 11 was a welcome addition.

98. In connection with article 12, some representatives endorsed the approach whereby special rules would apply where the planned measures had "an appreciable adverse effect" - a phrase rightly intended, in their opinion, to involve a lower standard than that of "appreciable harm" under article 8 - upon other watercourse States. One representative maintained however that the mechanism for triggering the procedures laid down in part III should be the "planned measures" as such and not planned measures that might have an appreciable adverse effect upon other watercourse States, since that concept implied a subjective assessment.

/...

99. Some representatives commented on the relationship between articles 12 and 18. One representative viewed those articles as striking a fair balance between the interests of notifying and notified States. Noting that one could with some justification ask what protection the proposed system offered a potentially affected State if it was left to the subjective determination of each State to decide whether its planned measures would have adverse effects and whether it was obliged under article 12 to provide timely notification, that representative pointed out that the answer was to be found in article 18 which provided that if a State that was planning measures failed to notify a potentially affected State the latter could request that the former apply the provisions of article 12. Another representative, while agreeing that the procedures set forth in article 18 partly solved the problem that would be posed if a watercourse State failed to give notification of its planned measures, stressed that those procedures would be unhelpful in the case where a watercourse State had no information at all about measures planned by another watercourse State and consequently no possibility of resorting to article 10.

100. As regards article 13, the remark was made that the period of six months envisaged therein might be too short in many cases. The same remark was made in relation to article 15.

101. Article 14 was considered as drafted in somewhat weak terms and the view was expressed that a watercourse State which planned to undertake measures that might have an appreciably adverse effect on other watercourse States was obligated to obtain the necessary data, even when they were not readily available.

102. In relation to article 17, paragraphs 1 and 2, article 18, paragraph 2, and article 19, paragraph 3, the question was whether the obligation of the State planning the measures and of the State which might be adversely affected thereby to enter into consultations and negotiations and the obligation of each State to pay reasonable regard, in good faith, to the rights and legitimate interests of the other State did not merely imply the duty of States to comply with the obligations laid down in articles 6 and 8, and if so, why explicit reference was not made to those articles as had been done, for example, in articles 15, 16 and 19.

103. Other comments made in relation to article 17 included the remark that the term "situation" in paragraph 2 needed to be clarified, the observation that the provisions of article 12 to which reference was made should be specified and the remark that, although the Commission was to be commended for putting some teeth into the duty to consult and negotiate, the text could be further improved in this connection through the addition of more detailed provisions for determining whether the conduct of either the notifying or the notified State constitued a breach of that duty and, possibly, through the establishment of a third party dispute settlement system.

104. Commenting jointly on articles 17 and 18, one representative pointed out that the proposed texts were silent as to the procedure to be followed in the event of the failure of consultations and negotiations. In his view, a possible solution was the inclusion of a text along the lines of article 12 of the 1975 Statute of the River Uruguay. He added that consideration should also be given to the

possibility of appropriate compensation for harm caused by the postponement of the implementation of planned measures, in a case where a request for postponement was made by a watercourse State without sufficient justification or in bad faith. Also referring to the possibility that the consultations and negotiations envisaged in articles 17 and 18 might not bear fruit, another representative expressed interest in the idea of a joint fact-finding mechanism, which could form the subject of an annex to the proposed framework agreement.

105. Referring to article 18, paragraph 3, one representative said that the interpretation therein, aside from being contrary to the well-known principle of permanent sovereignty of States over their natural resources, would not help to promote wide acceptance of the draft articles. He referred in that connection to the Special Rapporteur's discussion of the conclusions reached in the Lake Lanoux arbitration contained in the commentary to article 12.

106. Article 19 was favourably commented upon by one representative, who stressed that the obligation to warn of impending hazards was important enough to warrant a separate article outside the ambit of notification of planned measures and that, where there was particular urgency in conveying such warnings, the usual stipulations concerning the period of notification and reply should not be rigidly applied. Another representative indicated however that he failed to see the point of consultations and negotiations as envisaged in paragraph 3 if the planned measures had already been implemented owing to the circumstances envisaged in paragraph 1.

107. As regards article 20, one representative suggested that its wording be clarified by using internationally accepted terminology, for example, that of the United Nations Convention on the Law of the Sea, with a view to specifying that nothing contained in the draft could be construed as obliging a State party to provide information whose disclosure would be contrary to its vital security interests.

108. Article 21 was approved of to the extent that it introduced a measure of flexibility into an otherwise rigid structure but its wording was considered inadequate because it only stated the obvious. It was suggested to include in the article a more explicit reference to the United Nations, which, like the specialized agencies, had an important role to play not only in situations where there were serious obstacles to direct contacts but in the wider context of providing technical assistance and information on watercourses - a role which had been clearly envisaged at the Mar del Plata Conference and at the Dakar Meeting and could be indispensable for developing countries.

3. Comments on the draft articles submitted to the Commission by the Special Rapporteur in his fourth report

109. In commenting on the draft articles proposed by the Special Rapporteur in his fourth report, most delegations focused on the two points on which the Commission had specifically invited observations from Governments in paragraph 191 of its

report, namely (1) the degree of elaboration with which the draft articles should deal with problems of pollution and environmental protection relating to the law of the non-navigational uses of international watercourses, and (2) the concept of "appreciable harm" in the context of paragraph 2 of article 16.

(a) Degree of elaboration with which the draft articles should deal with problems of pollution and environmental protection relating to the law of the non-navigational uses of international watercourses

110. There was general agreement that the ecology of watercourses and the responsibility of States for water pollution were questions of paramount importance for mankind as a whole. It was stressed that increased co-operation was needed in environmental protection, both bilaterally and within the framework of international organizations, and that environmental problems, because of their international scope, could only be resolved with the collaboration of all countries. Mention was made in this context of the suggestion that an environmental council be set up with a view to facilitating such collaboration. Attention was also drawn to the experience of the United Nations Environment Programme, which dealt with the question of land-based pollution, particularly pollution by watercourses, in its regional programmes, and emphasis was placed on the need to reconcile, as did the principles contained in the Stockholm Declaration, the essential requirements of development with the obligation to protect the environment and to produce solutions that were not only legally viable but also politically acceptable.

111. A few representatives held the view that there was no need to devote a separate part of the draft to the sub-topic of pollution and environmental protection and that the Commission should confine itself to the provisions already drafted - namely, draft articles 2, 4, 6, 8 and 9, which could be supplemented if necessary - and to leave it to the watercourse States themselves to establish more precise and detailed procedures that took account of the specific characteristics of the watercourse in question and the particular problems to which they gave rise. One of the representatives in this group felt that environmental protection and pollution should be left out of the draft under elaboration and form the subject of a separate draft convention.

112. Other representatives felt that the growing need for enhanced environmental protection with respect to international watercourses justified dealing with that matter in a separate part of the draft articles. The point was made that 80 per cent of marine pollution was land-based and reached the seas through rivers and that it would be ironic if the duties accepted by States to deal with the "protection and preservation of the marine environment" (part XII of the United Nations Convention on the Law of the Sea) were to be undermined because of a lack of adequate measures with regard to watercourses. It was also pointed out that what was at stake was a single physical resource that was shared between neighbouring States and that conservation and the adoption of measures to avoid pollution were integral parts of the use of a river - an essential aspect of modern water law that needed to be reflected in the draft articles. As regards the argument that the general principles and the procedural principles contained in parts II and III were sufficient to deal with the problems of pollution and the

protection of the environment, the point was made that there was a need to add something to those provisions. Mention was made in this connection of the possibility that States which were not watercourse States could play a role in the protection of the marine environment through their inclusion, by virtue of a direct interest, among the States that enjoyed procedural guarantees similar to those in part III. Reference was also made to the possibility of encouraging such States to participate in watercourse agreements.

113. Among the representatives favouring the inclusion in the draft of special provisions intended to stress the importance of the problems of pollution and environmental protection, some struck a note of caution in this regard.

114. Attention was on the one hand drawn to the conceptual problems involved. Thus one representative observed that the introduction in the draft of the question of pollution would require a major revision of the texts adopted so far and even of the assumption on which the topic had been dealt with by the Commission since it would move the emphasis from interdependence within an ecosystem to interdependence among different ecosystems and called into question the very concept of an autonomous or even semi-autonomous ecosystem on which the whole draft was based. He observed that non-riparian States - for example, an island State situated thousands of miles away - could suffer appreciable harm as a result of pollution generated in a watercourse and that since non-riparian States could not be easily identified on the basis of mere observation it was difficult to see how the obligations to exchange data and information and those relating to notification could be effectively discharged in such situations. After pointing out that an approach whereby harmed non-riparian States would be subjected to a régime less favourable than the one which watercourse States enjoyed under the draft articles could lead to manifest injustice - thereby demonstrating the inadequacy of a geographic criterion to determine interdependence and showing that the concept of good-neighbourliness was not confined to situations of geographic proximity - he suggested as a possible solution the construction of a less rigorous régime than that currently found in the draft articles, perhaps on the basis of article 123 of the United Nations Convention on the Law of the Sea, relating to co-operation among States bordering enclosed or semi-enclosed seas, adding that in many respects the position of watercourse States in relation to the watercourse was identical to that of States bordering on enclosed or semi-enclosed seas.

115. Emphasis was on the other hand placed on a number of factors which were viewed as inviting the Commission to remain at a high level of generality in dealing with the problems of pollution and environmental protection. Thus one representative remarked that the problems connected with the pollution of international watercourses were regional and that it was illusory to hope to achieve a solution through a general convention. In his view, therefore, the provisions to be included in the draft should be rather an encouragement to resolve the question than rules applicable to it. A second factor which was viewed as militating in favour of a broad treatment of the subject was the general endorsement of the framework agreement approach within and outside the Commission. A number of representatives stated in this connection that the best course of action was to provide only a limited number of articles of a general nature and to leave it to riparian States to adopt more specific and detailed measures on the matter. One of

/...

them pointed out that everything seemed to indicate that the control of any watercourse had to be based on its particular characteristics, determined by mutual agreement between the riparian States, and that it would be unrealistic for the Commission to endeavour to establish general criteria of international scope. Still another argument invoked in favour of a broad treatment of the topic was that environmental protection and the regulation of pollution problems had not yet been sufficiently analysed. In this connection, the view was expressed that, bearing in mind that what was involved was the drafting of the first universal instrument on the subject, a more thorough review of the issue was necessary in the light of existing regulations, particularly as an analysis of the current practice showed that the agreements neither regulated pollution in general nor provided for its total prohibition, which in any case would be impracticable.

116. One representative held the view that the question of whether to have a separate section on environmental protection and pollution was not essential and should be decided in the light of the degree of development that existing provisions might require. He observed that the subject was to be dealt with in terms of rights and obligations of States and that it was therefore to be seen whether each specific rule was applicable to environmental protection and pollution and whether additional rules were needed. He added that the importance of the relevant rules would reside in their content and that their placement in the draft should be decided according to the logic of the text as a whole.

117. Also commenting on methodology, some representatives emphasized the need for consistency in dealing with pollution and the protection of the environment. Thus one representative stressed that any new articles relating to the question would have to be appropriately linked to existing draft articles on the rights and obligations of States. Another representative urged that, as far as possible, there should be harmony between the new draft articles and the relevant provisions of the United Nations Convention on the Law of the Sea. Still another representative, after noting that agreement had not yet been reached on whether harm caused by pollution should be regarded as giving rise to liability based on fault, observed that the question was obviously closely related to the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law and that the Commission should try to ensure a proper interrelationship between those issues in order to avoid inconsistency. He added that his delegation doubted the validity of using strict liability as the basis for liability for appreciable harm by pollution, even though watercourse States were of course free to apply the principle of strict liability in respect of harm caused by watercourse pollution, on the basis of specific international watercourse agreements concluded between them in accordance with draft article 4.

(b) <u>The concept of appreciable harm in the context of paragraph 2 of article 16</u>

118. Observing that the concept of appreciable harm already appeared in article 8 as provisionally adopted by the Commission, some representatives raised the question whether pollution which caused appreciable extraterritorial harm should be treated in the same way as water uses causing appreciable harm which did not involve pollution. Some felt that there was no reason why harm caused by pollution

should be treated differently from harm having another origin and that if the concept of appreciable harm was considered defective it should be analysed not in the context of article 16 but in that of article 8. Other representatives disagreed with that view, pointing out that, whereas with regard to water uses not involving pollution the "no apreciable harm" principle contained in article 8 should be subject to the principle of equitable utilization contained in article 6, State conduct and opinion concerning transboundary water pollution pointed in the direction of the application of a "no appreciable harm" principle which was not subject to the principle of equitable utilization of the waters of an international watercourse, an approach which could be explained by the general recognition of the need to maintain the quality of the water for current and future use.

119. As regards the type of responsibility involved, the remark was made that article 16, paragraph 2, did not specify any more than did article 8 whether what was involved was responsibility for fault or liability arising from activities not prohibited by international law, the result being that everything depended on whether agreement existed on preventive measures, in which case any harm resulting from failure to implement the measures would entail responsibility on the part of the State of origin; or whether no such agreement existed, in which case the issue would automatically be one of liability arising from non-prohibited activities.

120. While one representative felt that the issue of strict liability of States for private activities under their jurisdiction should be explicitly addressed, most of the representatives who referred to the issue agreed with the Special Rapporteur that there was little, if any, evidence that States recognized such liability for water pollution damage which was non-accidental. It was stressed in this connection that strict liability was suitable only for hazardous activities and that in the case of normal industrial activities with harmful effects a certain level of harm would have to be tolerated for the foreseeable future, taking into account the exigencies of interdependence and good-neighbourliness. Most of these representatives therefore ruled out as unrealistic the idea of resorting to the concept of strict liability in the current context. One representative furthermore observed that while a standard of strict liability would ensure compensation for a harmed State, it could, because it was based on the assumption that the activity giving rise to appreciable pollution was not prohibited, lead to a situation where a rich State habitually polluted a watercourse, gave pecuniary compensation and, if the harmed State accepted that arrangement, caused irreparable harm to the watercourse and its environment.

121. Most of the representatives who commented on the issue concurred with the Special Rapporteur that the obligation contained in article 16, paragraph 2, was an obligation of due diligence. They disagreed with the view, held by a few representatives, that the obligation of due diligence as a standard for responsibility for causing appreciable pollution harm had not been clearly defined. Harm must be the consequence of a failure to exercise due diligence to prevent damage, but the mere fact that there was a failure to exercise due diligence did not entail automatic responsibility if harm did not ensue. The question was however raised whether the current formulation of article 16, paragraph 2, correctly reflected the intention of its drafter and whether it was not paradoxical, notwithstanding the fact that international law did not prohibit

/...

all pollution, to provide, as did paragraph 2, that a watercourse State could pollute another watercourse State as long as appreciable harm did not result from this pollution. Preference was expressed in this context for the formulation suggested in paragraph 162 of the report, namely:

> "Watercourse States shall take all measures necessary to ensure that activities under their jurisdiction or control be so conducted as not to cause appreciable harm by pollution to other watercourse States or to the ecology of the international watercourse [system]".

122. The current wording was also viewed as unsatisfactory in that it did not make it clear enough that the obligation which it would impose on States was truly an obligation of conduct and not of result.

123. Some representatives examined the "due diligence" concept from the angle of the burden of proof. The remark was made in this connection that the concept in question could place the harmed State under an unduly heavy burden of proof since only the source State had the means of proving whether or not it had exercised due diligence; it was suggested that the problem could be reduced by shifting the onus probandi to the source State and by providing for fact-finding machinery. As regards the proposition that the concept of due diligence should be linked to the level of development, the delegations which referred to it feared that it might be going too far to condition the acceptance of the standard of due diligence on that linkage. While it was recognized that a State's level of development should be taken into account in determining due diligence, the view was expressed that undue emphasis on that aspect was misconceived: in the first place, there was a definite correlation between the degree of development of a State and the amount of pollution produced in it; secondly, a greater number of developed countries bordered on other developed countries than on developing ones; and, what was more important, there should not be two laws, one for developing countries and the other for developed countries. One representative remarked that, while the standard of due diligence should be considered in the light of the means at the disposal of the source State, an obligation to endeavour to acquire the appropriate means ought to be imposed on States.

124. A number of representatives considered that the concept of appreciable harm, even though it lacked precision, offered the appropriate criterion for determining the threshold of unacceptable pollution of an international watercourse and had the advantage of being widely employed in various international documents on watercourses. The term "substantial", which had been mentioned as a possible substitute, was viewed as inadequate in that it would raise the threshold above the level which had been widely established by State practice; as for the possibility of not qualifying the term "harm", attention was drawn to the fact that in drafting the Convention on the regulation of mineral resource activities in Antarctica an international conference had recently found it necessary to modify the term "harm" in a way similar to the one proposed by the Special Rapporteur. While supporting the use of the term "appreciable harm", the representatives in question recognized that in the absence of specific agreements on scientifically determined levels of emission it was possible to have only a general standard that could come as close as possible to objectivity and that, whatever the criterion finally used, it would

be necessary to establish an appropriate mechanism for the settlement of disputes which might arise between the States concerned when applying such a criterion. It was also recognized that there was a need for consistency in the usage of the term both among the various articles of the draft and in the language used for other topics such as international liability for injurious consequences arising out of acts not prohibited by international law.

125. Other representatives expressed reservations in connection with the term "appreciable harm". Concern was expressed that the adjective "appreciable" did not adequately convey the meaning intended by the Commission as reflected in paragraph 138 of its report and was ambiguous in that it could mean either "detectable" or "significant". It was remarked that the report itself gave two different explanations of the term "appreciable harm", which, aside from appearing in a whole series of articles already adopted by the Commission, was not consistently used in the draft under consideration and in the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. The Commission was therefore invited to reconsider the different uses of the term in the draft articles, bearing in mind that a term which played such an important role in the draft should have a meaning which was clear on the face of the text without reference to explanations in the accompanying report, and that most environmental instruments, among which mention was made of the 1964 Statute on the Lake Chad Basin, the 1971 Declaration of Asunción on the use of international rivers and the 1966 Agreement between Austria, the Federal Republic of Germany and Switzerland, tended to use the word "significant" in preference to "appreciable". It was furthermore suggested to replace the adjective "appreciable" by "substantial" or "serious", and to substitute for the word "harm" the phrase "adverse effects".

126. Still other representatives took a negative position in relation to the adjective "appreciable", which in their view did not provide a sufficiently objective criterion and was too subjective for a universal instrument. The remark was made in this connection that a form of pollution which might cause no "appreciable" harm for irrigation might have catastrophic effects for human consumption purposes.

127. Several delegations commented on what was termed the apparent contradiction in the use of the concept of "appreciable harm" and of the notion of "detrimental effects" in article 16. Some expressed doubts and reserved their position as to the wisdom of maintaining "appreciable harm" in article 16 as the basic concept concerning the obligation of States regarding the environment, after having defined pollution as something that, although "detrimental", "might not rise to the level of appreciable harm" (paragraphs 158 and 159 of the report). Others indicated that the way to reconcile the two concepts was to interpret them as meaning that it was only when pollution entailed detrimental effects exceeding the threshold of appreciable harm that it would be prohibited by article 16.

(c) <u>Other comments made on the draft articles submitted to the Commission by the Special Rapporteur in his fourth report</u>

128. Some of the delegations favouring the inclusion in a separate section of the draft of a few broad provisions on pollution and environmental protection (see

paras. 112 et seq. above) explicitly endorsed the draft articles proposed by the Special Rapporteur on the matter, namely draft articles 16 [17], 17 [18] and 18 [19], while some among the representatives holding the opposite view (see para. 111 above) questioned the appropriateness of enunciating in those draft articles general principles which were in their view already set forth in part II of the draft. Such repetition could be a source of confusion as the same principle carried a different meaning according to where it appeared in the draft convention.

Article 16 [17]. Pollution of international watercourse[s] [systems]

129. Several delegations viewed the definition of pollution in paragraph 1 as too narrow in comparison with other generally accepted instruments, among which mention was made of the United Nations Convention on the Law of the Sea (paragraph 1 (4) of article 1). It was suggested that the definition should identify the effects of pollution and contain an express reference to the effects detrimental to marine life, that it should cover harm to living resources and aquatic life, reduction of amenities and impairment of the quality of water and that it should encompass pollution produced by new technologies and radioactive elements and refer to changes in the river bed and to the modifications of the ecological balance attributable to pollution of the watercourse. Disagreement was on the other hand expressed with the idea of expanding the definition, especially as regards energy, because if the composition of the water was not altered there was no reason to consider that the introduction of energy might constitute pollution.

130. Reservations were expressed about the words "which results directly or indirectly from human conduct" and concern was expressed that the proposed definition did not describe the manner in which the alteration in the composition or quality of the water must have taken place. It was remarked in this connection that water pollution could result from human conduct other than the introduction of certain substances into the water, for example, by a mere alteration of the régime of the water in the form of a change in its volume, velocity or turbulence, and that such changes in the régime of the water would more appropriately be governed by a rule concerning equitable use of an international watercourse than by a rule governing pollution of the waters.

131. Other comments on paragraph 1 included the remark that the words "effects detrimental" should be replaced by the word "hazards"; the suggestion that the phrase "likely to result in" be added at the appropriate place in order to take account of foreseeable risks; the suggestion that the end of the paragraph, beginning with the words "for any beneficial purpose", be deleted; and the suggestion that the definition be moved to the provision on "use of terms".

132. As regards paragraph 2, comments concerning the concept of "appreciable harm" have been summarized in subsection (b) above. Other comments included the remark that the obligation in the paragraph should cover the prevention of pollution, and the remark that the protection should extend to the marine environment and estuaries, taking into account article 207 of the United Nations Convention on the Law of the Sea. One representative furthermore expressed doubts as to the need for

the reference to the "ecology of the international watercourse [system]" and another representative suggested substituting the concept of the "environment" for that of "ecology".

133. Paragraph 3 gave rise to various types of reservations. One delegation withheld its full endorsement of the paragraph as it stood on account of unanswered questions as to where pollution would be dealt with in the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. Another delegation, basing itself on the experience gained in certain regions of the world, expressed doubts as to the effectiveness of the method of preparing lists of substances and species and mentioned the possibility of inviting expert opinion on the matter. Still another delegation viewed the paragraph as too specific. The words "at the request of any watercourse State" gave rise to divergent views: while one representative held that it would be more appropriate to recommend that States should discuss jointly procedures for improving the quality of water than to authorize a given watercourse State to set consultations in motion unilaterally, other representatives felt that the preparation of lists should be obligatory, and they expressed preference for the text proposed by the previous Special Rapporteur. Those representatives were furthermore of the view that the paragraph should contain a provision requiring States to take duly into account the model lists appearing in annexes to the convention, and agreed with the Special Rapporteur as to the merit of singling out certain pollutants, not only toxins but also substances of particular persistency.

Article 17 [18]. Protection of the environment of international watercourse[s] [systems]

134. While some delegations approved of the thrust of the draft article, others wondered whether such a provision had a place in a draft concerning the non-navigational uses of international watercourses, inasmuch as the impairment of the environment which it envisaged did not necessarily result from pollution of an international watercourse. Another basic question raised in connection with the article was that of its precise relationship to articles 16 and 6 to 8. One delegation wondered in this connection whether the obligations laid down in article 17, paragraphs 1 and 2, did not in fact constitute obligations *erga omnes*, differing as such from those contained in articles 16 and 6 to 8.

135. As regards the notion of the environment of international watercourses - a notion which it was said should be examined further - the possibility of including a definition of the term in an introductory article was taken note of.

136. As regards paragraph 1, some delegations expressed agreement with the Special Rapporteur's view that the protection of the environment of international watercourses was most effectively achieved through régimes specifically designed for the purpose. The remark was made in this connection that the adoption of such régimes should be left to the discretion of States and that paragraph 1 should therefore be drafted in less absolute terms. It was recalled in this connection that the draft was intended to become a framework agreement. Other delegations took the view that provision should be made for an obligation on the part of

/...

watercourse States to adopt measures and régimes to ensure protection of the environment of international watercourses and that such a régime should be established and all necessary measures taken to protect the marine environment from degradation or destruction caused through an international watercourse.

137. Several representatives favoured substituting for the obligation to protect the environment the obligation to prevent, reduce and control pollution of the environment, following the approach of other comparable instruments. Some representatives furthermore suggested replacing the term "territory" by the expression "jurisdiction or control".

138. Other comments included (1) the remark that the phrase "take all reasonable measures" was rather weak and could be replaced by "to the extent possible take necessary measures"; (2) the observation that the term "environment" was preferable to the phrase "ecology of the watercourse"; (3) the remark that the appropriateness of the phrase "or serious damage thereof" (also to be found in paragraph 2) should be considered further; and (4) the suggestion that paragraph 1 be made a separate article.

139. In relation to paragraph 2, one delegation wondered whether the question of marine pollution, "including estuarine areas", should have a place in the draft articles, while another delegation took the view that estuarine waters could (at least to a certain extent) be considered part of the environment of an international watercourse.

140. One delegation expressed the view that article 17 should stipulate in a series of paragraphs the measures that watercourse States had to take at the national level and make it clear that any breach on their part of an obligation with respect to the pollution of international watercourses gave rise to international liability. The same delegation added that the principles and rules to prevent and mitigate the pollution of international watercourses should take into account the economic capacity of developing countries and their need for economic development, as well as the costs and benefits of environmental protection.

141. With regard to the question raised in paragraph 172 of the Commission's report as to who could exercise a general right corresponding to the obligation of protection where the ecology of international watercourses was concerned, in other words, which State could be said to have been injured within the meaning of article 5 of part 2 of the draft articles on State responsibility, the view was expressed that either the articles could expressly provide that in the case of a breach of the duty to protect the ecology of a watercourse system any watercourse State which was a party to the articles could be considered an injured State even though it had suffered no direct harm, or they could proceed on that implicit understanding.

Article 18 [19]. Pollution or environmental emergencies

142. It was suggested that the title of the article should read "Emergency action".

143. As regards paragraph 1, it was suggested that the definition of "pollution or environmental emergency" be moved to article 1. Some delegations were of the view that the definition should refer to natural as well as man-made emergencies.

144. With respect to paragraph 2, some delegations held the view that the circle of the States to be notified could be extended to States other than watercourse States that were likely to be affected and also to executive bodies of relevant agreements. Support was furthermore expressed for the suggestion that, rather than being limited to notification, the obligation in paragraph 2 should be expanded to include the obligation of co-operation in minimizing the harm caused by an emergency, and it was suggested that the obligation form the subject of a separate paragraph.

145. As regards paragraph 3, some representatives deemed it advisable for the State in which the emergency had occured not only to take appropriate action but to make the necessary environmental assessments.

146. A number of additions to the article were proposed. Thus, one representative called for the inclusion of a provision concerning the joint preparation and implementation of contingency plans to combat pollution, along the lines of article 199 of the United Nations Convention on the Law of the Sea, and of a provision requiring third States to take remedial action to minimize the adverse consequences of pollution or an environmental emergency. Another representative suggested providing for and making explicit the co-operative mechanisms to prevent, counteract or attenuate the risk of harm resulting from emergency situations. A third representative advocated the inclusion of a provision whereby in cases where the source State failed to take such measures it should be liable for the harm caused to other watercourse States. Finally, a group of delegations proposed the insertion of an additional paragraph on remedial action by third States and the obligation of watercourse States to pay the costs of such measures.

4. Other comments

147. Some representatives mentioned various issues which in their opinion deserved to be taken into consideration by the Commission in its work on the topic. Thus it was suggested that the draft articles should contain a recommendation to watercourse States to establish an authority to be entrusted with the task of administering the watercourse, disseminating information and data and making the necessary arrangements for consultations and negotiations. Gratification was expressed at the inclusion in the Special Rapporteur's preliminary schedule of the questions of the relationship between navigational and non-navigational uses, the security of hydraulic installations and the settlement of disputes. In that context, reference was made to the presentation on the protection of watercourse installations in the event of armed conflict, made by Norway and Sweden in 1983, and it was suggested that the text on that issue be drafted taking due account of Additional Protocol I to the Geneva Conventions, relating to the protection of victims of international armed conflicts. Emphasis was placed on the need to include in the future convention a binding procedure for the settlement of disputes. It was furthermore suggested that there be included in the future

programme of work an item on flood control and another on erosion. Finally, the question was raised as to whether it would be possible to finalize the drafting of the convention without appropriate scientific support, and the view was expressed that the preparation of lists of specific substances called for expert advice.

D. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

1. General comments

148. Several delegations welcomed the progress achieved at the Commission's fortieth session on the draft Code of Crimes against the Peace and Security of Mankind. Credit for that progress was given to the Special Rapporteur on the topic for his remarkable work as well as to members of the Commission for their spirit of compromise.

149. A number of delegations underscored the importance and political and legal significance of the topic in present-day international relations. The drafting of the Code, it was said, reflected the international community's serious concern at flagrant internationally unlawful acts directed against the legitimate interests of peoples and States in various parts of the world. Adoption of the draft Code would create a legal instrument enabling States to combat such crimes collectively and, if necessary, to prosecute and punish their perpetrators according to the gravity of their offences. The adoption of the Code would thus constitute a major contribution to peace, security and legal order and lend new impetus to the implementation of the 1984 Declaration on the Right of Peoples to Peace adopted by the General Assembly (resolution 39/11 of 12 November 1984, annex).

150. It was also stressed that the world was currently witnessing a new attitude favourable to the solution of problems affecting international peace and security; there were clear indications of positive changes in the international situation. The first steps had been taken towards strengthening the role of the United Nations in the maintenance of peace and security and the peaceful settlement of disputes and towards ensuring the genuine pre-eminence of international law. Those developments created a very propitious atmosphere for the work of the International Law Commission on the draft Code.

151. In view of the above, those delegations felt that the work of the Commission on the topic should proceed on a priority basis.

152. While stressing the importance and significance of the topic, some delegations acknowledged the difficulties and complexities involved in it and advanced suggestions as to the best approach to deal with those problems. Thus one delegation said that a reading of the draft Code showed that it drew inspiration from the Preamble to the Charter of the United Nations. If its objectives were to be achieved, a realistic and pragmatic approach must be adopted and controversy avoided. Negotiation on the basis of mutual advantage and collective interest provided a means of achieving those aims. The international criminal system must contribute to promoting beneficial and equitable social development, taking due account of the rights of the individual and of society. It must constitute an impregnable barrier to any desire to undermine the foundations of liberty, democracy, peace and security and have as its objectives the protection of mankind and his environment and the promotion of the fundamental universal aspirations of peoples. Another delegation remarked that, in all its deliberations on the draft Code, the Commission should be consistently guided by the mandate conferred on it by the General Assembly, which was to consolidate all the valuable elements

introduced into international law by the Charter of the Nürnberg Tribunal, while taking into account the new circumstances and demands of the nuclear and space age, the current level of development of international law and the sense of justice of the international community.

153. Reflecting on the unique role the Commission could play in drafting the Code given the realities of the international scene, one delegation noted that the promise of the Nürnberg judgement had not been fulfilled, for, as the memories of the horrible deeds of the Second World War receded, so waned the resolve to elaborate a Code that would make it possible to bring criminals to justice without requiring the defeat of the States of which they were nationals. The reason for this was that the Code, if elaborated, would apply to present-day leaders and heads of Government: it would take an extraordinary sense of justice and an unwavering commitment to the rule of law on the international plane for representatives of States to elaborate a code that could one day apply to their own leaders and heads of Government. Perhaps the only hope lay in an organ, such as the Commission, made up of members acting in their individual capacities. At the same time the difficulties for the Commission of acting in an area which was at the meeting-place of law and politics and which touched everyone's sensibilities and deeply held convictions could scarcely be exaggerated. That said, it could be asserted that the Commission's work on the subject had been successful.

154. Some delegations expressed doubts as to the usefulness of drafting a code of crimes against the peace and security of mankind as well as to some aspects of the direction in which the Commission's work on the topic was heading.

155. Thus one delegation stated that the initiative to draft a code of offences against the peace and security of mankind had been one of the early efforts to revitalize international law after the Second World War. Since then, much of that revitalization had taken place. In that delegation's view, the work of the Commission on the topic had not been marked by success. There had been wide differences on a number of the draft articles and persistent criticism by a number of delegations. The delegation believed that there had been a failure to reassess the need for the exercise of drafting a code of crimes. Such a need had existed when work on the project had begun in 1947. Substantial progress had however been made in the interim in addressing many of the concerns reflected by the Code. Examples were the multilateral conventions expertly defining offences affecting the international community as a whole; the 1949 Geneva Conventions; and in particular the Convention on the Prevention and Punishment of the Crime of Genocide. Given those developments, the need for a code had diminished.

156. Another delegation pointed out that the task of translating rules of conduct of States into penal provisions applicable to individual behaviour might be too ambitious. In its initial phase, the discussion within the Commission had been relatively general and abstract, focusing on problems such as the overall scope of the Code, the kinds of offences to be covered, the application of the Code to the activities of States and the preparation of the statute of a competent international criminal court. The absence of clear guidance on those general questions had obliged the Commission to adopt certain assumptions at the outset of its work.

157. Another delegation stressed that it continued to have doubts on the topic, and it felt that the Commission's work was still far from its objective. From the Commission's report, that delegation had the impression that the Commission was concentrating its efforts in a direction which was particularly difficult as well as legally and politically contentious. It was losing sight of the central problem in that, in order to define crimes that could be attributed to individuals, it was concentrating its attention on the codification of rules of general international law that were well known to be contentious. It was not tackling persistently enough the task of determining the role that individuals played in acts committed by States in violation of the rules which the Commission was so painstakingly trying to define. Draft articles 3, 10 and 11 and article 12, paragraph 1, were just a beginning in that direction. They were insufficient but at least indicated how much deeper the Commission had to go.

158. Another delegation pointed out that some of the definitions of acts constituting crimes against peace presented by the Special Rapporteur raised fundamental doubts. Breaches of obligations between States designed to promote peace could not simply be recast in the form of criminal offences. In many instances, there did not even exist a specific definition of conduct that merited punishment. There was a danger that some States might attempt to impose their views on others by means of criminal prosecution. It was not realistic to entertain the prospect of individual judges deciding on the conduct of States in political matters which were the object of political contention between States. In view of those unsolved fundamental problems that delegation felt that many of the specific matters dealt with by the Special Rapporteur and the Commission were premature.

159. It was also pointed out by one delegation that the very use of the inherently imprecise term "international crime" was indicative of the Commission's imprecision in treating jurisdiction and other issues. Among the categories of offences included in the draft were (a) offences under international law, such as genocide; (b) acts defined by a treaty which States parties were obliged to treat as criminal offences under national law; (c) possibly, acts prohibited by international law but constituting neither crimes <u>per se</u> under international law nor conduct which States parties were required to treat as criminal offences under national law; and (d) "international terrorism", which appeared to be an omnibus phrase for other offences. Also, no provision appeared to be contemplated for the traditional immunities extended to persons such as diplomats or travelling heads of State.

160. Some delegations referred to the scope <u>ratione personae</u> of the draft Code.

161. One delegation was of the view that the scope of the draft should extend not only to Government officials but also to other persons having participated actively in the organization and planning of crimes against peace and to private individuals who had placed their economic and financial power at the disposal of the perpetrators. That would give the draft Code a very important preventive and deterrent role, especially in cases of aggression. In that delegation's view, if the Commission did not establish the criminal responsibility of such persons, certain criminal activities would remain outside the scope of application of the

future Code when by their nature and dangerous consequences they should be regulated by it.

162. Another delegation stressed that the fact that the draft Code was concerned with the criminal responsibility of individuals and not with the criminal responsibility of States carried with it a corollary, in that the implementation of a system of criminal responsibility required a body of rules relating to the intention of the offender, to the various offences which could be relied upon and to such matters as the burden of proof and related evidentiary and procedural issues.

163. Some delegations did not think that criminal responsibility of individuals under the future Code should exclude the international responsibility of States for international crimes committed by their own authorities. One delegation remarked in this connection that while the provisions in chapter I of the draft were generally in line with the decision made by the Commission to confine its work at the current state to international criminal responsibility of individuals, it faced the difficulty in drafting articles intended for chapter II, of determining whether individuals could in fact commit crimes against the peace and security of mankind. Some of the crimes proposed for inclusion, such as aggression, the preparation of aggression and the threat of aggression could be committed only by States or by individuals who abused State authority. That delegation therefore believed that the draft Code would be incomplete and to some extent even ineffective it if did not deal with the responsibility of States in respect of crimes against the peace and security of mankind.

164. A number of delegations referred in general terms to the contents or scope ratione materiae of the future Code.

165. It was generally agreed that the Code should concern itself only with the gravest and most dangerous unlawful activities which carried the most serious consequences and harmed the fundamental interests of mankind. Not all violations of international law constituted crimes engaging the responsibility of the individuals making the decision or issuing the orders to commit the acts in question.

166. It was also pointed out that the crimes that could be labelled "crimes against the peace and security of mankind" and for which individuals could be held responsible under the Code were of two types: wrongful acts (and perhaps "international crimes" within the meaning of part I of the draft Code on State responsibility) committed by a State under international law; and those that did not constitute such wrongful acts because they could not be attributed to States. The latter category, which included certain forms of terrorism, was less complex. To term such acts "crimes against the peace and security of mankind" might serve the purpose of underlining their grave character but did not make them qualitatively different from other crimes for which States had already agreed to establish universal jurisdiction, international co-operation and extradition, such as the hijacking of aircraft, hostage taking and certain acts against the security of navigation. Where the first category was concerned, the qualification as "crimes against peace and security of mankind" was essential in order to avoid the

application of the usual concept of international law according to which individuals were not responsible to other States for acts which they accomplished but which international law attributed to a State. It was thus as important to establish with precision in which cases the act attributed to the State could also be attributed to the individual as it was to define the requirements the act must meet in order to constitute a particular crime. The discussion in the Commission showed the dilemma it was facing: on the one hand, to give to the definition of the crimes the precision required by criminal law, and on the other hand, to seek that precision within the context of rules of international law defining the obligations of States, which were themselves extremely controversial as was clearly apparent in the cases of aggression and intervention.

167. Several delegations stressed the need for express, precise and workable definitions for the acts to be included as crimes against the peace and security of mankind. The Code being concerned with crimes subject to universal jurisdiction which were committed by individuals, it was of great importance that the specified crimes be clearly and precisely defined. In this connection several delegations were of the view that each crime should be spelt out separately in the Code. It was also observed that there existed two ways of achieving the necessary degree of clarity and precision in the definitions concerned. One possibility was to define a crime in terms of its constitutive elements and to add to the definition a list of acts pertinent to the definition, in keeping with the usual practice in criminal law. On the other hand, as it might not always be necessary to list all possible ways of committing a given crime, a definition of the constitutive elements of the crime might suffice. But, it was observed, in this case the Commission should be even more extremely careful in defining the constitutive elements of the various crimes in a precise and restrictive manner, so that misunderstandings could be avoided in the application and interpretation of the draft article in question.

168. Referring to other aspects of the contents of the draft Code, one delegation pointed out that, bearing in mind Article 51 of the Charter of the United Nations, self-defence should be included as a condition precluding criminal responsibility. This delegation also believed that the draft Code should deal with complicity in the context of general principles. In its future work on the subject, the Commission should use the term "complicity" in its broad sense under international law. Moreover, all elements of the issue must be dealt with in the draft Code with the greatest care. Where "attempt" was concerned, the Commission should choose from among the various solutions offered by domestic law and develop an appropriate criterion, but "attempt" should not fail to be included.

169. Several delegations suggested a number of crimes for inclusion in the draft Code. It was suggested that it should include aggression, planning or preparing a war of aggression, threats of aggression, annexation, apartheid, genocide, intervention in the internal or external affairs of States, terrorism, breach of treaties intended to ensure international peace and security, colonial domination, mercenarism, transfer or massive expulsion of populations by force and implanting settlers in an occupied territory with a view to changing its demographic composition. Also mentioned were violations of the rules of war, conspiracy to commit crimes against the peace and security of mankind, direct incitement to commit such crimes and complicity. Ecological crimes were also suggested. Another

/...

proposed inclusion was the use of weapons of mass destruction, in particular, the use or threat of use or first use of nuclear weapons and the use of chemical weapons.

170. With regard to the future status of the set of articles, one delegation thought that they should become an instrument with binding force. Another delegation felt that some aspects of articles 4 and 8 were pointing in the direction of conventional obligations.

171. One delegation pointed out that it would be up to the General Assembly, when it received the full text, to determine whether the work should be continued, and to give the Commission the political guidance so sorely needed.

2. Comments on draft articles provisionally adopted by the Commission on first reading

Article 1. Definition

172. Several delegations were in favour of the deletion of the square brackets so that the words "under international law" would become an integral part of the draft provision.

Article 2. Characterization

173. One delegation expressed support for the article as a whole and in particular for its second sentence.

Article 3. Responsibility and punishment

174. One delegation expressed the view that the element of intent appeared to have been deliberately omitted from the article. Yet, in this delegation's view, intent was normally an indispensable element of a crime under civil-law and common-law systems, a need fully recognized, for example, in the Convention on the Prevention and Punishment of the Crime of Genocide.

Article 4. Obligation to try or extradite

175. Several delegations approved of the article and expressed their satisfaction with it. In support of the article it was said that its particular importance lay in the fact that it made provision for specific ways of implementing the principles laid down in the draft Code. The challenge presented was to provide for a mechanism which defined the obligations of States with sufficient precision to ensure the inevitability of punishment but which, at the same time, was sufficiently flexible to be acceptable to the maximum number of States. In one delegation's opinion, that mechanism should be based on the principle of universal jurisdiction, as embodied in article 4, pursuant to which the State must either

itself try or extradite to another country at the latter's request. Another delegation, also supporting the principle of universal jurisdiction, endorsed the provisions now contained in the article. In this delegation's view, although those provisions did not prejudge the possibility of establishing an international criminal court in the future, it was unrealistic to demand that such a court have exclusive jurisdiction. The establishment of different enforcement mechanisms for the draft Code should be examined carefully. An examination should cover all the legal and practical problems that different variants of an international criminal jurisdiction would entail. That process should, however, not be made a pre-condition for continuing codification work or be allowed to hamper further work on the draft Code, namely, on the material criminal law to be applied.

176. Supporting the article as a whole, another delegation pointed out that the principle underlying it, namely, the obligation to try or to extradite, had been widely accepted in international conventions on the punishment of international crimes. The provision that States should assume their international obligation to try or extradite criminals was necessary for the prevention and punishment of crimes against the peace and security of mankind. The fact that domestic criminal courts currently were responsible for the prosecution and punishment of international crimes should in no way preclude in-depth studies on the necessity and feasibility of establishing an international criminal court for the submission of appropriate suggestions on the matter to the General Assembly.

177. Also in support of the article, some delegations pointed out that while the current state of international law regarding criminal jurisdiction did not involve a direct responsibility of the individual the international community had on many occasions adopted the approach of an indirect responsibility of the individual through the creation of an extraordinary jurisdiction on the part of States (the principle of so-called universal jurisdiction). They cited article 129 of the Third Geneva Convention Relative to the Treatment of Prisoners of War, one of a number of conventions to have adopted that approach. All those conventions had aimed, not at defining crimes to be dealt with by an international criminal court, or at laying down rules on State responsibility, but at intensified international co-operation with a view to ensuring that individuals committing serious offences were brought to justice and, upon conviction by a competent court of national jurisdiction, suffered appropriate penalties taking due account of the seriousness of the offences concerned. These delegations favoured the approach of creating an extraordinary jurisdiction for the States themselves, reflected in article 4, rather than the two other possibilities mentioned in the commentary to that article.

178. Other delegations had reservations on the article as a whole. Thus in the view of one delegation the assumption that the Code should be applied by national courts did not per se provide as firm a basis as it might seem, for the question arose as to which national courts were to be given competence. The concept of "universal jurisdiction" was not complete enough to lead to the formulation of concrete rules. It was also pointed out that the article was at best a framework provision; none the less, it was necessary to examine thoroughly at some point the complex problems of international competence and international judicial assistance which were becoming ever more pressing in the international fight against crime.

/...

179. Another delegation disagreed with the Commission's view that, while it had not developed all of the articles that it might propose on the issue of jurisdiction, it had none the less proposed articles sufficient to establish jurisdiction over the offences to be codified, and that it had established "universal jurisdiction". Regarding article 4, for example, if national courts rather than an international tribunal were involved, it would have to be decided whether one was dealing with crimes under international law or crimes to be established under national law.

180. One delegation criticized the article on the ground that, in its view, individuals who had committed a crime against the peace and security of mankind should be tried and punished first of all in the State where the crime had been committed. The delegation did not support the application of universal jurisdiction, which, in its view, was at variance with the principle that jurisdiction in criminal cases must be vested in the court of the place where the crime had been committed. The delegation therefore also opposed the setting up of any international criminal court.

181. In connection with paragraph 1 of article 4, one delegation suggested that the word "try" should be replaced by "submit the case to its competent authorities for the purpose of prosecution". Another solution, the delegation added, would be to prescribe a series of specific steps which States would have to undertake when an alleged offender against the peace or security of mankind was in their territory.

182. Some delegations remarked that some members of the Commission had considered that the term "an individual alleged to have committed a crime" should be defined so as to ensure that it did not apply to an individual in respect of whom there was no proper basis for trial or extradition. That was, in the view of those delegations, a legitimate concern which should be met by the drafting of the specific rules necessary for giving effect to the principle laid down in the article, whose elaboration had been deferred to a later stage. In practice, the individual referred to in paragraph 1 could be neither tried nor extradited unless sufficient evidence against him was available, the final decision in that regard being taken in the light of the criteria established in the Code. The principle laid down in paragraph 1 thus simply meant that the individual alleged to have committed a crime must be subjected to proceedings which could lead to his trial or extradition. It was also suggested that that wording should be clarified in a separate article on the use of terms in order to ensure that an individual was not extradited or tried on the basis of malicious accusations. In this connection, another delegation, while agreeing that the text might be improved by defining, possibly in an article on the use of terms, the words "an individual alleged to have committed a crime", recalled, however, that in the conventions to which reference was made in the commentary, including one on the protection of diplomatic agents, which had been prepared by the Commission itself, no need had been felt for such a definition. Nevertheless, that delegation felt that such a definition in the Code could be considered a useful addition to the judicial guarantees provided for in article 6.

183. Some delegations supported the current drafting of paragraph 2. It was found to be an appropriate and flexible compromise provision giving, in case of

concurrent requests for extradition, special attention to the request of the State in whose territory the crime had been committed.

184. Some delegations, while not opposing the article, would have preferred that the principle of territoriality be recognized in it in somewhat clearer and firmer terms, by giving a clear priority to the request of the State in which the crime had been committed. This had been the approach taken in a number of international instruments, including General Assembly resolution 3074 (XXVIII) of 3 December 1973 entitled "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity".

185. Some other delegations felt that the article should clearly establish an order of priorities in case of competing requests for extradition. In this connection, one delegation expressed disappointment with the article. It pointed out that although the principle contained in article 4 was no doubt correct the content of the article was modest. The State was given the choice between instituting proceedings and acceding to a request for extradition, and if there were two or more requests for extradition the State was free to choose among them. Too much weight was given to the State in whose territory the individual was present, since in most cases that presence would be accidental, if not sought by the individual for his own reasons. Perhaps the excessive importance given to the jurisdictional powers of that State resulted from the failure to solve the general problems of estabishing a coherent principle governing attribution of such powers to the different jurisdictions that might compete. A clear indication of an order of priorities among jurisdictions had to be inserted in the Code, and the choice between requests for extradition would naturally follow from that indication.

186. Specific orders of priority were suggested by various delegations. In the view of one delegation priority should be given to the State in whose territory the crime had been committed, followed by the State whose interests or the interests of whose representatives had been directly prejudiced, then the State of which the offender was a national. Another delegation said that priority should be given to the State which was the main victim or in which the crime was first committed. Still another felt that priority should be given to the State in whose territory the crime had been committed and to the State which was the principal victim of the crime.

187. In connection with the question of priority, one delegation observed that the provision in paragraph 2 giving priority to the extradition request of the State in whose territory the crime had been committed was not persuasive. In some cases, justice might best be served by returning a fugitive for trial in the country in which he had committed overt acts; in other cases, by delivering him to the country that had suffered most from acts committed elsewhere, as in the case of drugs imported illegally. In other cases again the key issue might be the ability of one State to extradite the fugitive to a third country. In this connection another delegation indicated that, although it was difficult to determine an order of priorities given the different considerations that had to be taken into account, the bases on which jurisdiction was asserted were not all of equal strength. While the primacy of jurisdiction based on the territorial principle was generally

acknowledged, the same could not be said of the protective principle and the passive nationality principle, which some States did not even claim for themselves.

188. In the view of one delegation, in cases other than those in which both the victim State and the State in which the acts had been committed consented to the extradition, the culprit should be extradited to the international criminal court, if such a court were established, or to either of the two States referred to. That would remove the possibility that an inadequate penalty might be imposed by the State in which the culprit was present, thus necessitating a request for extradition by either of the two States most affected. It would also allay the fear that the provisions might leave a loophole by which States might disregard the criminal judgement handed down by another State.

189. Also addressing the question of priorities, another delegation said that paragraph 2 represented a compromise between those who wished to uphold the discretionary power of the State in whose territory the alleged offender was present and those wishing to give preference to extradition to the State in whose territory the crime had been committed. The delegation indicated it would be in favour of the first alternative but would also be willing to accept the second. One example of a provision which might be useful to the Commission in that regard was provided by paragraph 5 of article 11 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, according to which a State party which received more than one request for extradition should pay due regard, in selecting the State to which the offender or alleged offender was to be extradited, to the interests and responsibilities of the State whose flag the ship was flying at the time the offence was committed. A similar formulation might be incorporated in the draft Code.

190. In the context of paragraph 2, some delegations also referred to other procedural questions. Thus, one delegation pointed out that States should be encouraged to extradite individuals for procedural reasons, since the gathering of evidence was usually much easier in the country where the offence had been committed. Besides, experience had shown that States often neglected to prosecute their own nationals. Furthermore, an awareness on the part of potential perpetrators of crimes against the peace and security of mankind that they might not escape extradition to the country where the crime had been perpetrated would increase the draft Code's preventive value. Another delegation indicated that the article should include a reference to co-operation among States in arranging extradition. As with the Convention on genocide, it should also provide that, for purposes of extradition, crimes covered by the Code should be regarded as political crimes. The Code should prohibit the granting of territorial asylum to persons under serious suspicion of having committed a crime against the peace and security of mankind.

191. In connection with paragraph 3 of article 4, delegations expressed their views on the question of the creation of an international criminal court or jurisdiction.

192. A number of delegations supported the idea of establishing an international criminal jurisdiction. It was said in this connection that this would be most appropriate to the nature of crimes against the peace and security and would

guarantee equitable and independent judgements, the certainty of punishment and the efficacy of the draft Code. It was also said that if the international community was not prepared to establish an international criminal jurisdiction it was pointless for the Commission to be engaged in the hasty drafting of a code for the punishment of such offenders. It was also pointed out that, since genocide, apartheid, mercenarism, international terrorism, the taking of hostages, the seizure of aircraft, unlawful acts directed against the safety of civil aviation and offences against persons enjoying international protection were regarded as international crimes, the idea of establishing an international criminal jurisdiction for the same purpose would not be premature. One delegation indicated that it favoured the establishment of an international criminal court enjoying the recognition of Member States and having competence to try both individuals and States, with the power to make binding decisions and to enforce those decisions. Such attributes might not be achieved easily, but without them the effectiveness of such a court would be debatable.

193. Support was expressed for an international court with its own statute and with judges appointed on the basis of their legal qualifications, their moral standing and their status as representatives of the major legal systems. Hope was expressed that in the immediate future the Commission might be able to tackle the task of drafting the statute of an international criminal court. It was pointed out that the Commission could undertake such a task without being specifically requested to do so by the Assembly, as it definitely fell within the Commission's mandate. It was also said that, although the preference for an international criminal court might not have appeared very realistic in the past, the prospects for the establishment of such a jurisdiction were better in 1988 than they had been for a long time.

194. Some delegations, while favouring the idea of an international criminal jurisdiction, pointed out that such an idea could be put into practice in different ways. One possibility was an international criminal court. Another possibility was the establishment of ad hoc or special criminal tribunals for some categories of crimes. It was said in this connection that the same results could be achieved by empowering some courts to try some types of crimes. An effective mechanism of international criminal justice would be a useful element in the general structure of the international judicial organs called upon to preserve the stability and order in the world by the methods particular to them. It was also pointed out that the idea of setting up, with the agreement of States, special criminal courts to hear specific cases could already be found in the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid.

195. In connection with the possibility of creating a regional criminal court with jurisdiction over the crimes covered by the Code, one delegation expressed its doubts as to the usefulness of such a possibility.

196. Some delegations, while not opposing per se the idea of an international criminal jurisdiction, stressed certain conditions to be met, advocated caution in examining the possibiity or underscored the difficulties of the political context in which the establishment of such a jurisdiction would have to take place.

/...

197. Thus one delegation pointed out that the possible establishment of an international criminal court should be done in such a way as not to detract from the competence of national courts in respect of such crimes, and recourse to international jurisdiction should be optional. The precedents established in that field indicated that such an approach would be successful.

198. Another delegation indicated than an international criminal tribunal would not be just another piece of international dispute-settlement machinery. On the contrary, it would be a way of dealing with the question of international jurisdiction, free of the vagaries and risks of national approaches. That was not to say that an international tribunal was a good or a bad idea. It was simply a matter which must prudently be addressed before any decisions about the scope of jurisdiction were taken.

199. In the view of another delegation, one of the most important questions still to be resolved related to the statute of a competent international criminal jurisdiction for individuals. It would be logical to establish an international court, since otherwise the Code might not have the desired effect, quite apart from the problem of divergent interpretations of its provisions by national courts. However, it must also be borne in mind that the topic under consideration was the most "political" question on the agenda of the Commission and that it was intimately linked to the state of international relations, which prompted some degree of scepticism. If relations continued to improve, it might become easier to reach agreement on questions on which opinions were still divided. Time was needed in which to reflect on the problems - some of them quite fundamental - if there was a genuine wish to elaborate a binding legal instrument and not just a declaration. The topic was certainly very important in a longer-term perspective, but it seemed to be of less immediate urgency than some of the other items currently under consideration by the Commission.

200. Another delegation indicated that the question of the establishment of an international criminal court had been on the international agenda for a considerable period of time and was a matter of great interest but very considerable difficulty. Debate continued as to the precise juridical basis of the two international criminal courts actually established in the twentieth century, since both had been created in rather exceptional circumstances at the end of the Second World War. The case for some standing machinery required serious consideration, but there was considerable risk and difficulty involved in establishing further international machinery for the resolution of disputes: such machinery might not be used; it would deflect attention from securing the appropriate exercise of jurisdiction by national courts, which was the method normally chosen to implement international policies in criminal matters. Accordingly, although this delegation agreed that it could be appropriate for the International Law Commission to examine the question of establishing an international criminal court, it did not think that the draft Code should itself include specific provisions relating to such a court. Nor did it believe that the progress which the Commission was making on the item should be retarded or put at risk by the elaboration of what would undoubtedly be a complicated and controversial set of rules, which were properly the subject-matter of a different instrument.

201. Some other delegations pronounced themselves against the idea of an international criminal jurisdiction. They found that the establishment of such a jurisdiction was probably not practicable at the current state of development of international law. They pointed out that while enforcement machinery was imperfect with regard to States it was non-existent with regard to individuals. Only States provided machinery for enforcing the rights and duties of individuals both towards each other and vis-à-vis the State, and it seemed unrealistic to expect a transfer of such a machinery to the international sphere within the foreseeable future. These delegations thus deemed it premature for the Commission to consider the question of preparing a statute of a competent international criminal jurisdiction.

Article 5. Non-applicability of statutory limitations

202. One delegation expressed satisfaction with the article. The delegation stressed that its country was a party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and that its criminal code provided that statutory limitations should not be applicable to crimes against the peace and security of mankind.

Article 6. Judicial guarantees

203. One delegation suggested that the word "minimum" and the phrase "with regard to the law and the facts" should be deleted from the chapeau.

204. Another delegation was of the view that in the article's chapeau it might be better to refer to the "minimum guarantees due to an accused person on trial for a serious offence", which would make it clear that the relevant guarantees applicable under national law in securing due process would also be applicable to offences tried by the court of that country under the Code. The same delegation suggested specifying the guarantees which should be regarded as minimum in relation to prosecutions under the Code, and in doing so to draw on the relevant provisions of the International Covenant on Civil and Political Rights.

205. One delegation stated that the unusual suggestion that seemed to flow from article 6, that an accused might be granted appointed counsel of his own choosing, could probably be cured by more precise drafting.

Article 7. Non bis in idem

206. A group of delegations expressed satisfaction with the general thrust of the article which in their view established the right balance between, on the one hand, considerations of justice and equity tending to safeguard the human rights of the accused person and, on the other, the fact that the principle non bis in idem did not exist as such as a rule of public international law and that there were cases in which a retrial of a person was necessary. It was said in this connection that the Commission in article 7 had tried to mitigate in specific areas the negative consequences of universality. Exceptions to the preclusion of double punishment

were made in favour of the State in whose territory the crime was committed and in favour of the State which was the main victim. Contrary to the proclaimed principle of universality, the article quite rightly made a distinction between States which were directly concerned and others which were indirectly affected.

207. While supporting the article, some delegations made suggestions for its improvement. Thus, some suggested that the article should contain a provision permitting a second trial in the case of new facts or new evidence incriminating a person.

208. Another delegation wondered, in connection with paragraph 4 (b), how it was to be determined which State had been the main victim in cases in which more than one State was involved. One possible interpretation was that the matter would be decided by a court of the State which would want to exercise jurisdiction. The delegation felt that the Commission should express its position on the matter during the second reading, at least in the commentary.

209. Some delegations objected to the article because they felt that it went too far in recognizing the principle non bis in idem in the international sphere. In this connection, one delegation stated that the article exemplified efforts to reach a compromise solution that was intended to please everyone, and hence failed to be fully acceptable to anyone. The main problem lay in paragraphs 3, 4 and 5, which proceeded from a principle which had not yet been recognized by international law. It appeared to be a general practice of States not to recognize a criminal judgement handed down by a court of another State, except under the relevant terms of a treaty. Another delegation also stressed that the non bis in idem principle applied to national law. General international law did not oblige States to recognize judgements handed down by the authorities of other States in criminal cases. A State was obliged to do so only if it had signed an international convention providing for the obligation in question. Account therefore should be taken, added another delegation, of bilateral and multilateral agreements on the execution of judgements.

210. One delegation, in particular, was not convinced by the Commission's reasoning in applying the principle of non bis in idem to all cases, instead of merely to extradition, as was current international practice. In this delegation's view, there were some offences, such as air hijacking, for which many States had jurisdiction. If a person was prosecuted for a hijacking in State A and made his own way to State B, State B was free to prosecute him for the same offence. According to the delegation, there was nothing new with respect to the draft Code that called for a departure from current law in that area. Moreover, paragraphs 2 and 3 of article 7 contained exceptions to the proposed new rule that were themselves questionable, if not objectionable, to the delegation. The article should be revised to apply the rule only to extradition, provided that article 7, paragraph 1, remained unchanged. However, the delegation felt that it would really not be possible to reach a conclusion on the non bis in idem issue until the question of an international criminal jurisdiction had been resolved.

211. Some other delegations also felt that in formulating article 7 the Commission had stretched the principle of non bis in idem too far. In their view, new

decisive evidence, false testimony or a full confession were examples of factors justifying the remedy of a new trial. An absolute rule of non bis in idem might lead to unfairness and injustice. Thus the Commission should continue its deliberations about the exact scope of the principle.

212. One delegation stressed that the lack of definition on the question of jurisdiction was also responsible for the limitations of article 7. The article was too long and included, in a very incomplete form, elements that would more easily and properly be treated under the general question of jurisdiction. The inclusion of the non bis in idem rule in the Code could theoretically be justified by the argument that any court exercising jurisdiction under the Code would be acting not as a "national" or a "foreign" court but as an instrument of a legal community formed by the parties to the Code. However, on practical grounds, and in order for any decision of a court in application of the Code to be above suspicion, it seemed essential that the question of attribution of jurisdiction should be carefully considered in the Code. If the system of priorities indicated in the Code for the exercise of jurisdiction still left room for the exercise of more than one jurisdiction, the parties to the Code could be called upon to decide which court would actually be empowered to hear the case.

213. Summarizing what in its view were the main problems raised by the article, one delegation stated that it gave rise to difficulties in three areas in particular. First, the right balance had to be struck between the requirement of justice and the possibilities of abuse as a means of protecting those accused of crimes; secondly, there were technical and practical problems involved in laying down rules for the operation in individual cases of the non bis in idem principle; and thirdly, there were difficulties relating to the operation of that principle in the event that an international criminal jurisdiction was created. The last possibility would fundamentally change the parameters of the problem, and proper treatment of the topic required a decision in that sense. Until it was decided to establish an international criminal jurisdiction, the discussion could only be provisional.

214. Some delegations expressed their concern at the broad scope of the exceptions to the principle of non bis in idem contemplated in paragraphs 3 and 4. They felt that those exceptions should be more clearly and strictly defined and narrowed in scope so as to ensure the objective application of that crucial rule. Some of these delegations felt that the acceptability of the whole draft might be involved in a correct formulation of the non bis in idem rule.

215. In this connection and referring to the combined possible effect of the exceptions in paragraphs 3 and 4, one delegation pointed out that, as it interpreted the article, an accused person could be tried four times in respect of the same allegation. He could be tried by the courts of State A, where he might be, for a crime for which its national criminal law provided extraterritorial jurisdiction. He could subsequently be tried, for a crime under the Code, by the courts of State B or even of the same State A, neither of them being the State where the act had been commited, or the main victim. He could still subsequently be tried by the courts of both State C, where the act had been committed, and State D, the main victim, again for a crime under the Code. Such a situation might

/...

not happen very often, but the provisions of article 7 permitted it and the likelihood of its happening was enhanced by the provisions in regard to extradition and the non-applicability or applicability of statutory limitations. That raised serious doubts as to whether article 7 was an adequate version of the non bis in idem rule.

216. Another delegation stated that protection of the rights of the accused against whom popular sentiment ran high was just as important as protection of the rights of the accused whose alleged offence aroused no such reaction. If that was ignored, the line separating a second trial from mere arbitrariness would be difficult to discern.

217. With specific reference to paragraph 3, some delegations suggested that the Commission should consider some further modification thereto to reflect the principle that any subsequent prosecution under the Code should be for an offence which was significantly more serious than the earlier offence charged. That could be determined either by some formula relating to the gravity of the earlier charge or by reference to the maximum penalty which could have been imposed.

218. With specific reference to paragraph 4, one delegation stressed that the paragraph, by creating two exceptions, actually reversed the non bis in idem principle in cases where the second court was either the court of the State in whose territory the offence had ben commited or the court of the State which was the main victim of the crime. In this delegation's view, if the Code was to create a genuine system of universal jurisdiction, the decisions of national courts under that system must be respected, at least as a general proposition. If it was desired to give priority to the courts of the State in which the offence was committed, or which was the main victim of the crime, then the appropriate way to do so was to give those courts jurisdictional priority under article 4. Article 4, paragraph 2, correctly pointed out that special consideration should be given to a request for extradition by the State in whose territory the crime was commited but no mention was made of a request by a State which was the main victim. If the intention was to give some priority to the latter State, that should have been done under article 4, paragraph 2. The delegation also stressed that it should not be readily assumed that judicial procedures would be abused, since the whole tendency in the law relating to international judicial assistance, both in the civil and criminal spheres as well as in the area of transnational arbitration, had been towards greater recognition of the decisions of other courts, notwithstanding the possibility of occasional abuses. The delegation therefore suggested that the Commision should limit the exceptions contained in article 7, paragraph 4, to defined situations where a second trial under the Code was justified, for example, in cases in which substantial new evidence had become available since the first trial.

219. Commenting on the above objections made to paragrah 4, one delegation pointed out that the non bis in idem rule was not part of customary international law and that its inclusion in the draft was an instance of progressive development. Seen from that angle, the rule was itself an exception to the general rule which did not prohibit double jeopardy. That being so, the rule could not be treated differently on the basis of the principle on which jurisdiction was asserted. It was difficult

to see why a victim State should be able to dispense with the rule while the State of which the alleged offender was a national should be precluded from retrying him. Although it had no strong view on whether the rule should be embodied in the draft, the delegation believed that if it was included it should be included without exceptions. Furthermore, the presumption of good faith was a cardinal principle of international law. Accordingly, any trial in a particular State should be presumed to have been properly conducted. On the other hand, the non bis in idem rule was not to be found in the conventions relating to different aspects of international terrorism. Since the acts criminalized under those conventions would presumably become crimes under the Code, the relationship between those instruments and the Code in respect to the rule should be further studied.

220. Several delegations expressed support for the provision contained in paragraph 5 of the article.

221. It was said that the paragraph set out the incontrovertible principle of criminal law that there should be no duplication of penalty for the same crime. The paragraph was regarded as an essential addendum to any exception from the non bis in idem principle. It was stated that the paragraph accorded a defendant sufficient guarantee of his basic rights as an individual in the event of a second trial by another court.

222. In the view of one delegation, however, the word "deduct" in paragraph 5 could not meet the requirement of justice, except in the case of closely similar systems of penal law.

Article 8. Non-retroactivity

223. Several delegations supported the article. Speaking generally on the article, one delegation pointed out that the term "acts or omissions" should be used instead of the term "acts", as the crimes under discussion could occur at least as much by omission as by commission. Another delegation pointed out that the article should not constitute an obstacle to punishment in respect of an act or omission generally recognized by international law as a war crime or as a crime against humanity.

224. Referring specifically to paragraph 1, one delegation said that the paragraph's wording might be misinterpreted to mean that the Code could become binding on Member States which had not ratified the Code. In that connection the delegation stressed that ratification of a convention containing penal provisions would, under its country's constitution, require that those provisions should be sufficiently precise to meet the nullum crimen sine lege rule.

225. Several other delegations made special reference to paragraph 2. Some of them supported the paragraph's current wording. It was said in this connection that its wording was appropriate and more precise than that of article 15, paragraph 2, of the International Covenant on Civil and Political Rights, in that it took as its basis the law applicable at the time at which the act in question was committed, rather than less specific "general principles". It was also said that the phrase "was criminal in accordance with international law or domestic law applicable in

conformity with international law" in paragraph 2 validated the independence from national law of offences under the draft Code.

226. Still other delegations, while agreeing with the substance of the paragraph, felt that as currently drafted the paragraph might give rise to difficulties and should be clarified. It was observed in this connection that the Commission had tried to strike a balance but the matter needed further consideration before its proposals could find wide acceptance. Another delegation pointed out that the principle of non-retroactivity contained in article 8 was recognized by many legal systems and should be reflected in the Code. However, since crimes against the peace and security of mankind differed from ordinary crimes, it was important to ensure that perpetrators of the former type of crimes did not escape punishment. The delegation therefore agreed to the exceptions to the principle of non-retroactivity contained in paragraph 2 of the article. However, the concept of "domestic law applicable in conformity with international law" should be formulated more clearly.

227. Still other delegations expressed reservations or misgivings about the paragraph or some of its aspects. Thus, in the view of one delegation the concept of an act which was criminal in accordance with international law or domestic law applicable in conformity with international law was generally conceded to be valid and did not require reaffirmation. Addition of the expression "applicable in conformity with international law" was superfluous, inasmuch as the laws of a State were always in conformity with the rules of international law as embodied in pre-existing conventions to which the State was a party. The delegation would appreciate clarification from the Commission as to those cases covered by the expression so that it could better determine its underlying meaning. Another delegation, noting that the basic rule enunciated in the article was an application of the principle nullum crimen, nulla poena sine lege, said that in one of his earlier reports the Special Rapporteur had noted the divergence of opinion in doctrine on the interpretation of the word lex in the maxim and expressed the opinion that a wider interpretation would do away with the problem. However, it was difficult to see how the restrictive wording "or domestic law applicable in conformity with international law" could be interpreted as a sufficiently broad interpretation of the word lex. It was to be feared that it would open a considerable loophole that would enable criminals to escape being brought to justice.

Article 10. Responsibility of the superior

228. Several delegations supported the article. They noted that it had been formulated on the basis of article 86, paragraph 2, of the 1977 Additional Protocol I to the 1949 Geneva Conventions and that it was consistent with the Nürnberg principles. One delegation pointed out that the article demonstrated a simple presumption of responsibility, and was thus acceptable. It was entirely acceptable that the official position of the individual committing the crime should not constitute a justification or an excuse attenuating responsibility.

Article 11. Official position and criminal responsibility

229. Several delegations supported the article. One delegation remarked that article 11 on the relationship between official position and criminal responsibility should be regarded from the standpoint of the attribution to individuals of crimes against the peace and security of mankind. Another delegation, while admitting that the article rightly proceeded from the assumption that the official position of a person did not automatically relieve him of criminal responsibility, expressed reservations concerning some aspects of the commentary to the article. The conclusion in the commentary that an official position could not confer any immunity on the person concerned seemed to go very far if the purpose was to preclude existing rules on the immunity of certain high officials from courts of foreign States. It was inconceivable that judicial authorities could take action against foreign heads of State still in office on the ground that they had allegedly committed crimes.

Article 12. Aggression

230. All the delegations which spoke welcomed the decision of the Commission to initiate with the crime of aggression in article 12 the list of crimes against peace within the draft Code. That was entirely appropriate, as aggression constituted an extremely serious crime in view of its potentially catastrophic consequences for the whole of mankind.

231. All delegations also agreed that the Commission had been right in taking as a basis for its work the Definition of Aggression adopted by the General Assembly in its resolution 3314 (XXIX) of 14 December 1974.

232. Several delegations indicated that although the above-mentioned Definition could serve as a basis, its complete transcription or incorporation into the relevant provisions of the draft Code was not possible as the Definition was a political document whereas the draft Code was a legal document which was intended to be implemented by a judicial body. Furthermore the Definition of Aggression applied to the conduct of States whereas the draft Code was intended to regulate the conduct of individuals.

233. One delegation considered that the definition of aggression laid down in article 12 was rather narrow, since it dealt only with armed force, whereas there were other forms of aggression - for example, economic aggression - to which the Commission should devote greater attention. International economic interests were interlinked to such a degree that a State, or a private entity acting either on the State's behalf or under its cover, could trigger a serious crisis in another State's economy. For example, financial manoeuvres on commodity exchanges carried out by States through certain powerful economic and financial entities could lead to the collapse of a third State's economic machinery. Such manoeuvres could be described as aggression, and the individuals carrying them out could be described as criminals.

234. Most delegations concentrated their observations on specific paragraphs of article 12.

235. Speaking generally on paragraph 1, one delegation stated that it represented an initial attempt to deal with the problem of individual responsibility for aggression. It clearly recognized that the question was not simply whether a State had committed aggression but whether a particular person was to bear individual criminal responsibility in relation to that violation of international law. The article was clearly not intended to cover the acts of individuals not acting on behalf of the State, and thus needed to be supplemented by the addition of provisions dealing with attribution for the purposes of paragraph 1. Another delegation pointed out that the necessary link between the acts of a State and those of an individual was established by paragraph 1.

236. One delegation, stressing that the Commission had correctly adopted the essentials of the Definition of Aggression, pointed out that the Commission also had to establish a link between State and individual responsibility, so that an individual could be held accountable for a crime characterized by acts that normally could be committed only by a State. The concepts embodied, but not completely developed, in the Charter of the Nürnberg Tribunal provided a basis for the attribution of responsibility to individuals for crimes constituted by acts of a State. An individual would be responsible for having contributed, as a leader, organizer, instigator or accomplice, to the commission of an act. That contribution - and it must be an important one - would be the criminal act for which he should be tried and punished. The same reasoning might be applied to other crimes, in particular, crimes against peace.

237. Several delegations expressed reservations concerning paragraph 1. In the view of some of them, the idea contained in paragraph 1 was already contained in article 3 which said that any individual who committed a crime against the peace and security of mankind was liable to punishment. These delegations felt that from the point of view of legislative technique each article in chapter II of the Code should be limited to the definition and characterization of a given crime. In the view of one delegation, it was advisable to draft a more general provision applying either to all crimes or to a category of crimes covered by the draft code. If the first alternative was accepted, the language of article 3 could be modified to bring out more clearly the idea currently contained in paragraph 1 of article 12, it being understood that the principle did not apply only to the crime of aggression, but to every crime in the code.

238. Paragraph 1 was also criticized for its contents. It was observed in this connection that the substance of the phrase "any individual to whom responsibility for acts constituting aggression is attributed under this Code" was very indefinite and required clarification. In this connection, one delegation pointed out that that phrase was a fundamentally inappropriate predicate for determining the existence of a criminal offence. The implication that all persons performing some act in furtherance of the aggression would appear to be culpable even if they were responding to prima facie lawful orders and their conduct was in compliance with the Geneva Conventions, seemed excessive.

239. Several of the above-mentioned delegations supported the deletion of paragraph 1.

240. In connection with paragraph 3, one delegation pointed out that it did not clearly understand the intent behind the words "prima facie" in the paragraph. Although it was true that the Charter conferred on the Security Council the primary responsibility for the maintenance of international peace and security, that did not mean that the Council had exclusive competence to determine whether aggression had taken place. Aggression was a matter of fact and of law whose existence was independent of the Security Council's determinations. It was to be feared that paragraph 3, as currently worded, might introduce undue political considerations on points which could be established by the courts.

241. In connection with paragraph 4 of the article, most of the speakers were in favour of deleting the words "in particular" so as not to give the impression that there was uncertainty about the definition of aggression and about what acts were encompassed by the Code and so as to avoid the risk of the Code's not being uniformly applied, particularly if it was decided that national courts should enforce it. It was pointed out in this connection that the words raised the question of enabling national courts to characterize as aggression acts other than those listed in paragraph 4. To accord such a faculty to national courts would be inadmissible, for it would be in conflict with the basic principle of criminal law nullum crimen, nulla poena sine lege. The characterization of crimes and the establishment of penalties was within the competence of the legislature and not of the judicial authority, which had merely to apply the provisions laid down by the legislature. It was also said that criminal law should not be the subject of conflicting interpretations and that the types of crimes should be clearly defined. On the other hand, in the view of one delegation, since the provisions of the Definition of Aggression could not be exhaustive for national courts, the phrase "in particular" in paragraph 4 should be retained. Another delegation pointed out that, given the non-exhaustive nature of the 1974 Definition of Aggression, the retention of the words "in particular" left open the possibility for national courts, or the international body to be established, to regard as aggression acts other than those listed in General Assembly resolution 3314 (XXIV).

242. Conflicting views were expressed with regard to bracketed paragraph 5. Some delegations were in favour of retaining the paragraph and consequently of deleting the square brackets therefrom. It was pointed out in this connection that it should not be open to a national court to determine, contrary to a determination of the Security Council, whether an act of aggression had occurred. One delegation explained that the paragraph meant that when the Security Council made a determination as to the existence of an act of aggression no national court might determine otherwise. A national court could not rule that an individual was involved in an act of aggression once the Council had decided that there was no act of aggression. However, should the Council determine that such an act existed, the national court was not limited in assessing individual involvement.

243. Another delegation stressed that, under the United Nations Charter, the Security Council bore the primary responsibility for the maintenance of international peace and security. Since under Article 25 of the Charter, Member

/...

States had the obligation to carry out the decisions of the Security Council regarding the existence or non-existence of aggression, such decisions should also be binding on the domestic courts of Member States. The brackets around paragraph 5 should therefore be deleted and the paragraph maintained.

244. It was also pointed out that, not without reason, Article 39 of the Charter made it the responsibility of the Security Council to determine the existence of any act of aggression. The armed conflicts of recent decades showed that the question whether an act of aggression had been committed, and by whom, had nearly always been controversial. So long as that question had not been settled with binding effect on the States concerned, the matter could not be left in the hands of any judge in any country. In fact, the question might be asked whether any State proceeding to prosecute persons involved would not be interfering in a conflict between other States, in contravention of international law. In any event, there was a danger that States would wrongly use such means in pursuit of their own political aims.

245. One delegation in favour of the purposes behind bracketed paragraph 5 was of the view that the paragraph would state in clearer terms what it intended to convey if it were rephrased as follows: "The existence of an act of aggression, in any proceeding before a national court, can be assumed only on the determination of the Security Council."

246. Other delegations questioned some implications of bracketed paragraph 5. One delegation pointed out that from a conceptual point of view aggression could exist without a prior finding by the Security Council. Article 51 of the Charter authorized the exercise of the inherent right of self-defence before measures had been taken by the Council. However, even if the crime of aggression could exist without a prior finding by the Council, it must be admitted that there were too many possibilities of abuse. National courts should be bound by a positive finding made by the Council. Nevertheless, further thought should be given to the interplay between a State's obligation to accept and carry out the decisions of the Council under Chapter VII of the Charter (an obligation under Article 25), on the one hand, and the independence of the judiciary, on the other. The real problem was when there was no finding by the Council not so much because of the use of the veto but rather because of the Council's tendency to act as fireman and not as judge. Although it was difficult to be certain in the matter, the delegation inclined to the view that, in the absence of a prior determination by the Council, national courts and, with more certainty, an international criminal court should be able to prosecute for the crime of aggression.

247. Another delegation stressed that it was not necessary to link the characterization of an act as constituting aggression with the prior determination of aggression by the Security Council. It went without saying that when the Council recognized the existence of aggression in a given situation the national judge and a fortiori the international judge were bound by that determination. On the other hand, where the Council refrained for political reasons from giving a clear opinion concerning an act which had all the characteristics of aggression, that should not prevent the judge from ruling on the facts.

248. It was observed by another delegation that, although the majority of States were in favour of strengthening the role of United Nations organs, particularly the Security Council, they did not necessarily go so far as to accept the possibility that decisions of the Council could serve as a direct basis for the sentencing activity of courts.

249. Some delegations proposed the deletion of paragraph 5. One of them stated that the paragraph was devoid of practical usefulness since the Security Council was very often paralysed by the Charter provision relating to the right of veto. Another delegation could not support the inclusion of the paragraph which, in its view, would subordinate the decisions of national courts to those of the Security Council with respect to the existence or non-existence of aggression.

250. On paragraph 6, one delegation was of the view that it was self-evident and not essential to the definition of aggression.

251. With respect to paragraph 7, the same delegation pointed out that the notion that wars of national liberation must not be considered aggression should be formulated in a more direct manner. The first part of the paragraph could be deleted and the second part expanded by the inclusion of a reference to the right to self-determination.

3. Comments on acts other than aggression proposed for inclusion in the part of the draft devoted to crimes against peace

Threat of aggression

252. A number of delegations supported the proposal of the Special Rapporteur to include in the draft Code a provision incriminating the threat of aggression, as a separate crime against peace. It was said in this connection that such an inclusion would correspond to the principle of the prohibition of the threat or use of force as laid down in Article 2, paragraph 4, of the United Nations Charter, in the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations and in other international instruments such as the 1954 draft Code prepared by the Commission. The inclusion of the threat of aggression was also justified as an important means for the deterrence and prevention of aggression. The threat of aggression, in the view of other delegations, was sometimes more frequent than aggression itself, had the same objective as that of aggression itself and could result in the same serious consequences. Although the modalities employed and the degrees of damage caused could differ between aggression and the threat of aggression, both endangered international peace and security.

253. Concerning the characterization of the threat of aggression, one delegation pointed out that it could take the form of coercion and intimidation, troop concentrations or military manoeuvres near a State's borders or general or local mobilization for the purpose of exerting pressure to make the threatened State yield to demands.

254. Some delegations referred to the wording of a provision laying down the threat of aggression as a crime against peace. They stressed that confusion between aggression and mere verbal excesses should be avoided and that the language should be as precise as possible, so that a State could not use the pretext of a threat of aggression to commit aggression itself. The draft Code, it was also said, should clearly distinguish between the threat of aggression and preparation of aggression on the one hand, and preparation for self-defence on the other. It was also suggested by one delegation that in clarifying the relevant draft article the final text should include many examples to guide judges in reaching decisions.

255. One delegation pointed out that the threat of aggression was no less condemnable when it was of an economic nature. In this connection, another delegation wondered whether the establishment of a permanent economic blockade by one State of a neighbouring State with the intention of undermining that State did not constitute a crime against the security of mankind.

256. Other delegations did not consider that the threat of aggression as such should be included as a separate crime in the draft Code. It was said in this connection that the threat of aggression was not in itself a crime against peace and was punishable only when initial steps were taken to carry it out, thereby reflecting criminal intent. With some exceptions, another delegation said, a threat which was not followed by some specific action should not be regarded as a criminal act.

257. Placing the question of threat of aggression within a broader context of the definition of a crime against the peace and security of mankind, one delegation stressed that in order to qualify as a crime of this nature an act must on the one hand be very serious and include a mass element and, on the other, have a certain motive. It believed that on the question of definition it was desirable to concentrate on legally definable crimes; prudence demanded that controversial areas or those which gave rise to abuse be avoided. In that regard, the Commission had in the past included the threat of aggression in the list of crimes against the peace and security of mankind. That concept had undergone a radical change since it was included in article II, paragraph 2, of the 1954 Code. Subsequent State practice and the experience of the United Nations itself indicated that the inclusion of the threat of aggression in the Code would be counter-productive. If the threat of aggression was included, that would automatically give rise to the exercise of the right of self-defence, with the catastrophic results that could be easily imagined. Besides, that right would not remain a right of self-defence, which was subject to certain limitations imposed by Article 51 of the Charter, but would become a right of self-preservation. It was therefore essential for the Commission to examine the question carefully.

Annexation

258. A number of delegations pronounced themselves in favour of including annexation as a separate crime against peace within the draft Code, notwithstanding the fact that annexation was contemplated in article 3 (a), of the Definition of Aggression and in article 12, paragraph 4 (a), on the crime of aggression, provisionally adopted by the Commission. It was remarked in this connection that

there had been cases of annexation not directly connected with the use of armed forces. In such cases, article 12, paragraph 4 (a), might not, as it stood, provide for the prosecution of the perpetrators. Since annexation could result from the use or threat of use of force, annexation by whatever means should be viewed as a crime against peace.

259. One delegation, in particular, stressed that the question of the possible inclusion of annexation as a separate crime required further consideration. If the concept was accepted, the relevant wording of the 1954 draft Code would seem to be the most appropriate. Annexation, as a crime, could result not only from the illegal use of force but also from the threat of force. In addition, there might still be a legitimate question as to whether to include in the draft Code territorial cession as a result of force or the threat of use of force. Any future formulation concerning annexation and, perhaps, territorial cession should be without prejudice to the Charter, including its provisions concerning the lawful use of force.

260. Another delegation, elaborating extensively on the notion of threat of aggression, felt that all the rules formulated in 1954 should be reproduced in the Code, although they might have to be adapted to present-day requirements, by eliminating only what changed circumstances truly warranted. That delegation's remarks were particularly true of annexation, which should appear in the draft Code as a separate crime against peace. The relationship between the draft Code and the Definition of Aggression was quite different, in the delegation's view, from that between the present draft Code and the Code of 1954. The acts enumerated in the Definition of Aggression were to be considered as guidelines designed to help the political organs of the United Nations and States to determine whether aggression existed in a specific case. They had not, however, been qualified as crimes against peace. The delegation concurred with those members of the Commission who considered that annexation should be regarded as a crime against peace and as such should be dealt with in a separate provision in the draft Code. The various cases mentioned in the Definition of Aggression must be thoroughly examined in order to determine whether they should be incorporated into the draft Code as crimes against peace and, if so, in what form, for what might be an adequate guideline for the political qualification of an act as aggression was not necessarily valid for determining that a crime against peace should be included in the draft Code. The acts set forth in the Definition of Aggression should therefore not automatically be qualified as crimes against peace. The forcible annexation of a State or of a part thereof by an aggressor was undoubtedly a serious breach of the peace and should thus be provided for in the Code. But such annexation was preceded by the invasion of foreign territory. If the invasion evoked only weak protests and was for all practical purposes accepted, as in the cases of Austria and Czechoslovakia in 1938 and 1939, the aggressor concluded the series of violations of international law with the annexation of the territories occupied, hoping that time would consolidate his conquest. History had shown that this might encourage further acts of aggression against other countries.

261. On the other hand, there was one delegation to whom it did not seem necessary to include annexation as a separate crime in the draft Code, since it was already covered by paragraph 4 (a) of article 12, as provisonally adopted, which

/...

characterized it as an act of aggression. To this delegation, it might be desirable to expand the scope of paragraph 4 (a) by including a reference to the threat of force.

Preparation of aggression

262. Some members of the Commission did not believe that the preparation or planning of aggression should be included as a separate crime in the draft Code. They felt that the notion was rather vague and thought that it would probably be difficult to draft with the required precision any provision relating thereto. They also felt that it would be very difficult to make a clear-cut distinction between preparation of aggression and preparation for defence. Some of these delegations felt that the notion of preparation of aggression should be covered by the notion of threat of aggression.

263. Most of the other delegations which spoke on the question were in favour of including the preparation or planning of aggression as a separate crime within the draft Code. It was said in this connection that the concept of preparation of aggression had already been reflected in the Charter of the Nürnberg International Military Tribunal and in the Charter of the International Military Tribunal for the Far East as well as in the Nürnberg principles. Now, in the nuclear age, it might be even more significant as a deterrent to activities entailing an incalculable risk. It would rightly facilitate the incrimination of individuals whose activities were essential for the launching of a war of aggression. The fact that the concept was elusive was not a valid argument for not including it in the Code. It was possible to identify various elements of the preparation for aggression. Both the Charter of the Nürnberg International Military Tribunal and the Charter of the International Military Tribunal for the Far East contained clear stipulations on preparation of aggression, and the criminal law of many countries provided that preparation for a criminal offence was itself a crime. The inclusion in the draft Code of preparation of aggression as a separate crime would be conducive to the maintenance of international peace and security, deter potential aggressors and prevent wars of aggression.

264. Some delegations, while supporting the inclusion of a specific provision in the draft Code on preparation of aggression, acknowledged that the concept warranted precise definition and that additional considerations needed to be introduced in order to clarify it. It was not always easy to differentiate between aggressive and defensive preparations; yet criteria did exist. In this connection, one delegation indicated that acts constituting planned aggression would, for example, include the categorical refusal to settle disputes by peaceful means, warlike propaganda, military stockpiling in excess of defensive needs and the planning of offensive operations. Another delegation, recalling paragraph 225 of the Commission's report, said that preparation of aggression consisted of "a high degree of military preparation far exceeding the needs of legitimate national defence; the planning of attacks by the general staff; the pursuit of foreign policies of expansion and domination; and persistent refusal of the peaceful settlement of disputes". In the delegation's view, it would be hard to find more persuasive language to justify the inclusion of preparation of aggression in the Code as a separate crime. The necessary elements of the crime of preparation of

aggression were criminal intent and the material element of preparation, while in the case of threats of aggression the actual threats could speak for themselves, without there being a need to prove criminal intent.

265. One delegation stressed that it was essential to include in the draft Code the preparation and planning of a war of aggression. Individual responsibility for that crime under international law was already an integral part of the Nürnberg principles. In the delegation's view, it was now more imperative than ever to define the planning and preparation of a war of aggression as a crime and to establish individual criminal responsibility for it. All individuals who had the means, including economic means, to plan and prepare aggression must be aware that such acts constituted crimes against peace. It was irrelevant whether the act of planning and preparing a war of aggression was included in the draft Code separately or under the heading of "aggression", which would cover all related acts, including warmongering and war propaganda. The draft articles submitted so far by the Special Rapporteur on crimes against peace did not clearly establish individual criminal responsibility. Article 12 provisionally adopted by the Commission represented an improvement in that regard, but paragraph 1 of that article should be reworded in order to obviate the need to declare every individual involved in an act of aggression, including ordinary soldiers, guilty of a crime against peace. It was important to identify clearly the circle of individuals who owing to their political, military or economic powers had the means to perpetrate acts connected with the planning, preparation and conduct of a war of aggression, and who should be held responsible for the crimes in question.

Sending of armed bands into the territory of another State

266. Some delegations shared the Commission's view that, since the organization or toleration of armed bands within the territory of a State for the purpose of incursions into the territory of another State had been included among the acts constituting aggression both in the 1974 Definition of Aggression and in article 12 provisionally adopted by the Commission, there was no need for a separate provision dealing with them.

267. Another delegation stated, however, that such a form of aggression had been prohibited by international law for a long time. Such acts should be incorporated separately in the draft Code and a separate draft article should be devoted to each.

Intervention

268. Most of the delegations which spoke on the question were in favour of including intervention as a crime against peace, although many acknowledged the difficulties involved in defining the notion. They pointed out that the rule of non-intervention had become part of customary international law. It was a deep-rooted and universally accepted principle of international law and had been incorporated in several international documents such as the Charter of the Organization of American States and various declarations and resolutions adopted by the General Assembly. The importance of including this crime in the draft Code also arose from the fact that intervention had become one of the most common forms

/...

of coercion of sovereign States. It represented in its various forms an encroachment on the political independence of a foreign State and a violation of its sovereignty. One delegation stressed that arbitrary and arrogant interference in the internal affairs of a State in disregard of its independence and sovereignty constituted a violation of international law.

269. Some delegations endeavoured to characterize intervention in its constituent and typical elements. Several addressed first some terminological questions. They stressed that the term "intervention" should be reserved for wrongful acts and should not be applied to the influence exercised during normal relations. They questioned the need to make a distinction between lawful intervention and wrongful intervention. The term "intervention" had the connotation of wrongfulness, and normal relations between States which were not characterized by coercion did not come under intervention. Furthermore, the direct use of armed force by a State against another State was more a matter of aggression than of intervention. In this connection, one delegation said that this raised the question of acts falling into more than one category of criminal conduct outlawed by the code. In such circumstances the Code, following the precedent of domestic law, could give the court responsible for applying it competence to decide on the characterization to be used in each particular case.

270. Some delegations stressed that the central element of intervention was the idea of coercion that was an obstacle to the free exercise of sovereign rights by a State. Consent negated coercion, said one delegation, but for that to be so the consent had to be freely given. It was in that context that the legality of what the commentary referred to as "intervention by consent" or "intervention by request" must be examined.

271. Several delegations also were of the view that only the most serious forms of interference should be covered by the draft Code, namely, those which undermined the sovereignty of a State, constituted a prelude to aggression or constituted a direct attack on the sovereignty or stability of a State. Given the different modalities, motivations, degrees and consequences of intervention, it would be unrealistic, according to one delegation, to stipulate that all acts of interference were crimes against the peace and security of mankind.

272. Some delegations were of the view that the concept of intervention should also encompass coercive measures of an economic or political character. They recalled in this connection article 2, paragraph 9, of the 1954 draft Code and article 18 of the Charter of the Organization of American States.

273. One delegation took the view that the definition given by the General Assembly in its resolution 2625 (XXV) of 24 October 1970, containing the Declaration on Principles of International Law concerning Friendly relations and Co-operation among States, should be considered the basis for a definition of the concept of intervention in the draft Code.

274. Another delegation believed that the definition of intervention should be as broad as possible so as to cover all violations of the sovereignty of States and of the rights of peoples to self-determination.

275. Commenting further on the subject of intervention, one delegation observed that the question arose as to the extent to which an international organization which under its constituent instrument had the power to take certain action in relation to its member States which were in breach of that instrument could take such measures without violating the principle of non-intervention. In the delegation's view, the response would be negative if the principle was considered a principle of jus cogens.

276. Several delegations expressed their preference for the second alternative of paragraph 3 of article 11 presented by the Special Rapporteur. It was pointed out in this connection that it was more comprehensive and thus more appropriate in the type of international instrument in preparation. It was also said that the second alternative seemed to offer better prospects for the definition of intervention as a crime against the peace and security of mankind.

277. In connection with the second alternative for paragraph 3 of article 11, one delegation observed that the notions of "disturbance or unrest" and "activities against another State" should be clarified.

278. Some delegations, underscoring the difficulties, complexity and delicate nature of the subject of intervention, advocated extreme caution in dealing with it and thought that the subject required further in-depth consideration by the Commission. One delegation in particular noted that intervention was too vague and general a notion to be considered in all cases a crime against peace and felt that neither the first alternative, which was too general, nor the second, which in any case did not take into account differences in degree, appeared to clarify the question.

Terrorism

279. A number of delegations supported the inclusion of a provision on terrorism in the draft Code. It was pointed out in this connection that international terrorism was a very serious and complicated issue for the international community. Apart from the tragic toll in human lives and the disruption of social and economic development, international terrorism imperiled the security, independence and territorial integrity of States and seriously jeopardized international peace and security. It should thus find an appropriate place in the list of crimes against the peace and security of mankind, and an accurate and comprehensive definition should be provided by the Commission. In that connection, it should be borne in mind that in the previous two decades international terrorism had reached new dimensions and emerged in different forms, with State terrorism as its most harmful and deadly manifestation. Terrorist acts on a large scale and using modern means had been perpetrated with the aim of domination, or interference in the internal affairs of States, and any definition should pay due attention to that aspect of the problem.

280. It was understood that terrorism confined to a State, without foreign support, did not fall within the purview of the draft Code, at least within that of the chapter on crimes against peace.

/...

281. Some delegations believed that only State terrorism should be covered by the draft Code, namely, State-supported international terrorism involving massive interference or intervention in the affairs of another State. It was noted in this connection that State-organized or State-directed international terrorism constituted a crime against peace only under certain circumstances, namely, when the harm it caused was of uncommon gravity and intensity.

282. Other delegations felt, instead, that the draft Code should also cover other forms of international terrorism such as terrorism by groups or organizations operating at the international level.

283. In this connection, several delegations referred to the problem of the definition of international terrorism and to the difficulties involved in that task. To one delegation it might even be premature to define terrorist acts, since no universally accepted definition of international terrorism had been agreed upon so far. Another delegation stressed that particular prudence was called for in defining international terrorism as the international community had not yet succeeded in finding such a definition and the Commission should restrict itself to giving a description of terrorist acts. In this delegation's view, the 1977 European Convention on the Suppression of Terrorism provided a good example.

284. Several delegations expressed reservations with regard to the definition of terrorism proposed by the Special Rapporteur, which was based in the 1937 Convention on the Prevention and Punishment of Terrorism. It was remarked in this connection that the presence of an international element was essential for an act to constitute a terrorist crime against the peace under the draft Code, and that such was not always the case under the 1937 Convention, which also enumerated as terrorist acts, inter alia, acts calculated to damage public property. The provisions of the 1937 Convention also had to be considered in the light of developments over the past 50 years, in particular, the experience gained in connection with the conclusion of treaties dealing with particular manifestations of terrorism. In this connection, one delegation stated that the list of terrorist acts as proposed by the Special Rapporteur required revision in the light of the conventions recently adopted on the subject, particularly the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol, supplementary to the Montreal Convention of 1971, relating to the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, adopted by consensus in Rome and Montreal respectively in the spring of 1988. The Rome Convention, which had been drawn up on the basis of a joint initiative by several countries, also referred to General Assembly resolution 40/61 of 9 December 1985 on international terrorism.

285. Some delegations stressed that in any definition of international terrorism to be adopted by the Commission a distinction should be drawn between terrorist acts and the exercise of the legitimate right of peoples to struggle for independence, self-determination and freedom from the yoke of colonialism, domination and racism. That right was deeply rooted in international law and was recognized in several international instruments. It was suggested that a saving provision should be included to preserve that right, similar to that included in the Definition of Aggression and other instruments, such as the Manila Declaration on the Peaceful

Settlement of International Disputes, 6/ the International Convention against the Taking of Hostages, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations 7/ and General Assembly resolution 42/159 of 7 December 1987 on terrorism.

286. Some delegations, while supporting the legitimate right of peoples referred to in the preceding paragraph, were of the view that a distinction should be made between the legitimacy of a struggle and the means employed to advance the struggle, and that the basic rules of international humanitarian law should always be duly respected.

287. Several delegations also stressed that since international terrorism often harmed innocent people it should constitute not only a crime against peace but also a crime against mankind.

288. Some delegations pointed out that the draft Code should deal with international terrorism as a separate crime, as not all forms of international terrorism constituted a form of intervention.

Breach of treaties designed to ensure international peace and security

289. Some delegations supported paragraphs 4 and 5 of article 11 proposed by the Special Rapporteur, which lay down that the breach of treaties designed to ensure international peace and security constituted a crime against peace. One of the delegations felt that the provisions on the crime in question must be drafted in such a way so as to establish the criminal responsibility of individuals. It also suggested that paragraphs 4 and 5 could be merged.

290. Some delegations, while supporting paragraphs 4 and 5 of article 11, expressed some reservations regarding various aspects of those paragraphs. Thus, it was stressed that not any breach *per se* should constitute a crime against peace but only the most serious ones, those which constituted a threat to international peace and security. Therefore, a classification should be made of possible breaches, taking into account the gravity of the consequences. The remark was also made that not only breaches themselves but also their outcome should be taken into account. In other words, whatever the degree of seriousness of a breach of a treaty obligation, the outcome of the breach must be the determining factor.

291. As regards the types of treaties whose breach should constitute a crime against peace, one delegation said that the relevant provisions should relate only to treaties with a universal scope of application. Another delegation believed that although treaties on disarmament were relevant other treaties were also relevant and disarmament should not be regarded as the only element of international security. In this connection the remark was made that the proposed

---

6/ General Assembly resolution 37/10, annex.

7/ General Assembly resolution 42/22, annex.

enumeration in paragraphs 4 and 5 starting with the phrase "In particular" was far from complete. Peace and security and the coexistence of States were threatened at least as much by gross violations by certain States of their commitments under human rights instruments as by violations in respect of disarmament.

292. Some delegations, while supporting the view that the breach of obligations under treaties designed to ensure international peace and security should be included as a crime in the draft Code, emphasized that care should be taken to guarantee that States not parties to a treaty on the maintenance of peace and security were not placed in an advantageous position vis-à-vis States which had signed such a treaty. One delegation said in this connection that, like many other principles included in the 1954 Code, the violation of a treaty designed to ensure international peace and security had been included in the Code at a time when the objective of the elimination of war had been an emotionally charged one. While that objective remained, it was nevertheless necessary at the current stage to guard against any abuse of the concept. In the current circumstances, one could hardly see any objective criterion which could define that principle clearly and prevent it from being used by a powerful country to intervene, and even use force, in a weaker neighbouring country. Consequently, caution must be exercised when taking any decision on the inclusion of that crime in the Code.

293. Other delegations pronounced themselves against the inclusion of the proposed provisions among the crimes against peace. One delegation, in particular, was of the view that the Commission should not become involved in characterizing as a crime against peace the "breach of treaties designed to ensure international peace and security". The first problem was to determine which treaties were meant. Although disarmament was one of the elements of security, it was not the only one and should not be presented as such. The real scope of the envisaged provision was therefore, in the delegation's view, too imprecise for it to be included in a text intended to define crimes meriting punishment. It would be totally unrealistic to affirm that any breach of a treaty, whatever its subject, constituted a crime against peace. Moreover, it was impossible to establish at which point a crime against peace would be considered to have been committed. The delegation urged the Commission to bear in mind that not every serious violation of international law or every morally condemnable act, no matter how heinous, was bound to be considered a crime against peace.

Colonial domination

294. Many delegations supported the inclusion of colonial domination as a crime against peace, as proposed by the Special Rapporteur in both alternatives of paragraph 6 of article 11 of his draft. It was observed in this connection that the existence of colonialism represented a threat to international peace, involving both the use of force and the denial of the right to self-determination. It was therefore necessary to include it in the Code. It was also observed that colonial domination was by no means a phenomenon of the past. Colonialism remained a reality in several regions. As a political and legal concept, colonialism referred to conduct that was incompatible with the principle of the equality of the rights of peoples and of their right to self-determination. Although classic colonialism had virtually disappeared, vestiges remained in places such as Namibia. Thought

should also be given to prohibiting a resurgence of colonialism in the future, and other, more subtle forms of colonialism such as neo-colonialism should likewise be proscribed.

295. Most of the delegations supporting the inclusion of colonial domination in the draft Code were in favour of merging or combining in the relevant future provision both alternatives for paragragh 6 proposed by the Special Rapporteur namely, "the forcible establishment or maintenance of colonial domination" and "the subjection of a people to alien subjugation, domination and exploitation". In support of the merger it was also said that it would harmonize the relevant wording of the draft articles on State responsibility (art. 19) with that of the relevant General Assembly resolutions.

296. Some other delegations favoured the retention of the second alternative for paragraph 6 of article 11 proposed by the Special Rapporteur. In this connection one delegation said that the definition of colonial domination should not be restricted to historical forms of colonialism but should extend to any other form of domination. Another delegation said that the second alternative perfectly covered that phenomenon without expressly mentioning it. Furthermore, on the threshold of the twenty-first century, there was no reason to retain in the draft Code historical forms of colonialism which, at least it was hoped, would soon be things of the past.

297. Some delegations addressed the problem of the scope of the principle of self-determination. In this connection, one delegation pointed out that it went without saying that the principle occupied its own prominent place in contemporary international law. It did not detract from the importance of that principle to caution against its use in a cavalier manner, which might have serious implications for other significant principles of international law, in particular, the territorial integrity of States. Accordingly, it was appropriate for the commentary to the relevant draft article to make it clear that the crime of colonial domination applied only to the subjection of a non-metropolitan people which had not yet attained independence, and did not cover the case of a minority wishing to secede from the national community. Along the same lines, another delegation indicated that the concept of self-determination related exclusively to the freedom of peoples subjected to colonial exploitation and in no way provided justification for the secession from an established State by heterogeneous communities. In today's world, fully homogeneous States were rare and if, by a spurious interpretation of the lofty principle of self-determination, any ethnic group was allowed to secede from an established State, the present national State system would collapse into utter chaos.

298. One delegation was of the view that the principle of self-determination was universally applicable.

299. Another delegation observed that the term "colonial domination" raised a range of delicate issues concerning self-determination and deserved further study.

Mercenarism

300. A number of delegations referred to paragraph 7 of article 11 proposed by the Special Rapporteur, which incriminates "the recruitment, organization, equipment and training of mercenaries or the provision of facilities to them in order to threaten the independence or security of States or to impede national liberation struggles".

301. Most of the representatives who spoke on the question were of the view that mercenarism should be included in the draft Code as a crime separate from that of aggression. It was said in this connection that mercenarism was an activity aimed at violently undermining the sovereignty and political independence of States or suppressing the struggle of peoples deprived of the right to self-determination. While the acts of mercenaries, said one delegation, were directed against the civilian population, aggression was directed against a State.

302. In connection with its characterization, one delegation stated that mercenarism, which the General Assembly had called a threat to international peace and security, should be considered a crime against peace, although it could also fall under the category of crimes against humanity. Another delegation stated that the examination of the crime of mercenarism should be based on a firmer foundation than diffuse considerations concerning the peace and security of mankind.

303. Several delegations referred to the definition of the crime of mercenarism or to the concept of "mercenary" to be included in such definition.

304. Some delegations pointed out that the definition of a mercenary contained in Additional Protocol I to the 1949 Geneva Conventions, on which the Special Rapporteur had relied for his own proposed paragraph, was insufficient since the Protocol applied only to mercenarism in time of war. The draft Code should provide a broader definition which would also be applicable to mercenarism in peacetime. It was also remarked that the Protocol I definition, although reflecting the fundamental features of mercenaries, was not necessarily fully reflective of the international situation and the requirements of the draft Code. The Protocol I definition was also criticized on other counts. Thus, one delegation said that private gain should be regarded as an important element, without undue emphasis on the amount of the gain. Other delegations also expressed reservations regarding the criteria of material compensation or its amount and of the nationality of the person in question.

305. In connection with the definition of mercenarism one delegation pointed out that it should be made clear first of all that the article dealing with the crime of mercenarism pertained only to acts which did not otherwise amount to violations of international law and which were attributed also to States as wrongful acts or crimes against the peace and security of mankind. It would be absurd to make a distinction between aggression committed through mercenaries and aggression performed through other means. Furthermore, the qualification of "crimes against the peace and security of mankind" should be limited to the acts of those who recruited mercenaries, made use of them and so on, without extending to the acts of the mercenaries themselves. Thirdly, the Commission had retained the criterion of

participation in hostilities. That criterion might be useful in defining those acts connected with mercenarism which were deemed so grave as to be classifiable as crimes against the peace and security of mankind.

306. Another delegation indicated that the definition taken from article 47 of Additional Protocol I to the 1949 Geneva Conventions had become outdated. Perhaps a better approach would be to adopt a definition based on the work currently being done to draft a convention on mercenarism. On the other hand, according to the delegation, a definition of mercenarism might no longer be necessary once such a convention came into force. Article 12, paragraph 4, on aggression, provisionally adopted by the Commission, would then be sufficient to bring mercenarism within the scope of the draft Code.

307. One delegation also stressed that members of the international community must reach agreement on individual responsibility for the recruitment, use, financing and training of mercenaries.

308. Some representatives expressed the view that the Commission should await the outcome of the work of the Ad Hoc Committee on mercenaries set up by the General Assembly and of the work of the Third Committee of the General Assembly before taking a decision on the definition of mercenarism. Most delegations were, however, of the view that the Commission should proceed with its own work on the matter, without prejudice to taking into account or even co-ordinating with the work of the other organs. In the view of one delegation, a definition proposed by the Commission could be of assistance to the Ad Hoc Committee.

Other proposed crimes against peace

309. Several delegations shared the view expressed by some members of the Commission in paragraph 275 of the Commission's report to the effect that the massive expulsion by force of the population of a territory, the forcible transfer of populations, the implanting of settlers in an occupied territory and the changing of the demographic composition of a foreign territory should find their way into the draft Code.

310. Some delegations, while sharing the view that all or some of the above-mentioned acts should be covered by the draft Code in an appropriate form, felt that they could as well fall under the categorization of crimes against humanity and not necessarily under crimes against peace.

311. One delegation stressed that the question of the forcible expulsion of peoples required a cautious approach. Whereas the expulsion and resettlement of peoples could take place in the framework of a policy of genocide and brutal suppression, there were cases of transfers of populations on the basis of international agreements, implemented in a humane manner. Accordingly, such situations must be assessed in the light of international law.

/

/...

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

1. General comments

312. A number of delegations took note with satisfaction of the considerable progress made on the topic. It was remarked that the Commission had held constructive discussions at its last session on important aspects such as the scope of the draft articles, the inviolability and immunity of the courier and the protection of the bag. The Special Rapporteur was congratulated for his follow-up to the replies received from Governments on the draft articles adopted on first reading, and gratification was expressed at the efficient organization of work which had conferred the necessary momentum on the Commission's work. The Special Rapporteur's eighth report (A/CN.4/417) was viewed as extremely useful in laying the groundwork for the deliberations during the second reading and the current draft was described as very comprehensive, meticulous and well written, notwithstanding remaining divergences for which balanced solutions would be found. The completion of the draft articles, it was also said, would pave the way for smooth communication between States and missions throughout the world.

313. One representative however expressed disappointment at the outcome of the Commission's discussions at its fortieth session with regard to the topic. He remarked that the draft articles, as they stood, would do nothing to help to curtail abuses of the diplomatic bag of the type that had been well publicized in recent years and expressed the hope that radical changes could still be made because, if not, the necessary consensus would not exist and it would be impossible to justify convening a diplomatic conference to adopt an international instrument, especially at a time when the finances of the United Nations were in such a parlous state.

314. A number of delegations commented on the aim or purpose of the draft articles, as well as the criteria whereby the adequacy of the solutions enshrined therein should be measured.

315. Several representatives stressed that the aim of the draft articles was to establish a consistent régime governing the status of all types of diplomatic couriers and bags, based on the provisions of existing conventions which implied on the one hand the consolidation, harmonization and unification of the existing rules and on the other the development of specific and more precise rules for situations not fully covered by those conventions. In their view international practice in recent years had pointed to the need to improve the legal regulations governing the status of the diplomatic courier and bag.

316. One representative however held the view that the primary objective of the draft articles should be to establish, using a pragmatic approach, supplementary rules to fill the gaps that had arisen in practice, for example, regarding unimpeded access to the ship or aircraft in order to take possession of the bag, as set forth in draft article 23, paragraph 3. In his opinion, there did not seem to be a need for unification of régimes intended to meet different requirements and

the draft articles should therefore not cover bags of consular posts, special missions and delegations to international organizations, nor should their scope be extended to bags of international organizations.

317. Some representatives endorsed the concept of functional necessity as a basic condition for determining the legal status of the courier and the bag. It was said in this connection that when considering the need to find a balance between the confidentiality of the contents of the bag and the security and interests of the receiving and transit State the focus should be on the effective performance of the official functions of the courier and the bag.

318. Several delegations furthermore insisted on the need to strike a proper balance between the interests of the sending State, the receiving State and the transit State as one of the guiding concepts of the draft. It was observed that such a balance should not prove too difficult to achieve as most States were both receiving and sending States and could be transit States. The remark was also made that any definition of the diplomatic bag proposed by the Commission must meet the balance-of-interests test by ensuring that the important functions of communication by the sending State were not impaired and that the interests of the receiving or transit State were not compromised by the abuse of the bag.

319. Commenting generally on the draft articles, one representative stressed that the full implementation of the right to free communication between States and their missions abroad, as laid down in the 1961 Vienna Convention on Diplomatic Relations, was an indispensable condition for the unimpeded performance of their functions by those missions, and that the official courier, as a person duly authorized by the sending State, must therefore be guaranteed full protection under international law, in the interest of unimpeded communication between the respective State and its missions abroad. In his opinion, that concern had been largely met in the draft articles prepared by the Commission. Another representative said that, on the whole, the text elaborated by the Commission provided an acceptable basis for the adoption of an equally acceptable international legal instrument, adding however that some provisions would benefit from additional clarification and that the draft should attempt to improve the regulations concerning correspondence between States and should confirm and develop the norms relating to freedom of communication. Still another representative felt that the draft articles constituted a solid foundation for an international legal instrument in that area. He insisted that the proposed document should clearly set forth the norms which would ensure smooth official communication between a Government and its representatives abroad and should also reflect the principles of inviolability of the diplomatic bag and personal inviolability of the diplomatic courier, which in many cases derived from the inviolability of temporary accommodation. A number of delegations shared the view that the current draft constituted a solid foundation for the remaining work of the Commission on the topic and that the final text, once adopted, would further reinforce State practice under the existing codification conventions in the field of diplomatic and consular law.

320. Emphasis was however placed by some delegations on the complex nature of the issues which the Commission still had to solve. The remark was made that some of

those issues were controversial and that it seemed particularly important to arrive at balanced formulations so as to enhance the general acceptability of a draft convention the need for which was not unchallenged.

321. As regards future action on the draft articles, several delegations favoured the conclusion of an international convention on the topic. Others expressed doubts in this connection. One of them, in particular, stressed that there was no need for a new convention on the item since existing conventions, especially the 1961 Vienna Convention on Diplomatic Relations, and the 1963 Vienna Convention on Consular Relations, adequately covered the field. He warned against elaborating a new convention which would result in a plurality of régimes applicable to the courier and bag, thereby calling into question solutions arrived at in conventions with wide and comprehensive participation.

2. Comments on draft articles provisionally adopted by the Commission on first reading

322. Speaking generally on part I of the draft articles, one representative pointed out that the provisions therein contained had to do with principles or definitions generally accepted by the international community. He singled out as particularly important the freedom of official communications provided for in article 4 and the duty to respect the laws and regulations of the receiving State and the transit State laid down in article 5.

Article 1. Scope of the present articles

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

323. Some delegations expressly endorsed the inter se concept reflected in article 1 to the effect that the scope of the draft articles should also extend to official communications between missions, consular posts or delegations of the same sending State, with each other and wherever situated. It was said in this connection that article 1, as currently drafted, reflected common practice and that the legal justification for protecting communications among the missions of a State could be found in the four Vienna codification Conventions, in particular article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations.

324. Some representatives supported the extension of the scope of the draft articles to the couriers or bags employed by international organizations of a universal character, an approach which was viewed as particularly opportune given the increasing role of international organizations in world affairs and the likelihood that a régime would soon have to be established for such couriers and bags. It was suggested to cover not only the couriers and bags employed for the official communications of an international organization with States or with other international organizations but also those employed for the internal communications of international organizations between their different offices, organs or agencies.

325. Other delegations spoke against an extension of the scope of the draft articles to couriers and bags of international organizations. It was observed in this connection that the general practice of the Commission, which had been endorsed by the Sixth Committee and by successive diplomatic conferences, was to distinguish between relations between States on the one hand and relations between States and international organizations on the other, and that although international organizations were an important factor in contemporary international relations their status as subjects of international law was different from that of States, so that their communications should at least at the current stage be governed by separate instruments, i.e., the relevant agreements between them and their host countries or between Member States themselves.

326. Some delegations took an intermediate position on the issue. Thus one delegation, after pointing out that practical difficulties would arise from the fact that the nature and functions of international organizations differed, went on to indicate that separate articles might be drafted to deal with official communications among international organizations and between those organizations and States. Another delegation, while seeing no necessity to apply the régime governing the couriers of States to international organizations particularly in view of their heterogeneity as regards their composition, functions, objectives and size and their range of privileges and immunities, felt that it might be possible to adopt an additional protocol for organizations of a universal character within the United Nations system, as had been suggested by some members of the Commission.

327. Some representatives supported the extension of the scope of the draft articles to cover communications of national liberation movements. In this connection it was recalled that many countries had given the missions of those movements full diplomatic status and that the United Nations had adopted several resolutions requesting all States, in particular, the hosts of international organizations and international conferences, to grant the delegations of national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States the facilities and privileges necessary for the performance of their functions, in accordance with the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. It was also stated that, even though the matter could be settled by means of special agreements between States and the movements concerned, nothing stood in the way of extending by way of an additional optional protocol the scope of the draft articles so as to cover the national liberation movements recognized by the United Nations and some regional organizations.

328. Other representatives expressed reservations as to an extension of the scope of the draft articles to national liberation movements. One of them observed that the matter had not raised any practical difficulties in the past and there seemed to be no need to include those entities specifically in the scope of the draft articles. Another representative, without in any way wishing to minimize the importance of national liberation movements, remarked that those movements were of a temporary nature, since they ceased to exist once the corresponding States had regained their independence and were not so numerous that the question of their facilities and privileges could not be settled by way of special agreements to be concluded between them and receiving States. Yet another representative pointed

out that it was too late to make a change in the draft articles that was so fundamental that it raised a host of new and complex issues.

Article 3. Use of terms

329. In connection with paragraph 1 (7) of the article, containing the definition of the term "consular post", one delegation drew attention to the question of honorary consulates, pointing out that article 35 of the 1963 Vienna Convention on Consular Relations, which dealt with consular couriers and bags, also applied to article 58 of the Convention, which concerned the facilities, privileges and immunities of honorary consulates, and that in international practice the trend was towards an increase in the number of honorary consulates, requiring proper communication channels for the accomplishment of their consular missions.

Article 4. Freedom of official communications

330. Some delegations expressed support for the article.

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

331. The article was favourably commented upon by some delegations. One delegation felt however that reference should be made not only to the diplomatic courier's duty to respect the laws and regulations of the receiving State and the transit State but also to his duty to respect the "sovereignty" of the receiving State and the transit State and to refrain from interfering in the internal affairs of those States. He added that, in order to reinforce the credibility of the draft articles, mention should be made of the responsibility of the sending State if it failed to respect the sovereignty, laws and regulations of the receiving State and the transit State. Another delegation suggested eliminating the second sentence of paragraph 2, the contents of which seemed to be covered by the general obligation to respect the laws and regulations of the receiving or transit State.

Article 6. Non-discrimination and reciprocity

332. One representative favoured the deletion of the words "by custom" from paragraph 2 (b) inasmuch as in his view any modification of the facilities, privileges and immunities for diplomatic couriers and diplomatic bags should be made solely by agreement between States. He further suggested replacing the phrase "provided that such a modification is not incompatible with the object and purpose of the present articles", which was viewed as vague, by a formula based on the language of article 47, paragraph 2 (b), of the 1961 Convention on Diplomatic Relations, allowing States to agree on a régime more favourable than the one established by the Convention, but without restricting the privileges and immunities of the diplomatic courier.

333. The revised version of paragraph 2 (b) of the draft article proposed by the Special Rapporteur (see para. 323 of the Commission's report) was endorsed by one representative.

334. Speaking on Part II as a whole, one delegation, after pointing out that the provisions contained therein were essentially intended to guarantee the freedom and safety of the mission entrusted to the diplomatic courier, commended the fact that the Commission had generally done no more than to codify the rules set forth in the four relevant Vienna Conventions and to the extent that it had engaged in the task of progressive development of diplomatic law, had kept within the confine of its mandate, which was to elaborate provisions likely to ensure the protection of the diplomatic courier and the inviolability of the diplomatic bag. Another delegation noted with satisfaction that no substantive changes in the provisions of part II had been suggested and that the proposed drafting changes improved the existing text.

Article 8. Documentation of the diplomatic courier

335. One representative, clarifying the proposal of his Government as reflected in paragraph 330 of the Commission's report, said that requiring that information concerning the size and weight of the bag be included in the diplomatic courier's documentation did not mean that there should be a limit on the size and weight of the bag. The Special Rapporteur's proposal to include the words "essential personal data" in the draft article was considered worthy of further examination by one representative and was supported by some others.

Article 9. Nationality of the diplomatic courier

336. One delegation held the view that persons who were nationals of, or who resided in, the transit State should not be permitted to be appointed as diplomatic couriers, unless so agreed in advance. Another delegation supported the addition of a second sentence to paragraph 2, as proposed by the Special Rapporteur (see para. 338 of the Commission's report).

Article 11. End of the functions of the diplomatic courier

337. The addition, as proposed by the Special Rapporteur, of a new subparagraph (a) to the effect that the functions of the diplomatic courier come to an end, *inter alia*, upon "the fulfilment of the functions of the diplomatic courier or his return to his country of origin" was viewed by several delegations as a useful clarification. It was remarked that such a provision would define in practice the most common reason for the termination of the functions of the diplomatic courier. The point was on the other hand made that the courier might be given additional diplomatic mail or alternative courier tasks after he had handed over the diplomatic bag at its final destination and that he must therefore retain his status. The proposed addition was viewed as unhelpful in this regard, as it offered no guidance as to when the courier's functions were fulfilled.

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

338. In connection with paragraph 1, one delegation expressed the view that the words "or not acceptable" should be deleted, since the distinction between a person declared persona non grata and a person declared not acceptable did not apply in the case of a diplomatic courier. Another delegation was of the view that the right to declare a diplomatic courier persona non grata should also be extended to the transit State.

Article 13. Facilities accorded to the diplomatic courier

339. One representative expressed the hope that the concerns of his Government reflected in paragraph 357 of the Commission's report would be taken into account at some further stage as they were shared by a number of the Commission's members (see para. 359 of the Commission's report).

340. The view was expressed that the article, as it stood, would impose an unjustifiable burden on receiving and transit States and it was suggested that it be redrafted so as just to lay down the general duty of the receiving or transit State to assist the diplomatic courier in the performance of his functions.

341. The remark was on the other hand made that the facilities necessary for the performance of the courier's functions which the receiving State or the transit State were required to accord under the article were only general facilities and that assistance in obtaining accommodation and in using telecommunication networks was to be provided only upon request and to the extent practicable.

Article 14. Entry into the territory of the receiving State or the transit State

342. One representative viewed the article as too broadly formulated, bearing in mind article 7 - under which the right of a State to appoint a diplomatic courier was not absolute - and situations of non-recognition. He added that the article should make reference to articles 9 and 12 and should stipulate that entry into the territory of the receiving or transit State must proceed in accordance with the latter's regulations.

343. Another representative suggested providing in the article for the application of the principle of reciprocity as regards the granting of visas.

Article 15. Freedom of movement

344. One representative observed that the article required the transit State to ensure freedom of movement but only to the extent necessary for the performance of the courier's functions - an indication that article 13 should not be construed as implying a heavy burden on States.

345. Another delegation, referring to the commentary to the article and to the observation of the Special Rapporteur that "as a rule, the courier had to make his own travel arrangements and that only in exceptional circumstances, facing serious difficulties, the courier might turn to the local authorities of the receiving or the transit State for assistance" (see para. 366 of the Commission's report), stressed that his Government did not recognize any exception to the rule that the courier must make his own travel arrangements.

Article 17. Inviolability of temporary accommodation

346. A number of delegations spoke in favour of the principle of the inviolability of the temporary accommodation of the courier. Some found the current formulation of the article acceptable. The remark was made that its text struck an adequate balance between the interests of the sending State and those of the transit or receiving State inasmuch as it extended appropriate legal protection to the courier and bag, while stipulating that the temporary accommodation of the diplomatic courier should be subject to inspection if there were serious grounds for believing that there were in it articles, the possession, import or export of which was prohibited by the law of the receiving or transit Sate. It was also said that the article provided a safeguard against loopholes, notwithstanding its perhaps limited practicability, and that its paragraph 3 provided reasonable possibilities for protecting the interests of the receiving and the transit States.

347. Some of those delegations supporting the principle felt that some aspects of article 17, in particular its paragraphs 1 and 3, did not adequately safeguard the principle. One of them suggested that those paragraphs should be amplified. Another delegation had doubts concerning paragraph 3 and believed that the guiding principle in paragraph 1 should not be weakened. Another cautioned against weakening the guiding principle in paragraph 1 and observed that since the diplomatic courier normally remained very briefly in a receiving or transit State and usually stayed in the premises of the diplomatic mission, granting him full legal protection even outside the mission should not cause practical problems. Still another delegation, considering that the article should guarantee the inviolability of temporary accommodation to at least the same degree as modern penal codes guaranteed the inviolability of private domiciles, objected to the exceptions provided for in paragraph 3. The reservations voiced on the current text of the article found expression in a number of concrete proposals. Thus it was suggested that the second sentence of paragraph 1 be deleted. It was also proposed that paragraph 1 be reformulated as follows:

> "The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State or, as the case may be, of the transit State, may not enter the temporary accommodation, except with the express consent of the diplomatic courier. Such consent may be assumed in case of fire or other disaster requiring prompt protective action, provided that all necessary measures are taken to ensure the protection of the diplomatic bag, as stipulated in article 28, paragraph 1."

/...

348. As regards paragraph 3, it was suggested to place on the receiving State or transit State an obligation, "in the event of inspection or search of the temporary accommodation of the courier, to guarantee him the opportunity to communicate with the mission of the sending State, so that its representative could be present during such inspection or search". Another proposal sought to amend the first sentence of the paragraph to read:

> "The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing that the possession, import or export of articles which are in it are prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State."

349. Other delegations rejected the principle of the inviolability of the courier's temporary accommodation and favoured the deletion of article 17, which they viewed as particularly difficult to justify in terms of functional necessity and as being among those provisions which would hinder any possibility that the draft might be generally accepted. It was also remarked that if both the courier and the bag were inviolable the need for additional protection for "temporary accommodation" was far from clear and that difficulty with the scope of the article was exacerbated by the failure in any way to define what constituted temporary accommodation.

350. Still other delegations favoured a compromise solution, which would make the provision more acceptable by restoring therein a balance between the various existing trends. Thus one representative, while being of the view that article 17 was an unnecessary and impracticable provision which could not be justified by legitimate concerns for the safety of the diplomatic courier and the diplomatic bag, recommended that the question be studied further and expressed the hope that the Commission would be able to arrive at a solution which would take into account the views of a substantial number of Governments. Another representative advocated the establishment of a reasonable balance between the legal protection of the courier and bag and the interests of the receiving and transit States, keeping in mind that the inviolability of the temporary accommodation of the courier was secondary to the protection of the national interests of the receiving and transit States. Some delegations proposed a concrete solution consisting in the deletion of the first sentence of paragraph 1, which they viewed as unnecessary and misleading.

Article 18. Immunity from jurisdiction

351. Some representatives supported the article as taking due account of the various existing trends and striking an adequate balance between full immunity for the courier and the interests of the receiving or transit State. It was pointed out that, in view of the examples offered by recent diplomatic history of abuse of diplomatic privileges and immunities, the principle of full immunity from criminal jurisdiction could not be looked upon favourably by the international community as a whole and that even if it might be difficult to apply in practice the generalized principle of functional immunity provided for in article 18 seemed to offer an acceptable compromise. The remark was made in this connection that under the

article the courier enjoyed immunity from jurisdiction only in respect of "acts performed in the exercise of his functions", and that his immunity did not extend to an action for damages arising from a car accident. Moreover, he could be required to have insurance coverage against third-party risks when driving a vehicle.

352. Other representatives criticized the compromise solution reached by the Commission. Thus, it was felt that the functional approach did not correspond to the generally applied practice whereby States granted diplomatic couriers diplomatic visas and full immunity from criminal, civil and administrative jurisdiction and that the balance between the interests of sending States and those of receiving or transit States seemed to have been achieved at the expense of the main purpose of the draft articles inasmuch as the proposed limitations could make it difficult or even impossible for the courier to discharge his functions. It was also remarked that the Commission, by committing itself to the principle of functional immunity, had offered less protection to the courier than had already been provided in general practice based on paragraph 5 of article 27 of the Vienna Convention on Diplomatic Relations. A further observation was that the diplomatic courier, as an official representative of the sending State entrusted with functions of an even greater importance for that State's interests than those of administrative and technical staff who enjoyed full immunity from criminal jurisdiction, should be granted full immunity from criminal jurisdiction in the receiving State as a minimum guarantee for the normal fulfilment of his functions. Concrete proposals included the suggestion that paragraph 1 be deleted inasmuch as it duplicated article 16 and the suggestion that the second sentence of paragraph 2 be eliminated since the extension or withdrawal of immunity from jurisdiction could not be contingent upon an element as variable and uncertain as insurance.

353. Still other representatives objected to the article as a whole. One of them favoured its deletion and another one stressed that its retention would hinder any possibility of the draft articles being generally accepted.

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

Article 20. Exemption from dues and taxes

Article 21. Duration of privileges and immunities

Article 22. Waiver of immunities

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

354. These articles were viewed by one representative as presenting no special difficulties inasmuch as they all originated in principles derived from the conventional practice of States.

355. One delegation proposed the deletion of paragraphs 2 and 3 of article 19 and of article 20 on the ground that they did not respond to the criterion of functional necessity. Another delegation felt that the two articles could be omitted altogether, since the brevity of the courier's stay in the receiving or transit State made the exemptions therein unnecessary, except in so far as they were already covered by the guarantee of his personal inviolability.

356. The merger of articles 19 and 20 proposed by the Special Rapporteur (see para. 389 of the Commission's report) was favourably commented upon. Support was expressed for the deletion of paragraph 1 of current article 19 and it was remarked that the proposed new article, which would refer only to exemption from taxes and dues and to exemption, subject to certain limitations, for the courier's personal baggage, should, together with other articles of the same part of the draft, dispel any impression that the diplomatic courier was being given excessive privileges.

357. As regards article 21, some delegations supported the redrafting of paragraph 1 as proposed by the Special Rapporteur (see para. 398 of the Commission's report) which they viewed as considerably more precise with regard to the beginning of the privileges and immunities of a courier who was already in the territory of the receiving State at the time of his appointment. One delegation added that the question of the cessation of the privileges and immunities of the diplomatic courier ad hoc would also be dealt with adequately in the redrafted paragraph. One delegation proposed the deletion of paragraph 3 of article 21 as it did not respond to the criterion of functional necessity.

358. As for article 22, one delegation held the view that it should not be interpreted as applying to the courier's personal inviolability and that a courier could consent, for example, to a body search at an airport without any need for a formal waiver of the immunity in question. Referring to paragraph 4, another delegation indicated that it was also important to guarantee immunity in respect of the execution of a judgement in criminal proceedings, in case the courier enjoyed immunity only in respect of acts performed in the exercise of his functions. One delegation proposed the deletion of paragraphs 3 to 5 of the article.

359. Speaking generally on part III, one delegation stated that the articles therein contained were not on the whole confined to codifying rules already set forth in the existing diplomatic instruments and to reflecting the practice of States in that area.

Article 24. Identification of the diplomatic bag

360. One delegation expressed disappointment that the Commission had not been able to strengthen the article.

Article 25. Content of the diplomatic bag

361. One delegation stressed that the contents of the diplomatic bag should be restricted with a view to avoiding the abuses that had come to light in recent

years. Another delegation stressed that it was axiomatic that a sending State could not import through the diplomatic bag articles whose importation or possession was prohibited in the receiving State. It expressed concern about the comments made on this point in paragraph 414 of the Commission's report.

Article 26. Transmission of the diplomatic bag by postal service or by any mode of transport

362. One delegation supported the revised version of the draft article proposed by the Special Rapporteur (see para. 421 of the Commission's report).

Article 27. Facilities accorded to the diplomatic bag

363. One representative recalled in connection with the article an instance in which an unaccompanied diplomatic bag from his country had been delayed in a transit State for nearly three months. He stressed that the transit State must unconditionally provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag, and he supported article 27 in its current or in an even stronger form. Another representative approved of the revised version of the article, which met his delegation's misgivings about the vagueness of the previous version.

Article 28. Protection of the diplomatic bag

364. Several delegations underscored the importance of this provision, on the content of which the acceptability of the draft as a whole largely depended. Emphasis was placed on the need to formulate a text that took account of the conflicting interests of the sending States and the receiving or transit States, and to strike the right balance between the protection of the receiving State and the protection of diplomatic communications. In this connection it was remarked that the final formulation of acceptable provisions required serious reflection on the international community's priorities and on the trust placed by every State in the intentions, motivation and activities of other States in the context of the movement of couriers and bags, and that the inviolability of the bag, as was also the case with the enjoyment of absolute immunity by the courier, had to be approached with caution in order to achieve the correct balance and to ensure fulfilment of the basic aim of free movement for the diplomatic bag, while preventing betrayal of the trust upon which relations between States were founded.

365. A number of delegations upheld the rule of absolute inviolability, some of them referring in this connection to article 27 of the 1961 Vienna Convention on Diplomatic Relations, which was described as the most authoritative text in the field. These representatives supported paragraph 1 of the article subject to the deletion of the square brackets still contained therein. One of them, after indicating that his approach to the article was determined by the need to balance the respective interests of the sending and receiving States (i.e., to preserve the confidentiality of the contents of the bag and to prevent abuses) and by functional

necessity relating to the importance of the bag as a means of communication, particularly for small States lacking the resources for more sophisticated and more easily protected means of communication, said that paragraph 1 as adopted on first reading, but without the square brackets, was adequate and had rightly been retained in each of the alternatives proposed by the Special Rapporteur (see para. 440 of the Commission's report). Another representative stressed that to allow the examination, direct or indirect, of the bag would give undue consideration to the interests of the receiving State - which were already sufficiently taken into account by the provisions of articles 5 and 25 - to the detriment of the principle of the confidentiality of the documents contained in the bag. Those representatives considered it unacceptable that the bag might be subjected to examination by electronic or any other technical devices. One of them said that the use of such devices amounted to an infringement of the immunity accorded to the courier and bag and constituted interference in the sovereignty of the sending States, while another observed that it was not possible to ensure that the inviolability of the bag would not be affected, particularly bearing in mind technological advances to date and in the future. Still another representative pointed out that if the use of such devices were to be tolerated third world States would be at a disadvantage in relation to industrialized States.

366. The view was on the other hand expressed that the examination of the diplomatic bag through electronic devices must be permitted in certain clearly defined circumstances, as the draft articles would otherwise be totally unacceptable.

367. Other comments on paragraph 1 included the observation that it was not appropriate to affirm the bag's inviolability in terms other than those of the Vienna Convention, and the remark that even if the word "inviolable" was used in the Vienna Conventions on diplomatic and consular relations only to characterize official correspondence it was clear that it applied to the bag itself.

368. Paragraph 2 of article 28 gave rise to divergent opinions. While one representative wished to see it apply to all types of bags, whether consular or diplomatic, others took the opposite view. Thus one representative pointed out that a provision extending to all types of bag, including the diplomatic bag, the checking procedure provided for in article 35, paragraph 3, of the Vienna Convention on Consular Relations would depart from the rules set forth in the diplomatic conventions in force and contradict article 32, according to which the provisions set forth in the draft articles should not "affect bilateral or regional agreements in force". He insisted that any conceivable check could be performed only by the competent authorities of the receiving State, not those of the transit State. Another representative remarked that paragraph 2 established a particular régime for the consular bag and that withholding one particular aspect from the general régime of communications ran counter to the principal objective of the draft, which was to unify the international norms applicable in the field with a view to affording States greater freedom in communicating with their missions abroad. He therefore insisted on the deletion of the paragraph.

369. To the question whether the transit State should be afforded the same rights as the receiving State regarding the treatment of the bag, one delegation answered

in the affirmative. Another delegation, while considering a differentiation reasonable, expressed readiness to reconsider its position, should it be necessary to strike a balance between the interests of all States concerned. Other delegations objected to conferring on the transit State the same rights as were accorded to the receiving State. It was said in this connection that to place the transit State on the same footing as the receiving State with respect to opening the bag not accompanied by courier might cause delays and also impose additional burdens on the sending State, which would need to provide personnel to be present at an inspection in each transit State. The remark was also made that if the transit State had doubts as to the contents of the bag it could resort to the security measures which it deemed appropriate, including enjoining the diplomatic courier to leave its territory immediately.

370. Several representatives commented on alternatives A, B and C proposed by the Special Rapporteur (see para. 440 of the Commission's report).

371. Some did not expressly support any alternative but critically analysed those they were unable to accept. Thus, one representative, after pointing out that the comprehensive legal régime which the Commission was seeking to formulate should reflect the highest standards embodied in article 27 of the Vienna Convention on Diplomatic Relations, expressed reservations on alternatives B and C which he felt might reduce the protection given to the diplomatic bag and were furthermore based on a differentiation between diplomatic and consular bags of no practical significance. He added that, while sharing the view that measures aimed at preventing abuse in a few cases should not affect the legitimate activities of the vast majority of States which made proper use of the diplomatic bag, his delegation would keep an open mind, particularly in regard to the request that the diplomatic bag should be returned to its place of origin in exceptional cases, it being understood however that the rule of the confidentiality of the diplomatic bag should always be fully observed - which ruled out any examination of the diplomatic bag, either directly or using electronic, X-ray or other advanced technological devices. Another representative considered alternative A unacceptable because it took no account of the concern of States which might have serious doubts as to the contents of the bag. He viewed alternative B as being at variance with the concern for unification underlying the draft articles and described alternative C as a revision, restrictive in effect, of the régime established by the 1961 and 1963 Vienna Conventions, which could give rise to practical difficulties.

372. Some representatives supported alternative A. Among them, one noted with satisfaction that the proposed text was based on the common denominator afforded by the relevant conventions providing for identical treatment of various kinds of diplomatic bags. He rejected alternative C as seriously deviating from the 1961 Vienna Convention; and alternative B, which, while in line with existing international law, ran counter to the unification purpose of the draft articles. Another representative insisted that the confidentiality of the contents of the diplomatic bag should in no way be undermined. He recalled that the inviolability of the diplomatic bag was based on a sound legal régime set out in the 1961 Vienna Convention on Diplomatic Relations and therefore associated himself with those representatives who had voiced strong objections to the examination of the bag directly or through electronic or other technical devices. Yet another of the

supporters of alternative A endorsed the view reflected in paragraph 441 of the Commission's report that alternatives B and C would bring down the régime of the diplomatic bag to that of the consular bag, and associated himself with the objections to the scanning of the bag by electronic or any other devices.

373. Other representatives supported alternative B. One of them, after noting with satisfaction that all three alternatives proposed by the Special Rapporteur would exclude electronic scanning or examination by other technical devices - which corresponded with the current state of international law - expressed concern that the protection afforded to the free movement of the bag would be diluted by alternative C which in his view weakened the protection offered to the bag by article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations. He agreed with the Special Rapporteur that the extension to transit States of any right to request the opening of the diplomatic bag might lead to unreasonable delays and impediment of the rapid transmission or delivery of the bag, and insisted that a transit State should at least be given the right to request the opening of the bag or to return it in situations where there was some ground to believe that its contents were prejudicial to the safety or security of the transit State, any other issues which might arise from the contents of the bag being left to the receiving State. Another of the supporters of alternative B observed that the use of electronic or other technical devices to examine bags put developing countries at a disadvantage vis-à-vis technologically advanced countries and could result in the violation and even destruction of official documents of the State to which the bag belonged. He emphasized that freedom of communication between States and their missions abroad was a prerequisite in international relations and that the contents of the diplomatic bag should under no circumstances be violated or be subject to inspection, even by sniffing dogs.

374. Still other representatives supported alternative C proposed by the Special Rapporteur. One of them felt that this alternative offered the necessary flexibility and struck the right balance between the need for ensuring the inviolability of the bag and the confidentiality of its contents, on the one hand, and the legitimate security concerns of the receiving State and the transit State, on the other. Another representative, after rejecting as inadmissible any direct or indirect examination of the diplomatic bag and stressing that scanning or other modern technical means of examination, aside from being unevenly accessible to States, would violate the confidentiality of diplomatic correspondence, interfere with the normal conduct of State business and adversely affect friendly relations between States, stressed that diplomatic bags were to be used exclusively for the purpose of government business and that abuses such as drug trafficking and terrorist activities must be forbidden. He therefore held that non-intrusive external security checks, such as the use of sniffing dogs, were permissible in cases where there were valid reasons to suspect that diplomatic bags contained forbidden substances, it being understood however that in no circumstances should the confidentiality of documents and other legitimate articles be compromised. Another representative, while being of the view that under current international law electronic screening of diplomatic bags should be ruled out inasmuch as it could in certain circumstances result in a violation of the confidentiality of the documents contained in the bag, stressed that in order to balance the competing interests of sending and receiving States it should be made clear that the right to

request the return of a bag to its place of origin emcompassed both diplomatic and consular bags, it being understood however that the right of challenge - for both transit and receiving States - existed only in "exceptional circumstances" and when there were "serious reasons" to believe that a bag contained something other than correspondence, documents or articles intended for official use. Another of the supporters of alternative C dismissed the argument that the text in question departed from existing law, pointing out that while the drafting of articles on the topic was to a great extent a codification exercise it would be inappropriate to shy away from efforts to develop international law and that the Commission should take emerging practices and needs more fully into account.

375. One representative expressed qualified support for alternative C which, he observed, would entail the revision of existing conventions. After stressing that as a general rule the receiving State - and to a certain degree the transit State as well - had a legitimate interest in preventing the diplomatic bag from being abused in such a way that its national security would be jeopardized, he emphasized that since current international law was at best unclear on the means at the disposal of receiving States for preventing such abuses it would serve an important purpose to lay down clear rules which would apply to all types of bags in every case where a State had good reason to believe that such an abuse was occurring. Being the representative of a country which did not consider electronic scanning as in itself prohibited by the rules of positive international law, except where the confidentiality of the legitimate contents of the bag might be jeopardized, he expressed doubts as to the categorical stipulation in paragraph 1 of alternative C.

376. As for the proposal for paragraph 2 of article 28 reflected in paragraph 433 of the Commission's report, some delegations held the view that it opened up promising avenues.

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

377. The view was expressed that the provision was pertinent and acceptable.

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

378. While one representative described the current text as being pertinent and acceptable, another expressed preference for the revised version proposed by the Special Rapporteur (see para. 467 of the Commission's report) even though in his opinion the language thereof needed to be made more specific.

379. Disagreement was on the other hand expressed with any wording which amounted to de facto recognition of a sending State that was not otherwise recognized by the receiving and transit States.

/...

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

380. As regards the text provisionally adopted by the Commission on first reading, one delegation pointed out that the relationship between the draft articles and other existing diplomatic and consular conventions should be elaborated more precisely, particularly as the draft contained provisions which deviated in substance from the corresponding provisions in those conventions. Another delegation was of the view that while article 32, which was intended to establish a safeguard clause having the scope of the clause provided for in article 30, paragraph 2, of the Vienna Convention on the Law of Treaties, did not present a problem as far as bilateral agreements were concerned, it seemed to assign to the term "regional agreements" a broader connotation than that envisaged in Article 52 of the Charter. The same delegation observed that in mentioning only bilateral or regional agreements the Commission appeared to have opted in favour of excluding the four Vienna Conventions from the scope of application of the article, with the result that those Conventions would coexist with the instrument to be adopted on the basis of the draft articles. In that delegation's opinion, it was desirable to make it clear that the new régime was intended to supplement those Conventions, and even to modify them on certain points (as was currently true of art. 28, para. 2) and that the draft articles did not affect bilateral or multilateral agreements other than the four Vienna Conventions.

381. As for the revised version of article 32 proposed by the Special Rapporteur (see para. 474 of the Commission's report), some representatives considered it worthy of further examination, even though one of them viewed it as not fully consistent with article 30 of the Vienna Convention on the Law of Treaties.

382. On the other hand, one representative, after stressing that it might be premature to advance definite preferences and that much would depend on whether there would be radical departures of substance between the draft and one or more of the four Conventions, pointed out that the verb "complement" used in the revised version, although adequate to describe the relationship between rules that were compatible, was certainly not adequate to describe the relationship between rules with divergent contents. He furthermore drew attention to the need to specify in the text that, whatever relationship was established, it would apply as between States parties to the instruments concerned, recalling in that connection that while the 1961 and 1963 Vienna Conventions had been very widely ratified the 1969 Convention on Special Missions had only 24 States parties, and the highly controversial 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character was not yet in force. Finally, he raised the question whether accession to the new instrument on the courier and bag should be reserved for States parties to at least some of the relevant Conventions.

Article 33. Optional declaration

383. Many of the delegations which spoke on this article either advocated its deletion or expressed readiness to consider eliminating it after a careful study of

its implications. It was said in this connection that the essential purpose of the draft, which was to establish a coherent and uniform régime of couriers and bags, was seriously affected by article 33, which would have the effect of multiplying the régimes of couriers and bags and of spreading confusion in diplomatic and consular relations, since on the same route there could be a courier or a bag under different régimes (that of the sending State, that of the transit State and that of the receiving State), not to speak of the possibility of withdrawal of the declaration, as provided for in paragraph 3, which, moreover, would take effect at an unspecified time. The remark was made that no substantive arguments could be invoked in favour of allowing States, through an optional declaration, to exclude from the application of the future convention any given category of couriers or bags and that the practical justification which had been advanced, namely, to ensure a wider acceptability of the draft, was groundless since most Governments had reacted negatively to the article in their written comments and observations. The question was also raised as to the extent to which the article in fact established an option of making reservations of the type which the International Court of Justice had prohibited in its ruling on the North Sea Continental Shelf cases.

384. One representative however insisted that, notwithstanding the shortcoming of the system of optional declaration, the absence of such a provision of an equivalent régime would make the text totally unacceptable to many States.

385. Some delegations mentioned alternative ways of introducing in the draft articles the required degree of flexibility. Thus one delegation said that the inclusion in the draft, as proposed by the Special Rapporteur, of a safeguard clause providing that the adoption of a uniform legal régime would not imply blanket acceptance of the provisions of legal instruments to which a State was not a party, should dispel States' fears that they might be bound by provisions of international agreements which they had not accepted, while obviating the need to resort to a multiplicity of legal régimes. Another delegation suggested the addition of a provision enabling States parties to enter reservations.

Provisions concerning the peaceful settlement of disputes

386. Several delegations supported the proposal to elaborate appropriate provisions on the settlement of disputes which might arise in connection with the interpretation or application of the future convention (see para. 489 of the Commission's report). It was suggested that such provisions be embodied in an optional protocol following the precedent of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations or - a solution which one delegation deemed preferable - that they form part of the convention itself.

F. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

387. Some delegations found it unfortunate that the Commission had been unable, owing to lack of time, to consider a topic which was important to all developing countries engaged in State trading as a means of economic survival. Emphasis was placed on the need to expedite work in that area in view of the existing trend - discernible in certain recently adopted domestic laws which were not in keeping with international legal opinion - to current exceptions to State immunity as the general rule and to confront States with unilateral acts which could only impede progress.

388. Commenting on the substance of the topic, one representative stressed that the aim of the codification exercise which was under way should be to proclaim generally accepted norms and set forth provisions acceptable to all, taking into account the precedents established and the practice of States, and that the future instrument could confirm the jurisdictional immunities of States and their property by providing for certain well-defined exceptions in order to remove the prevailing legal uncertainty due to the fact that some States had different approaches to the question. He recalled that, while the full jurisdictional immunity of the State, based on the principle of respect for sovereignty and non-intervention, had always been recognized in his country's doctrine and practice, certain States had rejected in their doctrines, legislation and practice the concept of jurisdictional immunity in the traditional sense and replaced it with that of functional immunity, with the result that the application of the relevant principles had been weakened considerably and conflict created in relations between States.

389. Some representatives commented in broad terms on the draft articles provisionally adopted on the topic by the Commission at it thirty-eighth session. Some expressed agreement with the general approach reflected therein. Thus one representative, after noting that differences of opinion persisted between States that supported so-called "absolute immunity" and those favouring "relative immunity", stressed that the draft articles, although they should in his opinion be based to a larger extent on the provisions of the 1972 European Convention on State Immunity, represented a pragmatic compromise between those two schools of thought. Another representative considered that the draft articles adopted on first reading were likely to achieve a balanced compromise between, on the one hand, the rule of absolute immunity supported by the developing States which, like the socialist States, carried on commercial activities in the interest of the economic and social development of the nation and, on the other hand, the need to impose certain limitations on the application of that rule, which were justified by the requirements of international economic relations. After pointing out that development needs and economic interdependence made it impossible to disregard the position of the Western developed countries - which favoured limited or functional immunity to the extent that they left most of their commercial and economic activities to the private sector - and their increasingly dominant practices, he observed that the principle of immunity from measures of constraint apart from immunity from jurisdiction, embodied in part IV, was an essential counterweight to the restrictions imposed on the exercise of jurisdictional immunities (part III). He concluded that the draft articles could reasonably constitute a satisfactory basis for the elaboration of a multilateral convention on the topic.

390. The draft articles were on the other hand criticized as failing to balance properly the interests of the foreign State and those of the State in whose territory the question of immunity arose and as reflecting a restrictive interpretation of State immunity based on an anachronistic classification of the juridical acts of a State as acta jure imperii and acta jure gestionis. They were also viewed as an attempt to codify principles relevant to the immunity of States and their property on the basis of the concept of functional immunity, no account being taken of the position of States opposed to that concept. It was suggested that, to make up for that deficiency, parts of the text, in particular parts III and IV, should be redrafted, and the number of cases in which a State could not invoke immunity reduced, as the very principle of immunity would otherwise be undermined. Attention was drawn in that context to the concept of separate property whereby public enterprises had a legal personality and possessed part of the assets which they were entitled to use or to transfer without involving State liability and without being liable to the State, a concept which, it was observed, was largely recognized in the socialist countries and was also enshrined in numerous international instruments, such as the Protocol of 23 September 1978 amending the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties; article 1 of the 1969 International Convention on Civil Liability for Oil Pollution Damage; and article 2, paragraph 1, of the Convention relating to the Limitation of Liability of Owners of Inland Navigation Vessels of 1 March 1973.

391. Some representatives commented on the approach of the new Special Rapporteur for the topic as reflected in his preliminary report. They generally congratulated him for his pragmatism and realism and for his effort to determine on a case-by-case basis what types of activities should enjoy sovereign immunity and what types should not. The view was expressed that no useful purpose could be reached by maintaining rigid positions and the Special Rapporteur had rightly tried to avoid giving prominence either to the restrictive theory or to the absolute theory and to find an acceptable compromise between the two schools of thought.

392. As regards specific draft articles set forth in the Special Rapporteur's preliminary report, some representatives welcomed the recommended merger of articles 2 and 3 which, it was stated, would lead to greater clarity in the definition of the term "commercial contract". One representative suggested that such terms as "property" (patrimonial or not?), "interests" (legally protected or not?), and "ships" should be defined in the article on use of terms or should, at least, form the subject of interpretative provisions. Another representative favoured the inclusion in the text of a universally acceptable definition of the right of a State to own property, inasmuch as there were specific or implied references to that right in the draft.

393. Article 3, paragraph 2 as provisionally adopted by the Commission was viewed by one representative as acceptable in so far as it provided that the purpose of the contract should be taken into account if, in the practice of the State that invoked immunity, that purpose was pertinent for determining whether a contract was commercial in nature. The view was expressed that such a formulation was likely to protect the interests of States called upon to engage in activities which while meeting certain criteria of traditional commercial law were designed in actual fact for the purpose of serving a public interest and thus made acceptable the exception

provided for in article 11 on commercial contracts. As for the corresponding provision proposed by the Special Rapporteur, some representatives noted with satisfaction that it considerably diminished the importance of the proposed criterion in determining whether a contract for the sale or purchase of goods or the supply of services was commercial. While one of them felt that the new formulation brought an element of greater certainty to international legal operations, since it narrowed the scope of the intrusion of the purpose of the act or contract and made no reference to the practice of the defendant State as the key criterion for determining the public or private nature of the act or contract, another representative insisted that the "purpose of the contract" criterion should be deleted altogether and that the "nature of the contract" criterion alone was adequate inasmuch as immunity should not be determined by the contracting parties, one of which could in many cases be a private company. It was further remarked that if the conditions specified in the provision in question were not intended to be cumulative the comma before the word "such" should be replaced by a period.

394. Divergent views were expressed on article 6. One representative said that in its present wording it rendered the draft meaningless and would have the effect of making it possible for immunities to be restricted unilaterally, with the result that the future convention, which was intended to define the principle of immunity and to specify exceptions to it, would fail to achieve its objective. Another representative held the view that the article struck an acceptable balance by affirming the existence of immunity as a general rule of international law while accommodating the restrictive exceptions enumerated in part III.

395. As for the bracketed phrase "and the relevant rules of international law", one representative advocated its deletion, pointing out that its retention in the text would mean that the Commission had been unable to codify the topic, thereby considerably reducing the scope of its work. Other representatives expressed reservations on the deletion of the phrase. It was remarked that article 6 merely provided a particular means of applying the principle of immunity and that recourse to general international law should remain possible, either for the purpose of interpreting the convention or if States deemed its provisions inadequate. It was added that the reference to international law, far from restricting the scope of the future convention, kept open the possibility of adaptation to any subsequent development of the international normative order. In this connection attention was drawn to the wording proposed by Australia in its written comments (see A/CN.4/410): "and the evolving rules of general international law".

396. As for possible compromise solutions, one representative indicated that inclusion of the reference to international law in the preamble would detract from its significance and could cause the convention to rigidify the field of law concerned. The possibility, mentioned by the Special Rapporteur, that the deletion of the reference could to some extent be offset by the addition of proposed article 28 gave rise to doubts on the part of several delegations. It was remarked in this connection that the reference to general international law indicated the existence of a coherent practice accepted by a majority of States - something very different from the bilateral approach of article 28 which essentially concerned the application of the principle of reciprocity - and that the proposed article 28 could not fulfil the function which article 6 should fulfil even if what might be called a "development clause" were included.

397. Commenting on part III in general, one representative stressed that, while the traditional theory of immunity allowed exceptions subject to the express consent of the State concerned, i.e., of a future State party to the relevant convention, the exceptions provided for in the draft articles were unacceptable. Another representative, although agreeing that the exceptions in part III might prima facie appear to be too numerous and to rob the principle of its content, observed that on closer examination it became clear that the exceptions retained derived from the commercial character of the activities considered, from the traditional principle of lex rei situ or from the law of the place in which the injury or damage occurred. Among the representatives who commented on the title of part III, two expressed preference for the alternative "Exceptions to State immunity" and one favoured the alternative "Limitations on State immunity".

398. As regards article 11, one representative suggested the deletion of the words "the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly", pointing out that the waiver of immunity in the case covered in the article was based on the fact that a contract had been concluded and that the State did not have to consent to the waiver. Another representative observed that, once the criteria set forth in article 3, paragraph 2, were accepted, the exceptions provided in article 12 no longer caused a problem.

399. Referring to article 11 bis proposed by the Special Rapporteur, one representative remarked that the concept of "segregated State property" and the wording proposed called for further clarification. After pointing out that the question of immunity was perhaps being confused with the question of against whom to direct court action, he observed that the courts of the State of the forum would have to clarify whether a claim existed against a State or a State enterprise, and thus against whom legal action should be directed. He added that States were free to give their companies a legal personality that would enable them to enter into contracts in their own name and be liable for their fulfilment only in respect of their own property.

400. Articles 12, 13 and 16 were described by some representatives as unjustifiably broadening the range of exceptions to State immunity and, with specific reference to article 13, one delegation observed that, if under the hypothesis envisaged in the article a question of State liability arose, the rules of international law would apply.

401. Article 12 was considered by one delegation as favourable to developing countries whose nationals were called upon more often than those of industrialized States to take employment in the service of foreign entities (including State entities). Another representative favoured the deletion of pargraphs 2 (a) and 2 (b) of the article.

402. As regards article 13, one representative remarked that if the condition set forth at the end of the text ("if the author of the act ...") was intended to exclude transboundary injury and damage, an express clause to that effect should be included in the text and the necessary justification provided in the commentary. Another representative favoured the deletion of the condition in question, adding

that the resulting provision would correspond to the legal situation under article 13 of the Paris Convention on Third Party Liability in the Field of Nuclear Energy and article XIV of the Vienna Convention on Civil Liaiblity for Nuclear Damage.

403. The wording of article 14 was viewed as too vague by one representative but found acceptable by another, who also expressed agreement with the exceptions in articles 15 and 16, on the understanding that the exception in article 16 was to apply without prejudice to diplomatic law.

404. As regards article 18, one representative felt that its provisions should be linked more closely to those of article 3, paragraph 2, and insisted on the need to refer, in determining the commercial character of the use of the ship, not only to "commercial purposes" but also to the practice of the State concerned. He suggested deleting the square brackets around the word "non-governmental" in paragraphs 1 and 4. Another representative remarked that article 18 could pose numerous problems for States and that incorporation of the concept of separate State property would be more helpful in this connection. Still another representative expressed satisfaction at the Special Rapporteur's proposal that the word "non-governmental" should be deleted from paragraphs 1 and 4, adding that the rule in question should not be stated in such a way as to restrict the trade upon which developing countries relied for their economic survival.

405. Several representatives commented on article 19. One of them expressed readiness to accept any formulation that did not seek to add to or detract from the existing jurisdiction of the courts of any State or to interfere with the role of the judiciary in any given legal system in the judicial control and supervision that it might be expected or disposed to exercise in order to ensure good morals and public order in the administration of justice necessary to implement the arbitral settlement of differences. Another representative felt that the current formulation gave rise to much uncertainty about the court before which the State party to an arbitration agreement with a foreign person lost the right to invoke jurisdictional immunity. He recalled that as a general rule the arbitration agreement determined the competent court or laid down sufficiently clear conditions for specifying its location and nationality and he concluded that in the circumstances draft article 19 should be worded in such a way that the State party to an arbitration agreement retained the right to invoke its immunity before the court of a State which was not affected or not designated by the said agreement (unless otherwise provided in the agreement). A third representative viewed the exception provided in the article as fully justified and as merely sanctioning arbitration practice and the rules set forth by arbitration regulations, particularly those of the International Chamber of Commerce and the conventions on international commercial arbitration. The same representative, however, favoured the addition of a paragraph (d) concerning the recognition and enforcement of arbitral awards, since those questions were expressly referred to the competent court (see article 54, paragraph 2, of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States). A fourth representative expressed preference for the phrase "commercial contract" over the alternative "civil or commercial matter" which in his view prompted a restrictive interpretation of the principle of immunity.

406. As regards article 20, one representative expressed full agreement with the position adopted by the Commission. Another representative felt however that the article could be interpreted in such a way that it rendered ineffectual the principle established in international law with respect to acts of nationalization outside national territory.

407. Commenting in general terms on part IV, one representative said that it clarified the problem of immunity from execution and codified the norms and international practice in the area and that its three constituent articles were necessary and adequate.

408. Several representatives commented on article 21. One of them said that all the square brackets in the article should be deleted; that the link between the phrase "or property in which it has a legally protected interest" and article 7, paragraph 2, as well as articles 14 and 15, should be stressed more clearly in the commentaries; and that the requirement that there be a link with the object of the claim contained in paragraph (a) was necessary in view of the tendency of certain creditors to effect a general execution of all the property of the debtor State. Another representative, while recognizing that the wording of the first part was consistent with the requirement of contemporary international law, observed that paragraph (a) limited considerably the principle enunciated in the article. In this connection it was suggested to delete from the paragraph the words "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed". Regarding the rules relating to the burden of proof, one representative questioned the wisdom of requiring the enforcing party to furnish proof that grounds existed for one of the exceptions to the rule of immunity and suggested that article 21 be reviewed in order to keep to a minimum the difference between the criteria for immunity in cognizance proceedings and those in enforcement proceedings.

409. With regard to article 22, one representative observed that a waiver of immunity by a State with respect to certain measures of constraint had political significance and could have serious consequences. He accordingly felt that the article should stipulate certain conditions to be met where immunity was waived, for example, that the waiver must be provided in writing, expressly stated and unequivocal.

410. Article 23 was considered by one representative as sanctioning on the whole the generally accepted rules concerning the use of property associated above all with the exercise of the sovereign authority of the State. The same representative, however, expressed reservations about paragragh 2, which he viewed as difficult to reconcile with the very idea of permanent protection of certain categories of State property and as particularly dangerous for heavily indebted States, which might, under pressure, be prompted to allocate some of the protected property for the satisfaction of the claim which was the object of a proceeding before the court of another State in accordance with article 21, paragraph (b), or consent to the adoption of measures of constraint on that property.

411. As regards part V, one representative, while considering it acceptable on the whole, felt that article 28, paragraph 2, appeared to offer the possibility of a

unilateral restrictive application of the provisions of the draft articles, which would negate the objective of codifying the topic. He suggested drawing on article 6, paragraph 2 (b), of the draft articles on the status of the diplomatic courier and subordinating restrictive application to respect for the object and purpose of the draft articles and to the interests and obligations of third States, in accordance with article 41 of the Vienna Convention on the Law of Treaties. With reference to article 24, one representative held the view that accepting paragraph 1 (d) (ii) would be equivalent to abandoning all formal conditions and that only the options available under subparagraphs (a) and (b) should accordingly be retained.

G. STATE RESPONSIBILITY

412. Several representatives stressed the need for the Commission at its next session to devote the necessary attention to State responsibility, an issue which was described as being of fundamental importance for the establishment of legal security in international relations and for the development of international law as a whole. The remark was made in this connection that the inordinately long time which the Commission had taken to elaborate the topic had been said to have damaged international law. The hope was expressed that the Special Rapporteur would bring his usual perspicacity to bear on the topic and enable the Commission to meet the high expectations of Member States. Progress on the topic was felt to be all the more desirable as it would affect attitudes and approaches with respect to the topics "Draft Code of Crimes against the Peace and Security of Mankind" and "International liability for injurious consequences arising out of acts not prohibited by international law".

413. As regards the outline of parts two and three contained in paragraphs 534 and 535 of the Commission's report, agreement was expressed with the Special Rapporteur's intention to define the legal consequences of international crimes more precisely. Support was furthermore voiced for the Special Rapporteur's decision to treat in separate chapters the legal consequences deriving from an international delict and those deriving from an international crime, as well as for his decision to make a distinction within the chapters between the substantive and the procedural consequences of the two categories of wrongful acts - an approach which, it was stated, should prove particularly useful in establishing appropriate distinctions between the consequences of delicts and crimes and make it easier to tackle the question of settlement of disputes considered in part three.

414. As regards the two draft articles proposed by the Special Rapporteur, which were described as clear in content and, subject to the observation reflected in paragraph 416 below, consistent with State practice and doctrine, the significance of the distinction drawn by the Special Rapporteur between "cessation" and "restitution in kind" was underlined. It was remarked that the two concepts were very often confused, the former being often seen as included in the latter. Independent treatment of cessation of the internationally wrongful act was viewed as particularly important for political reasons, as it contributed to the reinforcement of the violated primary rule and consequently to the rule of law in international relations.

415. As regards restitution in kind, support was expressed for the Special Rapporteur's view that it should consist in the re-establishment of the situation that had existed prior to the occurrence of the wrongful act, namely the status quo ante. In this connection the remark was made that in article 7 it would perhaps be necessary to give some indication as to the content of restitution in kind, in addition to considering the conditions and exceptions to restitution. As regards scope, support was expressed for the Special Rapporteur's position that restitution should apply to any kind of wrongful act and that the only hypothesis where an international legal impediment could validly be invoked by a wrongdoing State would be the case in which the action necessary to provide restitution in kind was

incompatible with a superior international legal rule. Agreement was furthermore expressed with the Special Rapporteur's view that the ultimate choice between a claim for restitution and a total or partial claim for pecuniary compensation should be left to the injured State, as well as with the view that the injured State's right of choice should not be left unlimited. Concerning the drafting proposed for article 7, it was stated with reference to paragraph 1 that the criteria in subparagraphs (a), (b) and (c) should be cumulative. As regards paragraph 2, the two criteria (proportionality and serious jeopardy of the political, economic or social system of the wrongdoer State), which had been retained for the purpose of determining at what point restitution in kind could be deemed to be excessively onerous, were viewed as unobjectionable, although it was felt desirable to clarify whether both or only one of the criteria should apply and to elaborate on the concept of "serious jeopardy".

416. Also in relation to article 7, the following question was raised: Assuming that a State entitled to nationalize foreign-owned property in exchange for due compensation undertook a nationalization but failed to offer compensation and thus became guilty of an internationally wrongful act, did draft article 7, as proposed by the Special Rapporteur, imply that such a State, even if, at a later stage, it offered adequate compensation, including interest, would still be under an international obligation to make restitution in kind?

417. On the question of the final outcome of the Commission's work on the topic, the remark was made that although it would be premature to suggest the final form which the draft articles should take, consideration might be given - at least in the initial phase - to the formulation of guidelines.

H. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

1. Programme, procedures and working methods of the Commission

418. As regards the planning of the activities of the Commission for the remainder of the five-year term of office of its members, the intentions outlined in paragraphs 555 and 556 of its report generally met with approval. The Commission was commended for proceeding continuously and thoroughly with the various items on its agenda despite the pressure exerted on it. Several representatives noted with satisfaction that priority would be given in the next three years to the second reading of the draft articles on the topics of jurisdictional immunities of States and their property and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Among the other topics deserving priority, the question of the law of the non-navigational uses of international watercourses was singled out by some representatives, as was also the question of international liability for injurious consequences arising out of acts not prohibited by international law. The topic of the draft Code of Crimes against the Peace and Security of Mankind was viewed by a number of representatives as a pressing one; in the opinion of others, however, there was little value in the Commission making a special effort to complete the first reading of the draft by 1991. Some representatives considered it of the utmost importance that the Commission devote close attention to the question of State responsibility with a view to early completion of the first reading of the relevant draft articles. As for the second part of the topic of relations between States and international organizations, the view was expressed that there was little justification for spending more time on its consideration which was unlikely to yield better results than had consideration of the first part of the topic. Emphasis was placed on the need to achieve progress on topics of pressing importance to the international community and to meet the challenges posed by international development, and attention was drawn to the Sixth Committee's duty to give direction to the future legal work of the international community by indicating to the Commission an order of priority for its future work. 8/

419. With reference to the statement of the Commission in paragraph 557 of its report that attainment of the goals it had set for itself for the next three years would result in a reduction of the number of topics on its agenda and that it was therefore necessary to identify possible topics to be included in a long-term programme, several representatives took note with satisfaction of the Commission's intention to establish a small working group which would be entrusted at the next two sessions with the task of formulating appropriate proposals. While recognizing that such a working group would be useful, one representative stressed that the Commission itself should consider the question at its next session. Several representatives stressed that the Commission's work in this area would be facilitated if the Secretariat completed the updating of the 1971 Survey of

---

8/ This issue was dealt with in the framework of the Ad Hoc Working Group established under paragraph 6 of General Assembly resolution 42/156. For the results of the work of the Working Group, see sect. I.2 below.

international law (A/CN.4/245) in a timely fashion. One representative added that it would perhaps be useful if the Commission and the Secretariat consulted professional associations and eminent jurists throughout the world on their opinion concerning the future work of the Commission and the overall trends in the development of international law. 8/

420. As regards the content of the future programme of work, one representative expressed the hope that the Commission would concentrate on topics for which there was a real practical need and some reasonable prospect of a satisfactory outcome. Another representative, after stressing that the task of codification was not restricted to restating existing positive law but necessarily consisted in giving prominence to certain elements thereof and in bringing the law up to date, observed that the Commission's work could be of even greater utility if it enabled international law to be adapted to the changes in international society. He added that, although mention had been made of a dichotomy between law and politics and of the fact that the Commission could not embark upon the codification and development of rules in the case of legal questions, which were pressing but not yet sufficiently mature, the Commission should not select topics that had no influence on the daily life of the peoples of the world. The same representative accordingly expressed the hope that the working group to be established would be bold and imaginative enough to pick topics that would truly reflect the concerns of all groups of States, meet the expectations of the peoples and fulfil the hopes placed in the Commission at the time of its establishment in 1947.

421. One representative proposed that in its search for new topics to be included in the future programme of work, the working group should give some thought to the law of armed conflict. He stressed that, although rules and regulations pertaining to war had partly been formulated in the course of actual conflicts, through universal observance of some humanitarian aspects on the part of belligerents, and as a result of conflicts, to wit, the 1925 Geneva Protocol and the 1949 Geneva Conventions, the experience of his country suggested a need to formulate new restrictive rules in this area.

422. A number of representatives commented on the methods of work of the Commission. It was pointed out that while time-tested methods should not be radically or hastily altered some specific aspects of the procedures needed to be kept under constant review. One representative observed that further improvement was called for, pointing out in particular that discussions on certain topics tended to drag on much too long with little being achieved inasmuch as articles, after having been discussed in plenary and having undergone the scrutiny of the Drafting Committee, often gave rise to a further round of time- and energy-consuming debate.

423. Gratification was expressed at suggestions in the report that consideration of particular topics should be staggered so that both the Commission and the Sixth Committee could concentrate on particular items in some depth. The remark was made in this connection that the good results achieved by the Commission at its last session had coincided with the fact that only four topics had actually been considered, which seemed to indicate that concentration by the Commission on a few topics might indeed be conducive to greater efficiency and to an increase in

sessional output. Support was therefore voiced for the staggering of the consideration of the topics on the agenda, an approach which the Commission had already adopted de facto, notwithstanding its reluctance to take a formal decision to that effect.

424. Some representatives commented on the two methodological questions raised in paragraphs 560 and 561 of the report. Thus, one representative endorsed the view reflected in paragraph 560 that the process of consideration and drafting should strive to take into account and co-ordinate the theories and practices of all the major legal and social systems, so as to arrive at results acceptable to all sides. Another representative stressed the importance of the statement in paragraph 561 that the work of the Commission would be facilitated and its efficiency enhanced should the General Assembly find it possible to provide an advance indication of its intentions. He observed in this connection that the studies made by the Commission were not bound to culminate in legal documents and could sometimes more usefully serve as a basis for recommendations or as reference codes for use by States in resolving specific problems. He observed furthermore that in the life of a treaty adoption was only one stage, which became meaningful only through the signature and ratification of States, and that the elaboration of a convention based on the proposals of the Commission should not be undertaken unless there appeared to be a broad consensus on a set of precise and coherent rules (see sect. I.2 below).

425. Another methodological issue which was raised concerned the extent to which there was an undesirable overlap between particular subjects being studied by the Commission. In this connection, one representative stressed that a consistent approach needed to be taken on different international instruments dealing with the same or related subjects and that one area of possible overlap was the discussion of the three topics of State responsibility, international liability for injurious consequences arising out of acts not prohibited by international law, and the law of the non-navigational uses of international watercourses. After noting that the Commission's work on international watercourses was at an advanced stage and that in international practice the problem of watercourses had usually been dealt with by specific treaty provisions rather than under a general régime of liability for "lawful" acts, he stressed that a workable distinction should be drawn between injurious consequences and State responsibility, for while the latter topic was concerned with the general problem of liability for acts prohibited by international law the item on injurious consequences was strictly limited to the subject of acts which were not, in the absence of particular forms of injurious consequences, prohibited by international law. He therefore did not favour amalgamating or merging the three topics but insisted that the Commission should avoid any suggestion of inconsistency of approach in relation to them.

426. Also on working methods, the same representative suggested that the Commission should give Special Rapporteurs a clear indication of its intentions some two years in advance so that they could prepare for a given session a detailed and comprehensive work-plan, rather than merely focusing on relatively few articles in a wider, but not fully worked out scheme.

427. Another representative felt that the Commission's working methods could be improved on the basis of the following proposals emananting from various sources: (a) with a view to ensuring continuity, the members' terms of office could be staggered, with a certain number of the seats coming up for election every two to three years, instead of having all the seats come up for election every five years; (b) with a view to ensuring the regular contribution of new talent, a time-limit of two or three terms of office could be set for every member of the Commission; (c) with a view to lessening fatigue, two sessions could be held per year instead of one, with the total number of weeks remaining the same; (d) with a view to ensuring that the Commission was kept abreast of other activities in the area of the development of international law, a biennial update of the 1971 Survey of international law (A/CN.4/245) listing such activities could be prepared; (e) with a view to enabling members of the Commission to be fully informed on all subject areas in its agenda, the suggestion made in paragraph 570 of its report could be adopted; (f) with a view to enabling Governments to be prepared on time, all the Special Rapporteurs' reports could be transmitted to them as soon as they were issued.

428. With respect to the Drafting Committee, which was viewed by several representatives as having an essential role to play, regret was expressed that the question of the use of computer technology should have been deferred to "a later stage", as indicated in paragraph 567 of the report. It was suggested that the Secretariat undertake a feasibility study in order to help the Commission to reach a decision on the subject. It was also suggested that, with a view to ensuring harmonization of the texts produced by the Commission with other international instruments, a computerized data base be developed of texts of bilateral and multilateral instruments relating to the subjects under study by the Commission.

429. One representative stressed that it was appropriate to define objectively the respective functions of the Commission itself and of the Drafting Committee, so that the Commission did not become involved in fruitless deliberations. Another representative stressed that draft articles should not be rushed through the Drafting Committee prematurely. Still another representative suggested that the Drafting Committee be allowed a less interrupted opportunity for work in the early stages of each session except the first in any five-year period. He observed that there had at various times been a considerable backlog for the Drafting Committee and that, rather than all members of the Commission being present at Geneva throughout the scheduled 12 weeks, it might be desirable for the Drafting Committee alone to be given the first two weeks to work on the drafts to be dealt with later in the session, so that the Commission itself could start with as developed a set of proposals as possible. A further suggestion aimed at streamlining the work of the Drafting Committee was that greater flexibility in the latter's membership should be permitted, so that while a core group might be maintained for all subjects, an agreed number of "ex officio" members might be utilized for certain subjects.

430. All the representatives who commented on the question of the duration of the session of the Commission agreed that the length of future sessions should be maintained at no less than 12 weeks.

431. As regards documentation, several delegations welcomed the publication of the fourth edition of The Work of the International Law Commission. 9/ One of them expressed the hope that the French version would be issued without delay and suggested that an analytical index be prepared for easy reference. One representative asked that every effort be made to arrange for the early publication in Chinese of the Yearbook of the International Law Commission, taking into account the principle of equal treatment of all official languages of the United Nations reaffirmed in General Assembly resolution 42/207 C of 11 December 1987.

432. As for the suggestion in paragraph 582 of the report that the United Nations might bring Special Rapporteurs to New York for the debate on their topics, it was supported by one representative but gave rise to doubts on the part of another, who drew attention to the financial implications involved and remarked that, since the debates in the Committee were attended by the Chairman of the Commission and by a number of the Commission's members in various capacities and since Governments could make written comments on draft articles, ample opportunities existed for feedback to Special Rapporteurs (see sect. I.2 below).

2. Co-operation with other bodies

433. Some representatives expressed gratification at the Commission's continued constructive co-operation with such learned regional bodies as the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Arab Commission on International Law. Emphasis was placed in this context on the need to take into account the legal work of the Commonwealth and of the Movement of Non-Aligned Countries, as well as the contribution of the newly independent and developing countries.

3. International Law Seminar

434. Several representatives noted with satisfaction that the post-graduate International Law Seminar had again been held during the most recent session of the Commission, and approved the continued holding of the Seminar. Gratitude was expressed to the Governments of Argentina, Austria, Denmark, the Federal Republic of Germany, Finland and Sweden for their voluntary contributions which had provided fellowships to participants and support was voiced for the call made by the Commission for financial assistance to continue the Seminar, which had been of immense benefit to young lawyers from developing countries.

9/ United Nations publication, Sales No. 88.V.1.

I. EFFORTS TO IMPROVE THE WAYS IN WHICH THE REPORT OF THE COMMISSION IS CONSIDERED IN THE SIXTH COMMITTEE, WITH A VIEW TO PROVIDING EFFECTIVE GUIDANCE FOR THE COMMISSION IN ITS WORK

1. Summary of the relevant views expressed in the Sixth Committee

435. A number of representatives expressed interest in suggestions aimed at the establishment of a better dialogue between the Commission on the one hand and the Sixth Committee and States on the other. The remark was made in this connection that the main prerequisite for the success of the Commission's work was constructive dialogue with Governments through the Sixth Committee. Comments in this area concentrated on two questions, namely, how to ensure optimum conditions for the consideration of the Commission's report by the Sixth Committee and how better to meet the Commission's need for guidance from Governments.

436. On the first question, several representatives expressed support for the arrangements made at the current session for a topic-by-topic discussion of the Commission's report. The hope was expressed that those arrangements which enabled members to focus their attention on a specific subject at a given time would be maintained and even tightened, as they made the debate on each topic more intellectually stimulating. Several representatives furthermore emphasized that if Governments were given sufficient time to study the report it would be easier to give due consideration to the complex and novel topics covered therein. The remark was made in this connection that the Commission was overestimating the capabilities of delegates who had no more than two or three weeks to absorb the 280-page report, some parts of which were described by one representative as too long and disproportionate. With a view to enabling Governments to cope better with the mass of material emanating from the Commission, it was suggested to consider using more frequently summaries of the type contained in paragraph 535 of the report. It was furthermore suggested that the report be issued in instalments, each devoted to a particular topic, that Governments be provided at the end of each session with summaries of the developments on each topic, along with draft articles, if any, and that the report be shortened, for example, through the elimination of historical material. Future reports, it was stated, should be briefer, intermediate in length between the long document before the Sixth Committee and the brief introduction to the item given by the Chairmen of the Commission. In this connection the question was asked why the Commission did not find it possible to have the introductory statement of its Chairmen circulated in advance (see sect. I.2 below).

437. On the second of the questions referred to in paragraph 435 above, the remark was made that a complete knowledge of views of States was essential to the Commission in order to produce generally acceptable texts. Support was expressed for the Commission's current practice initiated at the request of the General Assembly of identifying questions in which the Government's views were particularly needed - a practice which, it was suggested, should be resorted to in a more systematic fashion. In this connection the view was expressed that the purpose of the debate was not to go into details but rather to give the Commission general political guidance and clear-cut answers to the questions it had put to its parent body. That kind of guidance would help the Commission to accelerate its work and would ensure the success of the United Nations codification programme.

2. Results of the work of the Ad Hoc Working Group established under paragraph 6 of General Assembly resolution 42/156

438. At the 40th meeting of the Sixth Committee, the Chairman of the Ad Hoc Working Group established under paragraph 6 of General Assembly resolution 42/156, orally reported to the Sixth Committee on the results of the work of the Working Group.

439. The relevant paragraphs of the summary record of the 40th meeting read as follows:

"10. Mr. TUERK (Austria), speaking as Chairman of the Ad Hoc Working Group, said that the Working Group, pursuant to its mandate, had considered ways of improving the manner in which the report of the Commission was considered in the Committee. Following a general exchange of views, on the basis of which he had prepared a list of questions, the Working Group had concluded that the current arrangements should be maintained and strengthened. To that end, delegations wishing to comment on the whole of the report in a single statement should, as a rule, be given the floor after the list of speakers on the topics scheduled for any given meeting had been exhausted; delegations wishing to make topic-by-topic statements should endeavour to abide by the agreed schedule and to exercise restraint regarding the length of their statements. Furthermore, the agreed schedule should be circulated to the members of the Committee well ahead of the start of consideration of the items concerned.

"11. The Working Group had expressed concerned that Governments had too little time to study the report of the Commission. The Commission shared that concern, as reflected in paragraph 581 of its latest report, and had suggested that the relevant items on the agenda of the General Assembly should be taken up at a later stage of the Assembly's session. However, in accordance with established practice, the items in question did not come under discussion in the Committee until the very end of October; deferring them to an even later stage would create less than optimum conditions for the holding of a serious debate.

"12. The task of Governments would be facilitated if the report of the Commission could, without prejudice to its clarity and comprehensiveness, be reduced to more manageable proportions. Accordingly, it was suggested that the Commission might consider the possibility of shortening or omitting the background information currently appearing at the beginning of most chapters; shortening the summary of the debate or focusing it on points on which the Commission felt a particular need to seek the comments of the General Assembly; and giving succinct treatment to individual draft articles which were to be read in conjunction with other still uncompleted draft articles and therefore did not lend themselves to meaningful discussion.

"13. It was easier to comment on individual articles if the intended structure of the corresponding draft was known in advance. No definitive conclusion could be arrived at until the work had reached a fairly advanced stage; however, the practice of Special Rapporteurs providing early indications of their intentions, and of the Commission working out tentative outlines on the basis of those indications, should be encouraged.

"14. With regard to the possibility of arranging, on a systematic basis, informal exchanges of views between delegations in the Committee on matters concerning the Commission, it was necessary to stress that the Committee and the General Assembly were alone empowered to provide the Commission with political or legal orientations in relation to its programme of work. Any common stand which might be arrived at as a result of informal consultations could be considered as emanating from the Committee only with its formal endorsement. On the other hand, informal exchanges of views on matters concerning, or dealt with by, the Commission, particularly if they involved the legal advisers of Governments gathered in New York, should be encouraged and facilitated. Such consultations should not lead to the issuance of a written report or formal recommendations. The Working Group wished to stress that recent experience showed that the follow-up action on the Commission's final drafts could be discussed with particular felicitous results in informal consultations, and that method might therefore be followed in the future.

"15. With regard to the suggestion contained in paragraph 582 of the report that Special Rapporteurs should be enabled to attend the debates held on their respective topics in the Committee, there did not seem to have been any previous lack of understanding on the part of Special Rapporteurs as to existing trends in the Committee. Furthermore, Special Rapporteurs were responsible to the Commission and care should be taken not to jeopardize that relationship. He also drew attention to the financial implications involved.

"16. Concerning the possibility of establishing priorities among the topics on the Commission's agenda, it should be noted that the programme worked out by the Commission at the beginning of each five-year period was submitted to the General Assembly for approval. In implementing the approved programme, the Commission required sufficient freedom of action; on the other hand, it was a function of the Committee to alert the Commission to the needs of the international community in the area of the progressive development and codification of international law. It was not clear whether the General Assembly could go far beyond the general directive which it had, for a number of years, given the Commission in the relevant resolutions. It might, however, be possible to express, in the draft resolution dealing with the report of the Commission, the desire of the General Assembly that those draft articles which were at the stage of second reading in the Commission should be submitted as soon as possible to the Assembly.

"17. Whereas the Commission, in paragraph 561 of its report, had pointed out that its task would be facilitated if the Assembly found it possible in certain cases to decide at an early stage on the form which the end product of the Commission's work should take, the Working Group believed that, as a general rule, a definite decision could only be taken once a specific draft had been completed; such a decision was necessarily conditional upon the acceptability of the draft.

"18. With regard to the Commission's future programme of work the Working Group recognized that Governments had an important role to play in that area, and assumed that, in accordance with past practice, the proposals of the Commission would be discussed in due course within the framework of the Committee."
