UNITED NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.443
16 January 1990

ORIGINAL: ENGLISH

UN LIBRARY

APR 5 1990

UN/SA COLLECTION

INTERNATIONAL LAW COMMISSION
Forty-second session
1 May-20 July 1990

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIRST SESSION (1989)

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

CONTENTS

CONTENTS (continued)

CONTENTS (continued)

CONTENTS (continued)

CONTENTS (continued)

CONTENTS (continued)

INTRODUCTION

1. At its forty-fourth session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 22 September 1989, to include in the agenda of the session an item entitled "Report of the International Law Commission on the work of its forty-first session" 1/ (item 145) and to allocate it to the Sixth Committee.

2. The Sixth Committee decided to consider this item together with another item which the General Assembly had also decided to include in the agenda of the session and to allocate to the Sixth Committee, namely, the item entitled "Draft Code of Crimes against the Peace and Security of Mankind" (item 142).

3. The Sixth Committee considered the two items at its 24th to 38th, 44th and 45th meetings, held between 25 October and 10 November and on 21 November 1989. 2/ At the 24th meeting, the Chairman of the Commission at its forty-first session, Mr. Bernhard Graefrath, introduced the report of the Commission. At the 45th meeting, on 21 November, the Sixth Committee adopted draft resolutions A/C.6/44/L.13, entitled "Report of the International Law Commission on the work of its forty-first session", draft resolution A/C.6/44/L.14, entitled "Consideration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and of the draft optional protocols thereto" and draft resolution A/C.6/44/L.11, entitled "Draft Code of Crimes against the Peace and Security of Mankind". All three draft resolutions were adopted by the General Assembly, at its 72nd plenary meeting, on 4 December 1989, as resolutions 44/35, 44/36 and 44/32, respectively. 3/

1/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10 (A/44/10).

2/ Ibid., Sixth Committee, 24th to 38th, 44th and 45th meetings.

3/ Also relevant to the work of the International Law Commission at its next session is resolution 44/39 adopted by the General Assembly at the same meeting under the item "International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes". That item was included as a supplementary item in the agenda of the Assembly's forty-fourth session at the request of Trinidad and Tobago. It was allocated to the Sixth Committee which considered it at its 38th to 41st meetings (A/C.6/44/SR.38-40).

Operative paragraphs 1 and 3 of resolution 44/39 read as follows:

[The General Assembly]

"1. Requests the International Law Commission, when considering at its

4. By paragraph 14 of resolution 44/35, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the Commission's report at the forty-fourth session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate, except for that part of the debate relating to chapter II of the report, "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", as it relates to a topic the consideration of which has been completed by the Commission.

5. The document opens with a section A entitled "General comments on the work of the International Law Commission and the codification process". Section A is followed by six sections (B to H), corresponding to chapters III to IX of the report of the Commission.

(continued)

next session the topic "Draft Code of Crimes against the Peace and Security of Mankind", to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under a code, including persons engaged in illicit drug trafficking across national frontiers, and to devote particular attention to the latter question in its report on that session;

"...

"3. Decides to consider the question of esablishing such an international criminal court or other international criminal trial mechanism at its forty-fifth session when examining the report of the International Law Commission."

TOPICAL SUMMARY

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

6. The International Law Commission was generally commended for the work it had accomplished at its forty-first session.

7. Several representatives emphasized the importance of the process of codification and progressive development of international law. Some of them observed that this process had become more necessary than ever in view of the international community's increasing concern to ensure the primacy of law in international relations. The remark was made in this connection that if the relevant rules of international law had been observed, the grave situation in which a Member State found itself as a result of foreign invasion and occupation could have been avoided. Reference was also made in this context to the memorandum of the Union of Soviet Socialist Republics on enhancing the role of international law and to the contribution of the Movement of Non-Aligned Countries which, at a ministerial meeting at The Hague in June 1989, had taken the initiative to call on the General Assembly to declare the 1990s as a decade of international law. 4/ One representative stated in this connection that the change in the climate of international relations and the declaration of a decade of international law provided the opportunity for a systematic review of the situation in the field of international law where contemporary developments were increasing the tasks and reponsibiiities of the Commission as well as of the General Assembly and the Sixth Committee.

8. With reference to the Commission's work in general, one representative remarked that the Commission was now concerned to a growing degree with either certain very specific and limited topics or with topics at the frontiers of international law and was often faced, in dealing with such topics, with subjects involving interdisciplinary considerations to which it could less and less react in purely legal terms. He added that the Commission was often producing work which was increasingly controversial, not just in terms of law but in terms of the underlying policy, and that it took much more time than used to be the case to complete work on any one subject, even though it met for steadily longer periods.

9. Those features were viewed by some representatives as inviting certain questions on the relationship between the Commission and the Sixth Committee. One of those representatives, after referring to the extent of disagreement with the outcome of the Commission's work and to the very detailed character of many of the contributions to the Sixth Committee's debate, queried the wisdom of asking a body of independent legal experts to consider a multidisciplinary topic giving rise to issues of considerable legal and political controversy, and pointed out that only once the Committee had solved questions of policy in a reasonably clear and

---

4/ See document A/44/191 and General Assembly resolution 44/23 of 17 November 1989.

generally accepted manner could the Commission be expected to transform that general acceptance into legal texts likely to meet with wide approval. The same representative, after stressing that progressive development of international law, while it was a proper function for the Commission, could only be left to it within reasonable and practical limits, observed that at the stage of the negotiations intended to lead to a treaty, the texts approved by the Commission were in large measure adopted unchanged, however strong might be the opposition of a significant number of delegations and even though the non-participation of those delegations in the future treaty was bound to have negative consequences as to the impact of the instrument concerned. In that representative's view, care should be taken to ensure the Commission's work a good chance of effectively contributing to the development of international law.

10. The same representative stressed that the key to a productive relationship between the Committee and the Commission lay in respect for the Commission's independence and legal expertise - which strongly suggested that the Committee should refrain from engaging in a technical debate on detailed provisions - and a proper understanding of the Committee's role which was to see to it that the Commission provided legal expertise in directions generally acceptable to Member States and relied - as it did and should do even more - on the guidance given by the Committee. Another representative remarked however that while delegations should not indeed seek to do the Commission's work for it, the distinction between policy and technique in legal matters and international relations was not clear and self-evident, and that the Sixth Committee undoubtedly had a legitimate role in commenting on draft articles, since the purpose of those articles was to arrive at an acceptable international text. To achieve that end, that representative observed, the Commission was entitled to know the provisional views of Governments, particularly in the case of long-term projects, such as the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, in which perceptions of the topic, and also the members of the Commission responsible for the topic, might change.

11. Commenting on the types of tasks which the Commission could be asked to perform, one representative said that if the Commission could speedily express a view on an appropriate legal framework for future action of some sphere of immediate concern to the international community, its value would be more generally apparent. Another representative said that it would be a useful innovation to entrust the Commission with the preparation of short protocols or amendments to existing conventions which had been shown to be in need of amendment, or with the task of providing technical guidance to the United Nations in formulating an agreed approach to specific topics. Reference was made in this connection to the proposed establishment of an international court for drug traffickers and to the planning and implementation of programmes for the proposed decade of international law.

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

1. General comments

12. Most delegations stressed the importance of the topic for the international community as well as its significance for the process of codification and progressive development of international law.

13. Commenting on the background to the elaboration of the draft Code, which one delegation characterized as "the most important task ever entrusted to the Commission", one representative recalled that 50 years had elapsed since the beginning of the Second World War and that that conflict, the most destructive war in the history of mankind, had given rise to new types of crimes, which were set forth in a series of international legal instruments constituting the legal basis of the relevant contemporary international law. He observed that the destructive and inhuman character of that conflict and the importance of eliminating the danger of nuclear war had led the General Assembly to include in the mandate of the Commission the task of preparing the draft Code which would become a key element in the United Nations system for maintaining international peace and security and was therefore of great political, legal and moral importance. While also recognizing the importance of the topic, one delegation noted that its examination should be viewed not as an attempt to revive the past but rather as an effort to promote international law.

14. In this connection, a number of representatives commented on the contribution which a draft Code against the peace and security of mankind could bring to international legality. One of them pointed out that in today's world, marked by growing interdependence and the accumulation of weapons with huge destructive potential, the preparation of the Code could help substantially to strengthen the basic values of the international community and develop an international peace order based on the rule of law. The completion of the draft Code, it was also said, would make a decisive contribution to preventing the recurrence of the most odious crimes in the history of mankind. Another representative, after pointing out that history had shown that avoiding war and achieving peace had invariably been a major problem for mankind, stressed that in the twentieth century the international community had outlawed war of aggression by adopting a number of legal instruments. He recalled that some of those who had been found guilty in the First World War had been prosecuted and punished, and that the idea had been given further impetus after the Second World War by the Charter and judgements of the Nürnberg Tribunal. He then remarked that by mandating the International Law Commission to elaborate a draft Code of crimes against the peace and security of mankind the international community had affirmed the desire to set up a permanent judicial mechanism for taking action against those who breached the peace and resorted to war, violated internationally accepted norms of war and committed crimes against humanity. He added that, at a time when the easing of international and regional tensions had created favourable conditions for international co-operation in a number of fields, the draft Code under discussion could become a vital instrument for preventing the use of force in international relations and could be a suitable way of strengthening peace and security in the world. Still

another representative observed that the draft Code would constitute a basic instrument of deterrence and punishment for violators provided it included three elements: crimes, penalties and jurisdiction.

15. Also underscoring the importance of the Commission's work on this topic, one representative pointed out that the draft Code, far from being fated to become a dead letter, was of major importance in the ordering of international legal affairs. He observed that, as a stage in the progressive development of international law, the draft Code could serve as a valuable reference document until it entered into force and that furthermore its legal value was not necessarily dependent upon its entry into force since it could be seen, initially, as an expression of the teachings of the most highly qualified publicists of the various nations, to be applied by the International Court of Justice as a subsidiary means for the determination of rules of law, as stipulated in Article 38, paragraph 1 (d), of the Statute of the Court. He further remarked that when circumstances permitted the establishment of an international court with competence in criminal matters, the fact that the Code already existed as a binding international legal instrument with the same force as those referred to in Article 38, paragraph 1 (a), of the Statute of the Court would facilitate the work of the judges.

16. Some of the representatives referred to above commented on the pace of work on the draft Code. The remark was made that, since the Commission had resumed its consideration of the question at its thirty-fourth session, it had made substantial progress. One representative pointed out that perhaps the Commission preferred to keep progress on the topic in step with the progress actually made in terms of universal awareness and that today's world, made up of nation-States, needed to attain a new awareness of unity and humanity. He added that, while the road was a long one, the obstacles encountered did not obscure the encouraging signs already apparent as regards achievement of the intended goal.

17. Other representatives however highlighted the difficulties inherent in the Commission's endeavour to elaborate a draft Code of crimes. Thus, one representative stated that the task was extremely complex because international institutions were not sufficiently developed, the international community did not have an entirely effective collective security system and there was no international criminal court to ensure implementation of the draft Code. He added that the codification of crimes called for a high level of agreement among a majority of States, and that preparation of the draft Code required the Commission to venture into the sphere of the development of international law. Another representative pointed out that the projected Code was intended to deal with the worst type of offence for which there was individual criminal responsibility, for example, genocide and the most serious war crimes, together with crimes against international peace and security, and that the fact that those offences were not contained in an international convention or clearly established group of conventions gave rise to complications. To illustrate his point, he remarked that the relevant concepts had evolved over many years and were reflected in both conventional and customary international law, that they continued to evolve and that various national and ad hoc tribunals had prosecuted those types of crimes, creating a set of precedents.

18. Still other representatives questioned the advisability of attempting to draft a Code of crimes against the peace and security of mankind and the usefulness of such an exercise. One of them reiterated his doubts about the possibility of achieving success in this area and indicated that the work of the Commission and the accomplishments so far only increased his scepticism. In his delegation's view, it was becoming increasingly clear that the most that could be expected was a revised and slightly improved version of the document which in 1954 had inappropriately been called a code, and that the Commission should complete the text in the understanding that the result would be a preliminary draft which would only serve as a basis for a more complete and meaningful document. Another representative, after pointing out that it was unreasonable to expect rapid progress on topics on which a broad consensus was lacking and that requesting the Commission to devote ever larger portions of its valuable time to unpromising topics was not only wasteful but also detrimental to topics of more immediate potential benefit, remarked that there was no consensus in the Sixth Committee on the draft Code and that the question arose whether giving the topic high priority would enhance the long-term prospects for a code. He stressed that the approach taken by the majority not only disregarded the firmly held and carefully considered views of a significant minority, but put the Commission on a collision course with reality. He urged that, in the interest of the Commission, of the codification and development of law in areas in which a consensus was possible, and of the development of international criminal law, the insistence on priority treatment for the Code should be reconsidered, and that his delegation's doubts as well as those of others expressed over a number of years with regard to the topic should be taken into account, inasmuch as there could otherwise be no meaningful progress towards the professed goal of contributing to world order.

19. Several delegations commented on the possible contents of the projected instrument. Some favoured a restrictive approach. Thus, one representative held the view that the Commission's chief goal should be to draw up a list of international crimes, generally accepted and based, to the extent possible, on existing international intruments. He remarked that if, by way of exception, the Commission were to depart from the principles laid down in such instruments or in the applicable law, it should provide detailed explanations for having done so. While not excluding the possibility of exploring new ground and discussing, for instance, crimes against the human environment and international trafficking in narcotic drugs, he felt it premature to include such crimes in the Code, except on a very provisional basis and subject to deletion at a later stage, if no consensus emerged on their inclusion. Another representative suggested that the draft Code should contain, in addition to a list of the offences included in the major accepted international instruments, the draft articles elaborated by the Commission for Part II, for example, on the obligation to prosecute or extradite and on traditional safeguards. He observed that a more ambitious scheme would involve many more years of work and could not be expected to produce a code that would be broadly accepted in the short term. By way of example, he referred to offences, such as attacks on the human environment, inhuman acts including destruction of property and international trafficking in narcotic drugs which had not yet achieved, in his delegation's view, the status of crimes against humanity in a broadly accepted international instrument and should be dealt with separately in order to facilitate the work on the other parts of the Code. Still another

representative, speaking on behalf of a group of Member States, pointed out that, when discussing war crimes and crimes against humanity, the Commission should maintain the approach it had taken in relation to crimes against peace; in other words, it should draw up a list of such crimes. Although not ruling out the possibility that further offences could be defined in the future, he insisted that the Code should contain only a list of those crimes with regard to which, at the time of its adoption, consensus existed in the international community. He felt that the Commission should refrain from inventing new formulations or concepts in areas where principles recognized by the international community had already been developed, and should be guided in its work on war crimes and crimes against humanity by those principles, especially those contained in the two Additional Protocols to the Geneva Conventions of 1949.

20. Other delegations took a broader view of the contents of the future instrument. Thus, one delegation felt that the formulation of a list of crimes should go beyond a narrowly defined enumeration because the text should be capable of incorporating acts regarded by the international community as crimes. It further stressed that the draft should also contain principles establishing a generic definition of crimes against the peace and security of mankind. Another delegation, after indicating that the problems of definition and terminology which had arisen in connection with the crimes proposed for inclusion in the Code were by no means surprising and after noting with approval that the Special Rapporteur had, in some instances, found it advisable to redefine certain crimes, remarked that the Commission should not be afraid to discard obscure definitions formulated to meet the requirements of a less liberal age in favour of definitions more appropriate to the present technologically advanced period. The same delegation added that, provided the objective of the enterprise was not lost and the customary principles of international law were respected, there was no harm in breaking with tradition in search of an early consensus.

21. The task of the Commission in determining the scope ratione materiae of the draft Code was viewed as a two-fold one, namely, on the one hand to clarify the relationship between the concept of crime under the draft Code and the concept of crime under State responsibility and, on the other hand, to define the concept of crime against the peace and security of mankind and to identify those acts which were serious enough to be so characterized.

22. On the first point, some representatives held the view that the Commission should bear in mind the overall concept of an internationally wrongful act as contained in article 19 of the draft articles on State responsibility. After recalling that, in that article, a distinction had been made between international delicts and international crimes, they stressed that the draft Code of Crimes against the Peace and Security of Mankind could be considered as a concrete application of article 19 to certain categories of international offences to be covered by the draft on State responsibility. They therefore deemed it desirable, in reviewing the draft Code, to bear in mind the progress achieved under the topic on State responsibility.

23. On the second point, it was remarked that a clear definition of what constituted a crime against the peace and security of mankind would have to be

provided sooner or later, and that not all grave breaches of international law or morally reprehensible acts, however widely or even universally condemned, necessarily fell within the category of such crimes. The Commission was therefore urged to ascertain whether the acts which it intended to include in the list constituted breaches of rules of law accepted by States, and whether those breaches were considered by States as being serious enough to constitute crimes against the peace and security of mankind.

24. Several representatives insisted on the need for precision in defining crimes to be included in the draft Code. One of them stressed that punishable conduct must be clearly defined, since precision and predictability were indispensable requirements of criminal law. Some representatives felt that, seen from this angle, the Commission's work was not wholly satisfactory. One of them stressed that the projected Code should be similar to a penal code containing a list of crimes - which implied that its provisions must be drafted in unambiguous terms, that the conduct it singled out must not merely be delictual but merit the special sanction of the criminal law and that the conduct must be of individuals and that it should furthermore deal with conduct which was internationally criminal, i.e., serious breaches of international law and not mere infractions. In his opinion, the work of the Commission, measured against those requirements, left much to be desired inasmuch as: (a) the draft under preparation was not sufficiently specific to form the basis of a criminal code; (b) its treatment of the question of individual responsibility was unclear and unsatisfactory; (c) it was not concerned solely with conduct of such seriousness as to give rise to international criminal responsibility; and (d) it was not limited to "crimes against the peace and security of mankind". Another representative observed that, quite apart from the need for certainty in establishing criminal offences, there was also an imperative need to adhere to the language of existing international treaties, especially those which had gained general acceptance. In this context he asked how, if the definition of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide was not strictly followed, States parties to that Convention would be expected to deal with the discrepancy, adding that, while there might perhaps be a case for expanding the concept, that should be done at a conference to review the Genocide Convention, and not, as it were, through the back door.

25. The following acts or activities were singled out by various delegations for inclusion in the draft Code: the planning, preparation and waging of a war of aggression; the establishment or maintenance by force of colonial domination; genocide; apartheid; violations of the laws and customs of war; mass expulsion of populations from an occupied territory in order to change its demographic composition; the use of mercenaries; serious damage to the environment; slavery; illicit drug trafficking; use of weapons of mass destruction, including nuclear weapons; and intervention in the internal affairs of other States. One delegation also referred to the taking of hostages, assaults by terrorists, violence against internationally protected persons and the hijacking of civilian aircraft. Some delegations also suggested that the Commission should consider establishing as a separate crime against the peace and security of mankind deliberate non-compliance with binding Security Council decisions designed to put an end to a case of aggression and to eliminate its criminal consequences, such as in the case of unlawful military occupation. In this context, it was recalled that both the

threat of aggression and aggression itself had already been identified as crimes against peace and the view was expressed that the draft Code would be incomplete if it did not ensure that international legality was definitively restored by providing for penalties for aggressors who deliberately violated Security Council decisions. Attention was furthermore drawn to the ever increasing number of war crimes and crimes against humanity committed by dissident individuals and groups masquerading behind false banners of patriotic nationalism and aided and abetted directly or indirectly by States or their surrogates. The hope was accordingly expressed that the Commission would, at an early stage, consider the question of the criminal responsibility of bodies found guilty of providing such assistance and would also succeed before too long in drawing up a set of minimum democratic standards to be observed by national Governments, in order to stem the activities of groups bent on ousting Governments in office. Finally, one representative insisted on the need to cover complicity, which he suggested should be dealt with under the general principles and be given the broad meaning it had in international law. He added that, since the draft Code referred to the most serious crimes, attempts should also be punished and that in this respect the Commission should choose between the various solutions offered under international law.

26. Some delegations also addressed the question of the scope ratione personae of the draft Code. One of them, noting that the content ratione personae of the Code was to be limited to the criminal responsibility of individuals, said that both military personnel and civilians should be held responsible under the Code and expressed the hope that the term "individual" would be construed in such a way as to exclude only States proper. Another delegation, however, considered that the Code should provide for punishment of not only acts committed by persons but also acts committed by States and that the limitation to individual responsibility was a provisional measure which left open the question of the responsibility of States, inasmuch as some crimes, such as aggression, apartheid and annexation, could be committed only by States. In this connection, one representative raised the question of the relationship between State responsibility and individual punishment. While agreeing with the fundamental idea underlying the Code, which was to declare certain conducts punishable under national or international jurisdiction with a view to increasing security and maintaining peace, he observed that crimes against peace were by definition committed by States, and that it was not certain that a breach of the rules obliging States to maintain peace was itself sufficient justification for the prosecution of individuals. He added that the question also arose whether the treatment of certain acts of States as criminal might not lead, paradoxically, to a diminution of the international responsibility of the State.

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

Article 2. Characterization

27. One delegation expressed support for the draft article as a whole and in particular for its second sentence, which it described as very useful.

Article 5. Non-applicability of statutory limitations

28. One representative expressed support for the draft article, noting that its contents coincided with provisions of the internal criminal law of his country.

Article 6. Judicial guarantees

29. One representative suggested deleting in the introductory paragraph the expression "with regard to the law and the facts" and the word "minimum" which he viewed as a source of possible confusion.

Article 7. Non bis in idem

30. One delegation expressed support for the draft article.

Article 8. Non-retroactivity

31. One delegation felt that paragraph 2 was not sufficiently precise.

Article 12. Aggression

32. The view was expressed that all manifestations and consequences of aggression, including annexation, should be included for the purpose of establishing individual criminal responsibility under the draft Code.

33. The draft article furthermore gave rise to a number of criticisms. Thus, one delegation wondered if the definitions of acts contained in the various subparagraphs of the draft article were sufficiently precise for them to be applied in criminal proceedings. The question was also raised whether the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX) provided a suitable basis for the definition of a crime under the Code. In this connection, one representative remarked that the Assembly had been seeking to lay down guidelines for consideration of the matter by a political body performing a political act, and that the numerous decisions involved in preserving the political discretion of the Security Council acting under Article 39 of the Charter were very different from, if not antithetical to, the decisions which would be required to provide a basis for a judicial body to act on criminal charges. In that representative's view, much of the problem with the draft article stemmed from the failure to recognize that distinction. Referring in particular to paragraph 5, another representative pointed out that under Article 39 of the Charter, it was for the Security Council to determine the existence of any threat to the peace, breach of the peace or act of aggression and that the question arose whether a national judge was bound by the decision of the Security Council. He stressed that although in certain respects that might seem desirable, it was well known that the Security Council was sometimes rendered powerless by the exercise of the right of veto and that, furthermore, the obligation for national courts to refer to the decisions of

the Security Council would raise problems of sovereignty for countries that were not members of the United Nations. He observed that it was one thing for a national judge to decide to base himself on decisions taken by the Security Council and quite another for such a judge to be under an obligation to do so. He therefore suggested the deletion of paragraph 5 which was within square brackets. He finally observed that subparagraph (h) of paragraph 4 raised similar difficulties.

Article 13. Threat of aggression

Article 14. Intervention

Article 15. Colonial domination and other forms of alien domination

34. While welcoming the provisional adoption of draft articles 13, 14 and 15 and agreeing with the Commission that such acts should form part of a Code of crimes against the peace and security of mankind, many delegations felt that those draft articles did not elucidate in an appropriate manner the question of the attribution to specific individuals of responsibility for acts which, in principle, were committed by States. Thus one representative, after making the general remark that the Commission was not considering in great enough depth the role played by individuals who caused States to violate the norms of international law, observed that while paragraph 1 of draft article 12 referred - albeit in a rudimentary form - to individuals to whom responsibility for acts of aggression was attributed, draft articles 13, 14 and 15 did not. He stressed that the latter draft articles, aside from the fact that they did not characterize the forms of conduct defined therein as crimes against the peace and security of mankind, failed to indicate that, in instances where the forms of conduct in question were attributable to individuals, those individuals were to be held responsible. He further remarked that the draft articles under consideration were equally silent on the categories of individuals concerned and on the circumstances in which individual criminal responsibility could be incurred. While noting the Commission's intention to consider that issue at a later date, the representative in question insisted on the need to deal with the issue without delay and in greater depth than did draft article 12. He considered as raising particularly thorny implementation problems the identification of those responsible for the crime of "maintenance by force of colonial domination" and the situation of members of collective bodies to whom responsibility by omission could be attributed, or who might have spoken against the perpetration of the crimes in question. In that representative's view, there would appear to be no point in considering crimes in depth until ways of transposing such violations from the level of States to the level of individuals had been fully developed. Another representative, after pointing out that the listing of crimes against peace was a particularly delicate question since it involved State actions contrary to the Charter for which persons bore individual responsibility, and after recalling that the application of penalties to individuals with respect to wars of aggression had proved a difficult undertaking, observed that to attempt to apply such penalties to categories such as threat of aggression, intervention, colonial domination and other forms of alien domination

would be no less difficult, and that the latter concepts were perhaps better left to the realm of State responsibility, where mechanisms existed, especially in the Security Council, to deal with such breaches.

35. The remark was on the other hand made that, although draft articles 13 to 15 did not contain provisions personalizing responsibility for the acts defined therein - which could be a source of interpretation difficulties and might even give the impression that the crimes were being dealt with within the meaning of article 19 of the draft on State responsibility - the Chairman of the Commission had explained that the Commission had the intention to draft a common chapeau for all the crimes in the relevant chapter, attributing penal responsibility for the crimes to individuals.

Article 13. Threat of aggression

36. The singling out of the threat of aggression as a separate crime against peace was supported by a number of representatives, one of whom described draft article 13 as a key provision which usefully supplemented draft article 12 on aggression. In support of the position taken by the Commission in this respect, the remark was made that threat of aggression was practised at least as often as direct aggression and entailed equally seriously consequences as regards international peace and security; it was also stated that in the past there had been many cases of States that had lost their independence through threats or ultimatums. The observation was furthermore made that contemporary international law prohibited not only the use of force but also the threat of the use of force and attention was drawn to Article 2, paragraph 4, of the Charter and General Assembly resolution 42/22 entitled "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations", as well as to the 1954 draft Code.

37. A different position was taken by other representatives on the basis of four main arguments. The remark was first made that only in some cases did the seriousness of a wrongful act committed by a State and its particular characteristics call for the attribution of responsibility to individuals and that the threat of aggression was not one of such cases, particularly as a determination by the Security Council, under the Charter, of the existence of a threat to the peace would have the effect of bringing into play the general rules of State responsibility. A second argument was that treatment of the threat of aggression as a crime might lead to more frequent recourse to force on the ground of self-defence. A third argument related to the imprecision of the concept of threat of aggression. One representative observed, in this connection, that it was not even clear from the draft article that routine military exercises would not fall within the scope of its definition. In his opinion, it was one thing to speak of new confidence-building measures, notification of exercises and so on, but criminalizing such exercises or permitting some to argue that they were criminal was another matter entirely. Another representative pointed out that it was difficult to condemn when the threat had not been translated into action, or to distinguish threat from preparatory acts. Still another representative pointed out that, as appeared from conventions drawn up in connection with terrorism such as

the conventions on hijacking and the taking of hostages, criminal law was not so much geared to combat threats as isolated phenomena, but rather to prevent them, or to punish the perpetrators of threats in order to prevent the prohibited goal from being achieved. Fourthly, the remark was made that the concept of threat of aggression was not to be found in the Charter, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the 1974 Definition of Aggression or General Assembly resolution 42/22.

38. Among the delegations favouring the characterization of the threat of aggression as a crime against peace, some felt that the wording adopted on first reading by the International Law Commission was not entirely satisfactory.

39. The remark was made that, like many other crimes, the threat of aggression must simultaneously embody the two elements of intention and action and that there should therefore be objective criteria by which to judge the existence of the intention of the threat of aggression. The current text was viewed as inadequate in this respect. The view was on the other hand expressed that the approach reflected in the draft article was appropriate since it provided the judge with concrete objective criteria.

40. The article was also criticized on account of its imprecision. Thus, one representative remarked that the problem of the identification of the specific group of persons who could be made responsible for the crime defined therein was left unsolved and drew attention in this respect to various international instruments, such as the Statute of the International Military Tribunal at Nürnberg, Law No. 10 of the Allied Control Council or Additional Protocol I to the Geneva Conventions of 1977. Another representative observed that the draft article, as provisionally adopted, included a series of subjective elements which were not entirely clear. In his view, the reference to "good reason ... to believe that aggression is being seriously contemplated" led to a real grey area concerning the discretion of a State to verify the facts and, more important, to uncertainty as to who should be the impartial third Party mentioned by the Commission in paragraph (4) of its commentary. Still another representative noted that the draft article failed to spell out and define the elements which constituted proof of threat. He insisted on the need to distinguish between mere verbal excesses and actual threats, in order to prevent a State from using certain kinds of statement as a pretext for attacking another State, alleging that it was under threat and compelled to defend itself.

41. A further criticism related to the lack of correlation between draft article 12 on aggression and draft article 13 on threat of aggression. In this connection, one representative stated that if the constituent elements of a threat were included in the text for appraisal by a tribunal, as the Commission indicated in paragraph (1) of the commentary, then it was difficult to see how a tribunal could be free to determine the existence of the crime of threat of aggression but not that of the crime of aggression itself, in the absence of any finding by the Security Council. In his opinion, that was not an easy problem for the Commission to solve in the absence of clear-cut choices by Governments of Member States, and it was also very difficult to envisage what the correct choices could be, in view

of the clarity of the provisions of the Charter, which assigned the competence to determine the existence of an act of aggression to the Security Council only. Many representatives shared the view that draft article 13 should clearly indicate that determination of the actual existence of a threat should be done by the Security Council and that national courts should not be free to disregard the Council's findings. One delegation however felt that the judge should not feel bound by the deliberations of an essentially political body, but should work on the basis of the facts.

42. A last set of criticisms concerned the scope of the draft article. In this connection, the view was expressed that threat of aggression should be understood more widely, to cover all stages of aggression short of actual military intervention. The word "measures" was viewed as too restrictive, since it might exclude acts which the draft article should address, such as the fact for a Government to inspire a press campaign of such a nature as to induce other States to consider themselves faced with a threat of war. The question was also raised whether a demonstration of force could be a legitimate protective response to certain acts, for example, terrorist attacks directed against citizens of the State making the threat.

Article 14. Intervention

43. Many delegations endorsed the basic thrust of the draft article inasmuch as, in the words of one representative, intervention was often practised with the aim of achieving submission of another State or obtaining specific privileges from it and represented an infringement of the other State's political independence and a violation of its sovereignty. One delegation however expressed the view that intervention was too vague and general a notion to be considered as constituting in itself a crim against peace.

44. Several delegations noted that the text prepared by the Commission was largely based on existing instruments. Mention was made in this connection of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)), the Definition of Aggression (General Assembly resolution 3314 (XXIX)) and the Judgment of the International Court of Justice in the case concerning military and paramilitary activities in and against Nicaragua. Due note was taken of the fact that the Commission had reproduced only the first part of the definition contained in the Friendly Relations Declaration, evidently proceeding from the view that the other acts covered therein would not constitute crimes against humanity. This approach which sought to avoid too broad a definition of offences and instead to enumerate activities that constituted intervention was viewed as felicitous because it showed that the elements in a definition of criminal offences were different from those that came into a rule of international law. In this connection the remark was made that since the broad concept of intervention under general international law and the limited concept reflected in the draft article did not coincide, the use of the word "intervention" could well be avoided, and emphasis was placed on the need for the Commission to be

cautious in elaborating, even on a provisional basis, formulations which had an impact on the shaping of international law.

45. The reference contained in the draft article to terrorist activities as a possible form of intervention was expressly supported by some delegations. It was noted in this connection that the belief that acts of terrorism were unlawful, whatever their underlying cause, had become well established in the international community. The remark was on the other hand made that terrorist activities should be distinguished from the legitimate struggle of peoples for their freedom and independence and that the draft article should also characterize State terrorism as a crime against the peace and security of mankind.

46. Divergent views were expressed with regard to the bracketed word "armed" contained in the draft article. Many delegations favoured its deletion on the ground that the draft article would otherwise not cover the forms of intervention other than armed intervention which were equally efficient, if more subtle, especially those involving economic measures. Support was expressed in this connection for the views reflected in paragraph (6) of the commentary to the draft article. Attention was also drawn to the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, adopted by the General Assembly at its twentieth session, which stated, inter alia, that no State had the right to intervene, directly or indirectly, for any reasons whatever, in the internal or external affairs of any other State - which meant that armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements were condemned. The Commission was furthermore invited to draw inspiration from the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, adopted by the General Assembly in resolution 36/103, and to take account of the obligation of every State to refrain from any interference in the internal affairs of another State in form incompatible with the purposes and principles of the Charter as well as from interference aimed at preventing a State from pursuing its own path of socio-economic development or exercising its sovereign rights, or at obtaining some advantage from it.

47. Some other delegations favoured the retention of the word "armed". Thus one representative remarked that only coercion involving the use of armed force was sufficiently serious to constitute a crime against peace. Another representative observed that for the purposes of criminal justice the draft article rightly gave a definition of intervention that was more restrictive than that given in the Friendly Relations Declaration and that for the purposes of instituting criminal proceedings it was not possible clearly to define concepts such as "subversive activities" or "economic coercive measures". He viewed the concept of economic coercion as particularly elusive inasmuch as economic relations between States were governed by a host of interrelated legal régimes.

48. Divergent views were also expressed on the bracketed word "seriously". In favour of its deletion, it was pointed out that fomenting subversive or terrorist activities and organizing, assisting or financing such activities were in themselves very serious acts and that any further qualification could weaken the

content of draft article 14. It was also argued that to include the word "seriously" in the definition of the crime would be tantamount to introducing a double criterion of seriousness, since it had been agreed that only serious offences would find a place in the Code. The remark was moreover made that there was a school of thought according to which even indirect intervention was a violation of the Charter and that it would therefore be better to stick to the criterion of violation of the Charter.

49. Support was on the other hand expressed for the retention of the word "seriously". It was stated in this connection that if that word was removed that might encourage false accusations and lead to unsatisfctory results in practice.

50. Other comments on the draft article included the remark that the last part of paragraph 1 from the words "thereby seriously undermining" was superfluous inasmuch as the crimes should be characterized by the objective description of the act.

Article 15. Colonial domination and other forms of alien domination

51. A number of representatives supported the draft article which was viewed as reflecting adequately the established principle of the inadmissibility of attempts against the right of self-determination. One representative, in particular, pointed out that the right of colonial peoples to self-determination, which had always been defended by the United Nations, should be strengthened on the basis of General Assembly resolutions 1514 (XV) and 2625 (XXV), as well as of the advisory opinions of the International Court of Justice on Namibia and Western Sahara. He stressed that under contemporary international law the principle of self-determination had been declared a peremptory norm of international law and an imperative legal order and that the maintenance by force of colonial domination or any other form of domination in violation of the Charter constituted a crime against peace. The singling out of colonial domination among the various forms of alien domination was considered as justified because colonial domination, in the words of one representative, was "still to be reckoned with", and, as another representative put it, had "by no means become an extinct phenomenon". Regret was expressed in this context that no legal instrument had been adopted to make the colonial countries pay up and make reparations to the colonized countries.

52. Some representatives on the other hand held the view that colonial domination and other forms of alien domination, as defined in draft article 15, did not seem to constitute grounds for penal action in view of the imprecise nature of the concepts involved. One of them observed that although colonialism was a recognized political concept, as was attested by the Declaration on the Granting of Independence to Colonial Countries and Peoples, its extension to the criminal sphere could run up against difficulties in application. He stressed that the element of coercion was necessary if an act was to be considered as a crime against peace.

53. Among the supporters of the draft articles, some formulated observations on its content and wording. One of them stressed that the relationship between the

situation (the domination) and the criminal acts (its establishment or maintenance) required further consideration.

54. Comments were also made on the scope of the draft articles. They included: (a) the remark that since colonialism was a crime not only in the case of violation of the principle of self-determination, it would have been preferable for the text to read: "Colonial or other forms of alien domination is illegal if carried out against the principles of the United Nations Charter"; and (b) the observation that self-determination was a right exclusively of peoples subject to colonial exploitation and that the draft article should be worded accordingly lest it provide justification for the secession of heterogeneous communities from an established State.

55. The reference to "any other forms of alien domination" gave rise to a number of negative comments. Thus one representative, although expressing strong support for the right of peoples to self-determination enshrined in the Charter and for the liquidation of all colonial situations, felt, on the basis of the premise that the Code should in principle be limited to codifying existing law, that only the concept of "colonial domination" could as yet be considered as being a crime under international law and that the same could not be said of the much more elusive concept of "other forms of alien domination". Another representative took the view that the concept of foreign domination should be taken to include so-called "neo-colonialism", which, while it was to be condemned from the political standpoint, was not a concept established in law. He further observed that, in any case, "neo-colonialism" was not always imposed by force, and often resulted from economic disparities between countries. Still another representative recognized that, while the ban on the establishment or maintenance by force of colonial domination or any other form of alien domination was concerned in part with historical facts, the forcible denial of the right of peoples to self-determination continued to be a basic form of injustice which was rightly condemned by the community of nations. He however considered it unacceptable to attempt to redefine that basic right by representing certain forms of oppression as less reprehensible than others or by including the violation of economic interests. He therefore expressed disagreement with the remarks in paragraph (3) of the commentary on the expression "any other form of alien domination", adding that, in that context as in others, his delegation opposed any attempt to advance political objectives indirectly by way of the definition of crimes. Also referring to this part of the draft articles and to paragraph (3) of the commentary, one representative remarked that while his country was among those which regarded resolution 1803 (XVII) as the General Assembly's most authoritative statement on the question of natural resources, it nevertheless did not regard that resolution as a suitable basis for asserting the criminality of acts arguably inconsistent with it.

3. Comments on the draft articles submitted by the Special Rapporteur in his seventh report and referred by the Commission to the Drafting Committee

(a) War crimes

(i) General comments and method to be followed in defining war crimes

56. Most delegations expressed satisfaction at the fact that the Commission had devoted a part of its discussion at its latest session to the question of war crimes and their possible inclusion in the draft Code.

57. Commenting on the historical background to this question, one representative pointed out that the very question of drafting a Code of crimes against the peace and security of mankind had its genesis in the war crimes perpetrated during the Second World War although the need to restrain the activities carried out during armed conflict had long been recognized by civilized humanity. Another representative similarly noted that customary law had predated the various conventions dealing with aspects related to war crimes and that the modern law of war was largely to be found in treaties which had been codified over the past 100 years. He stressed that those precedents, as well as the use of custom as a source of law, should be borne in mind in defining war crimes. Still another representative pointed out that in discussing those crimes it was necessary to bear in mind the developments that had taken place in international law since the Nürnberg Judgement and the adoption by the Commission in 1954 of the draft Code of offences against the peace and security of mankind.

58. As to the method to be followed in defining war crimes, some representatives felt that any attempt to draw up a list of acts constituting war crimes, whether exhaustive or simply indicative, would be counter-productive and might hamper the development of international law in that field. One of them pointed out that a list of crimes, however precise, would never be exhaustive and would not contribute to a better understanding of the phenomenon. He objected to introducing an element of uncertainty, which would require the inclusion of a clause such as the so-called "Martens clause" of the third preambular paragraph of the 1907 Hague Convention, and considered the opinion of the first Special Rapporteur on the matter as perfectly logical. In his view, the Commission could adopt a general definition of the crimes, leaving to the judge the task of investigating whether he was in the presence of "war crimes", and paragraphs (a) and (b) of the second alternative for the draft article were adequate without the addition of any list. Views along the same lines were expressed by another representative who recalled that when it had considered the definition of jus cogens in article 50 of the draft articles on the law of treaties (A/6309/Rev.1) the Commission had been opposed to formulating a list of examples of jus cogens because, although such a list would have been merely indicative, misunderstandings might have arisen as to the position concerning other cases not mentioned in the article. That representative cautioned that a list of war crimes, even if it was indicative, would in practice be treated as exhaustive, particularly because it was a relatively long list of acts. He therefore suggested that it be left to the courts invested with jurisdiction to determine, on the basis of the general definitions in paragraphs (a) and (b), and taking into account

relevant case law, State practice and treaty law, what acts were war crimes and to transfer the indicative list in paragraph (c) or a simplified version thereof to the commentary to the draft article, in order to offer guidance to the courts as to the kind of act that constituted a war crime.

59. Most delegations however favoured a general definition accompanied by an indicative or non-exhaustive list of war crimes, an approach which had been proposed by the Special Rapporteur in the second alternative to his new version of the draft article on war crimes reproduced in footnote 72 of the Commission's report. It was said in support of this approach that providing a list of acts in addition to a general definition would avoid legal imprecision and ensure a certain uniformity in the application of the Code provisions, as it was necessary to give guidance to domestic courts which could be entrusted with the implementation of the Code. It was also said that a general definition which would not be supplemented by a list of war crimes would not only compound the difficulties that national courts would experience in identifying war crimes but would also give them unwarranted discretion. A non-exhaustive list was viewed as having the advantage of leaving room for new crimes to be added in the light of a change of circumstances or future developments of international law and of avoiding the practical difficulties involved in establishing an exhaustive list. As for the argument that article 53 of the Vienna Convention on the Law of Treaties did not list rules of jus cogens, it was viewed as unconvincing, first because that article was not concerned with criminal liability, whereas the draft Code envisaged proceedings before a criminal court, and secondly because the Vienna Convention covered a wide variety of other matters while the draft Code's sole purpose was to define a series of offences.

60. One representative favoured a combination of the first and second alternatives for the draft article on war crimes. He stressed that, while the first alternative would not be clear enough for States that were not parties to the instruments referred to in the article, and while the expression "laws or customs of war" would give rise to interpretation difficulties, both an indicative enumeration of war crimes and the restriction of the use of the expression "war crime" to the draft Code were certainly to be supported. He therefore suggested that the first paragraph might read "Within the meaning of the present Code, any grave breach of the rules of international law applicable in armed conflict constitutes a war crime" and that at the same time the term "international conflict" should be defined more precisely for the purposes of the draft Code. He added that a mention of instruments referred to in the second paragraph of the first alternative might be helpful but should not prejudge the use of the expression "war or international conflict" in other contexts.

(ii) The concept of "gravity"

61. A large number of delegations addressed the question of whether the concept of "gravity" or "seriousness" should be considered as an element of the definition of war crimes.

62. Most delegations favoured the incorporation of the concept of "gravity" into the definition. It was pointed out in this connection that war crimes should

consist of serious violations of the rules of international law applicable in armed conflict, it being understood that minor violations of the rules of war would give rise to responsibility under the applicable international law on the basis of their nature and degree of gravity. The remark was furthermore made that the concept of gravity itself should be based on the nature rather than on the consequences of the crime, as had been done in the four Geneva Conventions and the Additional Protocols thereto. Elaborating on this point, one representative, after pointing out that since it had been decided that the Code should cover only the most serious international offences the violations contemplated in the draft article on war crimes must also be serious, noted that paragraph 102 of the Commission's report referred to the opposition of some members to the introduction of the concept of gravity, based on the ground that the concept was not a part of the laws of war and that a belligerent State was entitled to try members of the enemy's armed forces for any violation of the laws of war, even a minor one. In response to that argument, he observed that belligerent States would still be capable of trying someone for committing a less grave offence, notwithstanding the fact that war crimes were defined in the Code as serious offences and that in such a case jurisdiction to institute proceedings would emanate from the domestic law of each belligerent State and not from the Code. He added that, irrespective of whether domestic courts were granted exclusive or concurrent jurisdiction with an international criminal tribunal to deal with offences under the Code, the Code itself should include only the most serious international crimes.

63. Some representatives adduced a further argument in favour of the concept of gravity, namely, that the distinction between grave and ordinary breaches was already to be found in the 1949 Geneva Conventions as well as in Additional Protocol I to those Conventions inasmuch as under those instruments States had an obligation to impose penal sanctions only on the perpetrators of grave breaches. In this connection it was pointed out that if the definition included a reference to Additional Protocol I account must be taken of the fact that part V, section II, of the Protocol distinguished between common breaches and grave breaches, because use of the criterion of gravity to characterize a breach would result in the exclusion of certain violations of the Protocol from the scope of the draft article. The remark was on the other hand made that the notion of war crimes, interpreted as the most serious violations of the rules of international law applicable in armed conflict, should not necessarily be equated with the concept of "grave breaches" under the 1949 Geneva Conventions and Additional Protocol I.

64. Doubts were expressed by other representatives as to whether the concept of gravity should be incorporated into the definition of war crimes. Thus, one representative felt that the use of the concept of gravity as a determining factor for war crimes would entail the introduction of a subjective element which was out of place in the draft Code. He shared the opinion of the Special Rapporteur, as recorded in paragraph 96 of the Commission's report. Another representative, while accepting that not all violations of the law of armed conflicts necessarily had the character of crimes against the peace and security of mankind, queried whether the degree of gravity was the most suitable criterion for differentiation. He pointed out that the process of narrowing down the problem to the issue of gravity or the mass character of violations entailed a risk of overlooking the very nature of crimes that were characterized as crimes against the peace and security of mankind,

and that the substance of such crimes could be fully disclosed only in the light of their interaction with the wrongful conduct of the State itself, whose consent - even if tacit - was the key to comprehension of the problem. He concluded that where there was no hope that a State would punish its nationals for their crimes other members of the international community must take the place of the State in question, and that all reprehensible actions that must not go unpunished should therefore fall within the scope of the draft Code. Still another representative warned that by making gravity an element of a war crime under the Code and, as such, an element for separate and specific determination in any trial, one might interfere with the discretion of the judicial authority responsible for enforcing the rule.

65. One representative took a middle-of-the-road position, stating that the criterion of gravity might be required in the case of certain crimes such as attacks on persons or property but not in the case of others, such as the use of nuclear weapons.

(iii) The phrase "laws and customs of war" and the alternative "rules of international law applicable in armed conflict"

66. Several delegations referred to the terminological question whether a draft article on war crimes should refer to "laws and customs of war" (as in the first alternative proposed by the Special Rapporteur) or to "the rules of international law applicable in armed conflict" (as in the second alternative proposed by the Special Rapporteur).

67. The majority of delegations were in favour of using the phrase "the rules of international law applicable in armed conflict". The remark was made in this connection that the term "war" was not only outdated but also less precise and might help the aggressor avoid the application of humanitarian law. It was also said that the term "armed conflict" was more comprehensive inasmuch as it covered all types of armed conflicts to the extent that international law was applicable to them, without distinguishing between international and non-international armed conflicts. Some delegations furthermore stressed that the term "armed conflict" should be understood to cover not only international armed conflict but also, as mentioned in article 1 (4) of Additional Protocol I, situations in which peoples were fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination. The phrase "rules of international law applicable in armed conflict" was also viewed as more comprehensive in that it covered both rules based on customary international law and rules based on conventional international law such as the four Geneva Conventions and their Additional Protocols.

68. Some delegations, while recognizing that the words "rules of international law applicable in armed conflict" were in keeping with the current terminology in modern international law, felt nevertheless that the words "laws or customs of war" should not be discarded because they were established in many international conventions still in force and in the domestic law of many countries.

(iv) Specific suggestions on the list of crimes

69. Some delegations made specific suggestions with regard to the formulation of the list of war crimes contained in the second alternative of the draft article presented by the Special Rapporteur.

70. In connection with paragraph (c), one delegation endorsed the view expressed in paragraph 122 of the Commission's report to the effect that the non-exhaustive nature of the list would be better indicated by the use, in the opening phrase, of the words "in particular".

71. Several delegations held the view that subparagraph (i) should also cover attacks against civilian populations and that it was therefore necessary in that regard to follow article 85, paragraph 3 (a), of Additional Protocol I to the Geneva Conventions. Some delegations furthermore felt that the subparagraph should encompass mistreatment or inhuman treatment inflicted upon prisoners of war, including their use as forced labourers during or after hostilities, the deportation of persons and the destruction of defenceless towns and villages. Additional comments included the remark that the subparagraph showed a lack of consistency in the use of the adjective "intentional"; the suggestion that acts related to sea warfare be covered and the word "customs" inserted, taking into account the fact that much of the law relating to sea warfare had not yet been codified; and the observation that the subparagraph did not pay sufficient attention to new developments relating to the operation and the scope of the military-necessity clause and, in particular, failed to reflect both the spirit and the letter of article 57, entitled "Precautions in attack", of Additional Protocol I to the Geneva Conventions of 1949.

72. Except for the observation that the use of the expression "non-military targets" aroused serious conceptual doubts, and the remark that it would be appropriate to distinguish and treat separately, as suggested in paragraph 140 of the Commission's report, crimes against persons, crimes committed in the battlefield in violation of the rules of war and crimes constituted by the use of prohibited weapons, comments on subparagraph (ii) focused on the question of the use of weapons of mass destruction.

73. Several delegations strongly supported the inclusion of the use of such weapons in the proposed list of war crimes. Some singled out the use of nuclear weapons and the use of weapons prohibited by the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.

74. The specific question of nuclear weapons gave rise to divergent opinions. One representative insisted that the Commission should not discuss it, disarmament matters being considered in other specialized forums. He added that in view of the highly controversial nature of many of the issues the Commission should give ample time to their consideration and should come forward with proposals only when it had grounds to believe that they might be generally acceptable. Other representatives

felt that the use of nuclear weapons should constitute not only a war crime but a crime against humanity. One representative also pointed out that the use of such weapons would be a crime in virtually any circumstances, if only because the use of such weapons would inevitably imply a series of war crimes, such as the mass annihilation of the civilian population and the destruction of property and of the environment. Another representative stressed that the inclusion of a provision on the prohibition of the use of nuclear weapons in the list of war crimes would reassure the many signatory countries of the Treaty on the Non-Proliferation of Nuclear Weapons about possible nuclear blackmail.

(b) Crimes against humanity

(i) General comments

75. Most delegations agreed that "crimes against humanity" should form a separate category in the draft Code. One however pointed out that the phrase "crimes against humanity" which had been invented to designate the most barbarous international crimes and the most revolting international behaviour had been trivialized over the years and was currently used in international forums to stigmatize the behaviour of a political opponent. She stressed that an action might be considered an international crime, might be condemned in international forums and might be banned by international treaties without being a crime against humanity. She therefore saw no need to divide the crimes against the peace and security of mankind to be included in the draft Code into the categories of crimes against peace, war crimes and crimes against humanity, but added that if that distinction was maintained, the expression "crime against humanity" should only be used for the most heinous of international crimes, namely, genocide.

76. Some delegations raised the question of the relationship between the concept of "war crime" and the concept of "crime against humanity". In this connection, some delegations pointed out that if an act constituting a "crime against humanity" was committed in time of war it should be treated as "war crime".

77. As to the notion of "crime against humanity", many delegations endorsed the view, reflected in paragraph 152 of the Commission's report, that the word "humanity" should be interpreted as meaning the "human race" rather than conveying a moral idea. Crimes against humanity would thus be crimes directed against the human race as a whole and putting in question the essential values of human civilization.

78. As regards the method to be followed in defining crimes against humanity, many delegations favoured a general definition of those crimes, followed by a non-exhaustive list of acts so categorized.

79. Several delegations pointed out that the "mass element" should not be considered as an integral part of the definition of the crime. Thus, the view was expressed that the definition should cover not only mass crimes but also those perpetrated against individual victims when they formed part of a systematic persecution. One delegation said that there was no point in trying to distinguish between the concept of mass crime and individual crime, since the gravity of the

offence should be the primary consideration rather than the number of individuals affected by it. A single attack on an individual or his property, another delegation observed, could have the attributes of a crime against humanity.

80. With regard to the distinction between "motive" and "intent', and the relationship of these notions to the concept of crime against humanity, one delegation supported the Special Rapporteur's view, recorded in paragraph 156 of the Commission's report, that in the case of crimes against humanity the motive was all the more unacceptable in that it attacked values involving human dignity. Another delegation pointed out that motive should not be considered a relevant factor in establishing a crime against humanity, especially if the requisite intent was shown to exist. A third delegation pointed out that the underlying causes of crimes against humanity were racism, religious intolerance and ideological prejudices.

81. In connection with the definition of the various acts which might constitute crimes against humanity, one delegation warned against extremely broad definitions which might introduce confusion. Another delegation pointed out that the definitions should be free of any elements that might give rise to political interpretations.

(ii) Comments on specific acts

a. Genocide

82. The inclusion of genocide in the draft Code was generally recognized in the Sixth Committee as necessary. Several delegations also stressed that it was wholly appropriate to head the list of crimes against humanity with this most heinous crime.

83. Most delegations supported the Special Rapporteur's proposal, as reflected in footnote 75 of the Commission's report, to reproduce the relevant provisions of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. Some agreed with him that the list of acts of genocide should be non-exhaustive but others questioned this departure from the relevant provisions of the 1948 Genocide Convention which, it was observed, might be a source of difficulties for future parties to the draft Code who were also parties to the 1948 Convention.

84. As regards the introductory part of paragraph (1), one delegation pointed out that it would be important to clarify the meaning and the scope of the expression "national group". Another delegation suggested that in the light of recent history the definition of genocide should be broadened to include any act committed with intent to destroy a social group so as to cover a situation such as the systematic liquidation or persecution of intellectuals. Along those lines, one delegation proposed to replace "national, ethnic, racial or religious group" by "national ethnic, racial, religious or other group" in order to cover all reasonable possibilities.

85. As for subparagraphs (ii) and (iii), one delegation suggested that their wording be clarified by indicating that the acts concerned involved killing and thus constituted genocide in a strict sense.

86. One delegation noted with satisfaction that some members of the Commission had established a link between the crime of genocide and the crimes of deportation, expulsion of population from their territory or forcible transfer of populations since the latter crimes constituted, in that delegation's view, either the means or the object of genocide.

b. Apartheid

87. Most representatives supported the inclusion of apartheid in the list of proposed crimes against humanity. One representative, however, recalled that, while resolutely condemning all forms of racial discrimination, in particular apartheid, and while being in sympathy with the ideas underlying the International Convention on the Suppression and Punishment of the Crime of Apartheid, his country had been unable to become a party to that Convention for legal reasons connected with the imprecision of the charge and the difficulty of bringing it against an individual. In his view, there was some risk of a similar situation arising in connection with the draft Code.

88. One representative noted that the first alternative definition proposed by the Special Rapporteur and reproduced in footnote 76 of the Commission's report did not adhere to the definition used in the above-mentioned Convention but added the element of "the institution of any system of government based on racial, ethnic or religious discrimination", which was in his view a much broader concept lacking the precision necessary for any legal rule. He observed that the fact that progress in international law was incremental did not mean that definitions in international law should advance incrementally, ignoring the boundaries carefully established in existing treaty texts. Another delegation warned that the express mention of the 1974 Convention in the first alternative might raise problems for States not bound by the Convention.

89. Many delegations expressed preference for the second alternative definition proposed by the Special Rapporteur, which reproduced the provisions of article II of the 1974 Convention. Most of them favoured the deletion therefrom of the bracketed words "as practised in southern Africa". It was pointed out that these words were unduly controversial and even misleading, since they could be interpreted to mean that all States of southern Africa practised apartheid, and that they seemed to restrict the scope of application of the draft article to a specific area and to a particular type of racial segregation.

90. Some however were of a different view. Reference was made in this connection to the historical genesis of the crime and to the fact that, while it was true that the acts referred to in the draft provision were also committed in other parts of the world, it was only in South Africa that apartheid prevailed as an official policy. One delegation suggested that the words "southern Africa" might perhaps be replaced by the words "South Africa". Attention was drawn to the need to differentiate between the system practised in South Africa from what was referred to in paragraph 164 of the Commission's report as tribal or customary apartheid, which resulted from vestigial social customs of the societies where it was practised. The remark was made that such forms of apartheid which the States concerned were doing their best to eradicate should not be covered by the draft Code.

91. As for paragraph 2 (d) of the second alternative, one delegation suggested that it should include all types of property and not just landed property.

c. Slavery, other forms of bondage and forced labour

92. Most delegations supported the inclusion of slavery among crimes against humanity, proposed by the Special Rapporteur in the provision reproduced in footnote 77 of the Commission's report. One delegation in particular supported the broad definition of slavery given by the Supplementary Convention of 7 September 1956 on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery. Some delegations however expressed readiness to consider a definition of slavery wider than that of the 1956 Supplementary Convention so as to cover the phenomenon of slavery in all its manifestations.

93. The words "other forms of bondage" were viewed by a number of representatives as lacking precision. One representative in particular pointed out that the kind of bondage to which the Special Rapporteur referred existed in many third world countries and that such bondage was an illegal practice which resulted from extreme poverty and which could be eradicated only by the elimination of poverty. He stressed that the draft Code should take account of local conditions and that it was not desirable to extend the scope of crimes against humanity to grey areas. The question was also raised whether practices such as "debt bondage" ought to be treated as a crime against humanity.

94. Some delegations viewed the inclusion of the concept of "forced labour" in the proposed provision as unobjectionable. One delegation said that the characterization as a crime against humanity of forced labour, which had been resorted to on a major scale during the Second World War and also after it, had been an important new development. Another delegation considered it unfortunate that despite the efforts of the international community and the United Nations such practices still existed in various parts of the world and remarked that although the International Labour Organisation (ILO) had been concerned with the issue it was up to the General Assembly to declare forced labour a crime against humanity.

95. A number of representatives, however, questioned the inclusion of a reference to "forced labour" without further clarifications or distinctions. One of them observed that such a reference raised the more general problem of distinguishing between crimes against humanity and the violation of human rights and fundamental freedoms. He considered it essential to amend the text in this respect inasmuch as in its current form it could be interpreted to mean that States which obliged practising lawyers to defend destitute persons before criminal courts without adequate remuneration were committing a crime against humanity, since that could be considered to be "forced labour" according to the jurisprudence of the human rights organs established under the European Convention on Human Rights. Another representative stressed that the concept of "forced labour" would have to be carefully circumscribed to avoid confusion with accepted forms of civic service, a feature of the economic life of some countries. Still another representative pointed out that under the penal system of his country individuals sentenced to rigorous imprisonment had to do compulsory work in gaol factories and thus acquired training which enabled them to find employment after serving their sentence. He

stressed that such compulsory labour could not be equated with a crime against humanity and therefore suggested reconsideration of the definition of forced labour on the basis of intention. A fourth representative summed up these views by stating that if forced labour was imposed not on racial or religious grounds but in the interest of society and in conformity with normal judicial or other lawful procedures, it should by no means be regarded as a crime against humanity.

d. Expulsion of populations, their forcible transfer and related crimes

96. Many delegations supported the Special Rapporteur's proposal, reflected in footnote 78 of the Commission's report, to include in the draft Code and characterize as crimes against humanity the expulsion of populations, their forcible transfer and related crimes. One representative pointed out in this connection that although the forced transfer of populations had been considered illegal since the turn of the century and had been prohibited in the 1907 Hague Convention and in the 1949 Geneva Conventions, the practice still persisted in various parts of the world and that the General Assembly could help proscribe it by declaring it a crime against humanity. Another representative referred to his country's bitter experience with the crimes under consideration which continued unabated despite numerous resolutions of the General Assembly and other international bodies, including the Ninth Conference of Heads of State or Government of Non-Aligned Countries held at Belgrade and the Conference of Heads of Government of Commonwealth Countries held at Kuala Lumpur.

97. Many delegations, while generally supporting the Special Rapporteur's approach, felt that the proposed provision should be refined. One delegation in particular observed that many factors must be taken into account: the purpose of the expulsion or transfer, the presence or absence of humanitarian reasons, the means employed and the question whether legal or illegal methods had been used. It was therefore recognized that the Commission should further study the question of defining under what conditions and circumstances the above-mentioned practices became a crime under the draft Code. The remark was made in this connection that the transfer of some inhabitants from certain areas, which was decreed by a State through normal procedures for reasons of public or social interest, should be regarded as a measure beneficial to society and that the key point was to distinguish between different sets of circumstances and to draw the line clearly between legal and illegal conduct. Attention was also drawn to the need to distinguish between the transfer of populations motivated by humanitarian reasons and the arbitrary transfer of populations constituting a crime against humanity under the draft Code. The concept of "occupation of a territory" was viewed as a key element of the proposed provision. One representative pointed out that the establishment of settlers in an occupied territory was a highly topical problem, and that not a day passed without the occupation, by force of arms and on the basis of allegedly divine laws, of lands which could not be considered as "res nullius", because their owners were there to defend their ancestral heritage. He added that those who encouraged the establishment of settlers in occupied territories were criminals and should be considered as such for the purposes of the Code of which they were, furthermore, the first sponsors. Another representative however said that he did not see any valid reason to restrict the scope of the provisions to expulsion or forcible transfer from occupied territories.

98. Other comments on the provision proposed by the Special Rapporteur included the remark that subparagraph (c) on the "changes to the demographic composition of a foreign territory" should be amended to show clearly that such a crime could also be committed within the borders of a State, and the observation that, notwithstanding the views expressed by some members of the Commission, as reflected in paragraph 177 of its report, no parallel could be drawn between the crimes of the Nazi régime and the transfer, as an exceptional measure designed to maintain a lasting stable peace, of the population of the countries occupied by the Allied Powers.

e. Other inhuman acts, including destruction of property

99. Support was expressed by some delegations, for the incrimination, as proposed by the Special Rapporteur, of inhuman acts committed against any population or against individuals on social, political, racial, religious or cultural grounds. Such incrimination was viewed by one delegation as being in accordance with the Nürnberg Principles.

100. Divergent views were however expressed on the scope of the provision: While one representative held the view that inhuman acts were not only a matter of physical ill-treatment but could consist in humiliating or degrading acts, another representative observed that because of its inclusive language the provision appeared to cover any inhuman act committed against individuals on political grounds, which was far too wide. In his opinion, the fact that conduct was regrettable or even unlawful from the point of view of human rights was not a sufficient reason for its inclusion in the draft Code.

101. Many delegations supported the characterization as inhuman acts of the destruction of property, especially property belonging to the cultural heritage of mankind. The view was expressed in this connection that such characterization should extend to attacks against historical and artistic monuments, especially those declared part of the heritage of mankind by the United Nations Educational, Scientific and Cultural Organization (UNESCO). Reference was made in this context to the Convention adopted under the auspices of UNESCO which, it was remarked, had further developed the 1954 Hague Convention in respect of protection of property during armed conflict with a view to preserving mankind's cultural heritage, and the opinion was expressed that the criteria which that Convention had established for the definition of the concept of cultural heritage of mankind could provide guidance in the matter. One delegation endorsed the view reflected in paragraph 195 of the Commission's report that "the destruction of dwellings" should be added to the list of inhuman acts.

102. Some delegations, on the other hand, expressed reservations as to the advisability of characterizing attacks on property as crimes against humanity. Thus, one representative said that he had very serious doubts as to the possibility, except in some exceptional cases, of considering destruction of property as a crime against humanity, and that further extensive consideration of that question by the Commission was called for. Another representative pointed out that it was doubtful whether attacks on property met the criterion for a crime against humanity, i.e., a serious violation of rules of international law

applicable to armed conflicts. He warned against the temptation to pick offences from the 1949 Geneva Conventions and their Additional Protocols and label them crimes against humanity when in fact they did not meet the test of being a serious violation of the laws of war.

103. Further comments on the question of attacks on property included the remark that the intention of the proposed formulation appeared to be to include only specific attacks on property in aggravating circumstances of a quantitative and qualitative nature, and the observation that it remained to be clarified whether acts performed by private individuals should be included - a question which would have to be examined in the context of the general structure of the draft Code.

f. Attacks to a vital human asset such as the human environment

104. Many delegations supported the inclusion in the draft Code of some provisions concerning what several delegations called "ecological crimes", along the lines of the Special Rapporteur's proposal reproduced in footnote 84 of the Commission's report whereby any serious and intentional harm to the human environment should be characterized as a crime against humanity.

105. Many of the delegations supporting the inclusion of the concept of "ecological or environmental crime" felt nevertheless that the proposed provision was not precise enough. In this connection, one delegation pointed out that the reference to "any serious and intentional harm" was unsatisfactory as it would be a mistake to believe that the repeated use of the word "serious" was enough to ensure that the Code covered serious acts only. Another delegation felt that the Commission should specify the degree and extent of degradation of the environment which was envisaged, so that everyone knew what act or conduct in relation to the environment constituted a crime. Still another delegation believed that more specific wording should be sought, and suggested the substitution of the word "deliberate" for the word "intentional", as the latter might prove to be too restrictive in practice.

106. Several delegations commented on the relationship between the concept of environmental or ecological crime and that of State responsibility. Thus, one delegation pointed out that the notion of environmental crime, which needed to be studied in detail, should be linked to the idea of State responsibility in its broadest sense, entailing an analysis of the collective responsibility of States for an economic system which induced certain individuals or groups of individuals to resort, sometimes purely for reasons of survival, to attacks against the environmental heritage of mankind. Other delegations suggested that the wording of the provision under consideration should be brought into line with that of article 19 of the draft articles on State responsibility and article 55 of Additional Protocol I to the 1949 Geneva Conventions.

107. Other comments on the provision in question included the remark that the notion of "vital human asset" contained in the draft article proposed by the Special Rapporteur was too vague and might be open to very subjective and divergent interpretations.

g. International traffic in narcotic drugs 5/

108. A number of delegations supported the decision of the Commission reflected in paragraph 210 of its report to request the Special Rapporteur to prepare a draft provision on international drug trafficking for the next session. One representative in particular said that international traffic in narcotic drugs should be regarded as an international crime deserving the ultimate penalty, and that there should be no safe haven in any country for anyone engaged in that traffic. He observed that the international community's struggle against such illegal traffic was not helped by the existence in some consuming countries of very weak penal systems which constituted no deterrent to international drug traffickers. He therefore insisted that the countries in question should extradite offenders to States where more severe penal régimes existed, adding that although his country had concluded agreements with a few States on modalities for dealing with illegal drug trafficking, tracing and confiscating laundered money, extradition and other related offences those agreements did not preclude the adoption of a common international approach to deal with the phenomenon. Another representative also stressed the importance of co-operation between States and further suggested the setting up of an international court to judge the offences in question in specific cases.

109. Several delegations supported the approach advocated by the Special Rapporteur and reflected in paragraph 209 of the Commission's report whereby, given the detrimental effects it had on the health and well-being of mankind as a whole, international traffic in narcotic drugs should be viewed both as a crime against humanity and a crime against peace inasmuch as aside from being linked to local and international terrorism it had a destabilizing effect on certain countries, especially the smaller ones, and as such adversely affected harmonious international relations.

110. As regards the formulation of the future provision on the matter, one representative insisted on the need for a precise definition encompassing aiding and abetting. As examples of aiding and abetting, he referred to the industries that sold chemicals, knowing that they would be used in the manufacture of cocaine or heroin, and to the merchants who sold ammunition to the drug mafia for their mercenaries. He described individuals who sold chemicals and ammunition to drug dealers as essential links in the chain that led to drug trafficking, and insisted that the definition of the crime of drug trafficking be comprehensive enough to include all the links in the chain.

111. Some delegations commented on the possible relationship between a provision on international drug trafficking to be included in the draft Code and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. One of them recalled that this convention treated illicit drug trafficking as an international crime which endangered the peace and sovereignty of States and adversely affected the normal order of societies and that it had

---

5/ See also note 3 above.

established universal jurisdiction over that crime and imposed on States the obligation to "extradite or prosecute". Another representative suggested that the corresponding provision of the draft Code should be envisaged as a way of strengthening the provisions of the above-mentioned Convention. Still another representative pointed out that many countries had signed the 1988 Convention and that many of them had reached an advanced stage in their internal steps with a view to ratifying the Convention. He described the norms laid down in the Convention as the most appropriate for establishing effective machinery for international judicial co-operation in the field in question and warned that such machinery must not be adversely affected by the draft provision to be included in the Code, even though international traffic in narcotic drugs could be characterized as both a crime against peace and a crime against humanity.

4. Comments on the question of the implementation of the draft Code

112. A number of delegations addressed various aspects of the question of the implementation of the draft Code.

113. Some representatives favoured the establishment of an international tribunal or court to ensure the correct implementation of the draft Code. 6/ One of them, after expressing doubts concerning the method by which international obligations of States were indiscriminately transformed into criminal acts and after pointing out that international law lacked sufficiently precise definitions of punishable acts, remarked that if national courts were assigned the responsibility of adjudicating such acts States might be inclined to impose their own interpretations of international law. In his view, it was not enough to define reprehensible conduct in vague terms and leave the rest in the hands of criminal courts; a Code of crimes against the peace and security of mankind would therefore require the establishment of an impartial and objective organ in the form of an international criminal court. Another representative stressed that the Code would be less open to varying interpretations when applied by an international criminal court and that such a court needed in no way undermine the sovereignty of any State or minimize the primary role of any national judicial system. Still another representative held that the idea of jurisdiction being given to national courts with multinational membership was unworkable, as was the use of national courts as courts of first instance with the right of appeal to an international tribunal. He suggested either creating an international criminal tribunal with exclusive jurisdiction over Code offences or investing such jurisdiction in national courts and an international criminal tribunal, but not with the latter as an appellate body. He expressed preference for the first alternative, noting that the second would raise the question of how the principle of non bis in idem would apply.

114. Commenting on the modus operandi of an international criminal court, one representative indicated that the jurisdiction of such a court could be derived from its own statute and that judges could be appointed on the basis of their moral

---

6/ See also note 3 above.

standing, their legal qualifications and their status as representatives of the world's legal systems. A further question which was raised in this context concerned the relationship between judicial findings under the Code and decisions of the Security Council under Chapter VII of the Charter. One representative, after pointing out that such decisions were binding upon Member States and, presumably, on organs of those States, including national courts, stressed that, notwitstanding the need for the independence of any international court from political organs, it was essential to ensure consistency and credibility in interpreting and implementing the Charter, a problem which would be particularly acute in the case of such crimes as aggression.

115. Other representatives held the view that the implementation of the future code should be left to the national tribunals of the States parties to it. One of them pointed out that no evidence had been advanced to show that the existing system whereby various international offences defined by international conventions were prosecuted under national law was not an effective way of dealing with those offences. In his view, any proposal for an international court to deal with international offences would raise difficult issues: he asked in particular what rules of evidence would apply; whether jurisdiction would be compulsory and how it would be defined; what sentencing principles would apply; whether there would be a right to trial by jury; and what appeal rights there would be. Another representative said that, although the draft Code sought to define criminal offences of a particular nature in terms of gravity and of the status of the offender, the offences in question still fell within the realm of criminal law and would always, with the possible exception of those affecting the environment, be committed in respect of certain persons or groups of persons. He therefore felt that there was no cogent reason not to entrust implementation of the Code to national criminal law systems, acting where necessary through international co-operation (for example, in the case of extradition), particularly as many of the crimes deemed fit for inclusion in the draft, such as genocide, fell within the jurisdiction of national courts, as did also certain crimes such as mercenarism, hijacking and the taking of hostages.

116. Various formulae involving both national courts and an international machinery were suggested for the implementation of the draft Code.

117. Thus one representative, invoking the tremendous difficulties to be dealt with in order to establish an effective international criminal jurisdiction, and seeing no compelling reason to embark on such a course, suggested that in order to ensure uniform application of the Code's provisions consideration should be given to devising a mechanism for introducing into domestic criminal proceedings a truly international legal opinion on them. Other representatives felt that an international criminal court could function as a court of appeal for decisions of national tribunals. One of them, after stressing that it was time to forget the comparison between universal criminal jurisdiction and an international criminal court and instead to seek a realistic solution, recalled that at the Commission's forty-first session it had been suggested that the advantages of national courts and the principle of universal criminal jurisdiction should be combined in an international criminal court competent to review final decisions of national courts. He explained that under the suggested formula only States whose nationals

had been punished abroad and States in whose territories an offence had been committed or against which it had been directed (with the offender having been acquitted or condemned in another country) would be entitled to appeal and that national courts could be authorized to ask the international court for a binding opinion on a point of international criminal law. He stressed that such a procedure would avoid unnecessary extraditions, would not require a public prosecutor or law enforcement officials, would harmonize the case law of national courts and would provide States with effective protection against the shortcomings of the universal jurisdiction of national courts. Another representative, after pointing out that, according to the provisions of the draft Code already provisionally adopted, States parties would undertake to try or extradite an individual alleged to have committed a crime against the peace and security of mankind, so that upon entry into force the code would institute a "universal jurisdiction", asked whether that undertaking at the national level ought to be backed up by the establishment of an international criminal court, as provided for in paragraph 3 of article 4. He described the idea as acceptable provided the jurisdiction of a court of that kind did not exclude the jurisdiction of the national courts, to the detriment of national prosecution efforts. In his opinion, the court might essentially function as an international court of appeal, or as a forum in which to resolve conflicts of jurisdiction between States. Still another representative, while being of the view that the Code could be implemented by national courts, either through trial of the alleged criminals in the States where they were found or through their extradition to the States of origin or to the States in which the crimes had been committed, suggested that where a State was not willing either to try or to extradite the alleged criminal it might be given the possibility of submitting the case to an international court, which would thus function in parallel with national courts, but not as an appeal court for reviewing the decisions of national courts.

118. Several representatives, while leaving open the possibility of considering at a later stage the establishment of an international criminal court, advocated pragmatic solutions. One representative suggested that jurisdiction be conferred on national courts, while at the same time providing for a system of reports, with committees or working groups responsible for studying them. He stressed that that system had proved its effectiveness in the context of the United Nations and, particularly, in connection with the protection of individual rights. Another representative pointed out that the possibility of setting up special tribunals to consider specific cases at the request of the States concerned was provided for both in the Convention on the Prevention and Punishment of the Crime of Genocide and in the International Convention on the Suppression and Punishment of the Crime of Apartheid and remarked that, in view of current prospects for the establishment of a universal world order based on the primacy of international law, the emergence of new approaches to the implementation issue was not excluded.

119. A number of delegations insisted that the question of the implementation of the draft Code should not be allowed to prevent the Commission from concentrating its efforts, on a priority basis, on the speedy completion of the substantive provisions of the draft Code. One delegation, however, regretted that the Commission had again avoided, at its most recent session, an in-depth discussion of the question of an international criminal jurisdiction.

C. STATE RESPONSIBILITY

1. General comments

120. A number of representatives stressed the importance of the topic. One of them, after observing that the key to the establishment of an organized community of States founded upon the rule of law did not lie in coercion or the threat of being brought to book, but in a balance of interests backed by standards of international law, remarked that international life founded upon the primacy of law was inconceivable without a clear definition of the responsibility incurred by transcending the limits of what was permitted under international law.

121. Regret was expressed that the topic should have been on the agenda for such a long period and the remark was made that if the work had been completed or had advanced further many of the problems raised by the draft Code of Crimes against the Peace and Security of Mankind and the topic of international liability for injurious consequences arising out of acts not prohibited by international law would have been solved or seen in a different light.

122. Satisfaction was expressed with the fact that at its forty-first session the Commission had been able to hold a substantive debate on a topic which by general admission called for as expeditious a treatment as possible.

2. Comments on the proposed structure of Part Two and Part Three

123. The Special Rapporteur's proposal to study separately the legal consequences of "international delicts" and those of "international crimes" gave rise to comments of a methodological nature and to substantive observations on the distinction between "crimes" and "delicts".

124. As regards methodological aspects, the above-mentioned proposal was endorsed by several representatives. Different arguments were however adduced in support of it. One representative agreed with it on the ground that it allowed the Commission to deal with the consequences of simple breaches of international obligations without being held up by consideration of the consequences of international crimes. Another representative endorsed the proposed approach on the understanding that the Commission would choose at as early a stage as possible either the "additive" approach or a separate comprehensive formulation, lest the work of the Drafting Committee might remain deadlocked until the chapter on international crimes was submitted. Still another representative viewed the Special Rapporteur's proposal as a logical consequence of the fundamental choice made by the Commission in connection with Part One of the draft in adopting a concept which emphasized the wrongful act itself rather than the harm caused. He drew attention in this respect to the position of the International Court of Justice on the question of obligations erga omnes - a legal category whose parameters still remained to be fully defined - and remarked that, in view of developments taking place in international thinking in that field, the legal consequences of a wrongful act had to be analysed in terms of the degree of contempt of international law which that

act represented. He observed that such an analysis, although its results could not be prejudged, would be consonant with the distinction suggested by article 19 of Part One of the draft.

125. On the other hand, the Special Rapporteur's proposal to deal separately with the legal consequences of international delicts and those of alleged international crimes was objected to on the ground that the concept of international crimes was not supported by existing international law.

126. A number of representatives stressed that at the current stage the decision on the matter could only be of an interim character. One of them agreed with dealing separately with delicts and crimes provided that distinct articles provisionally adopted on first reading could be merged at a subsequent stage if separate treatment did not appear necessary. He added that such an approach would clarify the differences between the legal consequences of delicts and crimes and would allow the particular ramifications of the problem of international crimes to be discussed without repercussions on the problem of international delicts. Another representative pointed out that a final opinion on the matter could not be expressed in respect of any of the subjects dealt with in Part Two (particularly the way in which crimes were to be dealt with) until Part Three had been drafted. He stressed that although the concept of an international crime had positive aspects it was potentially dangerous unless appropriate steps were taken to prevent it from being used as a political weapon and that progress in the development of the rules of international law would not be possible if the new institutions that were to be set up were not accompanied by a system for the peaceful settlement of disputes.

127. As regards the second of the questions referred to in paragraph 123 above, a number of representatives endorsed the concept of international crime and warned against calling into question article 19 of the draft. One of them, after remarking that that concept was not new since it dated back to the First World War and figured in various international instruments, observed that article 19 established that, beyond breaches of the interests of States (delicts), there were crimes, namely, acts, that violated the fundamental interests of the international community. He added that article 19 implied an acceptance of public action against the author State of an international crime entailing the criminal responsibility of that State. Another representative observed that the expansion of the scope of State responsibility to international crimes such as aggression, colonial domination and racism reflected the development of international law.

128. Concurrence was on the other hand expressed with the view of some members, as reflected in paragraph 234 of the Commission's report, that the concept of international crime was not supported by existing international law and that it would be inappropriate to attribute any criminal responsibility to the State.

129. Several members, while reserving their position until the legal implications of the concept of international crime had been thoroughly explored, felt that at the current stage of discussion it would be inappropriate to raise questions concerning parts of the draft already provisionally adopted on first reading. They

nevertheless stressed that it would be necessary to re-examine thoroughly in due course the draft articles of Part One dealing with general principles of responsibility.

130. Some representatives commented on the general outline proposed by the Special Rapporteur for Parts Two and Three (see para. 228 of the Commission's report). One of them said that in the outline proposed for Part Two there was a disproportion between the consequences of international delicts dealt with in chapter II and the consequences of international crimes dealt with in chapter III.

131. As for the suggestion, reflected in the general outline, to treat separately the substantive legal consequences and the procedural consequences of wrongful acts, it was favourably commented upon. One representative noted in this respect that the former type of consequences imposed strict obligations on the State that had committed the offence which were quite independent of the subsequent behaviour of the injured State; she further observed that the procedural consequences were subject to other conditions aimed at satisfying the rights of the injured State, so that it did not resort to measures intended to re-establish the status quo ante. Also referring to the proposed distinction between substantive consequences and procedural ones, one representative, after observing that the right of the injured State to take countermeasures was a highly sensitive issue, stated that the draft articles on that subject should, as far as possible, encompass all cases and situations, and that the proposed distinction should not set unnecessary limits upon the scope of specific manifestations of State responsibility. Other comments on the concept of "countermeasures" included the observation that that term was preferable to the term "measures", because it implied an element of proportionality and connoted a response to an activity that was contrary to international law. The remark was also made that it was essential to have a text which made armed reprisals illegal.

132. As regards legal consequences of a punitive nature, also referred to in the general outline, one speaker disagreed with the Special Rapporteur's view that legal consequences of such a nature existed within the framework of State responsibility. He suggested that the Commission should abandon any reference to it in the draft articles. Another representative, however, remarked that the consequences of crimes were bound to be identified with criminal responsibility. Referring to the view expressed in the Commission that the consequences of wrongful acts should not be defined in such terms as to reject a people's right to existence, he stressed the need to reject any identification between the concept of a people and that of a State. He remarked that it was possible to punish a State without having the penalty affect all its nationals and noted that after studying the diplomatic and jurisprudential practice of reparation the Special Rapporteur had reached the conclusion that instances of inflictive measures vis-à-vis offending States were not rare. In his view, that applied to a certain extent to the coercive measures provided for in Chapter VII of the Charter.

133. As for Part Three, there was no objection to the idea of limiting it, as a working hypothesis, to the issue of dispute settlement.

3. Comments on draft articles submitted by the Special Rapporteur in his preliminary report and referred by the Commission to the Drafting Committee

Article 6. Cessation of an internationally wrongful act of a continuing character

134. A first issue which was commented upon in relation to this article was whether cessation belonged to the category of secondary or primary rules of international law. In this connection, several representatives expressed the view that the obligation embodied in article 6 was merely a different manifestation of the general duty of States to abide by the primary rules of international law and that any other view would deprive international law of its binding force. Accordingly, it was suggested that article 6 should be entitled "Discontinuance ..." rather than "Cessation ...", as the former term more clearly reflected the intrinsic link with the obligatory character of international law. One representative added that because cessation represented a substitute form of primary obligation, it should be dealt with separately in relation to delicts and crime.

135. A second question was whether it was justified to deal with cessation in a separate article so as to distinguish it from other consequences of State responsibility such as reparation, restitution in kind or interim measures. The representatives who addressed this question agreed that cessation warranted a separate article. The remark was made in this connection that cessation in the sense of the ceasing of a wrongful act either temporarily or finally could not be construed as being the same as reparation, which was the act of making amends for a wrong done. Another observation was that cessation could be described as future-oriented, in other words, implying future compliance with the primary rules, whereas the other measures referred to were oriented towards a past infringement of the relevant primary rule of international law. Reference was made in this context to the example of the military occupation of a territory: the withdrawal of foreign troops from the occupied territory would, it was stated, constitute the cessation of an internationally wrongful act but would not resolve the question of making reparation for the injuries caused by that occupation.

136. While agreeing that "cessation" and "reparation" were distinct concepts, some representatives observed that in certain cases they were closely linked. It was remarked in this connection that, as appeared from the practice of the Security Council and the judgments of the International Court of Justice, injured States often requested cessation together with restitution in kind and other forms of reparation and that, consequently, cessation was not always perceptible per se. The view was expressed that the close relationship between cessation and reparation should be reflected in the draft and that article 6 should be placed directly before the article on restitution. The remark was on the other hand made that a final decision on the placement of article 6 could be deferred until such time as a clear picture on the draft's overall structure had emerged.

137. A third question which was commented upon in connection with article 6 related to the position of third States. In this connection, one representative stressed that, while any non-compliance with a specific rule of international law could be a

source of conflict detrimental to stability and peace and was as such of concern to all States, it should be borne in mind that that general interest was distinct from the right to invoke the breach of the norm, a right accorded only to the injured State, as defined in provisionally adopted article 5. After observing that the interest of a State in the continued validity of a norm did not in itself suffice to define that State as one injured by a breach of the norm and that international practice and jurisprudence provided adequate evidence to that effect, he remarked that the duty of cessation could under no circumstances be made to depend on a demand by a State for the cessation of a wrongful act, as that duty derived directly from the binding force of international law and that in the case of a material breach of a multilateral treaty the conferment upon States parties to that treaty of the right to invoke a breach thereof must take into account article 60 of the Vienna Convention on the Law of Treaties. Hence, he concluded, the inclusion in draft article 6 of the right to demand cessation in favour of all parties to a multilateral treaty would be unwarranted. Another representative remarked that article 6, while establishing an equitable role for the injured State, conferred rights on the other members of the international community in the case of a violation of an erga omnes obligation.

138. A fourth question which was commented upon in relation to article 6 concerned the reference in that article to the "continuing character" of the wrongful act. In this connection, one representative said that, as recent judgments of the International Court of Justice showed, cessation was not restricted to acts of continuing character. Another representative insisted on the need to distinguish acts having a continuing character from those with a continuing effect. He observed that a continued illegal detention of diplomats would constitute an act of a continuing character, whereas the wrongful taking of property would belong to the category of acts with continuing effects, adding that the latter category of illegal acts would apparently not require separate treatment since the consequences of such acts would already be covered by the draft articles. In this connection, one representative referred to the question raised in paragraph 268 of the report, namely, the nature of nationalization as a continuing act subject to cessation, in other words, subject to denationalization. He expressed the view that it would not suffice simply to recognize, as did paragraph 272, the need to give "careful thought" to the question, and possibly not to exclude a reconsideration of the "inclusion of wrongful takings of property in the category of continuing wrongful acts". He furthermore stressed that a nationalization act was not a wrongful taking of property if it fulfilled the requirements of international law.

139. As for the formulation of article 6, some representatives felt that it should be more categorical, stipulating in particular the right of the injured State to demand the urgent cessation of the wrongful act. One of them remarked that cessation was a fundamental stage in that what was at stake was not only the existence and the validity of the rule that was violated but also the interests of the injured State. Other remarks included the suggestion that in the French text the word "acte" should be replaced by "action", and the observation that the word "remains" was preferable to the word "is" inasmuch as it better reflected the close connection of the provision with the binding nature of international law.

Article 7. Restitution in kind

140. Several representatives agreed that restitution in kind had a special place among other forms of remedies and was a mode of reparation that should be applied as widely and as universally as possible. It was stated that the restoration of a situation through restitution in kind was an essential element of reparation and should be given priority wherever restitution was practically and legally possible. Restitution was furthermore described as indispensable where there was a violation of jus cogens norms.

141. Some other representatives, while agreeing that the primary form of reparation for an international wrong was restitutio in integrum, observed that the strict application of naturalis restitutio would encounter practical difficulties, especially in regard to non-material harm. They therefore felt that the importance of other forms of reparation, in particular, reparation by equivalent compensation, should not be underestimated. Attention was drawn to the need evidenced by State practice and by the decisions of courts and tribunals to apply flexibility in determining restitution or reparation depending on circumstances, and the remark was made that monetary compensation, especially in the case of wrongs done to the nationals of a State, had been by far the most common form of reparation.

142. Also referring to the diversity of situations to be covered, one representative said that it would be very useful for the Commission to consider whether a distinction should be made between international delicts and international crimes in respect of the forms of restitution.

143. As regards the meaning of restitution in kind, it was noted that the report of the Commission 7/ acknowledged a lack of uniformity in doctrine and in practice: restitution in kind meant, for some, the re-establishment of the situation which had existed prior to the wrongful act and, for others, the reconstitution of the situation which would have existed if the wrongful act had not been committed. Some representatives expressed preference for the broader meaning. Two arguments were advanced against a narrow interpretation of restitution: first, it seemed theoretically impossible to re-establish the status quo ante, as circumstances were in a permanent state of flux, and secondly, if restitution in kind were considered to be equivalent to compensation it would then also have to correspond to the lucrum cessans forming part of the compensation - which would also be in conformity with the interpretation given to the well-known judgement of the Permanent Court of International Justice to the effect that the objective of reparation was to wipe out the consequences of the wrongful act. Other representatives however observed that regulation focusing exclusively on restoration of a hypothetical situation that would have existed had there been no legal violation would be too rigid because it would not take into account the diversity and specific nature of the primary norms violated and would give rise to speculative elements. It was

---

7/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10 (A/44/10), para. 280.

therefore felt preferable to focus restitution on restoration of the situation as it had been before the injury and to remedy any additional damage by way of compensation, as was often the procedure in State practice.

144. Several representatives held the view that article 7 did not reflect a clear preference for any one of the above meanings. The question arose in particular whether by stating that under the relevant provisions compensation should cover any injury not covered by naturalis restitutio in the measure necessary to re-establish the situation that would have existed if the wrongful act had not been committed the Special Rapporteur had meant to opt for the narrow concept of restitution. Emphasis was placed by several representatives on the need to avoid ambiguity in this respect.

145. The expression "restitution in kind" was found inappropriate whatever concept of restitution to which it was intended to give expression. In this connection, the remark was made that if the narrow concept was accepted, it would be better to return to the formulation used by the former Special Rapporteur in his proposed article 6, whereas, if the broad concept of restitution was favoured, the draft should refer to the obligation to restore the situation which would have existed if the wrongful act had not been committed.

146. Other comments of a general nature included, first, the observation that it was preferable, as the Commission had suggested, not to require a special régime for breaches of rules on the treatment of aliens, and, secondly, the remark that it was unnecessary to make a distinction between direct and indirect injury because a breach of the rules concerning the treatment of aliens could be invoked only if the local remedies had been exhausted.

147. As regards the exceptions to restitution in kind, the general remark was made that care should be taken not to impede the exercise of the right to nationalize as a basic expression of the principle of permanent sovereignty over national resources and that, when the State decreeing the nationalization was at a low stage of economic development, even pecuniary compensation could indirectly effect the exercise of the right to nationalize.

148. The exception of material impossibility in subparagraph (a) was viewed as reasonable.

149. The exception contained in subparagraph (b) gave rise to some reservations. Thus, one representative observed that to confine the concept of legal impossibility to cases where restitution was incompatible with a superior international legal rule such as the Charter of the United Nations or a peremptory norm would appear to be too restrictive. Another representative remarked that it was difficult to imagine a situation where restitution would be contrary to a peremptory norm of international law unless the primary obligation from which the restitution derived was also contrary to that norm, in which case it would be devoid of legal consequences. He added that as the identification of the peremptory norms of general international law was a matter of controversy subparagraph (b) would make restitution in kind too indeterminate.

150. As for the exception of excessive onerousness mentioned in subparagraph (c) and elaborated on in paragraph 2, it was more extensively commented upon. Thus one representative, after pointing out that under this exception the State would be exempt from the obligation of restitution in kind if it represented a burden out of proportion to the injury caused by the wrongful act or if it seriously jeopardized the political, economic or social system of the State which had committed the internationally wrongful act, remarked that it seemed difficult to conceive of restitution as being a burden out of proportion to the injury since the restitution contemplated in the article was restitutio in integrum, which amounted to restoring the balance, wiping out the injury. He further observed that only in the situation where performance of the breached obligation would have had the effect of seriously jeopardizing the political, economic or social system of the State could restitution in kind conceivably have that same effect and that in such a situation wrongfulness would have been excluded under article 33 of Part One, 8/ which provided that a state of necessity could be invoked as a ground for precluding the wrongfulness of an act which was not in conformity with an international obligation if the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril. That same representative furthermore pointed out that, according to the proposed article, reparation by equivalent would have to be applied if restitution were excluded, and that such reparation was likely to seriously jeopardize the political, economic or social system of the State. He summed up his position in the following manner: (a) if the excessive onerousness of restitution in kind corresponded to excessive onerousness of the original obligation, a state of necessity within the meaning of Part One of the draft articles must be recognized and the question then fell outside the scope of the article; (b) if excessive onerousness existed only with respect to restitution, a state of necessity should also be recognized, which precluded the application of the general rules on reparation by equivalent and left two options open: either to establish special rules or to rely on the rules on liability.

151. Also referring to the excessive onerousness exception, another representative pointed out that the current formulation favoured the State which had committed the wrongful act inasmuch as the mere fact that restitution in kind - the fairest kind of reparation - might be "excessively onerous" for the wrongdoer State would automatically deny the injured State that remedy. Still another representative observed that if the language of subparagraph (c) were retained any State which had committed a wrongful act could claim that the restitution in kind being demanded of it was excessive. She added that there should be some deterrent for States which chose to live dangerously in the clear and absolute certainty that heavy restitution which they might consider unbearable would be one of the consequences of their conduct.

152. Several representatives commented on the elaboration on the concept of excessive onerousness contained in paragraph 2. One of them remarked that the paragraph could lead to serious differences in interpretation inasmuch as, for instance, questions might be raised as to how the burden referred to in

---

8/ Ibid., Thirty-seventh Session, Supplement No. 10 (A/37/10), chap. III.

subparagraph (a) should be measured and when the political, economic or social system of a State should be deemed to be jeopardized under subparagraph (b). Also commenting on paragraph 2 as a whole, one representative suggested that it be made clear that the two criteria envisaged in subparagraphs (a) and (b) were alternative rather than cumulative. Referring to subparagraph (b), another representative observed that it apparently made no allowance for the injury to the political, economic or social system of the State which had been wronged. He suggested that if the current overall structure was to be retained, at least subparagraph (b) should be amended to refer only to disproportionate effects on the political, economic or social system of the wrongdoing State.

153. With respect to paragraph 3, several representatives stressed the importance of ensuring that the injured State's right to restitution in kind would not be impaired even if restitution in kind was rendered legally impossible by the internal law of the State which had committed the internationally wrongful act. Concern was expressed that if the obligation of restitution did not extend to certain acts, such as the judgements of national courts, that might be used as a pretext to negate the obligation completely. The point was made that an international society which had accepted the rule of law should work to bring municipal and international law gradually into line, and that the role of international law would be enhanced if more States followed the example of those States where the ratification of an international treaty automatically made such a treaty part of the domestic legislation which the domestic courts were required to administer. One representative felt that the cases in which restitution involved a manifest breach of an internal rule of a fundamental nature should be regarded as exceptions to the principle that obstacles deriving from the internal law of a State could not be validly invoked.

154. One representative commented on the relationship between paragraph 3 and paragraph 1 (c). He observed that paragraph 3 implied that excessive onerousness could be constituted in some cases by the domestic law of the wrongdoing State, which was tantamount to saying that a State could rely on its domestic law in order to avoid complying with its international obligations. He suggested that if the notion of excessive onerousness was retained paragraph 3 should be redrafted in such a way as to make it clear that a State was not entitled to claim that restitution would be excessively onerous merely by reason of a provision of its internal law.

155. Paragraph 4 gave rise to some reservations. It was found to be only loosely connected with restitution in kind since it was chiefly concerned with the limits on the right to select the reparation by equivalent. Another remark was that the paragraph did not clearly indicate that reparation by equivalent could be substituted for restitution only by agreement between the States concerned. As regards the proviso that such an agreement should not result in a breach of an obligation arising from a peremptory norm of general international law, the question was asked whether it was realistic to refer to breaches of such norms in the context of offences and whether the proviso did not rather belong in the context of the legal consequences of crimes.

156. Other comments included, first, the remark that the term "reparation by equivalent" should be used rather than the phrase "pecuniary compensation" in order to ensure compensation in a convertible currency, and, secondly, the observation that the right to choose between restitution in kind and reparation by equivalent might create problems if more than one State was entitled to claim reparation for a wrongful act of another State and the injured States were not unanimous as to which forms of reparation they should claim.

4. Comments on draft articles 8 to 10 submitted by the Special Rapporteur in his second report

157. Although the second report of the Special Rapporteur could not be considered by the Commission at its last session for lack of time, a few representatives commented on the articles proposed therein. As regards article 8, the Special Rapporteur was commended for his work on such topics as fault and the attribution to States of wrongful acts. The method of considering fault in terms of forms and degrees of reparation was viewed as fully in line with the ideas expressed in Part One of the draft articles, where fault was not mentioned as an element of the wrongful act, although the possibility existed of its playing a role in other aspects of State responsibility, for example, with regard to the degrees of reparation. On article 9, doubts were expressed on the need to devote a separate article to compensation for loss of profits, which had already been dealt with satisfactorily in article 8. With respect to article 10, one representative remarked that under the proposed text States might demand satisfaction for violations of their dignity. He stressed that when assessing the extent of moral damage the circumstances played an important role and that in any event it was essential to avoid establishing too direct a link between the degree of fault and the nature and amount of reparation. He furthermore expressed doubts on the term "punitive damages", pointing out that in assessing reparation for moral damages it was more important, as confirmed by prevailing international practice, to focus on the notion of adequate compensation for the injured party than on punishing the injuring party. Finally, he pointed out that a State was normally under no obligation to provide safeguards against the repetition of violations and was free to choose the safeguards it deemed appropriate.

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

1. General comments

158. Several representatives commented on the background against which the Commission's work on the topic was being conducted. One of them remarked that it was to respond to new needs and concerns that the Commission had embarked on an ambitious project which, although based on existing civil law principles and common law doctrine, had been pioneering in nature. Some others recalled that after the Chernobyl disaster their respective States had suggested that a draft convention on international liability should be accorded high priority, it being understood that more specific rules covering specific areas, such as nuclear accidents, should be prepared within other international organizations such as the International Atomic

Energy Agency (IAEA). They expressed regret that nearly 20 years after the Stockholm Conference had taken place the international community had not yet managed to develop a system of international law on environmental protection.

159. Commenting on the general approach to the topic, one representative stressed that the solution to be sought in this essentially new sphere had to be a realistic and balanced one, taking into account the interests of all States and mankind as a whole. The remark was made in this connection that it was important not to lose sight of the fact that the future document would deal with lawful acts or activities and that in most cases the State of origin would also bear, sometimes more severely than any other State, the injurious consequences of such acts and activities.

160. Several representatives stressed that the concept of international liability should be developed without touching on the question of possible wrongfulness and irrespective of whether or not damage occured as a result of illegal conduct. They insisted on the need for an approach based on an interest in protecting the victim instead of identifying the culprit and stressed that protection required co-operation among States, the exchange of information and ad hoc negotiations. They furthermore remarked that there were no general standards sufficiently specific to give the national lawmaker a clear idea of the consequences of regulation and that such standards must be sufficiently broad to take into account the risk and harm which might arise from the use of new technologies in the future.

161. Some representatives commented on the stage reached by the International Law Commission in its handling of the topic. One of them, after recalling that the first Special Rapporteur for the topic had succeeded in establishing a fairly broad consensus in the Commission and the Sixth Committee in favour of focusing deliberations on activities which caused, or threatened to cause, significant transboundary damage or injury of a physical character and on the establishment of a régime of procedural obligations for States, observed that the second Special Rapporteur had endeavoured to broaden the scope of the topic in a number of ways and that the question arose whether the draft articles proposed so far could provide the basis for a broadly acceptable and legally binding instrument. Another representative felt that before adopting individual draft articles the Commission should discuss the overall content of the draft and analyse, inter alia, the appropriateness of confining liability to specific activities involving risk, the question of causality, the definition of damage and the relationship between liability for activities not prohibited by international law and State responsibility for activities violating international obligations. Concern was expressed that no progress would be made in elaborating articles without agreement on the principles underlying the topic, and the view was expressed that the task of the Special Rapporteur and that of the Commission would be greatly facilitated if the key concepts were perfectly clear.

162. Other representatives generally supported the work done so far by the Commission on the topic. Some of them felt however that it was still too abstract, and that greater attention must be devoted to the obligations that flowed from the future instrument. In their opinion, it was questionable whether States Members of the United Nations were prepared to become parties to a convention under which they

would be obligated to accept liability for harm caused by activities which were unspecified and, to some extent, did not yet exist. The view was on the other hand expressed that it was not feasible to elaborate a list of activities covered by the topic, as such a list could never be exhaustive and might, if of an indicative character, be misleading. Preference was accordingly expressed for a general instrument applicable to all activities causing transboundary harm.

163. Other general comments concerning the stage reached by the Commission in its handling of the topic included the remark that the relationship between the current draft and other régimes of international co-operation for the prevention and reparation of transboundary harm called for the Special Rapporteur's and the Commission's attention and the observation that the work had not yet advanced to the point of establishing a legal link between risk and reparation so that the Commission sometimes appeared to be working on two separate sets of draft articles rather than one.

164. As regards the form of the future instrument in which the outcome of the Commission's work should be couched, several representatives favoured the elaboration of a framework convention, which would encourage the conclusion of more far-reaching regional treaties and bilateral agreements and would serve a useful purpose inasmuch as the existence of a general practice attested to by a host of international instruments called for codification. Some of them indicated that the texts produced could take the form of binding rules or a limited set of binding rules combined with guidelines laid down in a code of conduct. They suggested that attention be focused on formulating short general standards using the terminology of similar international or bilateral agreements, and that such a short basic text could be supplemented by annexes or appendices. It was recalled that that method had been used in formulating international and regional environmental conventions, such as the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1974 Paris Convention for the Prevention of Marine Pollution from Land-based Sources and the 1985 Vienna Convention for the Protection of the Ozone Layer.

165. Some other representatives felt that the Commission should aim at elaborating norms which could provide a legal basis for treaties regulating the co-operation of States in the settlement of problems arising as a result of transboundary harm. The view was expressed in that connection that the number and scope of conventions already existing in that field were very limited. The remark was furthermore made that, since the future instrument would have to provide States with basic principles and guidelines for the settlement of liability problems in specific areas and for the elaboration of negotiating appropriate agreements, special care should be taken to employ only such concepts and terms as were already established and accepted in the practice of international law.

166. As regards existing instruments on which the draft under elaboration should draw, some representatives singled out the Declaration of the 1972 United Nations Conference on the Human Environment (the Stockholm Declaration), more specifically, principles 21 and 22 thereof. They recalled that under principle 21 States had the sovereign right to exploit their own resources pursuant to their own environmental

policies and the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction, and that according to principle 22 States must co-operate to develop further the international law regarding liability and compensation for victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction. Mention was also made of the international conventions and agreements which were gradually building up a body of international environmental law. Attention was drawn to the work of the United Nations Economic Commission for Europe (ECE), the Organisation for Economic Co-operation and Development (OECD) and the United Nations Environment Programme (UNEP) as well as to the 1989 Basel Convention and emphasis was placed on the need for a thorough understanding of solutions adopted under various domestic laws if confusion was to be avoided concerning, inter alia, the concepts of "absolute", "strict" and "objective" liability.

167. Elaborating on the concept of "strict liability" as opposed to that of absolut[illegible] ability, one representative remarked that strict liability was liability deriving [illegible]n a causal relationship between activity and harm and was a concept accepted in many national legal systems and had also been recognized in many instruments and judicial decisions in international law. He pointed out that the Schematic Outline which the Commission had adopted as the basis for its work on the topic provided for a very limited form of strict liability that should not cause alarm to Governments since its application would be determined through negotiations between the State of origin and the affected State, and would be excluded if there was an agreement between the States concerned on hazardous activities.

168. Several representatives commented on the scope of the topic. Observations in this respect focused on activities causing harm to several States and on activities causing harm to the global commons. Regarding the first point, due note was taken of the Special Rapporteur's intention to study the matter further which was viewed as calling for the Commission's attention.

169. As for the proposal to include in the scope of the draft activities causing harm to the global commons, it gave rise to reservations on the part of some representatives who felt that the broader the scope of the topic the more difficult would be the establishment of uniform general rules. It was remarked that attempting to develop environmental law in this area from the narrow angle of liability was not prudent and that, although the aim seemed justifiable in view of the objective need for providing effective protection for the human environment also in areas beyond the national jurisdiction of any State, its translation into practice called for the elaboration of rules specifically designed for that case. One representative, after pointing out that the concept of global commons and its legal implications were still not well defined and gave rise to many theoretical and practical difficulties, including its relationship with the principle of territorial sovereignty of States, observed that, while the meaning of "transboundary harm" was clear when the affected State was a neighbouring State of the State of origin, the question arose which was the affected State when activities caused harm to the "global commons". He further remarked that, if it was accepted that the activities which caused harm to the "global commons" fell

within the scope of the topic under consideration, the question arose how was the State of origin to be determined and what were the rights and obligations of the State of origin and other States. He referred in this context to the "greenhouse effect" and the depletion of the ozone layer which were the consequences of industrial and technological activities carried out by mankind over a long period of time. Thus, he concluded, it was the common responsibility of mankind to reduce and gradually eliminate the activities which caused harm to the "global commons" through international co-operation and the adoption of practical and effective measures taking into account the specific situation of developing countries.

170. Some representatives, although not opposed to the proposed extension, highlighted the difficulties it might entail. Thus it was stated that in the case of "global commons" liability could be established only with respect to an organization with overall competence acting as the custodian of the "global commons" and that such an organization did not exist - which meant that, if at some time the Commission decided to extend the scope of the articles to cover "global commons" as well, the texts of various articles would have to be redrafted accordingly.

171. A number of representatives on the other hand supported the proposed extension. Thus one representative, while agreeing that such an extension raised the difficult problem of identifying the victim, and that the procedural provisions currently envisaged could not be applied in that context without appropriate adaptations, stressed that the Commission should not miss the opportunity of covering in the draft a phenomenon whose importance was increasing. Reference was made in this respect to the growing recognition that activities involving, for example, the emission of ozone gases could cause detriment to the world atmosphere. Another representative, after observing that the proposed extension was compatible with principle 21 of the Stockholm Declaration (which was not limited to the damage caused to other States but also embraced damage to the "global commons"), stated that any State which persisted in an activity that seriously degraded the "global commons" should be held liable and that, irrespective of whether the work of the Commission was to be regarded as codifying or as progressively developing the law, the international community must agree on the principle that States shared a common obligation to protect and preserve the environment and its living resources within and beyond national jurisdiction. He added that, inasmuch as justice and the expectations of the injured State required the criterion of liability and, in appropriate circumstances, a standard of strict liability, it was important to be open-minded, flexible and imaginative in developing the law in that field, taking into consideration innovative proposals that had been made concerning insurance schemes and liability funds, and even in relation to acts which were not inherently dangerous but were cumulatively damaging.

2. Comments on the concepts of "risk" and "harm"

172. Many representatives noted with satisfaction that under the new approach taken by the Special Rapporteur in his fifth report the concepts of "harm" and "risk" were given equally important roles in determining the activities coming under the

topic. The concept of risk was viewed as having a significant function in stimulating preventive measures and perhaps in identifying the standard of care to be applied, while the causing of harm by a State to another State as a result of transboundary activities was singled out as the basis of liability. It was remarked that "harm" could serve as the proper basis for the provisions relating to liability, while "risk" had its place in the provisions relating to prevention. In this context it was suggested that the draft be rationalized by separating the two concepts of risk and harm, with each régime covered in separate chapters. The view was on the other hand expressed that harm and risk were integral and constituted the basis of liability as a unity and that the risk factor had to be taken into account, along with other factors such as negligence and foreseeability, in determining liability.

173. Some representatives on the other hand expressed concern about the place given, under the Special Rapporteur's new approach, to the concept of "harm", which they viewed as a retrogressive step that undermined the place of the criterion of risk and would make the topic unmanageable. One of them insisted on the need for solidarity with the State of origin, which was often the first and hardest-hit victim of harm caused by its own, entirely lawful activities, and pointed out that the object of the exercise was surely not to treat that State as a hostile State but to provide a legal basis for co-operation among equally innocent States. He suggested that reparation for transboundary harm at the State level should be left to special agreements such as those elaborated in the framework of the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO) and that consideration could also be given in this context to the possibility of applying the rules of civil law on the limited liability of juridical persons. He furthermore pointed out that any solution to the problem of responsibility of States whose activities had caused transboundary harm should take into account the interest of scientific and technological progress and the development of pioneering forms of activity to individual States and to the international community at large while at the same time guaranteeing the interests of neighbouring States.

174. As for the concept of "risk", one representative pointed out that it connoted only a possibility that had not yet materialized, from which it flowed that the State undertaking an activity involving risk could be considered bound only to prevent a potential substantial harm from occurring. In his view, what was at issue was an internal, unilateral obligation, which became an obligation to co-operate with other States only when the State in question believed that individually it was not in a position to prevent a fault that might cause harm or, in the case of activities with injurious consequences, that it could not keep such consequences under the authorized threshold of substantial harm.

3. Comments on draft articles submitted by the Special Rapporteur in his fifth report 9/

Article 1. Scope of the present articles

175. The phrase "activities carried out in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control" was commented upon by several representatives. One of them observed that it embodied only a spatial concept of jurisdiction, even though the term "jurisdiction" encompassed, inter alia, States' ships and aircraft, installations and other objects such as drilling platforms and objects launched into space, expeditions sent to areas not subject to the sovereignty of any State and groups of persons of a State when in the territory of another State, such as troops authorized to pass through a country. He therefore suggested that part of the article be redrafted to read "activities carried out in the territory of a State or under its jurisdiction", adding that if the term "jurisdiction" was considered too imprecise, all the situations concerned should be specified. The comment was also made that the phrase "places under its jurisdiction as recognized by international law" could be interpreted to indicate that a State exercising its jurisdiction illegally but effectively in a given territory would not, in that territory, be bound by the obligations that were set forth in the articles - which was unjust and unacceptable. It was recalled in this connection that, in its advisory opinion of 1971, the International Court of Justice had indicated that the illegality of South Africa's presence in Namibia did not exempt the illegal occupant from fulfilling the responsibilities that were incumbent upon it because the territory had been under its control. Finally, it was suggested that the part of the text under consideration be simplified so that it would read "activities carried out in the territory of a State or in other places under its jurisdiction or control".

176. Various views were expressed on the term "appreciable". A number of representatives found it vague and unhelpful in the context of the present topic. The remark was made that the notion of "appreciable risk" was liable to extend State responsibility to fairly low-risk activities which caused no more than incremental damage. Some representatives however favoured the retention of the adjective "appreciable". Others suggested replacing it by "significant" or "substantial".

177. Other comments on article 1 included the remark that the reference to "physical consequences" improved the previous formulation, the suggestion that the end of the text could be simplified to read "when the physical consequences of such activities cause, or create the risk of causing, transboundary injury" and the observation that, assuming a clear distinction could be made between "acts" and "activities", the question arose whether it was appropriate to disregard, as did article 1, harm resulting from "acts".

9/ Draft articles 1 to 9 have been referred by the Commission to the Drafting Committee.

Article 2. Use of terms

178. With respect to subparagraph (a), it was stated that the phrase "simple examination" was inappropriate, the notion of simplicity not being the same for an expert and for a layman. The question was also asked if one could speak of "simple examination" in reference to a process which obviously involved the use of special apparatus and instruments, and the remark was made that "simple examination" could mean different things depending on the level of a country's development. A further observation was that if the intention was to draft provisions that took into account the current state of knowledge, specialists who were not jurists should be called in.

179. It was proposed that the subparagraph be redrafted to read: "'Risk' means the risk occasioned by the use, purpose of location of things or elements whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them highly likely to cause transboundary harm throughout the process."

180. As regards subparagraph (b), doubts were expressed about the clarity of the reference to activities which caused harm, or created a risk of causing harm "throughout the process".

181. Some representatives welcomed the inclusion in subparagraph (c) of a reference to the environment. It was pointed out that the environment had now acquired the character of an autonomous asset of a State liable to impairment, and that the time had come to go beyond the precedents of the Trail Smelter, Lake Lanoux and Corfu Channel cases and Stockholm Principle 21, as well as such instruments as the London Convention on the Prevention of Maritime Pollution by Dumping of Wastes and Other Matter and the United Nations Convention on the Law of the Sea, which had contributed to the building of a substantial body of customary and conventional principles on the subject.

182. Finally, the comment was made that the definition of terms in article 2 could be left, for the time being, to the Commission and its Drafting Committee.

Article 3. Assignment of obligations

183. The remark was made that the article had been formulated in general terms so as to apply to both developing and developed States and appeared to narrow liability considerably by making it conditional on knowledge or "means of knowing" - which did not seem to be the best way of safeguarding the interests of developing countries. In this connection, reference was made to the questionable theory which exonerated the industrial States from any liability for transboundary harm, and support was expressed for regulations which would make the transnational companies operating in the territory of developing countries directly liable for transboundary harm resulting from their activities.

184. It was noted that under the present formulation the responsibility of the State of origin seemed to depend on a wrongful act, namely, the act of tolerating,

or of not preventing, the use of its territory for activities prejudicial to other States and that the novelty lay in that the illicit character of the State's behaviour would, in the present context, be presumed on the basis of the place where the risk-inducing activities were conducted, the most important consequence being the shifting of the burden of proof. It was recalled that the International Court of Justice, in the Corfu Channel case, had rejected that approach in relation to classical wrongful acts consisting in violations of due-diligence obligations. Attention was drawn to the implications of this distinction between liability and State responsibility as regards the "global commons".

185. A further remark was that it was unclear from the article what practical evidence a State could produce to show that it had not known or had means of knowing that a particular activity was being or was about to be carried out in its territory, and that the second paragraph added to the article did not seem to resolve that problem.

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

186. Reservations were expressed on the article which was viewed as requiring additional reflection as to the advisability of subordinating the application of the draft to other international agreements. It was remarked that the topic warranted a more flexible approach, which might mean deleting the article entirely.

187. Other comments included the observation that the proposed text departed from that of article 30, paragraph 3 of the Vienna Convention on the Law of Treaties and the remark that the convention should make clear the dividing line between its rules on liability and the rules that were contemplated for a future convention on State responsibility and a code of crimes.

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

188. Preference was expressed for the second of the bracketed alternatives by some representatives, one of whom, however, indicated that none of the bracketed sentences was really necessary and that it would be better to have the matter left to general international law.

Article 6. Freedom of action and the limits thereto

189. While one representative noted that the revision of the text had brought it closer to Principle 21 of the Stockholm Declaration, some doubts were expressed on the article in its present form. The remark was made that it was difficult to see in what way transboundary harm could constitute a violation of the territorial rights or sovereignty of a State. It was also said that the article did not place enough emphasis on responsibility, reciprocity and welfare, which should be a priority for States. Attention was drawn to the importance of the welfare of

States in an age in which physical boundaries had ceased to constitute barriers to the transmission of harmful substances, and it was accordingly suggested that the final part of the article be amended to read: "compatible with the protection of the rights emanating from the sovereignty and welfare of other States."

Article 7. Co-operation

190. A number of representatives stressed the importance of the principle of co-operation which was described as the corner-stone of the future document on the topic. Some of them however warned against rigid or simplistic formulations. Thus, it was said that the article should invite States to co-operate and not impose on them an obligation to do so. The general remark was also made that the principles set forth in the text should be more fully articulated and that the modalities of co-operation should be spelled out. It was furthermore suggested that it be stated explicitly that co-operation must not be used as a way of obtaining a political advantage or bringing pressure to bear in the settlement of a dispute.

191. One representative observed that since transboundary harm, particularly that which generated liability, usually occurred not as a result of State activity but as a result of the activity of private individuals for which the State did not assume responsibility, and since those affected by such activities were again mostly individuals (apart from the environment, which was conceived as an asset belonging to the State), the legal relationships resulting from transboundary harm would mostly involve private individuals, the respective States being involved only in so far as they would have to require persons under their jurisdiction to take the necessary measures. While being of the view that article 7 would, as a result, have to take into account the involvement of private individuals in transboundary co-operation, granting them, for instance, the opportunity to take part in the relevant administrative procedures of the other State, that representative felt that an obligation to involve an international organization "that might be able to help" went far beyond what seemed acceptable, since non-compliance with such a duty would entail the responsibility of the State not seeking such help. In his view, the right to seek assistance from an international organization would certainly be sufficient.

192. As regards the last sentence, the remark was made that the obligation of the State of origin in case the harm was caused "by an accident" was not clearly defined.

Article 8. Prevention

Article 9. Reparation

193. Some representatives commented on the relative weight to be given in the draft to prevention and reparation. One of them remarked that there were three possible approaches to the question, the first being to combine prevention directly with reparation; the second to accord equal importance to prevention and reparation; and

the third to conceive the draft articles as an instrument that governed prevention alone. He suggested that a solution might be found in a suitable combination of the first two approaches.

194. Another representative observed that the obligation of reparation by the State of origin of damage caused by activities not prohibited by international law should be residuary in character and invoked only when none of the mechanisms provided for avoiding or minimizing damages, as well as for repairing them within the framework of private-law liability, had yielded results. He therefore suggested that the content of the rules on the obligation of prevention contained in article 8 (as well as in article 7) should be developed so as to encompass, for example, compulsory insurance, guarantee funds and the adoption of appropriate regulations concerning authorization, inspection and monitoring activities. Along the same lines, another representative felt it necessary to consider setting out modalities of co-operation and procedures for settling the issue of the costs involved in prevention or minimization of harm.

195. As regards article 8, it was suggested to delete the second sentence which, it was said, undermined the principle of the article by leaving preventive measures up to the discretion of the State of origin. Along the same lines, some misgivings were expressed about making the duty of prevention dependent on the availability of the relevant means. The question was asked whether a State could escape that duty if it did not make any effort to obtain the necessary means, and whether availability was intended to be objective or subjective. It was suggested that the problem could be at least partially resolved by imposing the obligation to take preventive measures and acquire the necessary means on the operator carrying out the activity. The expression "the best practicable, available means" was viewed as unclear.

196. Article 9 was described as the corner-stone of the draft, but the approach reflected in it gave rise to reservations. The possibility, already recognized in practice, of including in international agreements a civil-liability clause imposing on the individual operator responsibility for damages was viewed as an option to be taken into account even though the formula had been contemplated only in the case of hazardous activities and would be practicable only where the legal system in the State of origin granted adequate means to aliens to obtain reparation for damage sustained. It was suggested that in all cases where full compensation could not be effectively ensured through those means, the State-liability approach should be resorted to and that there could also be a system of primary State liability for harm to the environment in cases where the specific operator causing the actual harm could not be identified, as well as for ultra-hazardous activities, in other words, activities which because of their highly dangerous nature were so closely linked to control by the State that they could be directly attributed to it, as in the case of nuclear energy.

197. The proposal that reparation should be decided by negotiation gave rise to reservations. Negotiation, it was remarked, was only one of several options and if if failed the parties could resort to other peaceful means of settlement of disputes under Article 33 of the Charter of the United Nations. It was furthermore remarked that the proposal for reparation by negotiation did not take into account

the inequality of States from the standpoint of size, power and mutual interdependence, which was bound to make itself felt in the outcome of the negotiation process.

198. The reference to the goal of restoring the balance of interests affected by the harm was also criticized on the ground that it might result in the victim State receiving full indemnification of its loss only in limited cases. It was recalled in this context that the only convention in force dealing with reparation by States of damage arising from activities not prohibited by international law, namely, the Convention on International Liability for Damage Caused by Space Objects, provided explicitly for the right of the victim State to obtain full reparation.

199. As regards criteria for compensation, one representative said that they should be clarified and that the text could, for example, suggest a choice of factors to be considered in determining the level of compensation. Another representative, however, took the opposite view and felt that for the time being the best course would be to set out the principle in question as simply as possible.

200. Other comments included the observation that in the context of liability the term "indemnification" would be more appropriate than the term "reparation" and the suggestion that the phrase "To the extent compatible with the provisions of the present articles" be deleted.

Articles 10 to 17. Notification, information and warning by the affected State

201. Chapter III was viewed by many speakers as reflecting too rigid an approach and setting forth detailed procedures which did nothing but unnecessarily complicate the instruments of which they formed a part. It was pointed out that States had recourse to special procedures, notifications, exchange of information, consultations and negotiations only when they considered them useful and that imposing strict and cumbersome procedures was therefore counter-productive. The remark was also made that these articles failed to reflect the diversity of the activities and situations encompassed by the topic. One representative stressed that while in general the State of origin and the affected State should make sincere efforts at co-operation and adopt practical measures to reduce or avoid activities that might cause transboundary harm the procedural provisions should in no way imply that a State could veto the sovereign right of another State to act freely within its territory.

202. Among the three approaches to procedural steps for prevention listed in paragraph 382 of the Commission's report, namely, to formulate detailed procedures for compliance; to formulate general procedural articles with much flexibility in their application; and not to contemplate any procedural rules, one representative favoured the second and another the third.

203. One representative expressed the view that work on the procedural rules would be fruitless until the scope of the draft had been clearly defined. He therefore supported the Special Rapporteur's decision to withdraw Chapter III and to submit it again in 1990.

204. Some representatives suggested that, in designing prevention procedures, a differentiation be made between the various types of activities involved. Thus, one representative observed that the applicability of such procedures to existing or ongoing activities raised particular problems that would require a reasonable period of adaptation and that procedures could be set forth for future activities. Another representative suggested that a distinction as regards applicable procedures be made between activities involving risk and those causing harm.

205. Other general comments on Part III included the observation that it was unclear how the procedural obligations were related to article 7 on co-operation and the remark that in redrafting this Part, the Special Rapporteur should take into account a considerable body of existing practice dealing with prior notification and consultation with States likely to be affected by an activity which might cause harm or which posed a risk to other States.

206. As regards article 10, it was noted that under subparagraph (a) the State of origin had an obligation to assess the potential transboundary effects of an activity being carried out in its territory. The remark was made that this obligation should lie with both the affected State and the State of origin. It was also remarked that as far as hazardous activities and substances were concerned the obligation to make an assessment of the environmental impact was already established under national and international practice and that the article could therefore require States to impose that obligation on operators.

207. It was suggested that subparagraph (b) be redrafted to read:

> "Notify the affected State or States and the other States parties to the Convention as well as the relevant international agencies, rapidly and in a timely manner, of the conclusions of the aforesaid review."

208. With respect to subparagraph (c), it was suggested that the possibility be envisaged of granting not just States but also individuals access to information on dangerous activities as part of the procedures for the authorization of such activities.

209. Further observations included the remark that it was not clear from the text whether the State of origin could authorize the dangerous activity concerned when other States had not yet responded to the relevant information, and the suggestion that the article should take into account situations where the injured State could not be determined.

210. As regards article 11, the comment was made that it was important not to allow undue emphasis on so-called national security to prevent the timely transmission of vital information on harmful transboundary activities in such a manner as would enable the notified State to take prompt preventive action to forestall the adverse consequences of such activities. It was remarked that national security, which was a relative concept, particularly in the current technologically sophisticated age where few secrets escaped satellites and other devices, should not be allowed to stand in the way of effective co-operation among States and that the proposed exception could considerably weaken the obligation to inform and would put the developing countries in a subordinate position.

211. As regards article 12, it was noted that, while the purpose of the text was clear, its wording, particularly the use of the term "warning", required further examintion. On article 13, the comment was made that the six-month period for reply to notification was too long, especially in a case where the notifying State was already being affected. Article 14, it was remarked, was silent on the consequences of a refusal of the measures proposed by the potentially affected State and made no reference to the consequences of the inability of the State of origin to carry out the measures proposed. The expression "legal régime", which appeared in various places in article 15 and in other articles as well, was viewed as unclear in that it could designate a national legal régime or a special treaty régime to be agreed between a State of origin and the potentially affected State. The remark was also made in the context of article 15 that the procedural provisions should require States to afford opportunities to foreign individuals to participate in the process of transboundary co-operation, as they were the first victims of any harm.

212. With respect to article 16, the view was expressed that the two alternatives proposed were not mutually exclusive and could be combined. Other comments included the remark that a fact-finding commission of the type envisaged in alternative B was only one among a number of possible negotiation mechanisms, and the observation that if there was a notable difference in the levels of development of the notifying State and the notified State, the phrase "with a view to establishing the facts with certainty" in alternative A was meaningless, inasmuch as the notified State might not be in a position to establish a fact with certainty if it had no access to new data and techniques. Concern was expressed that the doubts of a notified State might act as a brake on the development of pioneering activities or impede scientific and technical progress.

E. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

1. General comments

213. The practical importance of the topic was stressed by many representatives, one of whom said that the need for codifying universally applicable rules of jurisdictional immunities had been increased by the growing co-operation between States and the development of international transactions involving the direct participation of States.

214. Many representatives noted with satisfaction that the Commission had achieved substantial progress in its work on the second reading of the articles. The remark was made in this connection that the discussion had shed more light on many aspects of the area of law in question and had made it possible to identify certain points of difference and to establish guidelines for making further progress. The Special Rapporteur was praised for having carefully analysed both responses from Governments and State practice. It was said in particular that by reflecting more faithfully the positive practice of States the report made a real contribution towards expediting the preparation of the future instrument and its eventual adoption and, even more important, towards making it more universally applicable. A number of representatives however observed that several substantive issues still remain unresolved. One of them also remarked that the Commission had not always taken account of the relevant practice and legislation of all States; while acknowledging that any jurisprudential analysis of State immunity was faced with the difficulty of obtaining pertinent legislation or judicial material from States, he emphasized that the topic was an extremely complex one and that many States were currently submitting written comments to the Commission which therefore should proceed without undue haste.

215. Comments on the general approach to the work focused on: (a) the need to work out as widely acceptable solutions as possible; (b) the method to be followed to that end; and (c) the extent to which the Commission had succeeded in striking an appropriate balance between existing positions.

216. As regards the first point, many representatives insisted on the need for the Commission to continue, notwithstanding the difficulties inherent in the task of codifying the jurisdictional immunities, the search for compromise solutions that were in keeping with the collective interests of the international community, a search which was reflected in the report submitted to the Commission by the Special Rapporteur. Emphasis was placed in this connection on the inadmissibility of proceeding on the basis of only one existing legal system, namely, the common-law system. Attention was also drawn to the need to take into account the practice of States which had different political, socio-economic and legal systems and which were at different stages of development.

217. As regards the second point, the Commission was generally praised for its pragmatic approach which enabled it to avoid a doctrinal debate on the general principle of State immunity and to concentrate instead on individual articles so as to arrive at a consensus on what kind of activities of the State should or should not enjoy immunity from the jurisdiction of another State. The hope was expressed

that the same realistic considerations would prevail in the remaining work of the Commission.

218. With respect to the third point, doubts were expressed as to whether the Commission had succeeded in working out balanced draft articles adequately reflecting, by means of judicious compromises, the main trends of State practice without, however, trying to halt that constantly developing practice. Concern was voiced that the draft articles were creating as much confusion among the States which favoured the restrictive immunity theory as dissatisfaction among the supporters of absolute immunity.

219. In the view of some representatives, the Commission, having to reconcile two categories of interests (those of the foreign States which hoped to enjoy the broadest possible protection in other States, and those of the State in whose territory the question of immunity arose, which wished to ensure for itself wide and comprehensive jurisdiction), had chosen to restrict the principle of jurisdictional immunity. In the view of those representatives, the objective of codification should be to confirm and reinforce the concept of immunity of States and their property, with clearly stated exceptions. In this connection, it was stated that when acting in the capacity of a sovereign State, as a subject of international law, the State must enjoy jurisdictional immunity, by virtue of the fundamental principles of sovereignty, equality of rights and non-interference in internal affairs - principles on which the very concept of the jurisdictional immunity of States and their property was based. The remark was also made that the replacement of the principle of State immunity by that of functional immunity not only weakened the efficacy of the rule but also introduced uncertainty and, in some cases, might even impede the economic growth of developing countries, exposing them to excessive and unjustified foreign jurisdiction. In the view of the representatives in question, the efforts of the Commission and of the Sixth Committee would not be very fruitful if the draft articles failed to reflect the fact that only a limited number of States subscribed to the theory of restrictive immunity and that a majority of States continued to practice a more absolute theory of State immunity, which should be perceivable in the "tacit practice" as well as in the stated opinions of a large number of States.

220. Some other representatives held, however, that the draft articles should reflect the recent trends of State practice towards restrictive immunity. It was stated that international law had developed in such a way that the traditional rule of absolute immunity was now obsolete and that those who found themselves involved in a dispute with the Government of a foreign State acting in a non-sovereign capacity should be able to have that dispute determined by the ordinary process of law. In this connection, one representative recalled that at the Commission's last session a member had repudiated the view that the States members of the Asian African Legal Consultative Committee (AALCC) had subscribed to the restrictive theory of State immunity. According to that representative, however, the majority of the States members of AALCC appeared to have accepted the distinction between public acts and private or "commercial" acts of a foreign State, and recently two Member States, Pakistan and Singapore, had enacted statutes granting immunity only with regard to public acts of foreign States, following the long-established practice of another Member State, Egypt. Thus, in his view, it would not be

correct to say that restrictive immunity was the practice of only a limited number of industrialized States of the West, as commonly held by the proponents of the theory of absolute immunity. Another representative cautioned against forcing divergent international practices into a rigid model and suggested that it would be necessary to lay down in the draft articles rules of reciprocity - much more developed than what was to be found in article 28 - providing for the situation where a group of States might decide to retain or establish additional limitations to State immunities outside the framework of the present draft articles. Concern was also expressed that granting States excessively broad jurisdictional immunities implied, for the forum State, a corresponding curtailment of the right of each individual to have its case heard by a judge in order to arrive at a determination of its rights and obligations: there was the need to strike a proper balance between the requirements of sovereignty and those of individuals, while bearing in mind that, for the latter, it was the right of access to justice, one of the fundamental human rights, that was at stake.

221. As regards further work on the topic, some representatives expressed the hope that the Commission would complete its second reading of the draft articles in 1990, while others considered that care must be exercised to prepare a balanced text, taking into account the various positions of States. One representative suggested in particular that the law relating to jurisdictional immunities of States was still in the process of rapid evolution and that instead of setting uniform and rigid rules the draft articles should be limited to providing guidelines and should contain a review clause indicating that the text could be modified or supplemented after a reasonable period of time.

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

PART I. INTRODUCTION

Article 2. Use of terms

Article 3. Interpretative provisions

222. Many representatives endorsed the Commission's decision to combine draft articles 2 and 3 into a new article 2 under the heading "Use of terms". As regards paragraph 1 (a) of the new article 2 which defined the term "court", it was suggested that the phrase "judicial functions" should be elaborated on in order to avoid the possibility of discrepant interpretations.

223. The definition of the term "State" in paragraph 1 (b) was considered by some representatives as requiring further clarification in regard to State enterprises and corporations and viewed by others as inappropriate in that it included State enterprises and corporations with segregated State property as agencies or instrumentalities of the State. It was pointed out in this connection that State corporations, enterprises and similar entities with an independent legal personality which could sue and be sued, and which could assume civil liabilities, should not in principle enjoy jurisdictional immunities. Two delegations

reiterated their proposals in this respect. One of those proposals sought to insert after paragraph 1 (b) the following provision "The expression 'State' as used in the present articles does not comprehend instrumentalities established by the State to perform commercial transactions as defined in article 2, if they act on their own behalf and are liable with their own assets". The other proposal sought to amend the wording of paragraph 1 (b) to read: "The 'State' means the State and its various organs and representatives which are entitled to perform acts in the exercise of the sovereign authority of the State." While each of these proposals received a measure of support, one representative felt that it was unnecessary to supplement the definition of the term "State" as contained in paragraph 1 (b) with wording that would exclude State enterprises in principle and that it was more appropriate to distinguish between State activities for which immunity was granted under international law, and activities in respect of which a State was answerable to a foreign jurisdiction, as a private enterprise.

224. As regards the reference to political subdivisions of the State in paragraph 1 (b), it was suggested that it be made clear that the constituent States of a federal State did not enjoy immunity. Another view expressed on this question, however, was that political subdivisions or agencies or instrumentalities of the State, being an integral part of the State, should enjoy immunity on the same terms as the State or, failing that, should be granted the same privileges in legal proceedings that would be granted to the State when jurisdiction was exercised over those agencies or instrumentalities.

225. Referring to paragraph 1 (c) which defined the term "commercial contract", one representative supported the proposal of the Special Rapporteur to replace the term by "commercial transaction" or "commercial activity". He noted that if the term "activity" was used in article 2 - which would accommodate his delegation's views - the whole draft would have to be modified accordingly.

226. With respect to paragraph 3, different views were expressed on the relative weight to be given in determining whether a contract was commercial, to the nature of the contract and to its purpose.

227. Some representatives expressed the view that in determining whether a contract was commercial equal weight should be given to the nature of the contract and to its purpose. It was pointed out that in current international practice developing countries in particular engaged in contractual transactions which were vital to the national economy or to disaster prevention and relief and were completely different from private commercial activities engaged in solely for the purpose of profit. The remark was made that if the nature of the contract was the sole criterion, it was likely that the activities of the State in the exercise of its governmental functions would be inappropriately deemed to be of a commercial nature and thus not entitled to jurisdictional immunity in foreign courts. To exclude the "purpose" test, it was stated, would not be conducive to the effective application of the principle of State immunity and it would moreover create difficulties for domestic courts in applying the principle, as shown in many cases of domestic litigation. The text proposed by the Special Rapporteur (paragraph 423 of the Commission's report) was therefore viewed as a step backward compared to the article provisionally adopted, inasmuch as it was too restrictive and did not adequately provide for unforeseen situations.

228. The views referred to above were not shared by other representatives. One of them felt that one should refrain from introducing subjective elements such as the "purpose" of a transaction in determining whether immunity might be claimed. Another representative stressed the importance of the nature of a transaction as a criterion for its classification as a "commercial contract" (or "activity"). He opposed any widening of the possibility of taking the purpose of a transaction into account, since the sole criterion in his country's practice was the nature of the legal transaction. He suggested a compromise whereby, while the criterion for determining immunity should be the nature of the contract, the court of the forum State should be free to take a governmental purpose into account also, in the case of a commercial contract.

229. Still other representatives felt that the texts proposed by the Special Rapporteur for paragraph 3 of article 2 which are to be found in paragraphs 421 and 441 of the Commission's report might open the way to a possible compromise. The latest of these texts provided that while, in determining whether a contract for the sale or purchase of goods or the supply of services was commercial, reference should be made primarily to the nature of the contract, the purpose of a commercial contract should also be taken into account, if an international agreement between the States concerned or a written contract between the parties stipulated that the contract was for a public governmental purpose; the text further provided that the court of the forum State was given the power to decide "in the case of unforeseen situations" that a contract had a public purpose. One representative suggested that in the case of contracts concluded for a public governmental purpose the term "written agreement" should be used rather than "written contract" so as to avoid confusion with a commercial contract. A number of representatives however felt that the texts proposed by the Special Rapporteur could be improved upon. One of them was of the view that the latest of those texts should be revised in order to settle the question of the criteria to be applied in determining the commercial character of a contract. Another representative, after stating that the Special Rapporteur was right to disagree with States that had opposed the "purpose" test on the grounds that in contracts governing development aid and famine relief the proposed criterion could be helpful in determining the character of a contract, felt that the latest version complicated the earlier text by requiring an international agreement or a written contract to establish that the purpose of a contract was governmental. He remarked that, aside from the fact that parties to a contract for the purchase or sale of goods seldom included such clauses, the formula suggested by the Special Rapporteur was too rigid and did not provide for unforeseen situations which could not be stipulated in advance. While much preferring the text adopted on first reading, he proposed a modified version of it, as follows: "In determining whether a contract for the sale or purchase of goods or supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract could also be taken into account in determining the non-commercial character of the contract." This formulation, it was explained, would remove the qualifications imposed on the purpose test by the present wording "if in the practice of that State that purpose is relevant", and would also avoid the criticism that the words "practice of that State" were subjective and ambiguous.

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

230. Some delegations favoured the addition of the words "under international law" in paragraph 1, which made it clear that the privileges and immunities were those conferred upon States by international law. Commenting on the article as a whole, one representative reiterated the position of his delegation that the current formulation as provisionally adopted by the Commission was unsatisfactory. He remarked that the existing conventions on diplomatic missions, consular posts, special missions and missions to international organizations did not deal with the question of their jurisdictional immunity because it was indistinguishable from that of States and that this gap was not covered by article 4, paragraph 1, which dealt only with the jurisdictional immunity of States. As for paragraph 2, he felt that the immunities accorded to heads of State should be extended to heads of Government and ministers for foreign affairs.

PART II. GENERAL PRINCIPLES

Article 6. State immunity

231. The views of delegations on this basic provision remained divided, particularly on the question of whether to retain or delete the bracketed phrase "and the relevant rules of general international law". Many delegations proposed the deletion of the phrase, pointing out that its retention would lead to a unilateral multiplication of exceptions to the principle of immunity and deprive the draft articles of their substance. It was maintained that the provision would in effect add to the exceptions provided for in articles 11-19 and would limit the scope of the rule of jurisdictional immunities of States and their property and that the need to take account of further development in State practice could be provided for by the adoption of additional protocols by the parties to the future instrument. In this connection some representatives expressed readiness to accept a compromise proposal of the Special Rapporteur to insert in the preamble to the instrument a paragraph affirming that the rules of general international law continued to govern questions not expressly regulated in the draft articles, if such a paragraph would make the deletion of the bracketed phrase in article 6 more acceptable. In any event, it was said, it should be made clear that in cases of disagreement as to the existence of immunity the court of the forum State could not take a unilateral decision; such conflicts must be resolved in accordance with the provisions on the settlement of disputes. Other delegations, on the other hand, were in favour of retaining the bracketed phrase. They observed that the immunity rule was applicable only to certain types of State activities, namely, those performed in the exercise of sovereign authority (acta jure imperii), whereas the rule of submission to jurisdiction governed all other activities which States decided to carry out (acta jure gestionis). The Commission, in their view, should continue its work on the basis of the original text, in conformity with a distinct trend towards restrictive immunity, and ensure that the draft article reflected, or at least not be phrased in such a way as to counteract, that legal development.

232. As to a possible compromise solution proposed by the Special Rapporteur in article 6 bis, which would provide for an optional declaration on additional exceptions to State immunity, it gave rise to serious doubts on the part of many representatives who, while appreciating the Special Rapporteur's effort, pointed out that it would result in the creation of a multiplicity of régimes, and therefore in uncertainty and instability in State practice, to the detriment of one of the essential purposes of codification, that of promoting a uniform law on the topic. It was pointed out that the possibility of a State being unwittingly tied to restrictions of immunity by not responding to a declaration of exceptions would be contrary to international practice. The words "unless otherwise agreed between the States concerned" appearing at the beginning of many articles were considered to provide adequately for the required flexibility as they left open the possibility of bilateral agreements.

Article 7. Modalities for giving effect to State immunity

233. Referring to the revised text proposed by the Special Rapporteur in the light of comments and observations received from Governments (paragraph 466 of the Commission's report), one representative suggested that the phrase "in a forum State" in paragraph 1 be deleted.

Article 8. Express consent to exercise of jurisdiction

234. Some representatives proposed the inclusion of an additional proviso to the effect that where there had been a "fundamental change" in the circumstances prevailing at the time of the signing of a contract the State which had consented to the exercise of jurisdiction by a foreign court would be able to claim immunity. It was remarked that there was ample legal authority for such a provision in domestic law, in the opinions of international jurists, in the decisions of the International Court of Justice and in the Vienna Convention on the Law of Treaties. Another representative proposed the deletion of subparagraph (b), which, in his opinion, could be interpreted to mean that a State should relinquish a right under international law by means of a contract under municipal law.

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

235. The addition in paragraph 1 of the reference to "any other step relating to the merits" of a proceeding met with reservations on the part of one delegation, which viewed it as imprecise and likely to give rise to differences of interpretation.

Article 10. Counter-claims

236. The new wording of paragraph 4 suggested by the Special Rapporteur (paragraph 482 of the Commission's report) gave rise to reservations on the part of some delegations. It was remarked that the jurisdictional immunity invoked by a

State against a counter-claim which sought relief in excess of that sought in the principal claim would have the unfair effect of preventing a judge from hearing the counter-claim even to dismiss the principal claim. It was suggested that the issue should be left to the determination of the competent court.

PART III. [LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

237. Many representatives observed that a number of substantive issues remained unresolved in respect of Part III. Some of them felt that the International Law Commission should seriously endeavour to reduce the envisaged exceptions. It was suggested that, consistent with the pragmatic approach adopted by the Commission, only those exceptions on which general agreement was reached should be considered in Part III, and that due account should be taken of the need to establish a reasonable balance between different views and to reflect, as far as possible, the laws and practices of different legal systems and all groups of States. As to the title of Part III, some representatives expressed preference for the alternative "Exceptions to State immunity" which, in their view, better reflected the notion that State jurisdictional immunity was the rule of international law and that exceptions could be made only with the express consent of a State. The Special Rapporteur's suggestion, that discussion of the matter should be deferred until all substantive issues had been resolved, was considered by one representative to be a practical approach. It was remarked, however, that if the Commission decided to delete the bracketed phrase in article 6 it would then be reasonable to adopt the title "Exceptions to State immunity".

Article 11. Commercial contracts

238. The article was viewed by some representatives as acceptable in so far as the general principle was concerned, but needing reformulation in respect of the phrase "by virtue of the applicable rules of private international law" in paragraph 1. It was stated that since the rules of private international law lacked precision and were not uniform it would be preferable to refer to a rule pertaining to the jurisdictional link between the commercial contract and the forum State. It was also remarked that the revised paragraph 1 as proposed by the Special Rapporteur (paragraph 491 of the Commission's report) was an improvement over the original text, although it still oversimplified the matter in its assumption that a particular activity was commercial when in fact it was the activity itself that might be in dispute. The deletion of the phrase "the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly", as envisaged in the revised version of paragraph 1, was supported in particular by one representative who felt that the wording tended to lend support to the exception to immunity based on the presumption of the consent of a State to a foreign jurisdiction, whereas the basis of that exception was to be found in the actual conclusion of the contract, without presumption of the State's consent.

239. Referring to commercial contracts relating to financial relations, another representative suggested that there were two important considerations to be taken into account in that respect: first, the choice of a contractual law implied the

acceptance of that law for the purpose of interpreting the contract but did not imply the acceptance of the forum so that, if the contract stipulated only the choice of the law, that did not imply the acceptance of the forum; secondly, the acceptance of the forum must be explicit, but a State which accepted the forum did not thereby agree to waive the jurisdictional immunity of State property. Referring to the case of independent State enterprises, he observed that, while it was clear that a contractual relationship existed under which the jurisdiction of the court was accepted together with the legal consequences which it entailed, that did not mean that State property could serve as collateral or be subject to attachment. The exceptions being considered by the Commission should therefore, he further remarked, include those stipulations.

240. Article 11 bis as proposed by the Special Rapporteur was commented upon by several representatives. Some of them supported it, suggesting that the article, together with article 11, would provide for a necessary distinction, with regard to commercial contracts, between States and their independent entities, an important concept which deserved to be studied in detail. The remark was made that if applied coherently the concept could serve to limit abusive recourse to judicial proceedings brought against the State on the subject of commercial contracts concluded by its public enterprises. One representative disagreed with the view reflected in paragraph 499 of the Commission's report that differentiating between States and their independent entities might leave private persons without a sufficient remedy. He observed that State entities engaged in economic and trading activities, including corporations, enterprises or other entities having the capacity of independent juridical persons, did not in fact enjoy jurisdictional immunities under domestic or international law; while engaged in commercial activities in the forum State, those entities were subject to the same rules of liability in respect of commercial contracts and other civil matters as private individuals and juridical persons. In his opinion, to allow the liability of those State-owned entities to be attributed to the State itself would be tantamount to making a State a guarantor having unlimited liability for the acts of its entities. The same representative, after remarking that the practice of separating the State from its independent entities was not necessarily confined to socialist countries and that in many countries such important industrial and economic sectors as railways, telecommunications and civil aviation were owned partially or totally by the State, stressed that entities such as airlines assumed civil liability for their operational activities, the States to which they belonged having no responsibility for them, and that the separation of States from their independent entities in terms of jurisdictional immunity was therefore the concern of all countries. Another representative, though generally in agreement with the substance of the proposed article, suggested that the term "segregated State property" should be reviewed to take into account the fact that in some States property continued to belong to the State, although administered by State enterprises or institutions, and was therefore not segregated from the State in respect of which a State enterprise was not liable.

241. Other representatives expressed reservations on the formulation of article 11 bis as submitted by the Special Rapporteur. One of them considered that the revised text proposed by a member of the Commission (paragraph 501 of the report) could serve as an appropriate basis for further discussion, while another

favoured a formulation similar to the one proposed by another member of the Commission (paragraph 502 of the report) which focused on the non-immunity status of State enterprises with segregated property rather than the immunity of the State to which the enterprise belonged. A third representative expressed preference for the proposal of one Government (paragraph 504) explicitly to exclude from the definition of the term "State" enterprises acting on their own behalf and possessing their own assets.

242. Still other representatives considered that the concept of segregated State property required further clarification and expressed doubts as to whether it was necessary to have a special provision in the draft articles on the subject. One representative pointed out that the real problem to be settled by that article was the liability of a State, rather than its immunity, in cases where a State enterprise had entered into a commercial contract. The view of his delegation was, however, that the future instrument would not be the right framework for settling the question of State liability and that at best one could envisage a provision to the effect that a State would still not be able to invoke immunity if, in spite of the fact that a segregated State enterprise had entered into a commercial contract in its own name, claims could be made on the State itself on account of the inadequacy of the enterprise's equity.

Article 12. Contracts of employment

243. Two delegations reserved comment on the article and subsequent articles until after the Commission had completed its second reading.

244. Some representatives proposed the deletion of the article. In their view, labour law disputes as envisaged in the text were better dealt with by mutual agreement between the Governments concerned. One representative suggested that further consideration of the provision was necessary in order to clarify its content and to determine the appropriateness of using the term "recruit".

Article 13. Personal injuries and damage to property

245. Some delegations proposed the deletion of the article. It was held that cases of civil liability for a wrongful act could be addressed most effectively through an insurance policy, a direction already taken by a number of States. One representative, noting that the article would exclude the immunity of the State in proceedings related to compensation for death or injury to persons, or loss or damage to property when (a) the act or omission attributable to the State was committed in the territory of the forum State and (b) the author of the act or omission was present in that territory at that time, objected to the suggestion of the Special Rapporteur that the second condition be omitted. He remarked that if the suggestion was accepted it would have the consequence of transporting questions relating to transboundary harm from their proper context in the field of State responsibility into that of competence of national courts. Another representative maintained that a State should not be subject to the jurisdiction of another State as a result of its having exercised the right of self-protection set forth in the

Vienna Conventions on diplomatic and consular relations. Some other delegations however favoured the retention of the article, including the Special Rapporteur's suggestion to eliminate the requirement for the second territorial connection.

246. As for the Special Rapporteur's proposal (paragraph 518 of the Commission's report) to add a second paragraph to make it clear that the article did not affect the rules concerning State responsibility under international law, one representative supported it on the understanding that the article applied only to private, as distinguished from sovereign, acts. The proposal of the Special Rapporteur was however deemed unacceptable by another representative who pointed out that international responsibility could not be invoked alone in relation to the limited scope of the provision of article 13 and that the rules pertaining to internationally wrongful acts and responsibility had a far broader role to play, particularly as the jurisdictional immunity of States could be invoked in cases involving a denial of justice or other violation of the rules pertaining to human rights or the treatment of foreigners. The reference to the rules of State responsibility was therefore considered to be outside the scope of the future instrument.

Article 14. Ownership, possession and use of property

247. With regard to paragraph 1, the view was expressed that subparagraphs (c) to (e) should be deleted, as they were based on the legal practice in common-law countries. It was also suggested that subparagraph (b) be deleted because the matters covered by that exception to immunity seemed to go beyond the purview of the topic. The use of terms such as "interest", which was not a clearly understood legal concept outside the common-law system, was viewed as particularly regrettable, as it might give rise to abuse in the application of the article.

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

248. One representative reiterated the position of his Government, reflected in the current text of the article, that exceptions to immunity should apply only to the commercial use of patents or trade names in the forum State, and not in connection with the determination of the ownership of such rights if they had been validly obtained under the laws of the defendant State and were used publicly only in its territory.

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

249. The bracketed term "non-governmental" in paragraphs 1 and 4 was viewed by one representative as redundant, since the word "commercial" had clearly defined the scope of application of the article. Another representative, although not opposed to the retention of the term, agreed that its deletion would promote general acceptance of the article.

/

250. Referring to the new paragraph 1 bis proposed by the Special Rapporteur (paragraph 548 of the Commission's report), one representative considered it to be an appropriate basis for future deliberations on the issue. Another representative found it unacceptable and illogical that the draft should, in the early articles, establish the jurisdictional immunity of States as a general norm and then later, in article 18, subject the foreign State to serious tests in order to justify invoking its immunity, thus placing the burden of proof on the defendant State.

Article 19. Effect of an arbitration agreement

251. Various modifications were proposed to the article. One representative suggested that the expression "a commercial contract" be used instead of the phrase "a civil or commercial matter" which could lead to a restrictive interpretation of the principle of immunity. Another representative, after pointing out that the current text told almost nothing specific about the court before which a State party to an arbitration agreement with a foreign person forfeited the right to invoke immunity from jurisdiction, suggested that the article be reformulated so as to provide that the State party to an arbitration agreement retained the right to invoke its immunity before the court of a State not affected or not appointed by an arbitration agreement, unless the agreement specifically provided for that. A third representative rejected the implied notion that the conclusion of an arbitration agreement was always tantamount to a waiver of immunity in disputes relating to the validity or interpretation of an arbitral award.

252. On the other hand, the current text received a measure of support. One representative welcomed the notion incorporated in the article that when an arbitration agreement giving jurisdiction to a national court over a foreign State was set aside the court should be prevented from continuing to deal with the matter, pending a determination as to whether it still had jurisdiction over the defendant State. Another representative supported the Special Rapporteur's suggestion that the article should be supplemented by a new subparagraph (d) as contained in paragraph 560 of the Commission's report.

Article 20. Cases of nationalization

253. Some delegations favoured the deletion of the article which was considered as giving cursory treatment to a very complex issue and as likely to present an obstacle to ratification. The remark was made that its location could give the impression that it formed part of the exceptions to the rule of State immunity, whereas nationalization measures were sovereign acts of a State. One representative found it difficult to understand why limitations should be placed on the doctrine of the act of State and why it should be envisaged that a State would not be immune from the jurisdiction of the courts of another State in respect of measures of nationalization taken by the former State with regard to industrial or intellectual property, even in the case of public acts of the State carried out in its own territory. He observed that the doctrine of the act of State involved an essential principle of protection of State sovereignty, and that its recognition therefore also implied safeguarding the principle of non-interference, a principle

which was fundamental to international relations, was rooted in the Charter of the United Nations and must be observed universally, without limitation.

PART IV. STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

Article 21. State immunity from measures of constraint

Article 22. Consent to measures of constraint

Article 23. Specific categories of property

254. Commenting generally on Part IV consisting of articles 21 to 23 on State immunity from execution, one representative expressed strong concern that the provisions in question might make it practically impossible to execute in one State judicial decisions rendered against another State, except where the other State had previously or subsequently agreed thereto. He stressed that in those circumstances there was no point in allowing judicial decisions against a State to be rendered as their execution could not be assured and that it would at least be necessary to lay down the international obligation of States to respect internal judicial decisions unfavourable to them so as to make it possible for one State to entertain international proceedings against another State alleging the latter State's responsibility for a wrongful act. It was further remarked that the proposed articles were unacceptable in so far as they provided that execution could be applied exclusively to State property that was successfully demonstrated to be "specifically in use or intended for use by the State for commercial purposes", as provided in article 21, subparagraph (a), with the result that the party concerned would face an insurmountable obstacle in obtaining relief. It was therefore suggested that for the provisions in Part IV to be acceptable, at least the burden of proof concerning the non-commercial purpose of the property in question should be laid entirely with the defendant State.

255. With specific reference to article 21 the deletion of (1) the bracketed phrase in the chapeau "or property in which it has a legally protected interest"; (2) the phrase in subparagraph (a) "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed"; and (3) the word "non-governmental" in subparagraph (a) as proposed by the Special Rapporteur (paragraph 573 of the Commission's report) was considered by one representative as reasonable and justified. Another representative, while supporting the deletion of the last part of subparagraph (a) "has a connection ... which the proceeding was directed", opposed the deletion of the bracketed phrase in the chapeau "or property in which it has a legally protected interest", a deletion which some other representatives found essential lest the provision concerned might lead to abuse.

256. Some delegations viewed the article as adopted by the Commission on first reading as too restrictive, and expressed preference for the reformulation suggested by a member of the Commission (paragraph 578 of the report) which was described as a simple and clear statement of the well-recognized principle of

State immunity in respect of property from measures of constraint. Another delegation, however, opposed the proposed reformulation.

257. Commenting on article 22, one representative suggested that the fact that a State waived its immunity in respect of certain measures of constraint was of particular political significance and could give rise to serious practical consequences. He therefore deemed it appropriate to require that the waiver should be in written form, express and unequivocal.

258. With regard to article 23, the view was expressed that the idea that States might waive their sovereign immunity in respect of measures of constraint against State property traditionally protected by international law was inadmissible as it called into question the principle of the legal equality of States and violated current practices. Article 23 as adopted by the Commission on first reading was therefore considered unacceptable. Misgivings were expressed in relation to the excessively detailed list of categories of property which were automatically excluded from measures of constraint, particularly with regard to paragraph 1, subparagraph (c), and to the fact that the non-official purpose of the property specified in subparagraph (e) seemed virtually impossible to establish in the face of simple denials by the defendant State. As regards subparagraph (c), the Special Rapporteur's proposal to add the phrase "and serves monetary purpose" met with a measure of support.

PART V. MISCELLANEOUS PROVISIONS

Article 24. Service of process

259. With reference to paragraph 1, subparagraph (d) (ii), one representative observed that to provide for an unconditional possibility of effecting service of process "by any other means" would be tantamount to a renunciation of all procedural requirements and suggested that it would be appropriate not to go beyond the procedures set forth in subparagraphs (a), (b) and (c).

Article 25. Default judgement

260. One delegation reiterated its proposal that paragraph 1 should be supplemented by the phrase "and if the court had jurisdiction".

Article 27. Procedural immunities

261. The Special Rapporteur's proposal whereby the exemption from providing any security, bond or deposit to guarantee the payment of costs or expenses would be accorded to a State only if it appeared as a defendant (paragraph 605 of the Commission's report) was supported by one representative. It was however objected to by two representatives, one of whom said that he saw no reason for such a limitation and that the exemption should be maintained for any appearance of a State before a foreign court.

3. Other comments

PART VI. SETTLEMENT OF DISPUTES

262. As for the provisions on the settlement of disputes contained in articles 29 to 33, the view was expressed that the matter should be dealt with in the draft itself and not in an optional protocol. It was also pointed out that the question did not have to be taken up at the current stage and could be resolved at a diplomatic conference.

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

1. General comments

263. The importance of the topic was especially stressed by those delegations whose countries were critically dependent on water resources for the development of their own economy. It was mentioned that out of some 200 international river basins only one third were governed by agreements among riparian States and that in the case of the others problems concerning the sharing of water resources remained a constant source of tension, so that it was essential to provide a legal basis for international co-operation which alone would make possible the rational and equitable exploitation of those resources.

264. The Commission was generally commended for the progress it had made in recent years in its work on the topic, and was urged to organize its future work in such a way as to ensure that the momentum achieved in 1988 was not dissipated. The hope was expressed by many delegations that the Commission would be in a position to complete the first reading of the draft articles by the end of its current term of office, in 1991.

265. Several delegations noted that the Commission's discussion of the topic had again reflected the growing emphasis on environmental problems, including those associated with global warming, and emphasized that efforts to address the issue should be based on international co-operation. Some of them considered it essential to avoid duplicating the work carried out on the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law, both of which were closely related to the question of watercourses. The remark was made in this connection that provisions relating to environmental protection and pollution control should form the subject of a separate document, the draft under consideration being reserved exclusively for matters pertaining to international watercourses.

266. As for the form which the end product of the Commission's work should take, most delegations reiterated their preference for a "framework convention" which should embody basic legal principles intended to supplement specific agreements to be concluded between various States. In their view, the topic was better suited to regional intergovernmental agreements, which could take into account both the characteristics of each watercourse and the interests of the riparian States, than to a general convention which would try to establish a uniform régime for all international watercourses.

267. Some of those delegations felt that such a "framework instrument" should provide a guide to enable States to identify the problems to be resolved, but should not go into detail, especially with regard to procedure, nor should it establish general binding obligations, which might affect existing agreements, or unduly restrict the discretion of riparian States to conclude agreements. The remark was made that despite the Commission's stated intentions the draft articles did not always reflect the framework approach and that it should be amended on

second reading with a view to devoting a larger number of articles to general principles and basic rules.

268. Other delegations did not object in principle to establishing legal obligations of States but felt that it was necessary to clarify the content of those legal obligations and to ensure that it was feasible to comply with them. One representative suggested that emphasis be given in the first place to the general obligation of States towards their neighbours with regard to the use of their own natural resources, an obligation which undoubtedly implied a limitation on the sovereignty of States and the need to impose some restrictions on the use of international watercourses. States should therefore, he remarked, negotiate in good faith in order to conclude agreements providing for the equitable and rational use of water resources.

269. Different opinions were expressed regarding the relationship between the draft articles under elaboration and State practice. One representative held the view that except as regards some harmful uses and effects of water use, such as pollution, it would be premature to draw up rules concerning the non-navigational uses of international watercourses inasmuch as international instruments and national laws in that area were very fragmentary and their impact uncertain. He added that caution was needed in considering treaties and case material as precedents, and that bilateral treaties could not in themselves serve as a basis for customary norms, even though they illustrated the emerging principles of international law. Another representative, while recognizing that caution had to be exercised in drawing inferences from bilateral treaties and decisions of international tribunals, deemed it extremely important to recognize common threads of State practice running through bilateral or multilateral conventions and jurisprudence and to transpose them to a set of clearly defined draft articles. He observed that, since it was entirely within the Commission's mandate progressively to develop international law where some State practice supported such a step, it was not essential that that practice actually be reflective of customary international law.

270. Some representatives, after noting that it was not clear whether the Commission intended to formulate draft rules on the basis of existing practice, or to go beyond them in a progressive spirit, advocated a reasonable compromise between conservative and progressive elements in order to ensure wider acceptability.

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

271. While most delegations focused on draft articles 22 and 23 as proposed by the Special Rapporteur in his most recent report, some made observations on draft articles provisionally adopted by the Commission on first reading at previous sessions.

[Article 1. Use of terms]

272. A number of delegations commented on the use of the term "international watercourse system" as opposed to the term "international watercourses" in this as well as in other articles. Several delegations felt that the broad concept of "watercourse system", which had a territorial connotation and included tributaries located within the territory of a single State, had no place in the draft articles. Extending the right of riparian States to the use of tributaries was viewed as excessive, as it would have the effect of making all the water resources of watercourse States subject to international regulation and would result in an infringement of the principle of sovereignty of States over their natural resources. In the view of those delegations, the use of the concept in question would probably create obstacles to the acceptance of the draft by a large number of States.

273. Other delegations were of a different view. One of them remarked that stringent and effective environmental protection of watercourses necessitated a broad approach, so that if the draft articles were to be based on too narrow a definition of the geographical areas concerned they would run the risk of lacking effectiveness.

274. One delegation considered it premature to take a decision on the deletion or retention of the square brackets around the word "system" pending a full review of all the draft articles on the topic, since such a decision was intrinsically linked to the whole orientation of the draft and should not be taken lightly.

275. Referring to the definition of the term "international watercourse" as a hydrological and geographical reality, one delegation said that it was first essential to recognize the unity of a watercourse, in terms of the interdependence of its component parts. He further observed that the international character of a watercourse should be determined by the fact that it crossed several States and that the idea of relativity in defining the international character of a watercourse was not legally valid because it lacked precision, was prejudicial to the interests of downstream riparian States and wrongly assumed that it was possible for one State to use part of the waters without affecting use by another State. An international watercourse, he concluded, should be described as a shared resource subject to equitable distribution.

276. Another delegation wondered whether the term "international watercourses" might not be replaced by another term such as "plurinational watercourses", to be appropriately defined in article 1, in order to avoid confusion with the narrower concept of "international rivers" or rivers crossing the territories of several States and open to the commercial shipping of all States.

Article 7. Factors relevant to equitable and reasonable utilization

277. Emphasis was placed by one delegation on the need to take into account, in the enumeration of factors relevant to equitable and reasonable utilization, of factors

such as geographical features, climate and environment, demography and the economic condition of the hinterland States, in order to co-ordinate the needs of all parties with the overall availability of water resources.

Article 8. Obligation not to cause appreciable harm

278. Some delegations expressed reservations concerning the use of the term "appreciable harm" in this and other articles of the draft. They felt that the degree of harm should be significant and that consideration should be given to the possibility of using the term "substantial harm".

Article 9. General obligation to co-operate

279. Support was expressed for the concept underlying the article, which set forth in clear terms the general obligation of watercourse States to co-operate with one another.

3. Comments on draft articles 22 and 23 submitted by the Special Rapporteur in his fifth report and referred by the Commission to the Drafting Committee 10/

280. Most delegations endorsed the general thrust of draft articles 22 and 23, which were described as a useful contribution to the International Decade for Natural Disaster Reduction, proclaimed by the United Nations for the 1990s. It was pointed out that emergency situations of natural origin were frequent in some areas, for example, in those African countries that experienced drought one year and severe flooding the next, and that in order to control floods watercourse States should establish co-operative arrangements of the kind envisaged in the two draft articles. Those texts were therefore viewed as likely to contribute to the development and establishment of hydrological projects in these regions. Some delegations however wondered whether, considering the general obligations to co-operate and to exchange data and information set forth in articles 9 and 10 respectively, and the intent to give the draft the structure of a "framework agreement", specific provisions like those in draft articles 22 and 23 might not be dispensed with or, if it was felt that specific provisions to be applied on situations of danger might be useful, be drafted in sufficiently general terms, since they would have a very wide application.

10/ One representative referred to the draft articles submitted by the Special Rapporteur in his fourth report on: pollution of international watercourses; protection of the environment of international watercourses; and pollution or environmental emergencies. While agreeing with the thrust and general concept of those articles, he expressed the view that that part of the draft should be made more precise.

281. The draft articles were welcomed as reflecting the main lines of thought expressed during the Commission's discussion of the topic. They were viewed as affording a well-balanced, flexible solution enabling States to deal with a wide range of harmful situations. The Special Rapporteur was commended for recognizing basic differences in the type of action to be taken in relation to each kind of problem, while adopting a holistic approach in dealing with hazards which were both directly and indirectly water-related. Appreciation was expressed for the practical, concrete tenor of the draft articles and the pragmatism with which the Special Rapporteur had reconciled the different schools of thought based on the concepts of "harm", "risk", "strict liability" and "fault".

282. Some delegations however questioned the way in which the Special Rapporteur had defined the respective fields of application of the two draft articles. Thus one representative, after remarking that draft article 22 contemplated "water-related hazards, harmful conditions and other adverse effects" while draft article 23 dealt with "water-related dangers and emergency situations", said that such language did not bring out clearly enough the distinction between the two situations. After recalling that the wording used in the title and in the text of the two new articles had been the subject of some criticism in the Commission, and that, as indicated in paragraph 659 of the report, the Special Rapporteur had pointed out the difficulties of finding general terms to cover all the phenomena addressed in the articles, he stated that in his understanding draft article 22 would deal with situations in which there was an impending danger of a more or less continuing nature, whereas draft article 23 would address situations in which danger had materialized and harm had already occurred or was imminent. He added that if that understanding was correct, language should be used that defined clearly the scope of each article and clearly distinguished each situation, taking into account that the conduct required in cases of actual disaster was different from that required in the case of a situation of a "chronic or continuing nature", to use the words of the Special Rapporteur (paragraph 648 of the Commission's report). Another representative, while recognizing in principle the advisability of introducing two articles on the question of emergencies, and while considering it reasonable to assume that normal hazards and harmful conditions required different treatment from hazards of a sudden or exceptional character, felt that the analytical distinction between those situations was not sufficiently clear and observed that both situations seemed to involve a system of notification, some mechanism for mutual consultation and advance contingency planning. After pointing out that the terminology used was also unclear and that the titles of the two articles did not give an adequate indication of the differences in the subject-matter covered, he suggested that if the idea of two separate articles was to be retained draft article 22 could be entitled "Co-operation to prevent harmful events and other adverse effects" and draft article 23 "Co-operation in emergency situations". At the same time, he saw wisdom in formulating a more comprehensive article to address both man-made and natural emergencies through a unified approach. Although agreeing with the Special Rapporteur that the relevant obligations of States increased with the degree of human involvement, he pointed out that to a large extent that was a matter which because it concerned the rules specifying the consequences of different types of human action fell under the topic of State responsibility and should not be treated separately in the draft on watercourses.

283. Still other representatives expressed reservations on the general approach reflected in the two draft articles. One of them, after recalling that with regard to hazardous conditions in watercourses one former Special Rapporteur, Mr. Evensen, had proposed two draft articles, relating to uses of substantial pollution on the one hand and to threatening natural conditions on the other, stated that the fact that three articles now dealt with those problems led to conceptual ambiguities and duplication. He pointed out that in its proposed wording draft article 23 covered those dangers and emergency situations which were primarily of natural origin and which were already dealt with in draft article 22, while also including pollution resulting from human activities, although such incidents were already sufficiently covered by article 18, as submitted by the Special Rapporteur in his fourth report. He suggested that draft articles 22 and 23 be combined and he added that in his delegation's view draft articles 10 and 8 would suffice to accomplish the purpose of paragraphs 2 (a) and 3 of draft article 22, provided the legal consequences of damages under article 8 were unambiguously regulated. Another representative remarked that draft articles 22 and 23 attempted to establish an absolutist or rigid régime, an approach which various instruments including the draft articles developed by the International Law Association had rightly avoided.

284. Three other substantive points were discussed in relation to both draft articles. The first concerned the extent to which existing international agreements containing provisions on floods could be viewed as evidence of customary law. One representative, while agreeing that, as pointed out by the Special Rapporteur, the conclusion of similar agreements undoubtedly signified in a general sense the existence of customary rules of international law on the subject, pointed out that care would have to be exercised in inferring the precise nature of the customary rules and that international agreements containing provisions on floods were likely to contain legal norms which derived their force from treaty provisions rather than customary rules. After recalling that in the North Sea Continental Shelf cases the International Court of Justice had pointed out that not all rules embodied in a treaty or treaties were accepted as customary rules by the opinio juris, he urged the Commission to use extreme caution in inferring customary rules from international agreements on watercourses.

285. The second point related to the binding character of the obligations established by the two draft articles: an obligation of co-operation in the case of draft article 22, and an obligation of notification and co-operation in the case of draft article 23. Doubts were expressed as to whether co-operation and notification, however desirable, could be made legally binding obligations in all cases. One representative expressed the view that it might be preferable to leave co-operation to a specific agreement between the States concerned. The remark was also made that co-operation should be viewed not as the source of States' rights and duties, but in the context of States' duties founded on good-neighbourly relations, inasmuch as the the duty of co-operation was intrinsically limited and that whenever international law set forth an obligation to take specific measures the duty to co-operate should be interpreted not as being an absolute one but as one conditioned by its reasonableness.

286. The third point discussed in relation to both draft articles concerned the content of co-operation. One representative suggested that the Commission

recommend specific forms of co-operation such as collection and wide dissemination of relevant scientific data and information on weather and other conditions; assistance to countries where problems recurred frequently, in order to ensure that the necessary steps were taken in the framework of national legislation and to promote alternative forms of human habitation and ways of life consistent with the development and conservation of natural resources; establishment of international institutions for training and assistance to deal with the hazards and dangers in question; and adequate international funding for various relevant purposes, including assistance in the event of large-scale disasters.

287. Comments of a drafting nature which were made in relation to both articles included the remark that consistency was required in the use of terms; the suggestion that the term "watercourse" should be substituted for the term "water"; the observation that redundancies and extensive enumerations which might be a source of confusion in interpreting the draft should be eliminated; and the suggestion that the two draft articles be re-structured, having in mind the need to refrain from establishing unnecessarily cumbersome procedural rules and to make the provisions as specific as possible.

Article 22. Water-related hazards, harmful conditions and other adverse effects

288. Some delegations considered that the formulation proposed by the Special Rapporteur was too general. The remark was made in particular that it was not clear whether the article referred to activities which had only an indirect connection with water uses, and that the current wording could, for instance, be understood as relating to activities such as road traffic in the vicinity of a watercourse, which was certainly not the intention of the provision. Another observation was that the text of the draft article needed to be tightened up and its structure made more logical and elegant.

289. The basic thrust of paragraph 1 was generally supported, as was also the idea underlying it, namely, the need for co-operation among States in order to prevent water-related damage. One delegation noted however that the nature and scale of co-operation could vary depending on the nature of the particular phenomenon concerned and that a distinction should be drawn between the planned, long-term co-operation required, for example, in the case of erosion or desertification, and the immediate co-operation called for in the event of sudden, dramatic emergencies such as floods. Moreover, in the view of that delegation and others, account should be taken not only of characteristics common to all watercourses but also of those specific to each watercourse. In that connection the suggestion of one member of the Commission to add to paragraph 1 the phrase "as the circumstances of the particular international watercourse system warrant" was viewed as well founded.

290. A number of representatives expressed reservations in connection with the phrase "on an equitable basis".

291. Some felt that the notion of equity had little to add to the principle of equitable use, which was already applicable throughout the draft. One

representative observed that the basis on which co-operation was to be conducted was naturally a matter to be decided by the system States themselves, and that the aim of the proposed instrument should be to indicate what legally binding considerations they must take into account. Another representative, after referring to the Special Rapporteur's statement, recorded in paragraph 638 of the Commission's report, that co-operation "on an equitable basis" encompassed the duty of a potentially injured watercourse State to contribute financially to protective measures taken by other States, remarked that such a rule would constitute an innovation, as it had not been reflected either in international or in national legal systems and needed further clarification inasmuch as the Special Rapporteur had not been able to provide sufficient justification for it. While considering it unlikely that States would accept such a duty, he stressed that it was open to watercourse States to conclude a prior agreement on the common financing of measures taken in the territory of only one State and that a duty to consider the possibility of such a financial contribution could accordingly be included in the draft article. Still another representative observed that the expression "on an equitable basis" seemed to establish a principle of "solidarity" between watercourse States when confronting the circumstances mentioned in the article, even though solidarity was not necessarily justifiable or acceptable in all cases. He warned that in establishing a general and absolute principle of "solidarity" there was a danger of proceeding in the direction of limitations on sovereignty to which States might not be willing to agree: if the riparian States of a watercourse were called upon to contribute materially or financially to protective measures against the damage which the watercourse might cause, they could also claim that they should be consulted before those measures were adopted. In that representative's view, it was not possible to establish general rules in that regard, and the draft could not go further than establishing an obligation of vigilance in respecting the rights of downstream States. Several delegations, accordingly, favoured the deletion of the phrase "on an equitable basis" and one of them suggested rewording the opening part of paragraph 1 to read "Watercourse States shall co-operate in accordance with the provisions of the present Convention".

292. Other representatives, however, saw merit in the reference to equity, which conveyed the notion of burden sharing in the face of natural disasters or emergencies. It was remarked that the idea behind the original wording was that all relevant factors should be taken into account in determining the respective "contributions" of each watercourse State to the prevention or mitigation of water-related hazards and dangers, and that co-operation "on an equitable basis" struck an appropriate balance between the interests of the various watercourse States. Among those representatives, some agreed that the notion of equity presented some difficulties due to its vagueness. The question was asked in this connection whether the steps to be taken by watercourse States in fulfilment of their obligations, as provided in paragraph 2, were intended to ensure co-operation on an equitable basis. Reference was made to the numerous unsuccessful attempts over the years to clarify the notion of equity by establishing the necessary criteria, among which one representative singled out the need to strike an appropriate balance between the rights of lower and upper riparian States. In order to clarify the content of the notion, it was proposed to define it in article 1. It was also suggested to insert after the phrase "on an equitable

basis", the proviso "in accordance with the provisions of the present Convention". Attention was furthermore drawn to the explanations provided by the Special Rapporteur on the matter: the notion of a duty of the injured State to provide appropriate compensation for protective measures taken by another State was viewed as very interesting and worthy to be included in the text of the article. One delegation furthermore suggested that the Commission might consider establishing machinery through which disputes on the interpretation of the phrase "on an equitable basis" could be settled.

293. A few comments were also made concerning the list of adverse effects in paragraph 1. Some delegations agreed with the inclusion of such a list, provided it was of an indicative character. It was suggested to include in the list a reference to damage caused to any species of aquatic life, as well as, in accordance with the decision to address both natural and man-made incidents, a reference to pollution. As regards water-related diseases, alluded to in paragraph 638 of the Commission's report, one representative remarked that if mention was made of such diseases in the draft it would be necessary to indicate whether the duty to combat ailments of that type related to the duty to abate diseases caused by pollution by the upper riparian State, the duty to impede the transport of germs naturally existing in a certain part of a watercourse to other parts or the duty to reduce the quantity of naturally existing germs. In his opinion, a duty in the latter sense would far exceed what was currently accepted by States and was not within the scope of the topic under discussion.

294. With regard to paragraph 2, some delegations considered it reasonable to lay down an obligation to exchange pertinent information, to consult on possible problems and to establish and review joint measures for the prevention of incidents. It was remarked that it might be necessary in some instances to adopt measures other than those specified. One delegation stressed in particular that it should be left to the riparian States concerned to choose the specific mode of co-operation. It was also noted that the enumeration of possible steps to be undertaken contributed towards a broad interpretation of the concept of co-operation. One representative criticized the paragraph as being too stringent. He observed that the term "steps" appeared to suggest that the obligations were cumulative and applied equally to all situations mentioned in paragraph 1, even though in fact each type of situation might require a different response. He accordingly suggested that paragraph 2 be drafted so as to indicate what kind of response was required to prevent or mitigate the danger.

295. One delegation suggested that subparagraph (a) should not merely provide for the exchange of data and information, already envisaged in article 10, but should require something more, perhaps in terms of the frequency of exchanges. Another delegation suggested that the words "regular and timely" should be replaced by the word "continual" since that term reaffirmed the idea of international co-operation.

296. Concerning subparagraph (b), a number of delegations shared the view that the phrase "structural and non-structural" should be replaced by a clearer formulation. Some agreed with the opinion expressed within the Commission that the phrase "joint measures, whether or not involving the construction of works" would be an appropriate substitute. Moreover, one representative viewed the phrase

"consultations concerning the planning and implementation of joint measures" as a source of potential difficulties because of its imprecision.

297. Paragraph 3 was considered of doubtful usefulness by several representatives on the ground that its subject matter was dealt with in article 8. Its retention was however advocated, subject to clarification of its wording, by other representatives, one of whom remarked that it referred to activities under the jurisdiction of watercourse States, whereas article 8 referred to utilization of watercourses.

298. The phrase "appreciable harm", more specifically the adjective "appreciable", gave rise to criticisms. One representative, after pointing out that State practice, judicial decisions, the generally recognized "Trail-Smelter rule" concerning good-neighbourly relations between States and the opinions of the most highly qualified experts all confirmed the prohibition of causing "serious" or "substantial" damage, emphasized that by general admission the economic use of a watercourse was not possible without an appreciable change in, and impairment of, water quality, and that the normative implementation of justified ecological demands was doomed to failure if economic realities were not taken into account. He therefore considered the term "appreciable" inappropriate, notwithstanding a legal definition according to which that term connoted a damage capable of being perceived or recognized by the senses. In his opinion, it was inappropriate to use the term "appreciable" in the draft differently from the way in which that term was generally used, and consideration should therefore be given to alternatives such as "serious" or "substantial" in order to spell out the prohibition more clearly and more realistically. The word "significant" was also proposed as a possible alternative.

299. Another representative expressed the view that the harm which might be caused to other watercourse States should not be qualified, least of all by a term as subjective and dangerous as "appreciable". He warned against the real threat entailed by the cumulative effect of harm (which, at a given moment, might not be regarded as "appreciable" but which, in the aggregate, might result in serious losses) and furthermore remarked that a State which was not appreciably harmed would still be affected by a harmful condition and would bear the additional burden of repairing the damage in order to return the situation to the status quo ante, since the State which had caused the damage would not be obligated to repair it if it was not appreciable. He finally pointed out, in connection with the reference in paragraph 640 of the Commission's report to article 194, paragraph 2, of the United Nations Convention on the Law of the Sea, that the paragraph in question prohibited States from causing damage by pollution to other States and their environment, but by no means stated that the prohibition applied only to "appreciable" damage.

300. Still another representative noted that the logical consequence of the principle of equitable sharing would be to prohibit not only the uses that might cause "appreciable harm" to the rights or interests of another riparian State but also those that might have adverse effects on another riparian State. In view of the vagueness of the notion of "appreciable harm", he suggested that an enumeration of the factors determining appreciable harm and the adverse effects on riparian

States should be part of any agreement on the uses of international watercourses, and mentioned the siting of works as an extremely important factor inasmuch as, in general, the lower down the site, the more serious the effects were likely to be, particularly in densely populated delta flood plains. In that context, he suggested that the Commission explore the possibility of establishing an international flood-related relief agency along the lines of the International Committee of the Red Cross or the International Red Crescent.

301. Other representatives favoured the use of the term "appreciable harm". One of them invoked in this connection article IV of the Helsinki Rules. Another indicated that, although he had commented adversely on the use of the term "appreciable harm" in the context of international liability for injurious consequences arising out of acts not prohibited by international law, he did not face the same difficulties when the same term was used in the context of international watercourses. In his opinion, the obligation of States to take measures to prevent certain hazards did not arise at exactly the same point as the liability for damages, and some imprecision with regard to that obligation should not be intolerable in the light, inter alia, of the inherently finite nature of what would be involved and the availability of obvious alternatives.

302. Noting that, under paragraph 3, watercourse States were under an obligation to take "all measures necessary" to the end specified in the paragraph, one delegation pointed out that since water-related hazards affected not only the watercourse State but also areas beyond its national jurisdiction it went without saying that efforts to prevent or mitigate water-related hazards called for co-operation by all States. Another representative suggested that it should be appropriate to refer to measures taken individually or jointly by watercourse States. Other comments on paragraph 3 included the remark that the word "practical" should be inserted before "measures", and the observation that since international watercourses were exclusively situated in the territories of States the phrase "under their jurisdiction or control" could be replaced by the words "in their territory". The phrase "other adverse effects" was favourably commented upon by some representatives but criticized by others.

Article 23. Water-related dangers and emergency situations

303. The basic approach reflected in the draft article was generally supported.

304. It was noted that paragraph 1 applied not only to other watercourse States but also to other potentially affected States, whose interests were thus duly accommodated. One representative however wondered whether the paragraph should be understood to mean that each State having knowledge of a hazard should inform various other States. He considered such an interpretation to be too far-reaching but agreed that the provision would be useful if it entailed only a duty for the upper riparian State to inform the lower riparian State. He therefore suggested that the text be formulated in such a way that only the State from whose territory or jurisdiction transboundary damage could emerge would have to inform any other State likely to be affected, regardless of whether the damage originated in the first State's territory.

305. As regards the notification measures referred to in the paragraph, the same representative pointed out that the communications which took place in the course of an emergency served different purposes, with the first communication having the function of an alarm and being, of necessity, incomplete, and the second aiming at providing the potentially affected State with the fullest and most accurate information possible so as to enable it to assess the possible danger and damage. In his opinion, those two different purposes should be adequately reflected in the article.

306. Some representatives commented on the temporal aspects of the paragraph. One of them welcomed the provision that notification of danger should be given without delay, time being of the essence in dealing with water-related emergencies. Another suggested that the duty of notification as defined in paragraph 1 should be confined to the case of danger as a result of human activities, and that in the case of water-related danger or emergency situations that were primarily of natural origin the watercourse State should merely be bound to notify others of the danger as soon as practicable. Still another representative observed that not all States had remote-sensing capabilities to detect water-related dangers or hazards in advance and that it was accordingly desirable in the long run to consider establishing an international agency endowed with the necessary remote-sensing capability, which would act as the channel for sharing and transmitting data to all potentially affected States.

307. Other substantive comments included the remark that prevention should be referred to in the paragraph or be dealt with in a separate paragraph and the observation that provision should be made for the possibility of floods resulting from human activities.

308. Some drafting comments were also made. One representative inquired about the exact purpose of the expression "intergovernmental organizations" and, noting that the term "international organizations" had been used in paragraph 3, called for terminological consistency. It was also suggested that the phrase "emergency situations" be replaced by a more adequate phrase or deleted. The definition of the expression "water-related danger or emergency situation" contained in the second sentence was viewed as reading like a commentary rather than the actual text of legal norms and as belonging in the article on the use of terms, as suggested in paragraph 642 of the Commission's report. It was furthermore interpreted as encompassing radioactive contamination. The remark was also made that the reference to "toxic chemical spills" did not conform with the language currently used in legal instruments in the field of international environmental law and could advantageously be replaced by a reference to "dangerous wastes and substances". The phrase "dangerous incidents" was viewed as calling for clarification.

309. As regards paragraph 2, comments focused on the scope of the obligation enunciated therein, on the duties incumbent upon potentially affected States and on the provision of assistance in case of emergency.

310. With respect to the first point, some representatives felt that the obligation under consideration should be kept within reasonable limits. One of them considered it suitable to refer to the possibility of preventing, neutralizing or

mitigating the danger or damage which could arise under the given circumstances. Another suggested that the paragraph be clarified by indicating that it applied principally to dangers and situations that resulted from human activities. Still another representative observed that laying down a general obligation on the part of the State within whose territory a water-related danger or emergency situation originated to "take all practical measures to prevent, neutralize or mitigate the danger or damage to other watercourse States" had excessively complex implications where the issue of liability was concerned. He remarked that if such far-reaching measures were to be taken it was necessary to have information on the geological, hydrological, biological and other conditions prevailing in watercourse States downstream and that the co-operation required later on in the same article of States in the area affected did not appear to be on the scale of that required of States within whose territory an emergency situation originated, since States in the area affected were called upon to co-operate in eliminating the causes and effects "to the extent practicable under the circumstances", whereas the other category of States was requested to take "all practical measures".

311. Other representatives suggested broadening the scope of the obligation laid down in paragraph 2. Thus one of them suggested that the phrase "other watercourse States" be replaced by "other potentially affected States". Another remarked that a watercourse State within whose territory a water-related danger or emergency situation originated should also be required to make timely assessments of the potential environmental impact of such situations.

312. As for paragraphs 3 and 4, it was noted by several delegations that they implied the existence of obligations for non-watercourse as well as watercourse States, and that could pose a problem, especially if the draft articles were finally to take the shape of a convention. The Commission was invited to give thought to finding a method of encouraging non-watercouse States to co-operate, while avoiding the suggestion that they were legally bound to do so. One representative viewed as an interesting and positive development that the paragraphs, though dealing with a non-maritime topic, had been based on wording contained in article 199 of the United Nations Convention on the Law of the Sea, thereby reflecting that Convention's influence, at least in so far as environmental law was concerned, on the development of customary law.

313. As regards the duties incumbent on potentially affected States, one representative questioned the validity of the idea expressed in paragraph 646 of the Commission's report that the potential victim should have to contribute to the protective measures. He observed that it would be very difficult to measure the level of contribution and to determine which State should be regarded as potentially affected before the actual damage occurred.

314. As to the question of acceptance of assistance in case of emergency, referred to in paragraph 647 of the Commission's report, some delegations, while being of the view that it should be studied more carefully, favoured the inclusion of a provision "requiring a State affected by a disaster to accept proffered assistance and not to regard offers thereof as an interference in its internal affairs". Others recalled that experience in the negotiation of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency had shown that most

States would be unwilling to undertake an obligation to accept assistance and suggested that mere encouragement to accept, rather than the creation of an obligation to do so, would suffice - which did not preclude international responsibility on the part of the State refusing to accept such assistance if damage could affect a third State.

315. Referring specifically to paragraph 3, one representative endorsed the suggestion, recorded in paragraph 669 of the Commission's report, that States which possessed certain types of technology should be encouraged to provide voluntary assistance to potentially affected States. Another representative saw merit in providing for machinery for joint action by States parties to deal with common problems, adding that the experience of the kind of joint commissions that existed, for example, in Africa could prove useful. Other comments on paragraph 3 included the suggestion that the word "shall" be replaced by "should", the remark that the reference to "the area" could be deleted and the observation that the term "on an equitable basis" could usefully be included in the text.

316. As regards paragraph 4, one delegation suggested specifying what was meant by emergency situations and contingency plans, and relying in doing this on bilateral treaty precedents, particularly the protocols concerning co-operation in combating pollution by oil and other harmful substances in cases of emergency. Another delegation considered that the paragraph might be more appropriately placed in article 22, since the formulation of contingency plans and the review of their effectiveness were matters of normal co-operation. Some delegations remarked that the development of emergency plans and their implementation presupposed a certain degree of concerted action and co-operation and, therefore, the setting up of some quasi-permanent consultation machinery. It was remarked that such a machinery might be entrusted with the responsibility of managing the watercourse, disseminating information, ensuring an appropriate climate for consultations and negotiations among watercourse States, preparing contingency plans and co-operating in devising the measures necessary for the elimination of dangers.

4. Other comments

317. Some delegations indicated that they would comment at a later stage on the two other draft articles submitted by the Special Rapporteur in his fifth report, namely draft article 24 entitled "Relationship between navigational and non-navigational uses; absence of priority among uses" and draft article 25 entitled "Regulation of international watercourses". A few observations were however made on draft article 24. Thus one representative endorsed the general philosophy underlying the draft article, which reflected a duty to conserve the water quality that would permit the widest possible use of water, thus depriving navigation of its privileged position. Another delegation wondered whether it was timely to make the principle that no particular use of international watercourses should take precedence over other uses into a rule which could be set aside only by a contrary rule. Still other delegations urged the Commission to lay down some general principles on which distinctions could be made between uses of varying degrees of importance. They remarked that in discussions of equitable resource use attention could easily be focused simply on optimal economic results over the short

term, without regard for the long-term negative consequences for the rights or interests of future generations and that for that reason those uses which maintained the quality of the watercourse system should be accorded an inherent, even if by no means absolute, priority over other uses. Considering however that current concerns and interests might be very weighty, they suggested that the best solution might be to include in article 24 a general principle to the effect that any use which was not detrimental to the long-term usefulness of the waters of an international watercourse should have priority over a use which entailed adverse effects on future uses of those waters.

318. Several representatives commented on the appropriateness of including in the draft secondary rules specifying the consequences of the breach of certain obligations by watercourse States. Some held the view that adopting secondary rules would interfere with the basic concept of a framework instrument; one felt that the matter should be dealt with in the context of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, while another suggested that the Commission confine itself to establishing a very general rule and guidelines, rather than an obligation in respect of liability, and that implicit reference be made to the rules applied in the draft on international liability for injurious consequences arising out of acts not prohibited by international law. Others however felt that it might be useful for the Special Rapporteur to deal with the matter in substance following the general outlines of the draft articles on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law. Some representatives advocated a régime of strict liability, under which States responsible for polluting a watercourse would be liable for the consequent damage, except in case of force majeure. Referring to the Special Rapporteur's apparent intention to eliminate any liability based on harm or damage and to establish liability exclusively for risk, one representative observed that risk could be the basic component of the draft only in respect of matters such as prevention and that compensation was not normally provided for an incident that had not yet occurred.

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

319. Several representatives welcomed the progress made on the topic. It was remarked that if international organizations were to achieve their objectives and carry out the tasks and functions assigned to them by Member States they had to be granted the necessary privileges and immunities. The hope was expressed that inasmuch as international organizations were playing an ever increasing role in the international community the Commission would intensify its deliberations on the topic and give it in-depth consideration.

320. Among those representatives, some praised the report of the Special Rapporteur for its great clarity and for the methodology reflected therein, which was described as pragmatic and appropriate, and expressed support for the Special Rapporteur's planned outline. One of them, while noting with pleasure that the topic, in which her country, as a host country of the United Nations and other

major international organizations, had consistently taken interest, was receiving serious attention in the Commission, queried the need for the provisions contained in Part II of the draft. She observed in relation to article 6 that harmonization with the 1986 Convention on the Law of Treaties had constantly to be borne in mind and in relation to article 7 that the principle of ne impediatur officia did not necessarily imply that international organizations had in every case to be granted complete immunity from legal process. Referring to the practice followed by host countries with regard to that aspect of their relations with international organizations, she urged further consideration of possible exceptions to immunity, particularly in respect of actions against an international organization brought by a third party for damages resulting from an accident caused by a motor vehicle belonging to or operated on behalf of the organization.

321. Other delegations felt that the topic should not be given priority and reiterated their doubts about the value of the Commission's work thereon. Those doubts, it was remarked, appeared to be shared by the Commission, since a cursory look at the historical summary of the work of the Commission on the topic suggested a lack of enthusiasm for it, and since the reports which had been submitted intermittently by the Special Rapporteur had not been considered, "owing to lack of time".

322. Explaining the reasons for their misgivings in relation to the topic, some representatives stressed that each international organization had its own individual requirements which had to be decided upon by its Member States and that it would be very difficult, if not impossible, to arrive at solutions that would be applicable to the enormous range of international organizations. The remark was also made that it would be unacceptable for the status or validity of treaties already in existence in the field to be called into question in any way. A third observation was that it was essential to preserve a balance between the interests of the organizations and those of the host States, and concern was expressed that the proviso in draft article 11, according to which "the scope of the rights accorded may be limited, in the light of the functional requirements of the organization in question, by mutual agreement of the parties concerned", indicated that the proposed common régime was not based solely on those functional requirements.

323. The representatives in question accordingly urged the Commission to proceed with the greatest caution and to aim at the formulation of guidelines and recommendations to be used by States and international organizations as they saw fit.

H. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

1. Programme, procedures and working methods of the Commission

324. With respect to the Commission's current programme of work, agreement was expressed with the intentions of the Commission concerning the goals to be attained by the end of the current term of office. The remark was made in particular that it seemed appropriate that the Commission should try to complete, in the near

future, its work on the second reading of the draft articles on the jurisdictional immunities of States, provided it took duly into consideration the need to arrive at a generally acceptable text giving due weight to the views of States.

325. Some representatives stressed that the Commission should focus on topics on which it could achieve the most progress by the end of the current term of office. One of them observed that substantial progress could be made during that period on the topic of the law of non-navigational uses of international watercourses, particularly if the framework of a general agreement were strictly adhered to.

326. Several representatives felt that greater priority should be given to the general topic of State responsibility rather than to the more specific topic of international liability for injurious consequences arising out of acts not prohibited by international law.

327. The view was on the other hand expressed that in relation to the latter topic the Commission could make a timely and important contribution based on the knowledge it had acquired and the skills at its command; it was therefore suggested that priorities be reconsidered and that the possibility of devoting, at an early date, a significant share of one session to the said topic be re-examined.

328. As for the draft Code of Crimes against the Peace and Security of Mankind, a number of representatives felt that it should as far as possible be given priority within the adopted programme of work. Doubts were on the other hand expressed by some representatives as to the possibility of arriving in the short term at a generally acceptable text on a topic which was described as highly sensitive and giving rise to widely diverging opinions.

329. As regards the Commission's long-term programme of work, a number of representatives welcomed the establishment of a Working Group on the subject. The hope was expressed that the Working Group would in due course produce recommendations on which the views of Governments would be requested. Emphasis was placed on the importance of exercising the highest degree of care in choosing further topics for consideration. One representative remarked in this connection that in considering what further topics, if any, should be put on the Commission's agenda the following factors would have to be borne in mind: first, for any topic to be put on the Commission's agenda, either there should already be a broad measure of agreement on underlying policies and objectives or, when a topic was referred to the Commission, it should be accompanied by the necessary guidance; secondly, attention should be paid to the time which any consideration of the topic was likely to take; thirdly, the topic must be one which held out a reasonable prospect of a generally acceptable outcome; fourthly, the topic must be one for which there was some genuine practical need; fifthly, it was important to enable the Commission to complete the work which it already had on its agenda before burdening it by the addition of new subjects. Special emphasis was placed by some representatives on the third and fourth of the above-mentioned factors.

330. One representative expressed the wish that the Commission consider at a future date the feasibility of developing the law on movement of persons across

international frontiers; that would entail a study and clarification of the principles of international law on expulsion of persons.

331. A number of representatives welcomed the Commission's constant concern to improve its working methods and to comply with the relevant requests contained in General Assembly resolution 43/169. Satisfaction was expressed at the Commission's response to the suggestions emanating from the Working Group set up in 1988 by the Sixth Committee.

332. One representative observed however that, although chapter IX of the Commission's report gave the impression that as matters stood everything was satisfactory and no change should be attempted, this was not the perception which his delegation had. The remark was made in this connection that while the Commission should be able to rely on well-tested procedures and working methods it should not reject innovation.

333. With a view to enhancing the Commission's efficiency, some representatives favoured the staggered consideration of different topics. It was suggested that the Commission might decide not to consider all the items included in its programme of work at the two forthcoming sessions so as to be able to proceed rapidly on the topics on which there was already a significant measure of agreement among States.

334. Several representatives insisted on the need to allow the Drafting Committee sufficient time to complete its work and welcomed the Commission's efforts to that end. One representative, however, expressed the view that in this area there was room for further improvement and experimentation: for example, where the Commission had before it a large number of articles, it might be useful to consider establishing either two drafting committees, or two subgroups within an enlarged drafting committee, in order to prepare preliminary versions of the texts.

335. As regards the length and timing of the Commission's session, the general feeling as reflected in paragraph 9 of General Assembly resolution 44/35 was that the duration of the session should be maintained at not less than 12 weeks. One delegation suggested that a slight adjustment in the dates of the Commission's session might make it possible to circulate the report at an earlier date. Another possibility which was mentioned as worthy of being further explored was that of splitting the annual session, it being understood that the total number of weeks involved would remain the same. One representative expressed the view that the issue of the duration of the Commission's session required a new and hard look.

336. Some representatives supported the idea reflected in paragraph 746 of the report to provide the Commission with computerized assistance. In this connection, it was suggested that a computerized data base of texts of bilateral and multilateral instruments on the subjects under consideration should be developed and made available regularly to the Commission.

337. Some representatives commented on the Commission's reporting methods. Observations focused on the methodology and contents of the report, on its length and on the timing of its distribution.

338. As regards the first point, several representatives expressed the wish that the Commission in the future pay increased attention to the recommendation contained in General Assembly resolution 43/169 11/ and indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments would be of particular interest for the continuation of its work. One representative also stated that while various topics obviously required different presentations that did not mean that a report on all the topics could not be produced in a format that followed an intelligible common denominator that would give the report as a whole a personality of its own, rather than make it a collection of drafts, each of which could be considered a separate report. He added that if everything fell upon the Special Rapporteurs the question arose as to what was the function of the Rapporteur of the Commission who was supposed to be responsible for its report.

339. Another question which was raised as regards the contents of the report was that of how to report the consideration in the Commission of questions dealt with in chapter IX of the report. One representative stated in this connection that while he realized that the discussion of those questions fell within the internal competence of the Commission, the Sixth Committee, as the Commission's parent body, was entitled to know the details of the Commission's consideration, whether of substantive points or of organizational matters. After pointing out that the Planning Group had held no fewer than nine meetings and had had before it a number of proposals submitted by members of the Commission, he asked whether the Sixth Committee was not entitled to be informed of the details of the discussions which had gone on at nine meetings, and of the substance of the proposals submitted by the members of the Commission, and whether there was any way in which the Sixth Committee could get a brief summary of the views presented in the Planning Group, as that seemed to be the only way in which the Committee would be able to get a more complete picture. He added that his delegation, while it could not go into details of the various views expressed without violating ethics, since the Commission had not reported on them, was fully aware that other delegations had

---

11/ In paragraph 5 (c) of its resolution 43/169, the General Assembly requested the Commission:

> "To indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work".

In paragraph 4 (c) of its resolution 44/35, the Assembly requested the Commission:

> "To pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work".

voiced some concerns regarding those questions, notably the issue of the duration of the Commission's sessions.

340. With respect to the second of the three points referred to in paragraph 337 above, some representatives suggested that in order to facilitate its consideration the Commission's report should be further streamlined and reduced to more manageable proportions. One of them, while noting the Commission's efforts in that direction, felt that the commentaries could be further summarized and shortened. Another suggested that the report deal only with the topics on which the Commission had held substantive discussions.

341. As for the third point, several representatives urged that the report be distributed within a reasonable time before the opening of the General Assembly's session. One of them proposed that summaries of developments on topics under which articles had been drawn up be sent directly to Governments immediately after the Commission's session so that Governments were not obliged to await completion of the lengthy process of finalizing the report on the whole session.

342. Satisfaction was expressed at the initiatives taken in the framework of the Commission to ensure that the work of the United Nations in the field of the progressive development and codification of international law was better known and appreciated and at the efforts made in that direction by the Office of Information at the United Nations Office at Geneva.

343. Some delegations commented on ways of enhancing the constructive and fruitful nature of the dialogue between the International Law Commission and the Sixth Committee. Support was expressed for the system of topic-by-topic discussion of the Commission's report. As regards the possibility of enabling Special Rapporteurs to attend the debate of the Sixth Committee on the report of the Commission, as envisaged in paragraph 742 of the Commission's report, the hope was expressed that the current session's resolution of the General Assembly would contain a provision inviting the Commission to consider, when appropriate, asking a Special Rapporteur to attend the session of the Assembly during the discussion of the topic for which he was responsible. 12/ The view was on the other hand expressed that the Special Rapporteur's presence was not really necessary, taking into account the corresponding financial implications and the fact that a thematic summary of the Sixth Committee's discussions was placed at the Commission's disposal by the Secretariat.

2. Co-operation with other bodies

344. Several representatives welcomed the continuing co-operation between the Commission and other bodies such as the Asian-African Legal Consultative Committee,

---

12/ For the action taken by the General Assembly, see paragraph 5 of General Assembly resolution 44/35.

the European Committee on Legal Co-operation and the Inter-American Juridical Committee. The remark was made in this connection that the Sixth Committee could have benefited from a dissemination of the results of some of the studies done by the Inter-American Juridical Committee, for example, on drug trafficking and extradition. One representative expressed the view that close contact should be established with the Movement of Non-Aligned Countries and with the Commonwealth countries to allow an exchange of views and familiarization with the legal work and thinking of those bodies on both substantive law and topics to be included in the Commission's programme of work. He recalled in this connection that the Movement of Non-Aligned Countries had proposed that the 1990s be proclaimed the United Nations decade of international law. 13/

3. International Law Seminar

345. Several representatives stressed the importance of the International Law Seminar as a means of propagating international law and thanked those Governments which had provided fellowships to enable the Seminar to be held. The hope was expressed that funds would be available in 1990 for fellowships for participants in the Seminar. Satisfaction was voiced at the Commission's awareness of the need to provide fellowships to bring together participants from all over the world, and an appeal was made for increased contributions to enable junior professors, government officials and students of international law to participate in the Seminar in the future. One representative expressed the hope that the conditions for participants' eligibility would be eased, particularly where developing countries were concerned.

4. Gilberto Amado Memorial Lecture

346. Appreciation was expressed to the Government of Brazil for its generous contribution to the Gilberto Amado Memorial. Referring to the theme of the lecture which had been delivered in this context by the Legal Counsel, 14/ one representative remarked that peace-keeping helped the United Nations achieve its primary objective of promoting the maintenance of international peace and maintaining law and order.

13/ See General Assembly resolution 44/23.

14/ "Reflections on legal aspects of United Nations peace-keeping".