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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-FIRST SESSION (1979)

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

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I. INTRODUCTION

1. The General Assembly, at the 4th plenary meeting of its thirty-fourth session, on 21 September 1979, decided to include in the agenda of the session the report of the International Law Commission on the work of its thirty-first session 1/ (item 108) and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the report at its 38th to 52nd, 59th and 60th meetings, held from 12 to 26 November and on 4 and 5 December 1979. 2/ At its 60th meeting, on 5 December, the Committee adopted by consensus draft resolution A/C.6/34/L.21, sponsored by 41 States.

3. The General Assembly, at its 105th meeting on 17 December 1979, adopted without a vote resolution 34/141, as recommended by the Sixth Committee. By paragraph 12 of that resolution, the Assembly requested the Secretary-General, inter alia, to prepare a topical summary of the discussion on the report of the Commission, to be made available to the Commission. The present topical summary has been prepared by the Secretariat in compliance with the above request.

1/ Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 10 (A/3410 and Corr.1).

2/ A/C.6/34/SR.38-52, 59 and 60.

II. DISCUSSION

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

4. Representatives generally acknowledged that the thirty-first session of the International Law Commission had produced substantial and excellent results as evidenced by its report. Satisfaction was expressed with the high quantity of work accomplished on the topics considered at that session. The report of the Commission showed that considerable progress had been made in the treatment of topics which had been on the Commission's agenda for many years. The first reading of the draft articles on succession of States in respect of matters other than treaties had been completed, pending possible future work on State archives. Furthermore, the first reading of the draft articles on treatics concluded between States and international organizations or between international organizations had been advanced considerably. Also, the first reading of part 1 of the draft articles on State responsibility was nearly completed. The Commission had also had substantive discussions on such other topics as the law of the non-navigational uses of international watercourses, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, jurisdictional immunities of States and their property and review of the multilateral treaty-making process. The Commission's progress on all the items mentioned previously attested to its vitality and desire to improve the quality of its work. The Commission, its officers and the Codification Division of the Office of Legal Affairs were congratulated on their high level of work.

5. The report of the Commission was said to be a source of inspiration to lawyers all over the world and a contribution, through the draft articles and commentaries thereto, to the progressive development of international law and its codification. The hope was expressed that the Commission would continue to be the primary source, in accordance with its Statute, for that codification and progressive development. By preparing drafts of legal instruments on the basis of the fundamental principles of contemporary international law, the Commission could make an effective contribution to the development of co-operation among States. The international community could consider itself fortunate, it was said, in the quality of the individuals elected to the Commission. Their skill in reflecting in technically sound legal texts the changing needs of a changing international community facilitated the work of the Sixth Committee, whose main task was to review the Commission's work and infuse into it, when the need existed, the elements of political thought which were indispensable to a proper development of international law.

6. Some representatives stressed the great importance their Governments attached to the codification and progressive development of international law since by laying down peremptory norms to govern the conduct of States, in accordance with the legitimate interests of all peoples and in strict conformity with the fundamental principles that should govern relations between States, peace would be strengthened, force and the threat of force would be eliminated and the peaceful settlement of disputes between States would be promoted. It was stressed that the work of the Commission in the codification and progressive development of

international law was difficult and complex; it required proper organization and the consideration of a wide variety of subjects from every angle, including the practice of States and doctrine. The development of international co-operation and the maintenance of international peace and détente highlighted the already important role played by international law in the contemporary world and placed on the Commission an obligation to intensify its work and to expand its field of action. The Commission should not merely consider legal problems in the light of purely technical criteria, it should also take into account the requirements of the international community, relations between States and the urgent need for détente. The codification and progressive development of international law should serve to strengthen friendly relations between States and thus to promote peaceful coexistence.

7. It was stated that the favourable verdict which the Sixth Committee delivered each year after considering the Commission's report was an added encouragement to work towards the codification and progressive development of international law. At the same time, it would be regrettable, it was stressed, if the Commission were to be excluded from a new legal dialogue that reflected the aspirations of the world community, and if its work were to be confined to the codification of traditional subjects, no matter how necessary that was. It had shown that it could respond to the General Assembly's expectations by dealing rapidly with highly topical matters and could thus satisfy the new needs of international society. The legal definition of shared resources, which was under consideration by the General Assembly's Second Committee, was cited as one example of a question that could be speedily solved by the Commission. In a more general sense, however, it could make a greater contribution to the new international legal order. The importance of international law in all areas was recognized under the Charter. Admittedly, the "principles of justice and international law" were referred to only in relation to world peace (art. 1, para. 1) and the "progressive development of international law and its codification" only in relation to international co-operation in the political field (art. 13, para. 1 (a)) but that omission would be repaired if the Charter also recognized the connexion between economic development and the progressive development of international law. The Organization was itself seeking to do so in its endeavour to replace the old order by a new order imbued with reason and equity. The Commission should likewise be enabled to contribute to the collective effort to promote a new international law which was characterized by co-operation, equity and solidarity and whose objective was the development of mankind.

8. The task of the International Law Commission in formulating rules having general acceptability was viewed as particularly challenging in view of the fact that the majority of States in the present community of nations had had no direct part in the evolution of the norms of traditional international law. Nevertheless, in many cases the work of the Commission had led to the adoption of several conventions on matters of considerable importance for the international community. The Charter of the United Nations had not only heralded a new set of values based on the sovereign equality of all nations, but had also set in motion a political process leading to a much larger and quite different international community. The Commission had readily recognized that in the progressive development of international law it was the juridical needs and values of that new international

community that had to be accommodated. Of no less importance was the Commission's task of recognizing and declaring the fundamental principles of international law that had found general acceptance by the present society of nations, including those of the principle of non-acquisition of territory through the use of force, the invalidity of treaties which ran counter to basic norms of international public order, the supremacy of the principle of self-determination in all circumstances, the rejection of apartheid, the fundamental principles of the new international economic order and, above all, the recognition that some of those rules were of a peremptory nature, derogation from which was not permitted by the international community of States as a whole, under any circumstances.

9. A number of representatives stressed that harmonious interaction between the Sixth Committee and the International Law Commission was of the utmost importance for the codification and progressive development of international law and that it had in the past produced very satisfactory results, as was attested to by the list of treaties referred to in the Commission's report (para. 194). The role of the Sixth Committee in that connexion was to scrutinize the results of the Commission's work with a view to providing the guidance that would enable it to pursue that work while taking due account of political realities and the concepts of contemporary international law. Thus, the Sixth Committee had a decisive role to play in the task entrusted to the General Assembly in Article 13, paragraph 1 (a), of the Charter, and that must be remembered in considering the relations between the International Law Commission and the Sixth Committee. The two organs were maintaining the necessary co-ordination and the Commission was listening attentively to the comments made by Governments through their representatives in the Sixth Committee, since its work required close and constant contact with Governments, and with world opinion as reflected in the General Assembly and, in particular, the Sixth Committee. The report of the International Law Commission was therefore considered one of the most important items on the Sixth Committee's agenda.

10. The constructive role played by the Sixth Committee in the process of international law-making was emphasized. There had been a time when the lack of items allocated to the Sixth Committee had been a cause for concern. That was no longer the case. It had contributed directly to the progressive development of international law in several fields, including the principles of friendly relations among States in accordance with the Charter of the United Nations, the definition of aggression and the draft articles on special missions, either through special committees whose establishment it had initiated or within the Sixth Committee itself. The balanced approach of the Committee to many delicate problems of the complex modern world had won it high prestige for impartiality.

11. Concerning the consideration by the Sixth Committee of the report of the Commission, some representatives were of the view that a better way of considering that report should be devised so as to take maximum advantage of the opportunity to have an exchange of ideas, rather than a mere reading of statements into the record. The representative of the United States circulated in the Sixth Committee the following proposal (A/C.6/34/CRP.1) on the discussion of the Commission's report:

"The discussion should be divided into three parts:

"1. Succession of States in respect of matters other than treaties;

"2. State responsibility, Question of treaties concluded between States and international organizations or between two or more international organizations;

"3. The law of non-navigational uses of international watercourses, Status of the diplomatic courier and the diplomatic bag non-accompanied by diplomatic courier, Jurisdictional immunities of States and their property, Review of the multilateral treaty-making process, Other decisions and conclusions."

12. Some representatives welcomed the proposal as an interesting one which merited serious consideration, but preferably at the next session of the General Assembly. It was thought that the proposal might delay the consideration of the Commission's report and that it would not be possible to implement the proposal during the 1979 session of the Assembly because of the limited time allotted to the consideration of the Commission's report. Another view maintained was that while the proposal was an interesting one, it would involve a multiplication of statements causing further delays in the Committee's work. Other factors which were mentioned as having an effect on the consideration by the Committee of the Commission's report included the short time available for delegations to analyse the report, the length of the report, the Committee's lack of concentration in considering the report due to interruptions for debate on other items and the reduction in the number of meetings allocated to the consideration of the report.

13. The above-mentioned proposal was withdrawn by its sponsor on the understanding that the Committee would consider the question the following year when organizing its work. He also hoped that the Commission would take into account all views expressed on the matter. The spokesman for the sponsors of the 41-Power draft resolution (see para. 2 above) indicated that during discussions in the drafting group, it had been stated that the Commission should indicate how the Sixth Committee could best convey to the Commission the results of its consideration of the Commission's report.

14. Finally, representatives expressed appreciation to the Swiss Federal Council for the decision to accord, by analogy, to the members of the Commission, for the duration of the Commission's session at Geneva, the privileges and immunities to which the judges of the International Court of Justice are entitled while present in Switzerland, thereby facilitating the performance of the functions of the Commission's members.

B. Succession of States in respect of matters other than treaties

1. Comments on the draft articles as a whole

15. The representatives who referred to succession of States in respect of matters other than treaties, noted with approval that the International Law Commission had advanced in its work by finishing the first reading of the draft articles regarding State property and State debts and adopting two additional draft articles on State archives in accordance with General Assembly resolution 33/139. A number of representatives indicated that they would refrain from commenting on the draft as their Governments would in due course forward their written observations to the Commission. The views expressed in the debate, both on aspects of the draft as a whole and on specific provisions, are summarized below under appropriate headings.

16. Most of the representatives who spoke on the matter considered the draft articles generally acceptable. It was, nevertheless, stated that a number of problems remained unsettled and the hope was expressed that they could be solved definitively during the second reading.

17. Several representatives underlined the importance of the topic by the large number of States which had attained independence since the Second World War and had thus become sovereign members of the international community. The topic was vast and not easy to codify as there were no previous codification efforts which could serve as a basis, but satisfactory progress had been made concerning in particular newly independent States, which required special protection with respect to cultural property, including archives, and natural resources. The draft articles put newly independent States in a category of their own and provided for favourable treatment of such States, stipulating that a newly independent State did not in principle succeed to State debts of the predecessor State and that the permanent sovereignty of newly independent States over their wealth and natural resources should not be infringed. Such provisions were entirely necessary.

18. Many representatives congratulated the Special Rapporteur, Ambassador Mohamed Bedjaoui of Algeria, who had very ably adapted the legal theories to the realities of present-day international life, taking a lesson from the history of Africa and Asia and such newly independent States as Algeria itself, and producing a coherent and legally functional synthesis out of a vast mass of material carefully analysed in 11 successive reports.

19. Several representatives considered that the draft articles should be ready to be sent without delay to Governments for their comments. The Commission should be able to complete its second reading of the articles before the end of the current mandate of its members, so that a final draft could be submitted to the General Assembly. The question of succession of States had been on the agenda of the Commission since its establishment and a Convention on Succession of States in respect of Treaties had already been completed. It was to be hoped that a conference of plenipotentiaries on succession of States in respect of State property, State debts and State archives could be convened as soon as the Commission completed its second reading of the draft articles on those matters. A convention adopted on the basis of those articles would constitute a positive achievement for the Commission and a major step forward in the development of international law.

20. Some representatives considered that the Commission had chosen the right method of work for its examination of the topic. The preparation of draft articles was the best method of developing the relevant rules of international law. One representative, however, stated that, while he could in principle accept the Commission's usual approach, whereby each case was dealt with in the form of a draft article accompanied by a commentary, he considered that the end product did not necessarily have to be a set of draft articles designed to form the basis for an international convention. The commentaries to the draft articles incidentally should be as short as practicable, and should seek merely to justify or explain the Commission's conclusions without entering unduly into the lengthy doctrinal dissertations on which such conclusions were based. In this connexion, the view was expressed that it was regrettable that the Commission had again included in the commentary unnecessary material which raised questions of economic policy and treated General Assembly resolutions out of context and in a manner inconsistent with their recommendatory character. It was also said that the numerous references made to source material which was not of a legal character and which emanated largely from economic agencies prompted the question whether there were not some interdisciplinary factors to which the Commission should be alerted.

21. Several representatives approved the approach adopted by the Commission in concentrating on those areas in which the work had been furthest advanced and which had seemed most important and urgent, and did not think it wise to attempt to draft general rules of international law on other aspects of succession of States which thus far had not been studied in detail by the Commission. It was noted with approval that the Commission had dealt with succession to State property and State debts in general terms, without endeavouring to settle each and every aspect of those questions or to add further elements. The separate treatment of State archives was justified because they could be regarded both as movable State property and as objects of historical and cultural value. Also, the Commission had recognized the need to differentiate between the treatment of succession to State property and of succession to State debts, since each had its own special characteristics.

22. Representatives generally welcomed the work of revision and co-ordination of the original draft articles. It was considered that the modifications adopted by the Commission had improved the draft as a whole, both as to substance and drafting. Reference was made in this connexion to the new wording of the general provisions on State debts, which had clarified that complex issue. Nevertheless, in the opinion of some representatives, although useful clarifications had been made, not all changes were acceptable.

23. The representatives who referred to the point approved the Commission's decision to delete articles 9 and 11 of the original draft, as explained in paragraphs 43 and 44 of the Commission's report. That decision was the logical consequence of limiting the draft to State property and State debts.

(a) Scope and title of the draft

24. It was pointed out that in the present draft, the over-all issue of succession between subjects of international law would still not have been covered in its entirety. The Commission would not have examined the questions of succession of Governments, succession of one international organization to another, succession in respect of territorial rights, nationality and the status of inhabitants of transferred territories, succession in respect of legislative and judicial matters and others. Even on the question of succession of States in respect of economic and financial matters, the Commission had restricted its work to State property, State debts and State archives, while leaving out other aspects of the economic and financial relations between predecessor and successor States. The draft articles were confined to issues of succession to State patrimony and had not dealt with problems of succession relating to property and debts of public enterprises, national corporations, public establishments, or local or provincial territorial units. The draft articles did not deal specifically with succession in respect of rights of States to tangible or intangible and corporeal or incorporeal properties other than State property as defined in the draft articles, nor did they apply to succession in respect of non-contractual or quasi-contractual obligations of non-pecuniary nature or duties to undertake specific performance other than repayment of State debts as defined. That was because the substance of the draft articles dealing with State property and State debts was clearly supported by a sufficient amount of State practice which could lend itself to appropriate codification and progressive development. Treatment of succession of States in respect of other kinds of property to which States could claim certain rights, and of other types of obligations of a non-financial nature, must await further crystallization of customary norms in the usage and practice of nations. It would be difficult to draft general rules of international law for those other matters in view of the wide variety of State practice in that respect. In view of the wide range of questions involved in the issue of succession in international law, it was quite appropriate that the Commission should have thus limited its work, so as to avoid turning the preparation of the draft articles into an interminable task.

25. It was also said that it must be determined whether the draft articles were to be limited to the subjects already covered, namely succession of States with respect to property, debts and archives, or whether more ground should be covered, including such difficult subjects as acquired rights and nationality. One indication of the general intention in that respect could be found in General Assembly resolution 33/139, which pointed towards a relatively early conclusion of work on the topic. If it were decided to include such controversial subjects as those mentioned, it would be impossible to conclude consideration of the topic soon. Some representatives indicated that they would have no objection to ending the Commission's work on the subject at the current stage; there was no need for the Commission to return to the topic of State succession in respect of matters other than treaties at its next or any subsequent session; although perhaps at its next session it could continue consideration of articles on State succession with respect to archives in order to complete that subject.

26. A number of representatives, referring to the title of the draft as well as to article 1, considered that the title would have to be changed since, if the work were concluded at the current stage, the draft articles would not cover succession in respect of all matters other than treaties. In the view of some representatives, while the reasons which had led the Commission to use the title "Succession of States in respect of matters other than treaties", were understandable, the second alternative formulation mentioned in paragraph 49 of the report of the Commission, namely "Succession of States in respect of State property, State debts and State archives" would be more appropriate. In the opinion of some representatives, that title could be simplified further to read "Succession of States with respect to State property, debts and archives". For other representatives that title might even be further abbreviated to "Succession of States in respect of State property and State debts". In their opinion, whatever decision was made concerning the texts relating to State archives, there could be no doubt that such archives were a part of State property and would thus be covered by the abbreviated title suggested, regardless of whether or not specific norms on archives were included. Article 1 in its final form would of course have to reflect the total content of the draft articles.

27. In the opinion of one representative, the title of the draft and article 1 were too broad in scope for the content of the draft articles. A more appropriate title would be "Succession of States in respect of State property and State archives", or perhaps merely "Succession of States in respect of State property", since the term "State property" should be understood as including all sorts of movable and immovable property, including rights and obligations of all kinds, and archives.

28. A number of representatives supported the present title of the draft. It was said in this connexion that, admittedly, it did not adequately reflect the scope of the draft articles but it was in accordance with General Assembly resolution 2634 (XXV) and a similar title had been used in the case of the Vienna Convention on Succession of States in Respect of Treaties. It was also stated that, so far as the two other titles suggested were concerned, the word "certain", in the first was too vague and the second was unduly restrictive and too specific. From the technical standpoint, it would doubtless be preferable that the Commission should retain the title of its draft articles without attempting to specify all the individual aspects to which the draft might apply; the draft might also cover the legal system of the predecessor State, territorial problems, the status of the inhabitants and acquired rights. The Commission had been well advised to keep open the scope of the proposed draft afticles, as they might have to be expanded to cover matters other than State property, State debt and State archives.

(b) Structure of the draft

29. Several representatives agreed with the Commission that in the work of codification and progressive development of international law relating to succession of States in respect of treaties and in respect of matters other than treaties it was desirable to maintain some degree of the characteristic

features that distinguished the two topics from one another. It was noted with satisfaction that the Commission, in elaborating the present draft articles, had based itself on the Vienna Conventions on Succession of States in Respect of Treaties and on the Law of Treaties. In reviewing the form and structure of the draft articles, the Commission had taken account of the need for consistency with the terminology used in the 1978 Convention. That was particularly important if misunderstanding was to be avoided and the homogeneity of the law relating to succession of States as a whole assured. In the opinion of one representative, however, the essential point was perhaps to establish whether, instead of continuing to follow the model of the Vienna Convention on the Law of Treaties, it might not be better to devote to that problem the special attention which it merited.

30. Some representatives welcomed the parallel grouping that had been adopted for the provisions on State property, State debt and State archives. Such an arrangement gave the reader a comparative over-all view of the articles in question, since the provisions concerning each type of succession were grouped under the same headings. The supplementary rules set forth in those provisions had the advantage of being applicable, over and above the principle of the intangibility of State frontiers, to groups of States.

31. In the opinion of one representative, complete parallelism in the rules applying to succession to State property and State debts could not always be maintained in every type of State succession because of the nature of the property and the debts, which must of necessity contain essential differences; that was particularly true with respect to newly independent States, to which the concept of the "clean slate" might apply especially with regard to succession to State debts of the predecessor State. Succession by newly independent States to State property of the predecessor State did not exactly parallel succession to State debts. The provisions relating to each type of succession of States varied according to the peculiar nature of the type of succession involved. The rules were not the same respecting the different types of succession, namely, newly independent States (arts. 11 and 20), uniting of States (arts. 12 and 21), separation of part or parts of the territory of a State (arts. 13 and 22), and dissolution of a State (arts. 14 and 23).

(c) The time factor

32. In the opinion of one representative, articles 2, paragraph 1 (d), and 6 related to the impact of the time factor on the subject under consideration and, if read together, prompted the question: to what was the draft as a whole intended to refer? The Commission had touched on that time factor in connexion with succession of States in respect of treaties in the report on its twenty-fourth session (A/8710, para. 41) but it had apparently been referring to the temporal element as an outward-looking factor, in other words, as it related to the date on which codification of the topic should be completed. Time, however, could also be an inward-looking factor, in which case it referred to the temporal conflict element as an integral part of the substantive rule which, in the draft articles was present in one case but absent in another. The question was one which would have to be faced squarely; and the fact that that

had not been done in the case of succession in respect of treaties, might account for some of the difficulties which, in his view, had been experienced by the Vienna Conference on Succession of States in Respect of Treaties as well as for the difficulties currently arising in connexion with the ratification of the Convention adopted at that Conference (A/CONF.80/31). Most of the States which had attained independence had dealt with the main problems of State succession without the benefit of any written codification of the international law and he therefore wondered whether it was consistent with the principle of the sovereign equality of States to require those, or any other, rules to be applied in future political situations which could not be foreseen. He recognized that the considerations which the Commission had found relevant to succession in respect of treaties might not be equally relevant to succession in respect of other matters. In the case of treaties, the inward-looking time factor was probably of short duration, since once the State concerned had reached its decision, within the accepted legal framework, that decision immediately produced continuing effects. In matters other than treaties, however, the time-span throughout which the effects of the succession might be felt could be quite long, and even unexpected, so that the rule could not necessarily be a momentary one. Furthermore, in a rapidly changing world, cases of double and triple succession could occur within a relatively short time-span. He had himself had occasion to deal with cases of succession involving the Ottoman and British Empires in their suzerainty over the territory which had become his country, and also with a succession which had run from the time of the Kaiser's Reich in the nineteenth century to that of the Federal Republic of Germany. He mentioned those two instances, which were probably not unique, to underline the complexities which the time factor could introduce into State succession. The Commission should take account of, and provide for, all those elements.

(d) The principle of equity

33. One representative welcomed the fact that the draft articles on succession of States in respect of State property, State debts and State archives, were based on the concept of equity. It would be impossible to devise a legal norm that could cover in detail the wide range of complex situations that could arise in matters of succession. Only by applying the principle of equity would it be possible to determine what was reasonable in a given case, at a given place and at a given time. In the draft prepared by the Commission, equity was not an abstract concept, but the very stuff of which the rules were made. Thus, in the Commission's draft, equity became a material source of law. If one could predict probable future trends, one might say that international law would no longer be a reflection of unequal or hegomonic relationships, or of strictly equal relationships, but rather that it would be a body of homogeneous rules in which an increasingly important role would be played by equity.

34. In the view of another representative, the draft articles on succession of State property suffered from one major defect in that they failed to deal with the question whether the property had been lawfully acquired by the predecessor

State. He failed to see how property that had been acquired unlawfully could fall within the scope of the rules. Such property should be returned as of right to its lawful owners or their successors in title, and there should be no actual or presumed escheat to or through the wrongdoer. That principle, which had been applied by the military Governments of the United States, the United Kingdom and France in Germany following the Second World War, was one of general application. The principle of equity, which the Commission had dealt with at some length was likewise one of general application and was not confined to colonial situations. Running through the draft articles was the notion that coercive policies gave rise to claims of restitution which took priority over other claims arising out of State succession. Care should therefore be taken to protect the necessary priorities when competing claims arose under different branches of law.

(e) Financial relationships

35. In the view of one representative, one of the complex issues dealt with was the question of the financial relationships which were established, in every case of succession of States, between the predecessor State and the successor State. The draft articles prepared by the Commission should help to expedite the often excessively lengthy proceedings that were required in such cases.

36. Another representative, referring to the financial situation of newly independent States, noted that the Commission had placed the codification and progressive development of international law in its political and economic context, expressing the view that it was impossible to evolve a set of rules governing State debts for which newly independent States were liable, without to some extent taking into account the situation in which a number of those States were placed. He had some doubts about the manner in which the Commission was applying that principle in the precise case of succession in respect of State debts. Great importance had been attached to the financial capacity of the debtor in the search for a basic rule governing such succession. While the Commission was correct in drawing attention to the increase in inflation since 1973 and the balance-of-payments deficit of non-oil-exporting countries and also in mentioning international discussions on debt cancellation, what its report seemed to be saying was that the legal decision as to whether a successor State inherited the debts of the predecessor State would depend on the price that the successor had to pay for oil, in other words, it would in large part be conditional on the decisions of the Organization of Petroleum-Exporting Countries. It would appear difficult to make the response to a legal problem hinge on such a political and economic variable. It would be more appropriate, legally speaking, to separate the problem of debt transfer from that of measures which might be required subsequently as a result of the situation of the debtor. Moreover, it was difficult to see how the argument of the debtor's limited capacity to pay, if accented, could serve as a basis for special treatment for newly independent States within the meaning given to that term by the Commission. If reasoning based on capacity to pay was pertinent, then it would be valid for all successor States, but that was not the conclusion drawn by the Commission, which excluded similar preferential treatment for other successor States if their independence was not considered to have come about

through decolonization. He noted that, in the economic field, those who claimed that developing countries had a recognized right to enjoy preferential tariffs for their exports had not gone so far as to request that the level of such preferential tariffs should be determined by the political process which had led to the creation of the States in question, arguing rather that the decisive factor should be their level of development. The introduction of a distinction between the situation of a State created as a result of the separation of part of the territory of another State and that of the so-called "newly independent" State was questionable; objective analysis based on legal rather than political considerations made it clear that only three events could give rise to succession of States: separation, transfer and union. His views were motivated by legal logic which separated the problem of debt transfer from the political question of the process of attainment of independence and from international measures which might subsequently be required by the debtor's situation. He noted that many Governments, including his own, believed that the very real and serious problem of debt relief for certain countries should be dealt with on a case-to-case basis. In addition to the measures taken by his Government which were mentioned in the Commission's report, a further debt cancellation of 748 million francs had been proposed in May 1979 for the benefit of 10 newly independent countries. France's position therefore did not stem from a creditor's greed but solely from a desire to deal separately with separate problems.

2. Comments on the various draft articles

PART I

Article 1

/see also "Scope" above/

37. One representative expressed his agreement with the Commission that the term "effects" should be used to indicate that the draft provisions concerned not the replacement of one State by another in the responsibility for international relations of territory, but its legal effects, i.e., the rights and obligations deriving from it.

38. In the opinion of another representative, article 1, which was meant to serve as an introduction to the draft as a whole, missed the point in that respect. In particular, the expression "matters other than treaties" was too negative. He suggested that the article should be redrafted to state specifically to what the articles did apply rather than to imply to what they did not apply. Article 1 of the Vienna Convention on the Law of Treaties would provide a better model in that regard than article 1 of the Vienna Convention on Succession of States in Respect of Treaties.

Article 2

39. It was considered fitting that the definitions of terms in article 2 corresponded to those contained in the Vienna Convention on Succession of States in Respect of Treaties, since the Convention and the draft articles referred to the same phenomenon in a number of instances.

Paragraph 1 (e)

40. Doubts were expressed whether the definition of the term "newly independent State" was the most appropriate, since in providing that the territory of such a State should have been a dependent territory "immediately before the date of the succession of States" it seemed intended to eliminate cases which there was no reason to exclude, such as the emergence of a new State as a consequence of the separation of part of an existing State or from the uniting of two or more existing States. It was said that that definition was very restrictive; it should have included all new and emergent States or States which became independent by means other than voluntary transfer of part of the territory of a State, and the benefit conferred on the "newly independent State" arising out of a dependent territory should have been conferred upon all new States without distinction.

Paragraph 1 (f)

41. In regard to the definition of "third State", the view was expressed that there was need to avoid attributing new, and not necessarily clear, meanings to established expressions. It was incumbent on the Commission, given the central role it played in the development of international law, to preserve the integrity and clarity of the lexicon of that law.

Paragraph 2

42. It was also doubted whether the intent of paragraph 2, should be restricted in the manner suggested in paragraph (8) of the commentary. Terminology was a secondary matter the real purpose of the provision, as it originated in the law of treaties, being to safeguard the internal law and usages of States in general.

Article 3

43. Some representatives stressed the importance of article 3. It was said, with reference to that provision, that the draft articles did not seek to undo what succession of States had entailed in the past. The draft looked to the future instead of attempting to harmonize past practices. It was also pointed out that the Vienna Convention on Succession of States in Respect of Treaties contained a similar rule.

44. In the view of one representative, article 3 was acceptable in principle for the time being since, in the light of the commentaries to the draft on Succession of States in Respect of Treaties and the Commission's report on its work on the article at its twenty-fourth session, it appeared to reflect settled

law. The time had, however, come for a more dispassionate appraisal of the rules of international law as embodied in the United Nations Charter. In the recent past those rules had been flagrantly abused to serve selfish national interests and wars of aggression had been waged by States on the pretext that they had been acting in self-defence or collective defence authorized by the Charter. Those acts of aggression, which were in no way proportionate to the acts that had prompted them, often resulted in armies of occupation becoming entrenched and were not in conformity with the rules of international law as laid down in the Charter.

45. One representative, while approving of article 3, nevertheless considered that its text should be amended as it incorrectly referred to the Charter of the United Nations, which was an instrument of an essentially political character. In the opinion of another representative, it would have been better if that article had been phrased in more general terms and had stipulated that the articles "apply to the effects of a succession of States occurring in conformity with international law".

PART II - Section 1

Article 4

46. One representative thought that articles 4 and 15 could have been combined for the purpose of defining the scope and application of the draft articles.

Article 5

47. One representative suggested that the definition of State property be included, together with the definitions of State debt and State archives, under article 2, so as to provide a ready indication of the matters covered by the draft.

48. Another representative considered that that definition with reference to the internal law of the predecessor State would have to be re-examined later. Since reference appeared logical, as the question of succession to State property would not have arisen had the property not been owned by the predecessor State under its internal law. However, the possibility could not be ruled out that the same property could be owned by several States under their respective internal laws, which might conflict, or that the property might be part of the common heritage of mankind, such as the sea-bed of the subsoil beyond national jurisdiction, which was regulated by international law and not by internal laws. Thus, further reference to international law or to settlement by the international legal system might be necessary.

Article 6

49. One representative considered that the rule laid down in article 6 should deal with any legal encumbrances, rights and duties on or over

the property which passed to the successor State. Assuming, for example, that the predecessor State had granted a concession for the instalment of kiosks and snack-bars in the stations of its State-owned railway system, the Government of the successor State should not be obliged to maintain that concession on a proper passing of the State property from the predecessor State to the successor State. That was in accordance with the view expressed by the Supreme Court of his country which his Government accepted.

50. Another representative said that the term "arising" did not embrace all the possible cases of succession of States that article 6 was supposed to cover, particularly the possible case of a territory which had had the structures of a State prior to colonization. In the latter case, instead of speaking of rights as "arising", it might be more appropriate to say that they had "arisen once again" after having been suspended during the colonial period. That view appeared to be supported by the choice of terms normally used in the same context in the international agreements cited in paragraph (2) of the commentary to article 6. In using the terms "to acquire" and "to cede", the Treaties of Lausanne, Versailles, Saint-Germain-en-Laye, Neuilly-sur-Seine and Trianon expressed the idea of continuity in the existence of rights. It should be added that the last part of article 6 provided clarification by means of the idea of the "passing" of the State property of the predecessor State to the successor State.

51. The same representative considered that in order to introduce that idea of the continuity of the existence of rights, it would be tempting to use the term "acquire", which conveyed the idea of the prior existence and the survival of those rights, but the adoption of that notion was problematic owing to the way it was used in the context of private international law, particularly regarding nationality. He recalled that the Commission and the Conference on Succession of States in Respect of Treaties had not only adopted the basic principle of "tabula rasa" in that regard but also combined it with the need for continuity, which was an essential element in the juridical security of international relations. Just as succession of States in respect of treaties did not always mean starting ex nihilo, succession of States in respect of State debts and State property, even though it entailed, de facto and de jure, the extinction of the rights of the predecessor State, did not always entail the "arising" of rights for the successor State. In order to introduce those clarifications into draft article 6, he wished to propose the following formulation: "A succession of States entails the extinction of the rights of the predecessor State and the obtaining by the successor State of those same rights in respect of such of the State property as passes to the successor State in accordance with the provisions of the articles in the present part."

Article 7

52. One representative considered that in view of the existence of various types of succession of States, article 7 should stipulate that the date of the passing of State property should be determined by the type of succession involved.

53. Some representatives criticized the phrase "unless otherwise agreed or decided" which occurred in article 7 and elsewhere in the draft. In the opinion of one representative, that expression was a pleonasm, and its use could not be justified by the explanation given in paragraph (4) of the commentary to the article. He therefore suggested that it be replaced by "unless otherwise determined". Another representative considered that article 7 should be brought into line with article 2 (d). He was pleased to note that the same phrase did not appear in article 11, and he fully endorsed the views set forth in the commentary to article 11, particularly the statement in paragraph (5) explaining why the phrase had been omitted. In his view, no loophole should be left, which could operate to the detriment of newly independent States when the date of the passing of State property or State archives was determined. Article 7, as drafted, was too permissive and would favour the interests of those metropolitan countries which were reluctant to relinquish their claims to certain State property or works of art and culture expropriated by them. He therefore trusted that the Commission would examine the article objectively at its thirty-second session.

Article 9

54. Some representatives approved article 9. One representative considered that it could be safely deleted. Another representative wondered whether it was absolutely necessary to retain it since it was perfectly clear that the articles relating to the passing of property dealt only with property owned by the predecessor State or States and not with the property of other States.

55. One representative noted that, although it followed from article 5 that the draft articles did not apply to property owned by third States, the Commission had decided to include article 9. While he agreed with the terms of that article, he considered that its wording should be simplified. It seemed unnecessary to refer to property, rights and interests "situated in the territory of the predecessor State" when that applied, _a fortiori_, to property, rights and interests situated outside the territory of the predecessor State. The deletion of the reference to the location of third State property, rights and interests would also improve the drafting of the article and remove the practical difficulty of determining the geographical location of a right or interest.

PART II - Section 2

56. It was noted that the Commission had introduced a distinction, in section 2 of part II, between immovable and movable property and that, since movable property could clearly not be linked to territory alone, an appropriate solution had been found in the formulation "movable State property ... connected with the activity of the predecessor State in respect of the territory to which the succession of States relates". In the opinion of one representative, that wording would cover such elements of property as currency, foreign exchange reserves and State funds as well as various public services. Under the legal

systems of many States, however, some types of property had always been treated as immovable property, and practical problems could also arise in regard to, for example, cultural property and means of transport. In this view, the Commission had therefore been right to soften the basic criterion by introducing the principle of equity.

57. For another representative, succession to State property, as dealt with in part II, section 2, posed no real problem in the case of immovable property since geographical location was the logical criterion, and it had been adopted in articles 10, 11, 13 and 14. In the case of movable property, however, a valid criterion was more difficult to find. While it was true that, in many instances, the application of the criterion of geographical location would not produce equitable results, it could usually serve as a guideline and should therefore not be altogether discarded. He could accept the formula finally adopted by the Commission although he had some doubts whether it was sufficiently clear to provide guidance in the event of a dispute.

Articles 10 to 14

58. One representative reserved his position on articles 10 to 14.

Article 11

59. It was considered that the topic of succession of States in respect of matters other than treaties having important political implications, the draft articles had taken account of contemporary reality so far as decolonization and elimination of the consequences of oppression and domination were concerned. The changes in the United Nations over the past three decades were largely attributable to the process of decolonization; it was gratifying that the Commission had seen fit to give legal form to the basic principles underlying that process. The need for rules concerning succession of newly independent States was further justified by the fact that many of the problems involved had not been solved even after independence had been attained.

60. Several representatives expressed support for the Commission's references with regard to succession in the case of a newly independent State to the statement in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations and that the dependent or Non-Self-Governing Territory possessed by virtue of the Charter a status separate and distinct from the territory of the State administering it and to General Assembly resolution 1514 (XV), under which every people, even if it was not politically independent at a certain state of its history, possessed the attributes of national sovereignty inherent in its existence as a people. In this connexion it was stated that although a closer correlation between the various articles and a more detailed coverage of the situations brought about by decolonization would serve to clarify the rules and to facilitate their implementation, it was gratifying to note that the Commission had established a link with the

Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations as well as with the Charter of Economic Rights and Duties of States and that, when drafting article 11, it had borne in mind the requirements of the new international economic order, and had based itself on article 16, paragraph 1, of that Charter.

61. Specific mention was also made with approval of the Commission's reference to the principle of the permanent sovereignty of every people over its wealth and natural resources.

62. Some representatives stressed that the principles on which the Commission had based itself and the rules of article 11 regarding newly independent States were of jus cogens, ultimately deriving from the right of all peoples to self-determination. It would be a positive factor if Member States conducted their internal relations in a manner that reflected that fact.

63. In the opinion of one representative, the rules relating to the passing of State property in the case of newly independent States must be based on the principles of the viability of the territory and on equity. The introduction of the concept of the contribution of the dependent Territory to the creation of certain movable property of the predecessor State was likely to reinforce the legal guarantees.

64. One representative pointed out that, with respect to succession to State property, British colonial practice appeared to have provided that on the attainment of independence the property of the territorial Government that had been held by the corporation named "The Chief Secretary" would be transferred to and vested in the Crown in right of the newly independent State. For his country, its administration was assigned to the Minister of Finance. Thus the differentiations made in draft article 11 did not appear to have been made by the British colonial authorities in respect of property held by the Chief Secretary either prior to or on the granting of independence to their former dependent territories.

65. In view of one representative, one recurring case not expressly covered by draft article 11 concerned the situation where the metropolitan or predecessor State held property of the dependent State which in due course became recognized as the property of the successor State: precious stones and historical artifacts had all too often been appropriated and kept in palaces or museums of the metropolitan State. He called for the elaboration of a basic rule of law declaring the past appropriation of highly valued property under such circumstances to be unlawful ab initio and for the acceptance of a strong presumption to the effect that such property in principle belonged to the newly independent successor State.

Paragraph 1

66. One representative suggested that immovable property should be dealt with before movable property to bring the article into line with articles 10, 13, and 14.

Paragraph 1 (d)

67. With regard to paragraph 1 (d), one representative considered that it was necessary to determine whether provision should also be made for the passing to the successor State of immovable property irrespective of its location, if it had belonged to the territory to which the succession of States related and had become State property of the predecessor State during the period of dependence.

Paragraph 3

68. One representative drew attention to a discrepancy between the French text of article 11, paragraph 3, which used the term "territoire dépendant", and paragraph (24) of the commentary on the article, which referred to "un Etat dépendant".

Paragraph 4

69. One representative, supporting the formulation of paragraph 4, expressed agreement with paragraph (29) of the commentary to article 11. In the opinion of another representative in regard to paragraph 4 it would perhaps be appropriate to draw further on legal documents which referred not only to natural wealth and resources but also to economic activities, such as the Charter of Economic Rights and Duties of States and the Declaration on the Establishment of a New International Economic Order. In this connexion, the view was also expressed that the principle of sovereign equality of States was largely an illusion, if the economic dimensions of independence were ignored. It was therefore necessary to adapt the formulation of that principle to modern conditions so as to restore to the State the elementary bases of its national economic independence. Such must be the aim of the new economic co-operation which must be based, in accordance with the Declaration and Programme of Action on the Establishment of a New International Economic Order, on equity, sovereign equality and independence, and must be reflected in practice by an inequality which favoured the least developed States. The Commission had therefore rightly considered that the validity of co-operation agreements should depend on their degree of respect for the principles of political self-determination and economic independence, in conformity with contemporary international law.

Article 14

70. One representative noted that article 14 did not make any reference to the possible existence of a priority in favour of one or the other part of the territory which might have "retain/ed/ or perpetuate/d/ the personality of the State which has ceased to exist", as provided in the draft code of international law by E. Pessoa quoted in paragraph (7) of the commentary to the article.

PART III - Section 1

Articles 15 to 18

71. One representative considered that articles 15 to 18 improved the draft as a whole.

Article 15

/See above article 47

Article 16

/See also above, article 57

72. In the view of one representative, in general, part III of the draft, dealing with State debts, was an improvement on the earlier versions submitted by the Commission. It should, however, be made quite clear, in article 16, that part III referred not to "any" financial obligations but only to financial obligations that had been legally incurred, since a very delicate problem could arise in practice. For instance, at the time of the termination of the mandate for Palestine, the United Kingdom had submitted a claim against his Government in respect of costs incurred in the course of the United Kingdom Government's attempt to suppress "illegal Jewish immigration" into the country. The Jewish authorities had taken the view that, since the purported limitation on Jewish immigration during the period 1939-1948 had been contrary to the terms of that mandate, his country could not be expected to assume the financial obligations incurred in pursuing action which was therefore deemed to be illegal. The differences between the United Kingdom Government and his country had since been settled amicably.

73. Some representatives drew attention to the problems that the Commission had faced on the question of succession of States in respect of State debts. It was very difficult to define State debts and the Commission had held lengthy discussions on the question whether State debts should be viewed strictly as international obligations governed only by public international law and covering only subjects of international law, or whether the definition might also provide for a possible relationship under private international law between a debtor State and a private creditor. The scope of the proposed articles would depend on which approach was chosen. It was pointed out that two alternative criteria had been adopted in article 16: the international personality of the creditor and the fact that the financial obligation was chargeable to a State, regardless of the public or private, national or international character of the creditor.

74. One representative considered that although article 16 provided for two categories of obligation, it was not clear what purpose would be served by making such a distinction, particularly since the subsequent articles did not do so. It might therefore be simpler to adopt as the definition of "State debt" the phrase "any financial obligation chargeable to a State" or some similar wording.

Subparagraph (a)

75. Most of the representatives who spoke on the article supported subparagraph (a). In the view of one representative, however, the introduction of a reference to international organizations, in article 16 and elsewhere, seemed to be an unnecessary complication and it might therefore be advisable to confine the draft to the effects of succession "between", rather than "of" States, and to modify article 1 accordingly. For another representative, the meaning of the phrase "any other subject of international law" was a theoretical question on which a consensus was very difficult to achieve.

Subparagraph (b)

76. One representative pointed out that the Commission had decided to include article 16, subparagraph (b), although with reservations. The reservations to its inclusion dated back to the previous session when the adjective "international" before the words "financial obligations" in former article 18 had been placed between square brackets. Thus, the controversy remained, though the wording was different.

77. Many representatives supported subparagraph (b) according to which State debt was defined as covering any financial obligation chargeable to a State, without exception. It was stated that subparagraph (b) had been deliberately so drafted by the Commission in order to cover State debts whose creditors were not subjects of international law.

78. One representative indicated that although some members of the Commission were of the opinion that article 16 (b) should not be applied when the creditor was a national of the debtor predecessor State, that was not the view which had prevailed. Moreover, it was difficult to see how the provisions requiring that an equitable proportion of the State debt of the predecessor State should pass to the successor State (art. 19, para. 2; art. 22, para. 1; art. 23) could be applied. It would be equally difficult to apply those provisions requiring that an agreement between a predecessor State and a newly independent successor State should not "endanger the fundamental economic equilibria of the newly independent State" (art. 20, para. 2), if the State debts the creditors of which were nationals of the predecessor State were left out of account.

79. One representative, speaking in favour of subparagraph (b) stressed that international law had always dealt with the relationship between a State and nationals of other States. Although those nationals could not claim their rights directly at the international level and had to exhaust the resources provided by domestic law, it was recognized that the so-called receiving State had the obligation to treat such persons in conformity with international law and that the State of which those persons were nationals had the authority to act on their behalf in order that they might be so treated. At the current stage in the development of international law, when both theory and practice were moving towards recognition of the rights of individuals, it did not seem right to exclude the possibility that a successor State might be a debtor of subjects other than subjects of international law.

80. Another representative found the new wording of article 16 in subparagraph (b) fully appropriate from both the legal and economic standpoints. From the legal standpoint it was internationally accepted that any natural person was capable of constituting the basis of a relationship in international law, and since such persons could be only subjects in respect of a legal relationship, they must be considered as subjects of international law. In international relations, international rights existed side by side with internationally protected rights, particularly in the context of diplomatic protection. The maintenance of article 16 with its two subparagraphs was an important contribution to the progressive development of international law. From the economic standpoint, the Commission had sought to maintain the balance between States and private bodies by guaranteeing the rights of those bodies, and facilitating the access of developing countries to the private capital market.

81. A number of representatives supported the definition of State debt contained in article 16 (b), as corresponding to the economic reality of the world today and, in particular, in view of the importance of the credit extended to States from foreign private sources. Deletion of that provision would not only restrict the sources of credit available to States and international organizations but would also be detrimental to the interests of the international community as a whole, particularly the developing countries. In the opinion of one representative, although theoretically only the category provided for in subparagraph (a) could constitute a State debt for the purpose of the draft articles, the category should also be mentioned in subparagraph (b) for practical reasons.

82. Some representatives, while in favour of retaining subparagraph (b) nevertheless expressed some reservations. One representative doubted whether there actually was a causal link between the availability of credit, on the one hand, and retention or deletion of subparagraph (b) on the other. Surely, it would be reading too much into the text to find that such a link existed with certainty. The availability of credit was indeed determined by the risk factor, but other factors not the least important of which was the profit motive, also played their role; thus, if subparagraph (b) was deleted, the plight of developing countries would not be as dramatic as some would suggest. The solution would perhaps be to retain subparagraph (b), together with the reservations on it, until such time as a conference of plenipotentiaries dealt with the draft article. Another representative considered that the general effect of subparagraph (b) was to divest subparagraph (a) of its substance. In the circumstances, he felt that subparagraph (b) should be reformulated in the light of the points raised during the discussion.

83. On the other hand, many representatives criticized the provision of subparagraph (b) and proposed its deletion. It was said in this connexion that the words "any other financial obligation chargeable to a State" seemed unduly broad and might give rise to improper interpretations. It was also said that whereas subparagraph (a) clearly referred to the two parties to a financial obligation, the debtor and the creditor, in subparagraph (b) only the debtor was indicated - by the use of the word "chargeable". There was nothing to indicate who the creditor was, nor did the commentary throw much light on the matter; yet

it was obvious that creditors who were not subjects of international law were private institutions operating as legal or natural persons. The question, therefore, was whether such persons fell outside the framework of a set of draft articles concerned with international financial obligations. That question became even more pointed when one considered the position in regard to debts contracted by public enterprises. The intent of the article in this regard was only partially clarified in the commentary which stated quite properly that, irrespective of the State's responsibility for such debts, under article 7 of the draft they were not subject to the rules on succession of States.

84. It was further stated that in so far as subparagraph (b) extended the application of the provisions of part III of the draft to State debts owed to creditors who were not subjects of international law, it gave rise to an obvious contradiction, since the draft articles embodied rules of international law and were therefore applicable only to subjects of international law. The draft articles should deal only with the international debts of States. The concept of State debt should include only the international financial obligations of States, to other States, international organizations or another subject of international law. The transfer of debts that were not international could constitute interference in the internal jurisdiction of the successor State. Matters relating to the financial obligations of a State to private creditors or, in other words, to creditors who were not subjects of international law should be regulated by internal law and could not be subjects of international codification. Subparagraph (b) might even come to include debts contracted with the nationals of a State, which should obviously be governed by national laws. The draft articles should not apply to debts owed by the State to its own citizens, foreign nationals and corporate bodies. Article 16, subparagraph (b), in its existing form, would have virtually the same effect as the deletion from article 18, as originally worded, of "international", for which there was no justification. It was also said that the recourse of a State to diplomatic protection of its nationals in accordance with the rules of international law was also a matter which should be considered outside the scope of the current articles on State succession. In the opinion of certain representatives, the deletion of subparagraph (b) would not imply exemption of a State from its obligations to private parties; article 18, paragraph 1, provided a sufficient safeguard for the interests of all creditors, including those who were not subjects of international law.

85. One representative, with regard to the transfer of State debts, stressed the importance of his previous suggestion to introduce the adjective "international" in the phrase "any other financial obligation chargeable to a State" in article 16 (b), in keeping with the decision in the "Barcelona Traction" case. It was regrettable that that suggestion had not been adopted. Before a final decision was reached as to whether article 16 should be retained as it stood or should be amended in accordance with his suggestion, it would be desirable for the Commission to look into that point more closely by studying the consequences and implications in that regard of both international case law and multilateral conventional rules, such as the 1965 Washington Convention or the provisions of standard bilateral conventions on the protection and guarantee of foreign investment in third world countries. More precise drafting could serve as the basis for a compromise.

86. In the view of another representative, a solution to the remaining substantial problem, the definition of State debts, was not to be found in taking sides as to the inclusion or exclusion of the second subparagraph of article 16, but rather in making positive contributions which would provide new material for the Commission in its second reading. In that context, he emphasized the need for the draft to remain relevant to the situation of all States, and not of certain States only.

The question of odious debts

87. A number of representatives noted that, although the question of "odious debts" had been discussed by the Commission, no provisions relating to it had been included in the draft articles. It was pointed out that the Commission had decided against drafting general provisions on "odious debts" in the expectation that the rules being drafted would be sufficiently wide to cover that situation. "Odious debts" were considered to be those imposed upon a country without its consent and contrary to its true interests, and debts intended to finance the preparation for or the prosecution of war against the successor State. Some representatives deemed, in this connexion, the proposals submitted earlier by the Special Rapporteur to be quite interesting. Reference was made to the draft articles submitted by the Special Rapporteur in his ninth report (A/C.4/301, pp. 69-70), under which odious debts contracted by the predecessor State which were contrary to the major interests of the successor State or were not in conformity with the principles of international law would be excluded from the provisions on succession to State debts. One representative disagreed with the Commission's conclusion that there was no point in defining the concept of "odious debts" and of stipulating that such debts could never be transferred. Another representative deemed it particularly important to clarify that point since the intent, under the draft articles, was that succession to State debts should be a general obligation on all States apart from newly independent States. He therefore considered that a provision should be included in the draft to cover that point.

88. Some representatives expressed the hope that, in view of the importance of the question, the Commission would review its decision regarding "odious debts" when it took up the articles on second reading.

Article 17

89. In the opinion of one representative, article 17 should be amended to provide that the successor State would take over State debts that passed to it, subject to any lawful encumbrances.

Article 18

90. Some representatives stressed the importance of article 18.

Paragraph 1

91. In the opinion of one representative, paragraph 1 could be read to imply that the creditor maintained his claim against the predecessor State and did not automatically obtain a claim against the successor State. Moreover, paragraph (10) of the commentary stated that the creditor did not, in consequence only of the succession of States, have a right to recourse or a right to take legal action against the State which succeeded to the debt. In cases where the predecessor State ceased to exist, however, the creditor would be seriously prejudiced if he did not automatically obtain rights, as a result of succession, against the successor State or States.

92. In the view of certain representatives, it would seem that the commentary had not been fully adapted to the paragraph's new wording. Thus, it was stated in paragraph (10) of the commentary that the word "creditor" in paragraph 1 of article 18 "should be interpreted to mean third creditors, thus excluding successor States, or when appropriate, natural or juridical persons under the jurisdiction of the predecessor or successor States". Besides the discrepancy between that interpretation and the wording of the text itself, why should a succession of States as such legally affect the rights and obligations of creditors which were natural or juridical persons under the jurisdiction of the predecessor or successor States? In another part of the commentary, the Commission had demonstrated that the creditor-debtor relationship as such should fall outside the scope of the rules of international law relating to State succession. Indeed, that relationship was normally regulated by municipal law, or where appropriate, by rules of conflict of laws indicating the municipal law to be applied. If the creditor and debtor were States, their relationships might be governed by a treaty, but then the present draft articles would not apply, the effects of State succession on treaties being the subject-matter of the Vienna Convention adopted on 23 August 1978. Quite a different matter was the relationship between, on the one hand, the predecessor and successor States and, on the other hand, a third State asserting a claim under international law on behalf of itself or its nationals, when the predecessor or successor State or both failed to meet its or their financial obligations under municipal law. Whether or not such a claim was admissible under the rules of international law and, if so, under what conditions and to what extent, were questions outside the scope of the draft articles. They fell within the scope of other rules of international law, namely those relating to diplomatic protection and State responsibility. But to the extent that those

other rules allowed a State - or another subject of international law - to assert a claim, a preliminary question might arise in connexion with a situation of State succession, namely whether an agreement between the predecessor and the successor State, being an instrument governed by international law, concerning the passage of State debts from the one to the other could be invoked against a third State. That question was dealt with in the present wording of article 18, paragraph 2 (see below). Now it was clear that in the situation contemplated in that paragraph, the creditor, being a national of the third, claimant State might fall under the jurisdiction of the predecessor or successor State. That, indeed, was why the third State could not normally assert the claim unless the creditor himself had exhausted the effective local remedies available to him. There was therefore no reason whatsoever to exclude creditors under the jurisdiction of the predecessor or successor State from the scope of article 18.

Paragraph 2

93. Some representatives expressed some reservations on paragraph 2. In the opinion of one representative, the paragraph and in particular the expression "the consequences of that agreement", which appeared in subparagraph (a), required clarification. He agreed, however, with the statement in paragraph (10) of the commentary to the effect that the provision was equally valid in cases where the creditors were not States, which was an added reason for deleting the references to international organizations. Another representative did not understand why paragraph 2 was confined to creditor States and creditor international organizations, whereas paragraph 1 dealt with creditors in general.

94. Certain representatives expressed also doubts about the condition laid down in subparagraph (a), namely, that the consequences of the agreement must be in accordance with the other applicable rules of the articles in part III. For one representative, the only exception to the general rule that the predecessor and successor States could conclude such agreements as they saw fit was to be found in article 20, paragraph 2, but he was not clear whether that was the restriction which had to be observed under paragraph 2, subparagraph (a). Another, and possibly more reasonable, interpretation was that the agreement could be invoked only if it complied with the general principles of succession which, under articles 19, 20 and 22, had to be applied in the absence of any agreement between the predecessor and successor States. Another representative, likewise, did not understand to which draft articles the words "the other applicable rules" referred.

95. Some representatives referred to the condition laid down in subparagraph (b) and to the conclusion that, in their view, could logically be drawn from it, namely, that the predecessor State or the successor State could invoke an agreement concluded between those two States against a third State or international organization which was not a party to that agreement. For one representative, however, there was nothing in article 18 to suggest that the third State or international organization enjoyed a similar right as against the predecessor and successor States, something that did not seem reasonable to him. Another representative, referring to that logical conclusion in the light of paragraphs 1 and 2 (a), namely that the agreement could be invoked if its consequences were in accordance with certain applicable rules of the draft articles, deemed it to be

clearly in conflict with article 34 of the Vienna Convention on the Law of Treaties. In his view, if the words "a third State or an international organization" used in paragraph 2, meant exclusively a State or an organization party to the draft articles, then the predecessor State or successor State or States were not invoking against the third State the agreement in question, but rather the applicable rules of the draft articles. It was said that the question remained to be analysed in more detail in the second reading in the light of the Vienna Convention on the Law of Treaties.

PART III - Section 2

Article 19

96. One representative observed that the expression "taking into account, inter alia, the property, rights and interests which pass to the successor State in relation to that State debt" used in paragraph 2, did not conform to the expression "taking into account all relevant circumstances" used in articles 22 and 23.

Article 20

97. A number of representatives supported the provision of article 20. It was said that the article had rightly been based on the clean slate principle and that it did not exclude the possibility of an agreement freely arrived at between the predecessor and the successor States. Appreciation was expressed for the Commission's efforts in drafting that positive provisional article. Nevertheless, in the view of certain representatives the article should have provided in more direct terms that no debt of the predecessor State would pass to the newly independent State, so as to ensure that the rule would not be open to any possible interpretation.

98. One representative expressed his satisfaction that on the basis of the principle of the permanent sovereignty of every people over its wealth and natural resources, which was a basic element in the right of self-determination, the Commission had decided to adopt as a basic rule the rule laid down in paragraph 1. However, in his view, that provision had been greatly weakened by the concluding part of that paragraph, providing for an exception to the rule in the case of an agreement between the two States. In view of the special circumstances in which the succession normally took place between a dominant State and a State that had been dominated, he could not see how such an agreement could be freely concluded on both sides. Even after independence the effect of domination was still felt, and the consent of the successor State in such circumstances could not be regarded as freely given. He hoped that the Commission could study that aspect of the question further in the light of the dominant position of the predecessor State, the different levels of development of the two States, the natural incapacity of the successor State to assume financial burdens resulting from the action of the predecessor State alone without the former's participation, the need to avoid, in the interests both of creditors and of the community as a whole, any adverse effect on the already unfavourable economic situation of a weak country, and the requirements of the new economic order. Although paragraph 2 of article 20 already provided some protection against excessive claims by the predecessor State, the best protection remained the rule that no State debts should be passed.

99. It was recognized that the succession of newly independent States was a distinct type of State succession. In this connexion, it was said that the political considerations advanced in support of the rule of article 20 were justified and that the interrelationship between the economic, political and legal factors had been duly reflected, the references to General Assembly resolution 31/158, on the debt problem of developing countries, being likewise relevant. It was also stated that problems of succession in the matter of State debt might be prolonged for decades if the automatic passing of such debt to the newly independent State prevented the latter from achieving real independence. Furthermore, it was said, the taking over of State debts by a newly independent State would be incompatible with that State's right to receive compensation for the exploitation of its resources by the colonial Power. That right had been affirmed in the Declaration on the Establishment of a New International Economic Order, and in the Charter of Economic Rights and Duties of States and had been proclaimed for the first time at the First Conference of Heads of State or Governments of Non-Aligned Countries in September 1961. The assumption of State debts by newly independent States was also incompatible with the legal obligation of the industrialized States to provide assistance to newly independent States. The opinion was likewise expressed that considering the scope of the draft articles as a whole, it was mainly in the relations between strong countries and the weak countries that had formally been colonies or protectorates that the draft articles would be applied most widely. In view of the special nature of those relations, it might have been more to the point in that context to deal with the question not in terms of succession of States, but in terms of a mere restoration of rights which did not involve any passing of debts. It was unreasonable that the predecessor State, having profited for decades from the natural and human resources of the successor State, should be allowed to pass on its debts to that State at the very time when, weakened by the colonial experience and the cost of fighting for its independence, it most needed aid and support.

100. Also with reference to article 20 one representative, for whom one area of succession of special interest was the position of newly independent States, considered that the practice of States that had been analysed appeared to deal extensively with French colonial practice, and to a lesser extent with Belgian, Netherlands and Spanish colonial practice, but much less with British colonial practice, except for a few countries in Asia which had gained their independence in the 1940s and 1950s. There was some difference between those administrative practices; for example, British colonial territories were considered separate administrative units and were largely fiscally autonomous. Consequently all borrowings by British colonies were made by the colonial authorities and constituted charges on colonial revenues alone. When British colonial territories needed capital it was raised by the colony itself, under the Colonial Stocks Act or the Colonial Welfare and Development Loans Act, from the World Bank, or from the London or local stock markets. Accordingly, in those instances, there was no question of succession to State debts as defined in the draft articles, since the debts were debts not of the predecessor State, but of the colonial territory itself. On its accession to independence in 1962, his country's public debt had consisted of financial obligations under the United Kingdom Colonial Stocks Act of 1877, to the World Bank, and to local natural or juridical persons. Those financial obligations had been honoured after independence, and legislation had been

enacted just prior to independence to secure that aim, especially in the case of inscribed stock under the United Kingdom Colonial Stocks Act. It therefore appeared that British colonial practice differed from that of other colonialists, and consequently draft article 20 would have little direct consequence for countries such as his. The Commission's report itself acknowledged that in the light of British colonial practice such local debts might fall outside the scope of the draft articles concerned with the debts of the predecessor State.

Paragraph 2

101. One representative emphasized that paragraph 2 incorporated two modern concepts favoured by the developing countries: permanent sovereignty of every people over its wealth and natural resources, and the fundamental economic equilibria of newly independent States. In this connexion, reference was made with approval to paragraphs (39) and (60) of the commentary to the article. In the opinion of another representative, however, it would be appropriate to broaden the scope of paragraph 2, as it was difficult to establish the meaning of the words "endanger the fundamental economic equilibria of the newly independent State".

Article 21

102. According to one representative, article 21, paragraph 2, was likely to complicate the payment of debts to a third State, since the State being a juridical person, could not be shown to be physically divisible for the purpose of attributing debt after the uniting of two or more States into one.

Article 22

103. One representative, considering that no State debt of a predecessor State should pass to a newly independent State, was of the view that article 22 would thus be superfluous inasmuch as article 20 dealt with the question of the liability of a newly independent State.

104. Some representatives expressed the opinion that article 22, paragraph 1, as drafted, could be interpreted to mean that the predecessor State could enter into agreements with the successor State which did not stipulate that an equitable proportion of the State debt of the former must pass to the latter. For one representative, that difficulty could, however, be overcome by deleting the phrase "and unless the predecessor State and successor State otherwise agree". For another representative, the provision of article 22 also appeared to contradict the provision in article 18, paragraph 2, which allowed creditors to deny the effect of such an agreement. He suggested that the Commission should re-examine article 18, paragraph 2, in its relationship with article 22, paragraph 1, during its second reading of the draft articles.

3. State archives

105. The representatives who spoke on the question noted with satisfaction that the Commission had supplemented its draft articles on succession of States with two articles on State archives.

106. It was pointed out that national archives were an important part of any country's heritage and, in modern times, the production and preservation of archives had become a key to power. Archives constituted as it were the memory of a country, had a special value in terms of its cultural and historical heritage, and were of practical importance in relation to the administration of the State and to certain rights both of the State and of individuals. Consequently, inclusion of that subject in the draft articles was fully justified. The draft articles on State archives would be very useful to both researchers and administrators, and would be invaluable to successor and predecessor States.

107. Emphasis was also placed on the importance of the question of archives for newly independent States. The work in that area, particularly in regard to the progressive development of international law, would be of special interest to those States, where prolonged armed conflict prior to independence had resulted in the destruction, removal and disappearance of invaluable documents. Those articles would give the newly independent countries an opportunity to recover some of those documents or at least copies of them.

108. The view was also expressed that the problem of archives should be dealt with in terms of the right to development, the right to information and the right to cultural identity, within the framework of the establishment of a new international order in all those areas.

109. In the opinion of certain representatives, it was particularly appropriate that the problem of archives in the context of succession of States should be dealt with at a time when both UNESCO and the General Assembly had taken an active interest in the protection of the cultural heritage of nations of which archives were an integral part. In that connexion, there had been reference to UNESCO resolution 18 C/4.212, adopted by the General Conference in 1974 in Paris, "inviting the Member States of UNESCO to give favourable consideration to the possibility of transferring documents from archives constituted within the territory of other countries or relating to their history, within the framework of bilateral agreements". UNESCO had shown particular concern with archives since it regarded them as an important part of the cultural heritage of nations, and its Director-General had appealed for the return of an irreplaceable cultural heritage to those who had created it (UNESCO Courier, July 1978, pp. 4-5). In the form of written legal rules, the two articles adopted by the Commission embodied and supplemented the efforts made by the United Nations and UNESCO to preserve the rights of people to conserve and recover their historical and cultural heritage. The Latin American countries had been particularly concerned with that question, as was shown by the "Andrés Bello" Cultural Convention, to which the Andean Pact countries were parties.

110. One representative, referring to the position of the Director-General of UNESCO considered that the problems should be solved primarily through bilateral or multilateral negotiations and agreements. It was also said that close co-operation among States was necessary for the settlement of disputes about archives through negotiations carried out in good faith.

111. One representative considered that with its work on State archives, the Commission had entered a virtually unexplored area of international law and, the problem of double and triple succession could present special difficulties in that regard. For example, the inquiries which his country had addressed to certain Governments regarding archival material relating to its territory had on occasion met with a rather unsatisfactory response. He would therefore like the Commission to consider whether earlier Governments, apart from the immediate predecessor Government, were not under some more specific legal obligation in that regard.

112. The opinion was expressed that State archives were State property in the sense of article 5 and would therefore be subject to the provisions of the relevant articles. Thus, it might not be necessary to add specific articles on State archives. Nevertheless, the proposed texts might contribute an element of specific interpretation and could therefore be included in the draft. It was also said that State archives should be treated mutatis mutandis within the framework of the rules governing State succession in respect of State property, with the proviso that the specific aspects of the subject-matter of State archives should be given due consideration.

113. In the view of other representatives, although archives might be regarded to some extent as included under the heading of State property, and the rules applying to State property might also be applied to archives, the special characteristics of archives made it appropriate to deal with them separately. Owing to their special nature and value, thus required different treatment from State property in general. The extent to which the nature of archives differed according to the territory to which they related was demonstrated in particular by the cases of mortgage registers and of birth and marriage registers, the latter relating to the population of a territory. There had been instances in the past of archives which related to the population passing to a successor State after the population had been transferred. Some of the criteria applying to their passing by succession as specified in the draft articles were different from the criteria that applied to State property. However, that did not mean that the provisions on that subject could not be included in part II, under State property, as special rules.

114. The opinion was also expressed that whether or not State archives were treated as a type of State property, they constituted a very special case in the context of succession of States. The two draft articles prepared by the Commission contained the minimum provisions desired by many of its members. The Commission should, therefore, in the view of a number of representatives, continue its work on the matter. This, it was said, was required in order to avoid undue repetition and make the scope of application of the articles clearer.

115. It was pointed out that, contrary to the system followed in respect of State property and State debts, the Commission, as regards archives, had not proposed general provisions and provisions relating to each type of succession of States. Apart from a definition of the archives, the Commission had proposed only one article relating to one type of State succession, namely, the type where the successor State was a newly independent State. A number of representatives agreed with this approach.

116. Certain representatives endorsed the Commission's suggestion that it should concern itself only with the definition of State archives and not with the drafting of one or more general provisions applicable to all types of succession of States. In this connexion, the view was expressed that while it was true that the legal problems connected with succession of States in respect of archives were of a quite different nature from those connected with succession of States in respect of movable State property in general and therefore had to be treated differently, it would be difficult, if not impossible, to draw up rules of a general nature to cover the various situations possible. Agreement was also expressed, in view of the particular importance attached to State archives by newly independent successor States, with the Commission's decision that a specific rule concerning the special problems of newly independent States should be included in the codification of the subject. Newly independent States should be given the legal framework to obtain and conserve the widest possible range of documents pertaining to their historical and cultural heritage. Some representatives, however, found it difficult to accept the definition of "archives" in article A as a sufficient basis for other types of succession of States, and for that reason welcomed the Commission's decision to limit the scope of the articles on State archives to the special case of newly independent States. In their view, the contents of draft articles A and B should be sufficient and no further provisions on the subject needed to be added.

117. A number of representatives considered that the treatment of State archives in other types of State succession than newly independent States might also require attention. In their view, it was to be hoped that the International Law Commission would be able to complete its study of that question at its next session and to submit to the Sixth Committee and to the General Assembly two or three draft articles on archives dealing with cases of succession of States other than those resulting from decolonization.

118. Some representatives considered that the articles on State archives should constitute part IV of the draft. Other representatives considered that those articles should be placed after article 14 in part II (State property) of the draft, rather than after article 23, to underline their special character and close relationship with State property. It was said in this connexion that in some cases, the original of a document was of greater historical and cultural importance than a copy.

Article A

119. A number of representatives supported the definition of State archives in article A. It was said in this connexion that the definition was a well balanced one. Introducing the formula of renvoi to internal law and adding a new element contained in the words "and had been preserved by it as State archives" seemed a very appropriate way of dealing with the definition. Some representatives also agreed that the widest possible meaning should be given to the word "documents". That word, understood in its widest sense, would make any specific enumeration unnecessary. It was also said that the words "documents of all kinds" were sufficiently clear. Inevitably, there would be cases where the categorization

became difficult, but an enumerative approach in the article would be difficult and should be avoided. The commentary should perhaps reflect in great detail cases that were intended to be excluded from the meaning of the article. It was further stated that the definition was acceptable, since equity was preserved by the supplementary rules concerning reproduction and fair compensation.

120. Certain representatives agreed with the Commission's opinion that it was not an easy matter to define State archives. It was said in this connexion that due care should be taken to ensure their preservation and transmission to the successor State as a fundamental right inherent in national sovereignty.

121. Some representatives expressed reservations on article A. It was said that the article required further study. Also, in the opinion of one representative, the Commission should consider revising the definition, which had been the subject of reservations by some of its members. There should be an international definition of archives; once it was established, independently of the internal law of States, what archives were then there could be a reference to internal law in determining which of the existing collections in a given country belonged to the State and therefore became subject to the rule of succession. He considered that the Commission also took that view, according to paragraph (1) of its commentary to article A. That view likewise seemed to be reflected in the first part of article A, but not in the last part, "and had been preserved by it as State archives". Thus, if the article had been intended to embody the view he had outlined, it did not appear to do so, for the text seemed to provide in a contrary sense, since the documents preserved by a State as State archives were surely those regarded as such in its internal law. Moreover, if the current text was accepted, it might not cover collections that might be held in State museums or libraries but which, not being preserved as State archives - a concept that was not defined - might not be covered by article A. He therefore wondered whether the last part of article A fulfilled its purpose. He was confident that the second reading of the draft articles would result in a text in line with the aim of establishing an international standard for archives that would make it possible to extract from the varied domestic legislations the substance of what was covered by the legal rule. In the view of another representative, in the definition of article A it would be preferable to delete the reference to the internal law of the predecessor State, since certain valuable historical and cultural documents might otherwise be held to fall outside its terms. Another representative considered that the definition still required much more elaboration before it could be considered fully satisfactory. On the one hand, as stated in the Commission's commentary itself, account should be taken of the fact that the concept of archives varied considerably, and that the content of State archives varied, in consequence, from one country to another. On the other hand, if the definition was not sufficiently accurate, the risk arose of confusing documents on facts, situations and persons concerning the territory which was the object of succession with works which had become part of the historical and cultural heritage of a country.

122. One representative noted that the definition had been given a very restrictive interpretation in the commentary. Although at one point it stated that the expression "documents of all kinds" was to be understood in its widest sense, and also that documents could be in written or unwritten form and made of a variety of

materials, at another it stated that that expression excluded objets d'art which might also have cultural value. He saw no justification for making such an exception. If the expression "documents of all kinds" was to be interpreted in the widest sense, then applying the sui generis rule, all documents relating to the cultural heritage of a people, whether written or unwritten, should be regarded as falling within it. Moreover, a definition which excluded works of art and culture presupposed that all civilizations used only writing as their means of expression. Yet, in Africa, the cradle of civilization, documents had also been expressed through the medium of objects of art. He therefore trusted that the definition in its final form would include objects of art and culture, wherever they were housed. Had there been an international convention in force at the time, his own country would have been able to recover most of its valuable works of art and culture; he wished to spare other countries the same sad experience as his own when they attained independence. It was also said that the definition should include inscriptions on wood and stone. For the sake of clarity, it would perhaps have been better to define clearly all the various types of document envisaged, instead of using the words "of all types", followed by a clearer elaboration in the commentary.

123. One representative thought that the definition could cause confusion in its reference to "documents of all kinds". In the commentary on the article it was pointed out that the words "documents of all kinds" should be understood in its widest sense and it was added that an archival document was anything which contained "authentic data which may serve scientific, official and practical purposes", whether or not in written form. In addition, tapes, drawings and plans, containing no writing, could also be archival items if a more general term than documents was introduced. There could be still more room for confusion there if it was remembered that the commentary specifically pointed out that the term "documents of all kinds" excluded objects of art which might also have cultural and historical value. Other observations in the commentary and, more specifically, the reproduction of article 2 of the Agreement of 23 December 1950 between Italy and Yugoslavia, tended to suggest that what was had in mind as archives were indeed "documents" in a broad sense.

124. In the opinion of another representative, who reserved his position on the article, it was very clear that article A should specify that it referred to State property within the meaning of article 5 of the draft. Again, as the question of determining whether documents where State archives depended not on what they contained or represented but on the manner in which they were kept, it might be better to define such State property as documents of any kind which, on the date of the succession of States, were owned by the predecessor State in accordance with its internal law and constituted State archives by virtue of what they contained or represented or the manner in which they were kept.

125. One representative stressed that in dealing with State archives, it was important to distinguish between two main categories of documents, each of which called for separate treatment: documents of practical importance for the administration of the successor State, which should be handed over to that State, and documents that could be of historical interest to both the successor and the predecessor State, and which might therefore give rise to dispute. Documents in

the second category should be treated in the same way as other cultural property and it would therefore be desirable to study the question in the light of the work being carried out on the cultural property of newly independent States. Modern methods of reproduction made it easier to reach compromise solutions on the transfer of State documents. In the view of another representative, the scope of the draft articles devoted to archives should be limited, in so far as possible, so that they included, for example, only those documents indispensable for administrative purposes. As for other types of archives, such as historical archives, they could very well be covered by the provisions relating to State property.

126. Another representative doubted that the definition could be adopted as final because of its vagueness and ambiguity; he would prefer a definition consisting of as complete a list as possible of the various fields of activity, to be included in article 2. The same definition could also be considered for State property, if that term did not have the same meaning in the various legal systems in the world.

Article B

127. A number of representatives expressed support for article B. It was said that article B dealt satisfactorily with cases in which State archives might be essential both to the predecessor State and to the successor State and which, by their very nature, could not be divided. Modern technology made it possible to provide for their reproduction, which was very important to newly independent States. In many cases, archives constituted a common heritage, not only for the predecessor and the successor States, but in some cases for several successor States, as had been the case with the Latin American countries when they had achieved their independence from Spain. The large volume of historical archives kept in Sevilla, Spain, represented a common heritage of Spain and Latin America and could not be divided among all the countries concerned. They had, of course, always been accessible to researchers from the Latin American countries, and, thanks to modern technology, could be reproduced. It was also said that article B was clear, and its various clauses expressed a proper balance of the interests not only of the predecessor and successor States, but also of the preservation of the cultural and historical heritage of peoples.

128. Other representatives, however, expressed some doubts about the equitable character of the solutions provided in article B on the question, and reserved his position, in the light of resolutions adopted by the General Assembly, the UNESCO General Conference and the Conferences of Heads of State or Government of Non-Aligned Countries on the restitution to newly independent States of archives of a cultural and historical character.

129. One representative indicated that since British dependent territories constituted separate administrative units, archives, at least those required for the normal administration of the territory, were already to be found in the territory at independence.

Paragraphs 1 and 2

130. One representative had difficulties with respect to the words "having belonged to the territory" in paragraph 1 (a) read in conjunction with what was said in paragraph (5) of the commentary. It did not seem appropriate to him to include the archives of such institutions as local missionary bodies or banks in that category. He therefore believed that there was a need for further consideration to be given to the precise nature of the relationship between the territory and the archives in question which should form the precondition for the operation of the relevant part of draft article B. In the opinion of another representative, the words "having belonged to the territory", and "should be in that territory", in paragraph 1 (a) and (b), and "of interest to the territory", in paragraph 2, were much too ambiguous to be included in a legal text. It was therefore necessary to formulate more explicit wording in order to minimize possible disputes over those criteria. If the scope of the draft articles was limited to official documents connected with administration, drafting difficulties would be reduced to some extent.

131. One representative expressed the view that a particularly delicate problem regarding documents relating to the imperium or dominium of the administering Power, but which were of interest to the newly independent State, had been approached with reference to the concept of equity, a concept which was present throughout the draft and which came to the forefront in paragraph 2. That was a good way to deal with the problem and therefore the wording of the provision would be accepted. Another representative did not share the opinion expressed in paragraph (17) of the commentary to article B and believed that documents of primary interest to the newly independent State should be immediately transferred to it - that is to say, documents in the economic, political and strategic fields and documents whose content might pose a threat to the sovereignty, independence or security of the newly independent State. Furthermore, provisions might be made for obliging the predecessor State not to utilize duplicates of those archives to promote acts of aggression and sabotage against the newly independent State.

Paragraph 6

132. Several representatives stressed the importance of paragraph 6. In this connexion, some of them emphasized the just claim of former colonies to the return of objects belonging to their cultural heritage. It was also emphasized that the paragraph limited the freedom of negotiation of States in the interest of cultural development.

133. One representative, while agreeing entirely with the reference to the right of peoples to information about their history and to their cultural heritage, would go still further since, in his view, all peoples had a right to the restoration of objects of their cultural heritage of which they had been despoiled. That right had already been recognized, under the Treaty of Versailles, in connexion with a part of Egypt's cultural heritage which had been found in Germany. Scattered throughout the world were many documents of great value to his country's cultural heritage. In some cases, those documents were well maintained and there was full access to them; in others, they were not treated with the degree of care they required. Very often they were of no use in the places where they were situated, since the

languages in which they were written were not known in those places. There were no scholars to study them and ensure their scientific dissemination, nor a general public anxious to behold part of its national cultural heritage. Access to such material was often extremely difficult, if not impossible, and the argument that those items of Jewish cultural heritage formed part of the cultural heritage of the State in which they were situated had a hollow ring, particularly when that State had been to the forefront in anti-Jewish persecution, had not come by such material lawfully, and had no real need of it. His country had met with varying degrees of understanding in its endeavours to obtain repatriation of that material and he therefore trusted that the Commission would be able to express in more specific terms the right of new States to the restoration of all materials that formed part of their cultural heritage, which was the logical outcome of the age of decolonization.

134. In the opinion of one representative, as drafted, the paragraph appeared to lay down a peremptory norm of international law. Although he accepted the principle that the people of a decolonized territory had a right to information about their history and their cultural heritage, he considered that the peremptory norm in article B, paragraph 6, was inappropriate, given the provisions of paragraph 2 of the same article. Another representative expressed the view that the words "the right of the peoples of those States to development, to information about their history and to their cultural heritage" were ambiguous. An attempt must be made to render the intended meaning in clear legal terms.

Additional articles proposed by the Special Rapporteur

135. One representative was of the opinion that because of the special features of the subject, the Commission might usefully consider at its thirty-second session some of the draft articles, identified as articles B, D, E and F, originally included in the report of the Special Rapporteur (A/CN.4/322 and Corr.1 and Add.1-2). The solutions provided in those draft articles could not be deduced from the general provisions on State property, and the special nature of the subject made those articles necessary. The present draft did not include, as in the original draft by the Special Rapporteur, the various cases of succession covering the transfer of a part of the territory of one State to another State, the uniting of States, the separation of part or parts of the territory of a State, or the dissolution of a State. All those possibilities had been considered in relation to State property and State debts, and there appeared to be no reason why they should not also be considered in relation to State archives. The Commission should take draft articles B and F as a working basis, perhaps dropping draft articles D and E. If draft article B was compared with the corresponding article for State property, article 10, it could be seen that the criteria for passing were different. Article 10 established for succession respecting movable property, which most closely corresponded to archives, that movable property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States related should pass to the successor State. In article B, on the other hand, paragraph 2 (a) (i) provided that archives of every kind - and not only State archives - belonging to the territory to which the succession of States related should pass to the successor State. The clause in

question was important, since it sought to protect the cultural heritage of a certain territory. The concept of "belonging" to the territory was original, and could not be inferred from any article on passing of State property. The other criterion for passing based on article B, paragraph 2 (a) (ii), and paragraph 2 (b) was also necessary. It referred to archives, in that case State archives that concerned exclusively or principally the territory to which the State succession related. That was a much broader concept than that in article 10 concerning the transfer of movable property, which might well include items that had nothing to do with the activity of the predecessor State in respect of the territory.

136. In the opinion of that representative, the same applied to article F, which invoked the same criterion, but also imposed a logical and just obligation on the State retaining the archives to make an appropriate reproduction thereof for the use of the State or States which did not receive the archives. The article also covered the case of indivisible archives. Possibly the maintenance of article D was less justifiable, since it would be easy to invoke the provisions of article 12, if State archives were regarded as property, or article E which, except for the obligation to make reproductions of the archives in paragraph 3, closely followed the text of article 13 on separation of part or parts of the territory of a State.

C. State responsibility

1. Comments on the draft articles as a whole

137. Several representatives expressed satisfaction for the work done so far by the International Law Commission on the topic and in particular for the adoption by the Commission in first reading of articles 1 to 32 of its draft on State responsibility for internationally wrongful acts. They commended the outstanding contribution made in this respect by the former Special Rapporteur, Mr. Ago. Appreciation was also expressed to the International Court of Justice for allowing Mr. Ago, elected there since as Judge of the Court, to take part, in his individual and personal capacity, in the work of the Commission related to the consideration of his eighth report devoted to the remaining article of chapter IV (Implication of a State in the internationally wrongful act of another State) and the articles of chapter V (Circumstances precluding wrongfulness) of part 1 of the draft.

138. Satisfaction was also expressed for the appointment of Mr. Riphagen to succeed Mr. Ago as Special Rapporteur on State responsibility. This decision of the Commission was regarded as an assurance that the high quality of the work already done by the Commission on this important topic would be preserved as well as a confirmation of the Commission's intention of completing successfully the task entrusted to it by the General Assembly regarding the codification and progressive development of the rules of international law governing State responsibility for internationally wrongful acts.

139. Several representatives endorsed the general approach followed by the Commission in its study of the topic. They commended the Commission for having undertaken the task of preparing a draft laying down rules governing State responsibility in general, without confining it to particular area such as responsibility for injuries to the person or property of aliens. Such an approach allowed to appropriately take into account State responsibility for acts endangering international peace and security, to distinguish between international "crimes" and international "delicts" and to cover the responsibility of a State for the violation of rules of international law protecting human rights independently of the fact that the persons concerned were foreigners or nationals. It was also noted with approval the Commission's decision to focus first on the question of State responsibility for internationally wrongful acts, leaving aside the question of international liability for injurious consequences arising out of acts not prohibited by international law to be dealt with separately. It was also observed that the work of the Commission on the topic has been as forward-looking as is possible and that the Commission has tried, albeit cautiously, to be responsive to contemporary needs, taking even some bold steps within the confines of a subject, which has always been approached with considerable restraint.

140. Several representatives expressed satisfaction for the commentaries by the Commission on the draft articles and observed that the explanatory remarks constituted a significant contribution in elucidating the proposed rules. While acknowledging the usefulness of the commentaries with respect to the draft

articles, certain representatives stressed that the State practice, judicial or arbitral decisions and writings of jurists relied upon should not be confined to old cases or reflect primarily the thinking of European jurists. The attention of the Committee was called to the survey of State practice, international judicial decisions and doctrine relating to "force majeure" and "fortuitous event" as circumstances precluding wrongfulness prepared by the Codification Division of the United Nations Office of Legal Affairs (document A/CN.4/315; originally published as document ST/LEG/13).

2. Comments on the various draft articles

141. Several representatives made comments on the draft articles. Others refrained from doing so on the grounds that their Governments would submit at a later stage written comments thereon. While representatives directed their specific comments primarily on the five new articles (articles 28 to 32) adopted by the Commission at its thirty-first session, there were references to the relationship between these articles and other articles adopted at previous sessions of the Commission. Difficulties with the distinction made by the Commission in articles 20, 21 and 23 between obligations of conduct, obligations of result and obligations to prevent a given event were also reiterated by certain representatives.

Chapter IV

142. The specific comments made on the provisions set forth in this chapter of part 1 of the draft concerned article 28 (Responsibility of a State for an internationally wrongful act of another State) adopted by the Commission at its thirty-first session. Article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act) adopted by the Commission at its thirtieth session was not the object of new comments or observations.

Article 28

143. Comments on this article ranged from those which supported it without reservations, those which agreed with its general approach but suggested ways by which it could be improved to make it more acceptable, to those which rejected the article as a whole explaining grounds on which it should be abandoned.

144. In support of the article, it was noted for example that it stands for the acceptable principle which would discourage States from committing internationally wrongful acts, even through the actions of another State. Its basic proposition, it was observed, is that, without prejudice to the international responsibility of the State which had committed the internationally wrongful act, the dominant State might have also to assume international responsibility for its implication in the internationally wrongful act of the State committing the act. The fact that the Commission had restricted the responsibility of the dominant State provided for in paragraph 1 of the article to wrongful acts of another State

committed in a sphere in which the freedom of action of the latter State was limited by the former State was noted with approval. The Commission was commended likewise for taking the position, for example, that military occupation should not impair the sovereignty or international personality of the occupied State. If the internationally wrongful act had been committed by the occupied State in an area of activity where that State was subject to the control of the occupying State, the responsibility fell upon the occupying State, regardless of whether the occupation was total or partial, legitimate or wrongful. In situations of "occasional" dependence, where a State was coerced by another State, against its will, to breach an international obligation to a third State, the State applying coercion should be internationally responsible for the act, as if it had committed the act itself. Clearly, however, the responsibility of the State applying coercion against another State which had committed a wrongful act did not preclude the responsibility of the State committing the act under other articles of the draft.

145. On specific suggestions for improving the article, it was observed that expressions such as "subject to the power of direction or control" used in paragraph 1 and "as a result of coercion" used in paragraph 2 are ambiguous. It was further observed that there were no criteria stipulating what acts constituted coercion, or the extent to which coercion or control must be exercised in order for a State to be able to claim that it had committed a wrongful act as a result of coercion or control exerted by another State. It was not clear, the view went on, whether the term "coercion" itself as used in the article included economic pressure in the same category, for example, as the threat or use of force. Addressing this same issue, the view was also expressed that "coercion" within the meaning of article 28 was not necessarily limited to the threat or use of armed force and that the concept should cover any action seriously limiting the freedom of decision of the State which suffered it. In other words, any measure making it extremely difficult for a State to act in a manner different from that required by the coercing State. Other representatives cautioned that, for a State to be able to invoke the article as a justification for avoidance of responsibility for an internationally wrongful act, the domination, coercion or control should be so absolute that the authorities of the State committing the internationally wrongful act could be held as having acted as agents of the dominant State. Referring to the vagueness found in the expression "direction or control" used in paragraph 1 of the article, the view was expressed that purely theoretical powers of direction which were not backed up by genuinely effective means of control should not be considered sufficient to establish vicarious or indirect international responsibility. It was also observed that the situations covered by paragraphs 1 and 2 of the article were rather exceptional, but that paragraph 1 could apply to situations which although exceptional were certainly now unlawful, such as the case of a federal State in which the component States had retained the status of subjects of international law. In this respect, it was further noted, paragraph 1 solved the question left open by the wording of article 7 of the draft on attribution to the State of the conduct of entities empowered to exercise elements of the governmental authority other than State organs.

146. Recalling that the commentary to the article referred to situations such as States with a federal structure, dependent territories, and military occupation,

it was also suggested that the Commission should re-examine the drafting of the article carefully in the light of certain basic principles of international law in order to avoid conveying the impression that it was permissible, despite the international responsibility attaching thereto, to breach basic principles of international law, such as the principle of the sovereign equality of States, the non-use of force in international relations, the non-acquisition of territory by force, and the prohibition against interference in the internal or external affairs of States.

147. Several representatives, however, rejected the entire approach of article 28 and some even called for its deletion. Thus, it was said, that article 28 is founded on a concept of responsibility which contradicted the letter and spirit of the principles set forth in chapter I of part 1 of the draft (articles 1 to 4). Under those articles, the view continued, a State is responsible for its own acts in violation of its international obligations. A State that committed an act of aggression or resorted to force to establish or perpetuate its colonial domination was totally responsible for its crimes, the State forcing the former State to commit such wrongful acts being responsible only for its own act, namely, its coercive action. Article 28 gave, however, the opposite impression. The view was also expressed that the weakness of the proposition on which article 28 is based is borne out by the vagueness of the terms used. What was meant by "power of direction or control"? What degree of "coercion" was required? How could it be proved that "coercion" had been exerted to secure the commission of a wrongful act or that a State had thereby been deprived of freedom to decide on its own conduct? Might paragraph 2 of the article not be used by some States to evade responsibility by invoking "coercion" as a pretext, no matter how slight "coercion" was? Under the article, it was also observed, an inquiry would have to be held into the freedom of decision of the State which committed the internationally wrongful act after that act had been committed but before responsibility for it had been attributed. This, it was further observed, could operate to the detriment of the weaker State and open the way to subjective interpretations. For some of the representatives sharing in general the views expressed in this paragraph, the terms "subject to" and "coercion" did not correspond to concepts of contemporary international law. In the contemporary world, according to their view, no State should coerce another State to commit a wrongful act and, if such practices still existed in international relations, they should not be endorsed by the way in which codified rules of contemporary international law are formulated.

Chapter V

148. Comments on the four articles of chapter V of part 1 adopted by the Commission at its thirty-first session, namely articles 29 (consent), 30 (countermeasures in respect of an internationally wrongful act), 31 (force majeure and fortuitous event) and 32 (distress), ranged from those who found them generally satisfactory, those who accepted them but made specific suggestions for their improvement, and those who withheld final assessment until the Commission, at its forthcoming session, has taken up discussion of the circumstances which remained to be considered, namely of "state of necessity" and "self-defence".

Moreover, there were representatives who tended to compare and contrast the situations described in the various articles adopted or to be adopted in chapter V of part 1 of the draft.

149. Thus, it was wondered, for example, whether given the differences between the situation described in article 29 (consent) and article 30 (countermeasures in respect of an internationally wrongful act) on the one hand and those described in article 31 (force majeure and fortuitous event) and article 32 (distress) on the other hand, it was wise to treat the four articles together in one chapter. Articles 29 and 30 both involved the legal relationship between two States A and B, State A having committed an act not in conformity with its obligations towards State B, and State B having either given its consent to the commission of the act (article 29) or having committed an internationally wrongful act justifying a countermeasure by State A (article 30). It would seem to be clear a priori that in both cases the wrongfulness of State A's act could be precluded only as regards State B, the same act still remaining wrongful in its relation to a third State C. Neither State B's consent nor its internationally wrongful act could affect the obligations of State A towards State C. That was clearly spelt out in article 29, paragraph 1. On the other hand, the wording of article 30 was somewhat less clear. That was perhaps because article 30 referred to other rules of international law, which might be the rules appearing in part 2 of the draft articles, since the right to take countermeasures was one of the consequences of international responsibility. It might be that under particular circumstances, still to be decided, a countermeasure legitimately applied by State A against State B also justified the breach of an international obligation of State A towards a third State C, for example where the countermeasure was ordered by the Security Council and could not otherwise be applied. Such a rule would be the counterpoint to article 29, paragraph 2, which provided, in the relationship between State A and State B, that consent given by State B to an act of State A did not preclude the wrongfulness of that act if the obligation with which it failed to comply derived from a peremptory norm of general international law.

150. In the case of articles 31 and 32, the circumstances precluding wrongfulness (force majeure, fortuitous event, distress) were beyond the control both of State A, which was failing to comply with its international obligations, and of State B, which was the victim, as underlined by paragraph 2 of both articles. In its commentary on article 31 and on article 32, the International Law Commission had recognized that State A might have to pay total or partial compensation for the damage suffered by State B but had considered that that was a matter to be dealt with in another context, either in part 2 of the draft on State responsibility or in the draft on international liability arising out of acts not prohibited by international law. The current wording of articles 31 and 32 gave, however, the impression that force majeure, fortuitous event and distress, by precluding wrongfulness of the act, liberated the State committing that act from all legal consequences normally attached to wrongful acts. That, it was observed, was certainly not the intention of the International Law Commission. Furthermore, if not all legal consequences normally attached to wrongful acts disappeared, it was obviously necessary to stipulate which disappeared and which remained, a subject-matter which would fit naturally into part 2 of the draft articles. Obviously,

wrongful acts committed under conditions of force majeure, fortuitous event or distress could not be equated with hazardous acts not prohibited by international law, even if their legal consequences might be partly the same in respect of compensation for damages. Moreover, the problem with articles 31 and 32 was not simply a matter of compensation for damages. The question might arise, for instance, as to whether or not an act of State A, which was not in conformity with its obligation towards State B, although committed in circumstances of force majeure, fortuitous event or distress, might entitle State B to take countermeasures. Thus, it was said, that it was in part 2 of the draft on State responsibility that the problem should be considered and that articles 31 and 32, and possibly other articles of chapter V of part 1 still to be drafted, should include a reference to the relevant rules to be set forth in part 2 of the present draft on State responsibility.

Article 29

151. Commenting on the above article, it was noted that article 29 carefully defined the extent to which "consent" to the commission of an internationally wrongful act could preclude wrongfulness. It was essential to determine precisely the substance of what a State had consented to, for example, consent to the overflight of a territory did not imply consent to the transport of arms and ammunition contrary to the provisions of the Chicago Convention. Similarly, consent to entry into a territory was not consent to its occupation, and the right of passage or transit could not carry with it the power to exercise sovereign authority over the foreign territory. Paragraph 2 of the article, the view concluded, clearly indicates that consent does not preclude wrongfulness when the obligation in question arose out of a peremptory norm of general international law (jus cogens). The view was also expressed that paragraph 2 of article 29, interpreted in the light of paragraph 1, could be taken to mean that the validity of consent itself was not affected by the fact that the commission of the act had conflicted with the obligation arising out of peremptory norm of general international law. However, in such a case, it was said, the validity of the consent itself should be denied. The suggestion was, therefore, made that paragraph 2 of article 29 be reworded to read: "In the application of paragraph 1, no consent shall be considered to be valid if the obligation arises out of a peremptory norm of general international law". Some representatives observed that the commentary on the article could indicate that, the point made in paragraph 2 on the effect of jus cogens upon consent could be also based on the notion of estoppage.

152. Accepting article 29, several representatives caution, however, against the abuses to which the application of its paragraph 2 could allegedly lead. The very idea of including "consent" among the circumstances precluding wrongfulness was also questioned by certain representatives. In this connexion, it was said that the commentary on the article failed to indicate what had led the Commission to include "consent" as a circumstance precluding wrongfulness in the draft. The difficulties involved were attested to by the fact that the Commission had dealt at some length with the question of validity of consent even though it was not

required to do so under the terms of reference of the topic. As the Commission stated in the commentary, in order for consent to be valid a number of criteria had to be met, one of which was that the consent must be given prior to the commission of the act to which it referred. The legal position, however, was that consent created an entirely new and different situation. If, for example, State A consented to the adoption by State B of measures that would otherwise have been prohibited, that constituted an agreement between those two States to set aside the earlier obligation and to replace it by a new one. There could be no question in such cases of an internationally wrongful act and, consequently, of international responsibility for it.

Article 30

153. Several representatives were satisfied that, under article 30, the Commission sought to clarify firstly, the legitimacy of the "countermeasures in respect of an internationally wrongful act" and secondly, their nature and relation to the traditional reactions of States in dealing with international offences. According to some of those representatives, a "countermeasure" was legitimate when it was permissible in international law and taken in accordance with conditions laid down in international law. Such a measure was distinguishable from the mere exercise of the right to obtain reparation for damage. The application of economic reprisals could be a legitimate sanction with the object of punishing the perpetrator of an internationally wrongful act. Not all countermeasures would be regarded as legitimate under international law, and not all internationally wrongful acts would entail the possibility of countermeasures that would be considered legitimate under international law.

154. To other representatives, article 30 itself gave no guidance as to how to determine what type of "countermeasures" are legitimate. Thus, it was said that the expression "if the act constitutes a measure legitimate under international law" was too vague. Were these words to be understood as referring to the act of a Government authorized by a positive rule of law? If so, then the term "under international law" rendered the meaning of the article vague by contradicting the first part of the clause which refers to "wrongfulness" of the act. In this connexion, it was observed that the said vagueness could be removed by redrafting the last part of the article to read as follows: "if the act was committed in consequence of an internationally wrongful act of another State, and it constitutes a measure legitimate under international law".

155. Several representatives emphasized that the term "legitimate countermeasures" should not in any case be interpreted to cover the use of armed force, and suggested that an additional paragraph be included in the article indicating that it cannot be interpreted as authorizing exceptions to the prohibition on the use of force other than those specified in the United Nations Charter. The "legitimate countermeasures" contemplated in article 30 should be interpreted in a restrictive manner and with great prudence. In this respect, several representatives stressed in particular that the concept of "countermeasures" used in article 30 must be carefully distinguished from that of "reprisals". The suggestion was even made

that the article be revised to include a statement of the principle that States have the duty to refrain from acts of reprisals involving the use of force.

156. The view was also expressed that article 30 deserved further consideration and could not be considered final in its present form. While there was a unanimous opinion that the State which was a victim of the wrongful act was entitled to have the act made good through restitution, compensation and moral satisfaction, opinions were however divided as to whether or not the wronged State had a right to apply sanctions against the State which had committed the wrongful act. In accepting that measures adopted by a State which were not in conformity with an international obligation did not constitute a wrongful act if they were applied in consequence of a wrongful act against that State, article 30 was in fact recognizing that the State had a right to apply sanctions. Although the Commission did not explicitly qualify such an act as a "sanction", reserving the use of that term for countermeasures determined by a competent organ of an international organization, it admitted that there were no differences of substance between measures institutionally decided by the international community and measures decided individually by the States themselves. Contemporary international law, however, tended to avoid States taking the law into their own hands and towards the centralization of the application of sanctions, including the use of force in all its aspects.

Article 31

157. Comments on article 31 were comparatively more brief. The rule embodied in paragraph 1 was expressly regarded by some representatives as properly enshrining the principles of force majeure and fortuitous event, the legal validity of which in international law had had the occasion of being confirmed in State practice, international judicial decisions and doctrine. However, the opinion was also expressed that the drafting of paragraph 1 of the article was not altogether appropriate, in that it refers to the event which had made it materially impossible for the State "to know that its conduct was not in conformity" with an international obligation. There was here a psychological element which should be seen as applying not so much to the State itself, an abstract entity, but rather to the organs of the State, i.e., to those persons who, in a situation of force majeure, had undertaken actions on behalf of the State, which would have been wrongful had the circumstance of force majeure or fortuitous event not occurred. It was also observed that paragraph 1 of the article should be assessed according to the extent to which the external event concerned was in proportion or disproportion to the seriousness of the wrongful act in question.

158. The provision of paragraph 2 of article 30, according to which force majeure and fortuitous event do not operate as circumstances precluding wrongfulness of the State in question has contributed to the occurrence of the situation of material impossibility was generally endorsed. The view was even expressed that the situation falling under article 31, paragraph 2, should be supplemented so that it covered cases where the State that committed the wrongful act had not

only "contributed to the occurrence of the situation of material impossibility" but had also participated in its aggravation. On the other hand, certain representatives questioned the usefulness of paragraph 2 of the article. In their opinion the paragraph was unnecessary since the Commission's commentary made it clear that, when a State contributed to the occurrence of the situation of material impossibility the defence of force majeure and fortuitous event could not be invoked by the State.

159. Finally, the distinction made by the Commission between the concepts of force majeure and fortuitous event of article 31, on the one hand, and the concept of "distress" dealt with in article 32, on the other hand, was noted with approval by certain representatives.

Article 32

160. Comments on article 32 dealing with "distress" tended to focus upon the need to clarify that concept. Thus, it was stated that the article referred to a situation in which the author of the act of a State had no other means of saving his life or that of persons entrusted to his care. The wrongfulness of the act of a State not in conformity with an obligation of that State was thus precluded. That type of exceptional situation had often been defined as a case of "relative impossibility" of complying with an international obligation. Freedom of choice in that situation was limited to the adoption of the conduct in question or the sacrifice of the life of the person or persons concerned. On the other hand, while welcoming the idea behind the article it was pointed out that its paragraph 1 should be reviewed for the purpose of giving greater precision to the phrase "situation of extreme distress". The rule embodied in paragraph 2 of the article, namely that "distress" does not preclude wrongfulness if the State in question had contributed to the occurrence of the situation of distress or if the conduct in question was likely to create a comparable or even greater peril, was also noted with approval, although as in the case of article 31, certain representatives questioned the usefulness of such a provision.

161. Reference in the Commission's commentary on the article to the principle that vessels in extreme distress had the right to enter territorial waters and to the corresponding obligation of coastal States not to refuse haven to such vessels was noted by certain representatives as particularly timely in the light of current problems of the international protection of boat refugees.

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

162. A number of representatives expressed their satisfaction at the considerable progress that had been made by the Commission on the question of treaties concluded between States and international organizations or between two or more international organizations. Some representatives stated that they generally agreed with the 22 new articles that had been adopted by the ILC at the 1979 session and expressed the hope that the Commission would complete the first reading of the draft articles in the near future. Some representatives noted that the increasingly important role played by international organizations in international relations was ample justification for the preparation of an instrument to define the rules relating to treaties to which an international organization was a party, and that such an instrument would make a valuable contribution to the codification of the Law of Treaties. The fact that the appearance of international organizations as contracting parties was relatively a new phenomenon, and that there was therefore little practical experience in regard to treaties to which such organizations were contracting parties, did not facilitate the Commission's task. To this end, it was stressed by some that international organizations should therefore co-operate with the ILC in the codification and progressive development of law on that question.

1. Method of work and scope of the draft

163. A large number of representatives who spoke on the subject endorsed the method of work followed by the Commission in adapting mutatis mutandis but with minor changes, the relevant provisions of the Vienna Convention on the Law of Treaties. It was noted that the Commission had overcome the difficulties that derived from the differing nature and limited international capacity of international organizations in treaty-making. It was also felt that since the Vienna Convention would soon be entering into force, the ratification of an analogous convention on treaties to which one or more international organizations were parties should not meet with major difficulties.

164. The view was also expressed by some representatives that the basic difference between States and international organizations should be kept in mind at all times. The capacity of States to enter into treaties, was general and existed for all States; but by contrast, the capacity of international organizations was much more limited, and was conditioned by their own internal rules. Although the Commission had been aware of that basic problem, doubt was expressed whether in fact the method of applying the provisions of the Vienna Convention on the Law of Treaties to the new draft articles mutatis mutandis produced entirely satisfactory results. The basic problem of capacity posed questions which were kept unresolved and that was the case with draft articles 39 to 60, especially those dealing with invalidity, termination and suspension of the operation of treaties.

165. Other representatives also questioned the wisdom of following too closely the model of the Vienna Convention on the Law of Treaties. They expressed the view

that since there was not such a great difference between them, it was doubtful whether in fact it was necessary to draft a new legal instrument on the subject and wondered whether in practice it would not have sufficed to apply the Vienna Convention by analogy. Some added that because of the complexity and relatively inchoate nature of the treaty, caution should be exercised in drawing analogies between the draft articles and the Vienna Convention on the Law of Treaties. They maintained further that a detailed study should be made and that in some cases, new and original provisions should be formulated.

166. One representative expressed the view that some commentaries to various articles, and in particular to articles 39, 40, 43, 44 and 50 could have been more explicit so as to avoid confusion on the position of States and international organizations parties to treaties.

167. One representative expressed his concern that the ILC was reshaping the original approach of the Special Rapporteur, which was to recognize that, although international organizations were not States, in the sphere of treaties their status was not essentially different, and that the Vienna Convention on the Law of Treaties should therefore apply with relatively few changes. He added that the ILC appeared to be fashioning what in a number of respects would be a new convention, in a conscious attempt to reduce international organizations to second-class actors on the world scene. In that regard, he maintained that the ILC was being influenced by the opinions of those whose views dated back to 1945, and which in the light of the decisions of the ICJ and current practice, could now only be regarded as regressive.

168. Most representatives who spoke on the question approved of the Commission's decision to submit the draft articles to Governments for their observations and comments before the draft as a whole could be adopted on first reading.

2. Comments on draft articles as a whole

169. It was stated that articles 42-60 at their current stage of development were in general acceptable.

170. One representative urged the Commission to adopt simpler solutions to some of its drafting problems and asked whether it was really necessary to distinguish in each and every instance, between treaties to which both States and international organizations were parties and those to which only international organizations were parties. He referred in particular to articles 47, 54 and 57 which he said were striking examples of unnecessarily complicated drafting, and in which a rather simple principle had become buried in the obscurities of defining the cases to which it applied. He was of the view that, for instance, paragraph (b) of both articles 54 and 57 could refer simply to "consultations with the other contracting States or organizations, as the case may be" rather than employ the present tedious wording, he added.

3. Comments on the various draft articles

Article 2, paragraph 1 (i)

171. It was stated that the basic problem which the Commission had encountered was that while all States were equal under international law, international organizations varied in legal form, functions, powers and structure and in their competence to conclude treaties. Consequently, it was not sufficient to define an "international organization" as meaning simply an intergovernmental organization, as was done in article 2, paragraph 1 (i). The view was further expressed that a definition of that kind simply begged the question, since many intergovernmental organizations did not, and probably never would possess the power to enter into treaties with one or more States or with international organizations such as the United Nations. That question was not simply of academic interest; 170 intergovernmental organizations were listed with the Union des associations internationales in Brussels. A question was therefore asked whether all those organizations were to be covered by the proposed definition. It was added that what was involved in the present circumstance was intergovernmental organizations with the capacity to assume rights and obligations under international law and thus to enter into treaties. It was therefore suggested that it was essential for the Commission to revise the definition of 'international organizations" accordingly.

Article 6

172. One representative expressed the view that in determining "the capacity of an international organization to conclude treaties", it was necessary not only to look at "the relevant rules of that organization", but also at their evolution as reflected in practice. He suggested that it would be helpful if the Commission in its commentaries on the draft articles indicated the manner in which the capacity of international organizations to conclude treaties in accordance with their rules had been exercised in practice. It would also be useful to have information available on any problem which might have been created by the capacity of international organizations to discharge their international treaty obligations since that question might have relevance to their capacity to enter into treaties, he said. He referred to the treaty-making powers of the European Economic Community, which were not confined to matters covered by express provisions of the Treaty of Rome but embraced the power to conclude treaties whenever the Community laid down common rules to give effect to common policies.

Article 7

173. Some representatives considered the wording of article 7 regarding production of "appropriate powers" by a representative of an international organization for the purpose of communicating the consent of that organization to be bound by a treaty, vague and as not showing clearly who might claim to represent an international organization. It was suggested that the Commission might try to build upon some analogy with article 7, paragraph 2 (2), of the Vienna Convention on the Law of Treaties.

Article 8

174. One representative expressed the view that article 8 was an application of the general rule of law that no organization could be bound by the actions of an unauthorized person unless he had received specific authorization for that purpose from an authorized person.

Articles 19 bis, 19 ter and 20

175. The view was expressed that the draft articles relating to reservations and objections were too detailed and that it would be better merely to lay down general rules and principles.

176. Some representatives however maintained the view that the Commission appeared to be on the right track in proposing a more restrictive rule of reservations and objections to reservations, especially in the case of a multilateral treaty open to participation by all States and by one or more international organizations. It was felt however that the Commission would need to formulate some alternative wording to express that approach in order to avoid possible controversy where the participation of an international organization was not "essential to the object and purpose of the treaty". The view was also expressed that in the case of reservations the guiding principle should be that international organizations should not be able to challenge the actions of States that were legitimate by virtue of their autonomy under contemporary treaty law in circumstances in which other States acting in concert through an international organization, could arrive at positions having legal effects which those self-same States could not take if they acted individually. In the representative's opinion, this would then avoid many of the pitfalls that lay ahead.

Article 36 bis

177. One representative maintained the view that State members of international organizations, even though they were third States in relation to treaties between the organization and other States, had to observe the obligations and could exercise the rights which arose for them under those treaties. If the rule of the organization provided that Member States were bound by treaties concluded by it or if all the parties concerned acknowledged that the treaty in question necessarily entailed such efforts, then the obligations and rights thereunder should devolve on State members of the organization. Both logic and practice seemed to support that concept which was at the core of article 36 bis. It was held that the question was, however, not without controversy and that further examination was required, bearing in mind developing practice.

178. Another representative held the view that because of the differences in character between a State and an international organization, it became absolutely impossible to attribute the same status to them with regard to capacity to commit themselves and others. It was therefore felt that it was not desirable that the

rights and obligations of a State should be negotiated by an international organization, as draft article 36 bis seemed to permit. He added that moreover, the foundation upon which an international organization was based was not absolutely verifiable, even in the case of the highly integrated European Economic Community. Furthermore, that the dual capacity of States to conclude treaties, either by their own consent or through an international organization, gave rise to the problem of conflicting commitments and also to the problem of the priority that was to be given to different types of commitments, taking into account such factors as time and membership or non-membership in the international organization concerned. It was suggested that the ILC should, above all, therefore endeavour to counter such potential conflicts by reflecting the evolution of international practice rather than attempting to anticipate it.

179. Some representatives, on the other hand, held the view that draft article 36 bis should be retained because it provided that the State members of an international organization must observe the obligations, and should exercise the rights, which arose for them from the provisions of a treaty to which that organization was a party. That would seem to fulfil the expectations of third States which concluded an agreement with the organization and therefore assumed, in good faith, that the State members of the organization would measure themselves against and be bound by the treaty concluded by it. It was added that the opposite situation would have destructive effects on the internal balance of international organizations, whose members would then be in unequal positions, and whose internal law would become uncertain since it would have a different sphere of application with respect to each member State.

180. One representative expressed the view that the formulation of draft article 36 bis could be improved, in the English version of the Commission's recent report. He said that the word "acknowledged" in subparagraph (b) had been replaced by "acknowledges". If that was not merely a typographical mistake, and the intention was to change the verb from the past to the present tense, it would creat considerable ambiguity in the text as to the point in time at which the acknowledgement must be made in order to be effective.

Articles 45 and 46

181. Regarding article 45, in particular its paragraph 2, some representatives felt that that paragraph did not take into account the special situation of international organizations when it stated that an international organization might no longer, under certain circumstances, invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50. It was pointed out that an international organization always had the right to withdraw from a treaty if it had been concluded under conditions contrary to its charter or its rules of procedure. It was therefore felt that that article should refer only to articles 47 to 50. The view was expressed by one representative that although he would have liked to see equality between States and international organizations in treaty relations maintained as far as possible, he felt that there was a sufficiently strong case for discriminating between them for the purpose of this article. He stated that although the question as to

whose knowledge or consent should be attributable to the State caused no serious difficulties, the same question could give rise to very serious difficulties in the case of international organizations. He held the view however that such difficulties could not justify a complete denial of the right of international organizations for acquiesence by reason of conduct. For that reason, he gave support to paragraph 2, subparagraph (b), of article 45, and thought it was a happy compromise.

182. One representative expressed the view that he had noted that the difference between States and international organizations was adequately reflected in paragraph 1 (b), and 2 (b), of article 45 which dealt with the renunciation of the right to invoke a ground for invalidating the operation of a treaty. He also felt that the inclusion of paragraph 3 of the same article was useful. Another representative on the other hand expressed the belief that international organizations should be subject to the same obligations as States with regard to the loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty, on the basis of the provisions of article 45, paragraph 3, which underlined the legal difference between States and international organizations.

183. One representative expressed the view that, while article 45 recognized heads of States, ministers of foreign affairs and ambassadors to be rational people, it did not similarly regard comparable officials of international organizations. Also, he did not find any great difference between the use of the word "acquiesced" and the expression "renounced the right to invoke" in draft article 45, paragraphs 1 (b) and 2 (b) respectively.

184. One representative welcomed the Commission's decision in relation to draft article 45 in particular, that no artificial difference should be created in the rules applicable to States and international organizations respectively, on the basis of the "limited international capacity" of the latter. He maintained that whatever limits there might be concerning the area of treaty-making competence, once competence was admitted, organizations must not be placed in a less favourable position. He said that that was particularly so in cases where the States members of an international organization had transferred treaty-making powers to it.

185. The view was also expressed by one representative that further discussion was ne essary on articles 45 and 46.

186. Some representatives who commented on draft articles 45 and 46 together held the view that the structural difference between States and international organizations with respect to treaty-making was particularly apparent. Some representatives stated however that because of this structural difference between them in the matter of treaty-making, a simple transformation of articles 45 and 46 of the Vienna Convention on the Law of Treaties, with full assimilation of international organizations to States in that respect, would not suffice. One representative added that the concept of security of legal relations underlying articles 45 and 46 of the Vienna Convention above was equally essential for treaties concluded by international organizations and that the ILC had struck the right

balance between those two considerations. On one hand, he went on, the ILC had recognized the structural difference between the two by treating all rules of the international organization regarding competence to conclude treaties, as having the same fundamental importance. On the other hand, he said, the ILC had taken due account of the need to ensure the security of legal relations by requiring that the violation of those rules of the international organization had been or ought to have been within the cognizance of the other parties, and by providing for the loss of the right of the international organization to invoke the violation in circumstances implying renunciation of that right. In that connexion, he said that it should be recalled that article 2, paragraph 1 (j), defined the term "rules of the organization" as meaning, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization. He felt that the definition above, left scope for the presumption that when the international organization had expressed its consent to be bound by a treaty, it had done so in accordance with its internal rules, and that it could hardly be expected that a non-member State or another organization could determine whether that had indeed been the case. He added that even if there had been some irregularity on the part of the international organization, and if the other party ought to have known it, it was very unlikely that any organ or Member State of the international organization would be unaware of the existence of the treaty. In other words, that the organ and Member States of the organization would very soon have had an opportunity to react to the situation and at that time, article 45 became applicable, he said.

187. One representative supported the drafting of article 46 in such a way that it corresponded to article 46 of the Vienna Convention in the Law of Treaties. He also found as quite persuasive, the Commission's conclusions that the criteria for the "manifest" character of a violation could be defined by reference to the partners of an international organization in the conclusion of a treaty. The heart of the matter, he said, was whether the partners were or should be aware of the violation.

188. One representative held the view that the omission in article 46 of the condition that the rules of the organization that were violated must be of fundamental importance was justified given the manner in which an international organization formed its will and the ease with which its rules could be ascertained. He felt that it would however be advisable to include a provision in paragraph 4 of the above article requiring contracting States and contracting organizations to act in good faith.

189. Another representative who spoke on article 46 stated that in opting for the test of a "manifest" violation of the rules of the organization dispensing with the condition laid down for States, namely, that of a violation of a rule of fundamental importance, the difficulty which arose was to judge whether in fact there had been a "manifest" violation of the rules of the organization regarding competence to conclude treaties, since there was no "normal practice" for international organizations and the organs or agents responsible for their external relations differed from one organization to another. Admitting those problems, he said, the solutions adopted by the Commission in article 46 appear reasonable, as was true of those solutions adopted in article 45.

190. One representative maintained the view that in adopting the solution that an international organization could not invoke a ground for terminating, withdrawing from or suspending the operation of a treaty if, after becoming aware of the facts, 'it must by reason of its conduct be considered as having renounced the right to invoke that ground'; while, in the case of a State, conduct was considered to be evidence of acquiescence in the validity of the treaty, the ILC was proposing that, conduct, in the case of an international organization, should be considered to be renunciation by the organization of the right to invoke a ground for terminating, withdrawing from or suspending the operation of a treaty. He was of the view that the result however appeared to amount to much the same thing, i.e., placing international organizations on a footing similar to that of States in so far as conduct was concerned.

191. The view was also maintained by one representative that, while his delegation accepted the text of the draft articles, it wished to express certain reservations over the Commission's commentary, especially that of paragraph 3 of draft article 46 inasmuch as the commentary tended to give subjective characters the expression "manifest violation". He added that the tendency was well founded with respect to States, but was not necessarily so with regard to international organizations since they, to a greater extent than States, were regulated by a system of "rigid constitution" in which the criterion of interpretation had to be absolutely objective.

192. One representative stated that, as regards the problem of violation of provisions regarding competence to conclude treaties (draft article 46), his delegation was of the belief that there could be no violation of any rules of an international organization on the pretext that they were not of fundamental importance, because the violation of any rule meant the violation of the agreement concluded between the States Members of such an organization. It was also stated that article 46 should in all cases remain independent since it was interrelated with article 45, paragraph 3.

Article 52

193. Regarding the question whether an international organization could be guilty of using force in order to secure the conclusion of a treaty, it was stated that if the ILC insisted on drawing up a comprehensive treaty, rather than a protocol to the Vienna Convention on the Law of Treaties which would simply introduce changes in the articles where that was absolutely necessary, an article on the use of force by international organizations would have to be included. In that case, he said, the commentary should be simpler and should not reopen the debate on the meaning of "use of force" within the context of the Vienna Convention.

Article 53

194. One representative expressed doubts on the wording of article 53.

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

195. Most representatives who spoke on the topic "The law of the non-navigational uses of international watercourses" noted with satisfaction the work accomplished thereon. It was said that the Commission had made a promising start on the topic on the basis of the very substantial first report prepared by the Special Rapporteur, Mr. Stephen M. Schwebel. Certain representatives, however, believed the method followed was not satisfactory.

196. The special or practical importance of the topic was emphasized by many representatives. Water was viewed as being essential to life and to development, and its availability and cost was said to determine the physical, economic and even political health of a country. The many uses of water affected every aspect of life and should serve to unite people, never to separate them. Yet on occasion States had found themselves on the brink of conflict over the issue of the sharing of waters. The droughts suffered by the Sahelian region and the water shortages experienced in Europe and other parts of the world had shown that the water problem could affect all societies. Water consumption was increasing annually, because of the growing range of water uses and the wastage of water. The upsurge in population and the needs arising from industrialization also made the question of codification of the law in the field an important task. The United Nations Water Conference had been held in 1977 to adopt policies to safeguard mankind from the threat of a world water shortage by a more rational management of that essential resource. Special attention, it was said, should be given to the topic as it related to the development of developing countries. The issues involved were said to be so complex, and the role of water in human existence so vital, that any dispassionate international examination of the problems was to be welcomed and would serve as a constructive step towards agreed international rules of conduct. Because of its great importance, certain representatives felt that the Commission should attach priority to the topic.

197. A number of representatives stressed that the Commission's study on the subject should be conducted in close co-operation with States, United Nations bodies and regional organizations concerned with water problems, as well as with related questions, especially those concerning the environment, in order to avoid duplication and make use of acquired experience. Support was expressed for the Commission obtaining such scientific and technical advisory services as it felt necessary in order to carry out its tasks.

198. Representatives also referred to the rich and varied experiences and information derived from regional and other institutional arrangements for co-operation in this field, which could provide a guiding line in the practice of States. Reference was made to agreements concluded relating to the Chad Basin, the Niger River, the River Benue, the Senegal River and the Gambia River, to the 1969 Treaty on the River Plate Basin as well as to the experience of the International Joint Commission which regulated the co-operative use of international watercourses between two North American States.

199. One representative stated that, in keeping with the spirit of General Assembly

resolution 2669 (XXV) of 8 December 1970, consideration should perhaps be given to producing supplements to the Secretary-General's report on "Legal problems relating to the utilization and use of international rivers" (A/5409) and to the 1963 volume in the United Nations Legislative Series (ST/LEG/SER.B/12).

200. In connexion with the questionnaire formulated on the topic by the Commission in 1974, representatives who referred thereto agreed that more replies from Member States would be helpful and welcomed the decision of the Commission (see para. 148 of its report) to again request Member States which have not already done so to submit their written comments on the questionnaire for consideration by the Commission. A number of representatives indicated their Governments would be in a position to respond in the near future.

1. Nature of the topic

201. The view was expressed that the topic was different in nature from the kind of topic normally discussed by the Commission since it involved a physical element which, because of its peculiar properties, was unique. Note was taken that the report indicated that the Commission had recognized the nature of the topic and that proper emphasis must be placed on the scientific and technical data accumulated in that regard. The scientific background to the topic, highlighting that water was a resource of finite and unchanging magnitude, showed that the implications of the topic were not confined to the particular situation of States with a common land boundary. It was furthermore stressed that the scope and complexity of the topic should not discourage a multidimensional approach designed to take account of scientific and technical factors, international and regional legal instruments, customary law in various parts of the world, the principles of the new international economic order, the provisions of the Charter of Economic Rights and Duties of States and the principle of equity.

2. The question of formulating rules on the topic

202. With regard to the formulation of rules on the subject, support was expressed for the conclusion that the topic was ripe for codification and to that end all States were called upon to co-operate in that effort. A number of delegations felt that account would have to be taken of the general rules of customary law already in existence. It was said that a norm calling for equitable and rational use of water already formed part of contemporary general international law. Any riparian State, whether upstream or downstream, had an obligation to take due account of the interests of the other State. It was extremely important to adopt rules based on the notion of interdependence and on the maxim sic utere tuo ut alienum non laedas: States could not be free to treat the waters flowing through their territory exclusively as theirs without regard to the interest of neighbouring countries. The fundamental principle which should govern the non-navigational uses of international watercourses was said to be that the waters of such a watercourse constituted a shared natural resource. Also, the principle of equitable utilization of those waters assumed paramount importance in the codification of the topic.

It was suggested that the Commission's attention be directed to the possibility of elaborating on that principle, bearing in mind article IV of the Helsinki Rules and the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States 3/ approved by the Governing Council of the United Nations Environment Programme. Mention was also made of the need, in elaborating legal rules for water use, to explore such concepts as abuse of rights, good faith, co-operation and humanitarian treatment and to take into account the concerns of land-locked States whose territory was crossed by international watercourses.

203. Another view put forward was that water was a domain in which the community of States could demonstrate to the full the solidarity that should reign among its members: the permanent sovereignty of States over their wealth and natural resources and the spirit of co-operation that should govern relations between States were the twin elements that would promote fruitful co-operation in that area. It was urged by certain representatives that in this field it was not possible to carry the principle of national sovereignty or the principle of the right of peoples over their natural resources to extremes, since water was a shared natural resource without which no life was possible. On that basis and on the basis of the principle of equitable utilization, it could not be maintained that General Assembly resolution 3171 (XXVII) of 17 December 1973, concerning permanent sovereignty over natural resources, justified the unlimited utilization of waters of international watercourse.

204. It was said by one representative that a basic element in the philosophy which should underlie the Commission's work on the topic concerned the equitable apportionment of the rights and duties of the States concerned. The matter was all the more delicate where a State was, at one and the same time, an upstream and a downstream State in relation to a single river or river system. Such equitable apportionment had two consequences, the first being that it buttressed the significance of agreement, as the foundation for the practical application of the rules of law, and the second that it excluded any automatic application of compulsory third party settlement if the States concerned did not reach agreement. Negotiation and possibly conciliation would therefore seem to be the only alternatives, according to that view. In that connexion, another representative believed that the Commission should cover the question of the peaceful settlement of disputes.

205. On the other hand, the view was expressed by certain representatives that there was no general law on the subject, that the question of non-navigational uses of international watercourses needed further study and that the question was not ready for codification. Before the substantive study of the rules of international law relating to the non-navigational uses of international watercourses was undertaken, all relevant materials on State practice should be compiled and analysed, it was said. Although the topic had recently been under consideration by many learned associations and organizations and was treated under various regional conventions and treaties, it must be stressed that in each region it had been dealt with according to regional and geographical needs and the approach had been different in each case. The principles of international law were evidently not clear and universal on the subject. The General Assembly and the International Law Commission

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should be very cautious in formulating rules on that subject. There were no simple answers in a field which encompassed so many diverse interests and situations.

206. According to one representative, if an international river basin was to be regarded as a single entity jointly owned by the riparian States concerned, those States had a primary duty, it was said, to consult each other. Although a duty to enter into genuine negotiations in the absence of legal rules to govern the subject-matter of the negotiations was somewhat problematical, satisfactory results had sometimes been achieved despite the fact that the parties declared their intention not to explore the legal merits of their conflicting claims. Beyond the minimum body of principles that were applicable to all nations, it was difficult to codify the relevant law rapidly. But if that task was undertaken, full account should be taken of national sovereignty and the rights of people over their natural resources. In the meantime, the rule that every State should behave in such a way as not to damage the rights and interests of other States should be respected. In addition, the view was maintained that the concept of equitable and reasonable apportionment of water was considered binding on the parties involved except in cases where treaties or custom provided otherwise. Equitable and reasonable apportionment should be determined in the light of all relevant factors, especially the human factors and the particular needs of each case, and should be arranged by agreement through peaceful negotiations and consultations between the parties concerned. Direct negotiations on the needs of riparian States and co-operation with regard to flood, pollution and erosion control on the basis of technical advice should be undertaken. International river disputes could best be settled by voluntary agreements based on the recommendations of impartial technical commissions.

207. The view was also urged that there appeared to still be considerable uncertainty in the Commission as to the best way of dealing with this difficult but important question. It was therefore hoped that more replies to the questionnaire that had been circulated on the subject would be forthcoming from Member States, so that the Commission could base its work on a broader survey of their views. The number of States which had so far replied constituted only a small proportion of the total membership of the Organization and could not serve as the basis for conclusions. It was suggested that the Commission should perhaps be requested to present a more concrete programme for its work on international watercourses at the next session of the General Assembly.

3. The methodology to be followed in formulating rules on the topic

208. In so far as the methodology or approach to be followed by the Commission in its work on the topic, most representatives who referred to the matter were in general agreement with the approach taken by the Special Rapporteur that because all river systems had their own special characteristics, the States using a given river system should be free to regulate that system in the manner they deemed appropriate, but within the framework of basic general rules to be formulated by the Commission. The relationship between the basic general rules and the rules provided in user agreements, negotiated by the parties concerned, would require careful study. While the general rules included in a framework treaty should not be imposed on the parties

to a user agreement unless they were also parties to the framework treaty, to the extent that the rules in that treaty codified customary international law, they would be binding upon all States whether or not parties. Particular care would, in any event, have to be taken to strike a balance in the draft articles being prepared between general rules and rules applicable to particular kinds of watercourse uses so that riparian States entering upon negotiations could be given uniform guidelines. Furthermore, while the approach suggested could, in general, be endorsed, it was essential to reach an acceptable compromise that would take account of the different interests of States.

209. Support was expressed for the formulation of general, universal rules on the law of the non-navigational uses of international watercourses. Certain representatives remarked, moreover, that while the suggested approach might ensure flexibility, the "framework convention" envisaged should not be so general as to defeat what must be one of the purposes of codification, namely, uniformity of the applicable law. That became more apparent if it was remembered that the premise that neighbouring States should conclude bilateral agreements did not always hold, for political reasons. The draft articles to be prepared on the law of the non-navigational uses of international watercourses should embody rules of general application, but they should not be drafted on too abstract a basis, notwithstanding the specific characteristics of individual watercourses, as that would be meaningless. Riparian States should be afforded adequate opportunity for taking due account of the geographical and economic characteristics of a particular watercourse under bilateral and multilateral agreements, but it was first necessary to define the rights and obligations that would facilitate the adoption of decisions on questions regarding all types of watercourses and their uses. It was said that the draft articles to be elaborated should also contain general rules concerning the rights and obligations of third States, which might be particularly concerned in matters relating to the aquatic environment as contamination of the environment caused by modern technology and intensive urbanization went beyond political boundaries.

210. It was stressed, in addition, that the elaboration of general rules should not be aimed at eliminating the natural inequalities between States or reducing the importance of the principle of national sovereignty over natural resources. Hope was expressed that the Commission would examine and prepare draft articles on the substantive aspects of the law of the uses of international watercourses, whether consumptive or non-consumptive. The Commission should not devote excessive attention to the question of the contents of user agreements between riparian States, which should be left to the States concerned. The objectives of the rules to be formulated by the Commission should be to promote equitable utilization of water by various riparian States and to ensure that one-sided obligations were not imposed on any riparian State, whether lower or upper. It was also stressed that the Commission should never lose sight of the fact that the principle of territorial sovereignty must take pride of place. States should be allowed to make the fullest possible use of water within their national boundaries as long as they took into account the effects of such use on both the lower and upper riparian States. The rules formulated in that area should, therefore, promote co-operation among riparian States in the utilization of the watercourses and not in the limitation of their rights to use them. The general approach taken by the Special Rapporteur of drafting a broad convention to be supplemented by agreements among users might, it was said, provide the necessary solution.

211. On the other hand, the Special Rapporteur's suggestion that the Commission's work on the topic should be structured to form what might be termed a "framework convention" was viewed as premature, since only a few States had replied to the questionnaire sent to them pursuant to General Assembly resolution 3315 (XXIX) and the detailed analysis of existing conventional rules had not yet been completed. The Commission should at all times bear in mind the view set forth in the report that any set of rules of general international law which it might devise could only serve as a framework for more specific conventional rules to be established between the States most directly concerned.

212. Other doubts were expressed concerning the appropriateness of supplementing the framework convention by user agreements. The draft articles presented by the Special Rapporteur reflecting that approach appeared difficult to implement, unclear and possibly less advanced than existing customary law. Moreover, it was not very encouraging after so many years devoted to studying the question to see that the Commission was still uncertain as to how to continue its work on the topic. Four possible approaches had been suggested by the Special Rapporteur and had met with mixed reactions. It seemed preferable to follow two of the approaches mentioned by the Special Rapporteur, namely the preparation of draft articles on particular uses and the drafting of general principles with respect to international watercourses. They were, moreover, closely connected, because the general principles should not be drafted too abstractly and the rules on particular uses must reflect the agreed general principles. Mention was made of existing texts which might be used as a basis, especially the Helsinki Rules adopted by the International Law Association and the Salzburg resolution of the Institute of International Law.

213. Certain other representatives, however, believed it would be too complicated to attempt to formulate rules on specific uses. What was desirable was a set of norms and rules applicable to all kinds of uses of international watercourses rather than rules formulated strictly on the basis of an examination of the individual uses of such watercourses. It was, in fact, only logical to start with the formulation of general rules from which specific rules applicable to a particular use could subsequently be derived. According to another view, the Commission should be concerned with the users of the watercourses themselves and not with the uses of the water from such watercourses.

4. Scope of the topic

214. Turning to the question of the scope of the topic and in particular the definition of the term "international watercourse", some representatives endorsed the Commission's approach that there was no need for the time being to define the term, and noted that the Special Rapporteur's proposal to include an optional clause in the draft articles could provide a flexible and satisfactory solution to the definition problem. Other representatives, however, urged the Commission to consider the definition of an international watercourse at the earliest opportunity to clarify the situation. In considering the acceptability of any draft articles formulated, the question as to whether the articles referred to successive or contiguous rivers or to the broader international drainage basin

would be of decisive importance to Governments, it was stressed. Also, the definition of the expression "international watercourses" could not be postponed any longer in view of what seemed to be the incorrect approach taken by the Special Rapporteur. It should be clearly established that the regulation of the uses of international watercourses were the concern only of the riparian States themselves.

215. As to the contents of such a definition, certain representatives felt that the drainage basin approach would be the most satisfactory and would lead to an equitable and rational use of international watercourses. Any serious approach to the topic should be based on the river basin. Due account, it was said, should be taken of the geographical and hydrological features of the drainage basin, of the previous uses made of its waters and of their importance in the light of social and economic requirements, as well as of the need to study the existing and future needs of riparian States. It was emphasized that the concept of an international watercourse could be too narrow as well as too wide: a narrow definition would tend to define a watercourse as a pipe carrying water, while the widest would regard all waters as belonging to one single system of the environment. The sensible approach lay, it was said, between the two extremes in regarding an international watercourse as a drainage basin involving all riparian or basin States which contributed to the sources as well as those which used the water. The expression "drainage basin" embraced both surface water and ground water. Legal developments aimed at regulating the non-navigational uses of international watercourses as defined could provide a serviceable guide to nations sharing an international basin.

216. Certain other representatives saw no justification for using the drainage basin concept and urged the use of the traditional 1815 Act of Vienna concept which defined an international river as a river which traversed or separated the territory of two or more States. The General Assembly and the Commission should take into account the sensitivity of Member States concerning the concept of a drainage basin, which in some cases applied to the whole country and might some day be applied to mineral resources. That concept was considered unacceptable, as it would have the effect of turning into an international watercourse any watercourse flowing in the territory of a single State but fed by ground water from beyond the territorial boundaries of that State. The representatives commented that if the Commission went so far as to endorse the drainage basin approach, it should also recognize that all nations stood on a continental shelf and that all coastal States should be ready to share the wealth of the continental shelf and their territorial waters with the other countries on the continent in question, especially land-locked and geographically disadvantaged States.

217. One representative, while considering that the Commission had been wise not to attempt at the outset to define an "international watercourse", believed some clarification was now required. In the preparation of each draft article a choice had to be made in accordance with the different consequences that would arise from adopting one concept or the other. It was clear, according to this representative, that the Commission would not be able to base its choice on isolated replies to the questionnaire by States, whose attitude to the definition of an international watercourse was likely to be coloured by their geographical situation regarding a watercourse. The choice of one concept rather than the other

should not necessarily apply to the draft articles as a whole, but should rather be made for each individual article. In some cases the drainage basin concept would be satisfactory, while in others it would be better to use the concept of an international river; it should always be borne in mind that the aim was to establish a code of conduct for States. More specifically, another representative said that with regard to the problem of pollution, his delegation was in favour of employing the concept of international drainage basins in co-ordinating or adopting joint measures to preserve the water environment but without prejudice to the sovereignty of each State over its own territory. He felt, however, that general international law was not as yet sufficiently developed to permit the concept of international drainage basins to be applied with reference to international watercourses in general.

218. Yet another representative was of the view that the approach envisaged by the Special Rapporteur - to draft a universal "framework convention" to be supplemented by "user agreements" - seemed to imply a broad definition of the term "international watercourse" for the purposes of the framework convention, while leaving the user agreements for each particular international watercourse to specify the scope of the various rights and obligations determined therein by indicating the waters in respect of which each of those rights and obligations applied.

219. As to other comments regarding the scope of the articles, it was said by one representative that they should cover aspects of tributaries and ground water, while another representative considered that the expression "use of the water of international watercourses" should be confined to the section of water along which the frontier ran, since the neighbouring State should be concerned solely with the condition of that section.

220. The question of pollution was referred to by a number of representatives. It was stressed that when considering the scope of the draft articles, special consideration should be given to matters relating to the protection and preservation of the aquatic environment, and international co-operation in the use of non-navigational watercourses, including scientific and technical co-operation. Certain representatives felt the Commission should take up the problem of pollution of international watercourses at the initial stage in its study, bearing in mind the work done by specialized international organizations such as UNEP. Other representatives felt, however, that the question of pollution should not be stressed. The problem of the detrimental effects of the uses of water did not, it was said, have to be given priority because a number of international organizations and other bodies were already studying and developing a legal régime of environmental protection, including water pollution control. It might be difficult to co-ordinate the efforts of the Commission with the activities of other organizations. It was also stated that inclusion of the problem of pollution would only broaden the scope of the Commission's work and unnecessarily complicate the formulation of rules on the subject. The rules dealing with a phenomenon which affected the entire ecosystem of a watercourse would have to be applicable throughout a river system. It was considered inadvisable by certain representatives to include in the scope of the study the problem of pollution.

221. Concerning the issues of flood control, erosion and sedimentation, while some representatives favoured including these matters within the scope of the Commission's work, certain other representatives opposed such an inclusion, believing that flood control, erosion and sedimentation had no bearing on the topic under consideration as they were separate from the uses of the watercourses.

222. It was furthermore stated that the interaction between navigational and non-navigational uses should be taken into account to the extent that it existed. One representative urged that a distinction be made between navigational waters that might be used by any country and non-navigational waters that would be used only by riparian States on the basis of agreements concluded among them. For example, pollution in navigable waters was even more important than the question of pollution affecting the environment in general.

223. Specific references were made to the proposed outline of fresh water uses included in question D of the Commission's 1974 questionnaire (see para. 96 of the report of the Commission). One representative said it might be more logical to put domestic and social uses first on the list. He proposed the addition of the commercial fishing to the list of economic and commercial uses and of the watering of cattle to the list of agricultural uses; it would also be appropriate to mention the need for preserves to protect aquatic flora and fauna.

5. Form of an international instrument which may result from the Commission's work on the topic

224. Concerning the form of instrument which may result from the Commission's work on the topic, some representatives specifically referred to the elaboration of draft articles which would serve as the basis for concluding a convention. It was said that the draft should take the form of a convention containing a small number of very general principles to serve as a guide for agreements between users in particular cases. The belief was expressed that the majority of States expected the results of the Commission's work on the subject to emerge in the form of a draft treaty on the rules and principles of the law on the non-navigational uses of international watercourses. Such a treaty would in the main be a codification of existing customary law, but might also contain some new elements and would contribute to the development of law.

225. Another representative, however, believed that formal agreements between the States concerned were of fundamental importance and to such an extent that all the rules drafted, apart from those dealing with general principles, would probably have to be cast in the form of true residual rules. This raised the question whether the topic could properly be consummated in the form of a codification convention. Yet another representative favoured the preparation of a code of conduct to which States wishing to conclude regional agreements could refer.

6. Comments on the draft articles presented by the Special Rapporteur

226. A few representatives referred specifically to the 10 draft articles proposed by the Special Committee in its first report. It was said that these articles represented the first attempt by the international community to regulate the subject-matter in comprehensive ways and that they required careful consideration. However, the view was also maintained that the articles might be difficult to implement in practice and were somewhat unclear.

227. With regard to article 2 ("User States") some representatives who referred thereto believed its drafting to be vague. The question was raised whether the definition of "user State" applied to tributaries of international watercourses. A suggestion made was that it might be useful, in connexion with the notion of "user State" to make a distinction between immediate use and advantages derived from such use. Other representatives who referred to the article expressed reservations thereon as they believed it reflected an extensive concept of what constituted an international watercourse that was close to the concept of a drainage basin. Also, it was difficult to establish exactly which States could be regarded as contributing to a watercourse and which were making use of it. Preference was expressed for a somewhat more restrictive criterion, interpreting a contributor State as one whose territory was crossed by the international watercourse or whose rivers were important tributaries, thus excluding States whose rivers contributed to the international watercourse. Similarly, a user State could be considered as one which made direct use of the international watercourse. Indirect users should not be considered user States, it was stated.

228. One representative stated that article 5 ("Parties to user agreements") and article 6 ("Relation of these articles to user agreements") would be difficult to implement. Another representative referred to these two articles and contended that the status of co-operating States was not clearly defined, since under article 6, paragraph 2, they could be subject to the provisions of the draft articles even if they were not parties to a convention embodying them. It should perhaps be specified that the provisions of such a convention would apply in cases for which the user agreement made no provision, provided the non-contracting State so agreed. He also said that article 6 seemed to give general multilateral agreements precedence over specific bilateral or multilateral agreements, which was contrary to accepted principles of international law. Furthermore, article 5 seemed to limit the right of States to enter into bilateral agreements outside the framework of the projected convention.

229. Finally, as to articles 8 ("Date collection"), 9 ("Exchange of data") and 10 ("Costs of data collection and exchange"), it was stressed that co-operation among user countries in the collection and exchange of data was particularly important for riparian States, and for the conservation and the safeguarding of the international watercourse and the health of its resources. Without data collection and exchange, it was stressed, little or no progress could be made in the law-making process. The view was also expressed, however, that obligations concerning the exchange of data should be regulated by user agreements and not be placed among the fundamental

rules. While an obligation concerning data collection and exchange might prove extremely burdensome for certain countries, it might be useful for riparian States if it was voluntary and based on bilateral agreements.

230. One representative commented that articles 8, 9 and 10 emphasized the unitary character of the water and the need for rational exploitation. Also, they were based on the principle embodied in article 3 of the Charter of Economic Rights and Duties of States. However, if it were intended by articles 8 and 10 to impose a mandatory rule, the special situation of the developing countries in the technological area must not be forgotten and the obligations imposed should be made more flexible. The suggestions were made that subparagraph 1 of article 8 should be worded in the same way as subparagraph 2 of that article, or subparagraph 2 of article 9, so that instead of beginning with the words "A contracting State shall collect and record data ...", it would read "Each contracting State shall employ its best efforts to collect and record data ...". He also hoped that in the future application of the draft articles, article 10, paragraph 3, would be invoked more often than article 10, paragraph 1, since the effect of the latter was to make the State providing the data bear all the costs of collection and exchange. In the case of a common resource like water, it was illogical that the costs of data that benefited all States should not be shared.

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

231. Many representatives stressed the importance of the status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier and the need of further elaborating the issues relating thereto, dealt with in existing conventions, namely, the Vienna Conventions on Diplomatic and Consular Relations and on the Representation of States in their Relations with International Organizations of a Universal Character, as well as the Convention on Special Missions. It was said that rules on the topic would promote the development of friendly co-operation among States by complementing those international legal instruments and making more precise the existing codification of international diplomatic law. In a field where the application of existing conventions presented daily difficulties, the work should make it possible to remedy omissions in the law and to replace unsuitable rules. It was also said that the topic was of the utmost importance in the light of the current international situation, because of the failure to respect diplomatic privileges and immunities. Everyone was aware of the need to maintain and safeguard those privileges and immunities because of their great importance in the protection of contracts between the diplomatic mission and its Government. It was necessary to reach agreement on rules in order to ensure equal treatment among the different countries.

232. Certain representatives, although feeling that the diplomatic bag, whether accompanied or not, was protected by existing multilateral and bilateral conventions, appreciated the attempt to develop international law in that area. It was said by some that although article 27 of the 1961 Vienna Convention was adequate, they would not oppose the idea of further elaboration of an international instrument.

233. A number of representatives expressed serious doubts about the utility of work on the topic. They held the view that the question was adequately covered in existing agreements. It was said that, rather, other problems regarding diplomatic immunities of a more fundamental and serious nature might deserve closer attention. Despite the heightened awareness of the ease with which inviolability of embassies and the immunities of diplomats could be jeopardized, no significant problems were known to exist in regard to diplomatic couriers. In the opinion of those representatives, it was not essential to carry out a study on the topic. It should be accorded a low priority, so as not to take up the time of the ILC for more important matters.

234. Certain representatives considered that if there was a problem in that field, it was more a problem of abuse of diplomatic bag privileges. It was said in this connexion that although technological developments might require some change in the existing legal régime of the unaccompanied diplomatic bag, which was a means of diplomatic communication extensively used, particularly by the developing countries, there did not seem to be any problems associated with the transmission of the unaccompanied diplomatic bag that would require further international regulation.

235. A number of representatives welcomed the results achieved by the Working Group which the Commission had established to consider the matter on the basis of governmental views, endorsed its conclusions, including the additions made to the list of questions on which attention should be concentrated and welcomed the appointment of a new Special Rapporteur on the topic.

236. Several representatives indicated that they were not opposed to the work of the Commission being pursued further on the basis of the Special Rapporteur's report. Once that was completed, Governments should be given the opportunity to study the results with a view to deciding how to proceed in the future.

237. Many representatives agreed with the Commission's conclusion in paragraphs 163 and 164 of its report that the further elaboration of specific provisions was desirable and that the Commission should make further progress by undertaking the preparation of a set of draft articles for an appropriate international legal instrument, which they hoped, would soon be submitted to the Sixth Committee for consideration. It was said in this connexion that sound State practice and uniform legal doctrine provided the right conditions for the speedy elaboration of a draft agreement.

238. One representative expressed the view that no additional protocol was needed and that the Commission would discharge its duties by submitting a report along the lines of section C of chapter VI of the Commission's report before the end of the current term of office of its members.

239. Some representatives indicated that they had an open mind regarding the nature and form of the future instrument and would take a final position on whether it should be a convention or a protocol in the light of future progress on the topic. Also, a number of representatives reserved their position on the form of the instrument to be adopted until the work on the topic had reached a more advanced stage or had been completed by the Commission.

240. Several representatives stressed that the question should be approached from a strictly functional standpoint. In this connexion reference was made to the principle embodied in previous conventions that privileges and immunities were intended not to benefit persons but to facilitate the performance of their functions. That principle should guide the Commission in its work on that subject. It was pointed out that the diplomatic courier did not belong to a mission, did not reside in the receiving State and had only a very specific and limited function. It should not be necessary to grant him diplomatic status, although of course he should enjoy the immunities and guarantees necessary for the performance of his duties. By the same token, the diplomatic bag not accompanied by diplomatic courier should be regulated with due regard for the need to harmonize the secrecy requirements of the sending State and the security requirements of the receiving State. It was said that a courier accompanying the diplomatic bag could only be granted the privileges and immunities attaching to the status of diplomatic agent within reasonable limits which reconciled the sending State's requirement for safe and rapid communication with the need for strict respect for the sovereignty and security of the receiving State.

241. In the opinion of one representative, some countries wanted diplomatic couriers and diplomatic bags to be required to submit to checks using technical equipment installed to safeguard civil aviation against terrorist sabotage. To check a courier constituted a violation of his person, and to check a diplomatic bag was tantamount to opening it. The personal inviolability of diplomatic couriers and the prohibition against the opening of diplomatic bags implied immunity from all checking. The purpose of that international customary rule was to protect the diplomatic secrets of States. To endanger diplomatic secrets would be detrimental to intercourse among nations. The proposed protocol should therefore clearly stipulate that diplomatic couriers and diplomatic bags should not be subject to examination by any means whatsoever. As the dispatching State was directly responsible for diplomatic couriers and bags, it was most improbable that immunity from examination would in any way endanger the safety of civil aviation.

242. The same representative stated that in recent years some countries had used diplomatic bags to send private articles. Such abuses should be stopped, and it was necessary to include specific provisions for that purpose in the proposed protocol. His country strictly abided by the international treaties and customary rules relating to diplomatic couriers and bags, and it consistently respected all the privileges to which diplomatic couriers and bags of other States were entitled. At the same time, it was opposed to abuses of diplomatic immunities by using diplomatic bags for such illegal purposes as smuggling or the shipment of arms. It was to be hoped that, in formulating the new protocol, attention would be given both to the needs of diplomatic couriers and to the closing of all loop-holes which enabled abuses to be committed.

G. Jurisdictional immunities of States and their property

243. Several representatives who spoke on the topic expressed the view that they found the preliminary report of the Special Rapporteur useful and that it had indicated clear and precise guidelines for further work. It was stated that the subject was a very important one at the current stage in the development of international law. The divergent practice of States and the recent national legislations were cited as additional reasons which made it appropriate for the ILC to undertake the progressive development and codification of that branch of law. The increasing acceptance of restrictive theories of the jurisdictional immunity of States had given rise to new problems such as the immunity of diplomatic missions, which had not been solved by the Vienna Convention on Diplomatic Relations. It was also stated that Governments had become increasingly engaged in economic and commercial activities with the view to promoting their national development aims, and that the conduct of these activities might thus give rise to legal disputes. It was therefore felt that it was necessary to determine whether a sovereign State could be sued in foreign courts, and if so, under what conditions. In this regard, it was suggested that the subject should be examined from both the substantive and procedural standpoints. The procedural aspects, namely, the manner in which sovereign immunity was to be claimed, acknowledged and recognized, had become more important since the enactment of laws on the subject by the United States and the United Kingdom in 1976 and 1978 respectively. Most representatives who spoke also expressed the hope that as many Governments as possible would reply to the questionnaire circulated by the Secretary-General in order that the work of the Commission on the topic may reflect varied views and practices of States, including those of developing and socialist countries.

244. One delegate maintained that the Commission should give priority to the topic and should base its work on jurisdictional and administrative practice, including that relating to State trading, which was said to be of great importance to third-world countries.

245. Another representative stressed the delicacy with which the topic had to be approached, not only on account of the practice of socialist and developing countries as stated in paragraph 179 of the Commission's report. The topic, he said, could impinge on some of the most sensitive areas of international relations at a time when the pattern of those relations, and the concepts of the rights and duties of States, were themselves in the throes of rapid change. Another representative added that it was necessary to establish a correct balance which would not impose onerous conditions on developing countries, since matters of trade fell within the sovereign competence of many developing countries and that the recent restrictive trends in the municipal law of some developed countries should not be allowed to upset the generally accepted rules of international law. The view was also expressed by one representative that sovereignty was also central to this question and that in tackling that question, the Commission had embarked on a long-term task in which it was once again desirable to take international practice as a basis and identify common ground before endeavouring to find solutions to possible conflicts.

246. Some representatives stated that codification of rules on the subject will not only be of particular importance to international legal experts, but also to judges, lawyers, and other practitioners, since State immunity was relevant to both international and national law. The draft to be prepared would thus serve not only to develop and codify international law but would also harmonize national law and practice.

247. The view was expressed by one representative that certain considerations should be borne in mind in dealing with the topic. At the current stage of international law, it was a recognized fact that a State was in principle immune from the jurisdiction of the international courts of another State. That applied, in particular, to public or jure imperii acts. Although some States allowed restrictions on State immunity, generally in the case of jure gestionis acts performed in the course of trade, no State had failed to recognize State immunity in respect of public acts, he added. The few international conventions on the matter, he said, all recognized, implicitly or explicitly, the jurisdictional immunities of States and their property and only excluded from the general rule certain specific situations. Consequently, he said, while he was pleased that the principle of immunity was to be affirmed as the general rule, he considered that that principle should be made subject to certain exceptions which should be studied carefully with a view to taking account of all the legal interests at play. The draft articles, he maintained, should seek to codify existing practice and should not go any further than that.

248. Some representatives endorsed the Commission's decision to concentrate their work on the general principles and to leave aside for the time being the question of immunity from execution of judgement.

H. Review of the multilateral treaty-making process

249. Several representatives expressed their satisfaction with the Commission's valuable study on the review of the multilateral treaty-making process. Some also expressed their full agreement with the report which the working group had forwarded to the Secretary-General in that connexion, for inclusion in the relevant report to be submitted to the General Assembly. Some expressed the hope that the Commission would present a supplementary report on the topic for submission to the thirty-fifth session of the General Assembly. It was stated by some that the techniques and procedures provided for in the statute of the Commission were well suited to the tasks entrusted to it by the General Assembly and had made a significant contribution to the codification and progressive development of international law. Some representatives added that other techniques and procedures could however also be used, either because vital national interests required draft articles to be prepared by Government representatives as had been the case with the Third United Nations Conference on the Law of the Sea, or because the issues were more scientific and technical than legal.

250. Some representatives maintained the view that the Commission's study of this topic was part of the rationalization effort now proceeding within the organization. It was further noted that in view of the broadness in scope of the subject, and in

view of new developments and increasing complexity of international relations, new bodies or Commissions had been established to develop legal rules for the regulation of those activities. Consequently, it was felt that the question that the General Assembly should consider is the adequacy of the new procedures and whether and to what extent multilateral treaty-making procedures might be rationalized.

251. It was also stated that the scope of the item proposed by Australia and Mexico several years earlier had been much broader than that of the study completed by the Commission. Two major problems that arose in connexion with this were identified to be the following: First, the defects inherent in the methods employed in drawing up treaties were said to be the root cause of the very low percentage of accessions to international instruments. The international Covenants on Human Rights was cited as an example of this and it was said that their texts were not even submitted to the drafting committee for the elimination of contradictions. The second problem was said to be the question of the theory of the sources of international law. The hope was expressed that this question would be considered in the near future with a view in particular to establishing the legal validity of the decisions of international organizations.

252. One representative expressed the view that the conclusion reached in the report that the techniques and procedures provided ir the Commission's Statute, as they had evolved in practice, were well-suited to the tasks entrusted to the Commission by the General Assembly, seemed to beg the question. He pointed out that though the report 4/ had a list of important conventions concluded by the States on the basis of drafts prepared by the Commission, it did not proceed to examine their current status vis-a-vis the number of parties to them. Nor had the Commission attempted to find reasons why entirely new techniques had had to be evolved to deal with the question of the law of the sea, and the preparation of the Convention against the Taking of Hostages.

253. He also expressed the view that the Commission's practice of concluding its work on a given topic by submitting draft articles which were intended to form the basis of a convention ought to be revised. In connexion with this, he hoped that the Commission would explore other methods.

254. On the question of postponement of the item on the multilateral treaty-making, he stated that the General Committee, acting on the advice of the Secretariat, had reached this decision without making available any of the documentation to Governments other than the report of the Working Group of the ILC. He expressed the view that the decision to postpone the discussion on the item should have been left to the Sixth Committee.

4/ A/34/10, para. 195.

I. Other decisions and conclusions

1. Appointment of Special Rapporteurs

255. Those representatives who addressed themselves to the matter welcomed the appointment of Special Rapporteurs, recorded in paragraphs 196 and 197 of the Commission's report.

2. Programme and methods of work of the Commission

256. Most of the representatives who spoke on section B of chapter IX of the Commission's report, relating to its programme and methods of work generally expressed support and satisfaction with regard to the Commission's programme and methods of work.

257. As to the future programme of work, it was said that the objectives and priorities set out in the report were in accordance with the Statute of the Commission and the resolutions and recommendations of the General Assembly. The hope was expressed that the Commission would shortly be able to complete the drafts which it was currently preparing so that it could submit draft instruments to promote international co-operation. Mention was made in particular of completing the first reading of part I of the draft articles on State responsibility and of reviewing all the draft articles on that topic adopted to date. It was also stressed that the Commission would soon begin its work on new topics reflecting the contemporary preoccupations of States.

258. Certain representatives reiterated their interest in the question of international liability for injurious consequences arising out of acts not prohibited by international law and said they looked forward to the initial report on that question. One representative stressed that the topic should be studied as a matter of urgency. It was noted that a group of experts of the Governing Council of the United Nations Environment Programme was already considering the matter from the ecological standpoint. In that connexion, the Commission should, it was suggested, co-ordinate its work with that of the group of experts and take into account the principles formulated in the same field by the Third United Nations Conference on the Law of the Sea. Certain other representatives referred to the second part of the topic "relations between States and international organizations" and considered that that topic, to which they attached no urgency, did not merit the Commission's attention at this time.

259. One representative expressed the hope that in reviewing its programme of work, the Commission would give priority to the question of dual nationality, which was not covered by the Commission's report but which had been deferred by the Commission in 1954 in connexion with its work on the topic "nationality, including Statelessness". He reviewed his country's practice and policies regarding immigrants, displaced persons and refugees and voiced concern over possible frictions between States having conflicting claims of citizenship, particularly in the areas of military service and diplomatic protection. While recognizing the reasons for the deep divergence of views on the topic, which existed among

Commission members even in 1954, and the difficulties involved in any attempt to reconcile different sociological and political interests of States, he felt that many of those difficulties could be solved if States would adopt equitable and flexible procedures when settling individual cases. In addition, States should facilitate the loss or renunciation of citizenship although admittedly such procedures were particularly cumbersome in many countries.

260. As to the methods of work employed by the Commission, some representatives endorsed those methods and noted with satisfaction that the Commission intended to keep constantly under consideration the possibility of further improving its present methods of work and procedures with a view to the timely and effective fulfilment of the tasks entrusted to it. The Commission was urged to study the possibility of further improving its methods of work and procedures; it must strive to enhance more effectively the role of the United Nations in the legal sphere, namely to promote international co-operation in order to encourage the progressive development of international law and its codification, which would further the work of strengthening the rule of international law, the development of mutual understanding and co-operation between States, and the cause of peace and security in the world. One suggestion made was that in elaborating its programme the Commission should try to concentrate at a given session on a limited number of topics, in order to be able to produce a comprehensive set of draft articles which would facilitate more coherent consideration by the Sixth Committee. Also suggested was a return by the Commission to its earlier practice of submitting more succinct reports. According to this view, the recently adopted practice of transmitting the articles to Governments almost immediately after the termination of the Commission's session was of limited value, and study of the Sixth Committee debate showed that the real interest lay in the Commission's justifications for its decisions. The excessive length of the reports made it impossible, it was stated, for the report to be the first item of business for the Sixth Committee, as it had once been.

261. Certain representatives drew attention to the comments contained in paragraph 209 relating to the need of Commission members to have at their disposal adequate time for the fulfilment of their responsibilities to the Commission. It was considered incumbent on all States to do what they could to ensure that the Commission was able to fulfil its onerous task in conditions as favourable as possible.

262. In that connexion, it was also stressed that the Commission needed to be given the staff and resource support required in research and other fields.

263. One representative commented in particular on the question of the honoraria paid to Commission members, mentioned in paragraph 210 of its report, and considered that appropriate rectifications were long overdue.

3. Relations with the International Court of Justice

264. Representatives noted with satisfaction that the Commission had established and maintained excellent relations with the International Court of Justice.

4. Co-operation with other bodies

265. The close relationship of co-operation between the Commission and regional legal bodies, such as the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee and the European Committee on Legal Co-operation, was welcomed. It was pointed out that if the rules drafted by the Commission were to be acceptable to the international community as a whole, the Commission must keep abreast of developments in the various regional systems. Maintaining a close relationship with regional legal bodies facilitated the Commission keeping attuned to contemporary concepts of international law.

5. International Law Seminar

266. The success of the fifteenth session of the International Law Seminar, organized by the United Nations Office at Geneva during the Commission's thirty-first session, was noted with gratification. It was emphasized that the session played a very useful role in training young international lawyers from all parts of the world. Hope was expressed that such seminars would continue to be organized during future sessions of the Commission. Representatives expressed appreciation to those Governments which had made financial contributions to the seminar, which made possible scholarships enabling junior Government officials and advanced students to attend the seminar. It was hoped that Governments would provide such financial contributions to make such scholarships possible for future sessions of the seminar.

267. Several representatives announced that as in previous years their Governments would make scholarships available to enable persons from developing countries to participate in the seminar, which would be held in conjunction with the next session of the Commission.
