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# REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS TWENTY-SEVENTH SESSION

## Report of the Sixth Committee

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# I. INTRODUCTION

1. At its 2353rd plenary meeting, on 19 September 1975, the General Assembly included in the agenda of its thirtieth session the item entitled "Report of the International Law Commission on the work of its twenty-seventh session" and allocated the item to the Sixth Committee for consideration and report.

2. The Sixth Committee considered the item at its 1534th, 1535th, 1538th to 1550th and 1573rd meetings, held on 8, 9 and from 14 to 28 October and on 26 November 1975.

3. At its 1534th meeting, on 8 October, Mr. Abdul Hakim Tabibi, Chairman of the International Law Commission at its twenty-seventh session, introduced the Commission's report on the work of that session. 1/ At the 1550th meeting, on 28 October, he commented on the observations which had been made during the debate on the report. He referred also to the question of the honoraria payable to members of the International Law Commission considered in the Fifth Committee. The members of the Sixth Committee expressed their appreciation to the Chairman of the Commission for his statements.

4. The report was divided into six chapters entitled: I. Organization of the session; II. State responsibility; III. Succession of States in respect of matters other than treaties; IV. The most-favoured-nation clause; V. Question of treaties concluded between States and international organizations or between two or more international organizations; VI. Other decisions and conclusions of the Commission. Chapters II, III, VI and V contained draft articles provisionally adopted by the Commission on the subjects of State responsibility, succession of States in respect of matters other than treaties, the most-favoured-nation clause and treaties concluded between States and international organizations or between international organizations, respectively. Chapter VI contained, inter alia, a description of the Commission's work on the law of the non-navigational uses of international watercourses, the conclusions of the Commission on the programme and organization of its work, as well as its conclusions on the general goals suggested by a planning group established by the Commission.

5. At the 1573rd meeting, on 26 November, the Rapporteur of the Sixth Committee raised the question whether the Committee, in accordance with established practice, wished to include in its report to the General Assembly a summary of the main trends which emerged in the course of the debate on the item. After referring to General Assembly resolution 2292 (XXII) of 8 December 1967, the Rapporteur informed the Committee of the financial implications of the question. At the same meeting the Sixth Committee decided that, in view of the subject-matter, the report should include an analytical summary of the Committee's debate on the item.

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1/ A/10010 (to be issued as Official Records of the General Assembly, Thirtieth Session, Supplement No. 10 (A/10010/Rev.1)).

## II. PROPOSAL

6. At the 1573rd meeting, on 26 November, the representative of Argentina introduced a draft resolution (A/C.6/L.1024) sponsored by Argentina, Egypt, Germany (Federal Republic of), Indonesia, Kenya, Mexico, the Netherlands, New Zealand, Norway, Paraguay, Thailand, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Yugoslavia, later joined by Canada, El Salvador, Hungary, Nigeria, Poland and Turkey (for the text, see para. 213 below).

## III. DEBATE

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

7. The representatives who took part in the debate congratulated the International Law Commission on the work it had accomplished during its twenty-seventh session and, in particular, on the important and substantial progress made in the preparation of draft articles on four difficult and sensitive topics of international law, namely, State responsibility, succession of States in respect of matters other than treaties, the most-favoured-nation clause and treaties concluded between States and international organizations or between two or more international organizations. The report submitted by the Commission on the work of that session was another example of the outstanding contributions made by the Commission since its establishment to the promotion of the progressive development of international law and its codification, in accordance with Article 13, subparagraph 1 (a), of the Charter of the United Nations, and thus to the fostering of friendly relations and co-operation among States and the strengthening of international peace and security.

8. The unparalleled importance of the work of the Commission was underlined by the increasingly significant role played by international law in the various fields of international relations as well as by the growing demands for codifying and developing international law in the light of the current needs and aspirations of the international community. To respond appropriately to the challenge of a changing world, the Commission should continue, as in the past, to take duly into account such needs and aspirations without lowering the high quality of its drafts. The Commission's twin tasks of codification and progressive development corresponded to the static and changing elements of international law.

9. Some representatives expressed the opinion that developments such as the accession to independence of many new States, the gap between developed and developing countries, changes in traditional economic and social relations, and the scientific and technological revolution showed that only a progressive development and codification of international law by all members of the international community could ensure the universal application of that law. Certain positive changes had taken place, like détente and the relaxation of tensions between States belonging to different political, economic, social and

legal systems, and the establishment of the framework of a new international economic order, but conflicts, insecurity and poverty had not disappeared altogether from international life. It was therefore vital to continue to make effective efforts towards strengthening world legal order as one of the most effective means of achieving international peace and security and harmonious economic development. The codification and further development of a system of modern international law, firmly based on the United Nations Charter, was therefore one of the foremost tasks facing the Organization and its Member States.

10. Several representatives recalled that the process of codifying international law was highly successful because of the close relationship established between the Sixth Committee and the International Law Commission, as the two main pillars of the system devised by the General Assembly for the fulfilment of its responsibilities under Article 13, subparagraph 1 (a), of the Charter. The annual consideration by the Sixth Committee of the report of the International Law Commission provided an opportunity for Governments to express their opinions on the drafts prepared by the Commission, on the direction and progress of the Commission's work, and in determining the final form and forum of the codification of a given topic. Such a consideration, together with the written comments submitted by Governments, made it possible to assess the work of the Commission, at its different stages, in the light of diplomatic realities, an essential contribution to a process which was not only a technical undertaking but also a diplomatic endeavour.

11. Some representatives recalled that accomplishments in the field of codification of international law depended ultimately on the willingness of Member States to accept the codification drafts. In this connexion, it was said that there were disturbing signs of changing attitudes towards the value of and need for work on the progressive development of international law and its codification. According to one representative, there would seem to be a certain undercurrent which favoured slowing down the process of development and codification, as if the modern international law being developed and codified with the participation of all States, including newly independent States, were to play a lesser role in the ordering of conduct among nations. The duty of the Sixth Committee was to proceed expeditiously to take the necessary decisions regarding the final stage of codification, once a final draft or report had been submitted by the International Law Commission.

12. Certain representatives underlined that an objective assessment of the accomplishments made in the field of the codification of international law should not overlook the fact that some important topics referred to the International Law Commission had had to be postponed or abandoned and that the pattern of acceptance by States of the codification conventions adopted on the basis of drafts prepared by the Commission had not been altogether promising. Only one convention, the Vienna Convention on Diplomatic Relations, had thus far been ratified or acceded to by a great majority of Member States. Any evaluation of the codification process undertaken under the auspices of the United Nations should also take into account many important conventions and declarations, some of which might be regarded as contributions to the progressive development of international law, adopted in the General Assembly or in international conferences without the participation of either the International Law Commission or the Sixth Committee. It was likewise stated that the time-lag between signature and ratification of codification conventions

tended to be particularly long and that Governments should be encouraged to ratify codification treaties so that the last stage of the codification process would be completed faster.

13. The need to recognize the limitations on the capacity of States adequately to consider material coming from the International Law Commission was recalled by certain representatives. In this connexion it was pointed out by certain other representatives that since only a fraction of new international multilateral treaty material reflected the work of the Commission, it appeared that the United Nations was approaching the moment when it should take a comprehensive look at the whole system of international treaty-making, outside as well as inside the Commission, including the respective roles of the Sixth Committee, the International Law Commission, ad hoc committees, diplomatic conferences and the secretariat in that system. Such a study would be timely and of benefit to the United Nations as a whole. It should consider the possibility of developing a set of guidelines to ensure a uniform approach to the preparation of drafts and commentaries thereon so that governmental examination of them could be simplified. International legislation by treaty-making was an art and not an accident. It was a complex and flexible technique and changed as society changed. If the Sixth Committee did not inspire thought about the problem, there was small likelihood that anyone else would.

14. Finally, reference was made by one representative to the principles of universality and equitable distribution as criteria which still remained to be applied by the General Assembly in electing the members of the International Law Commission.

## B. State responsibility

15. The paramount importance of the codification of the rules governing State responsibility for the development of international law as a comprehensive system of compulsory legal rules, and the magnitude of that undertaking, were underlined by several representatives. Thus, it was said that Governments had a fundamental interest in the elaboration of a draft on the topic since it would strengthen the observance and fulfilment of international obligations and agreements, including those relating to the maintenance of international peace and security, the protection of human rights, and international economic and investment law. The clarification of the rules governing State responsibility through the codification process would guarantee to each State, regardless of its size and strength, the possibility of lawfully asserting its rights in relation to other States and, therefore, would contribute to the friendly and equitable settlement of eventual international claims. State responsibility - a complex of State duties and of conduct attributable to the State - was one of the most intricate questions of international law. The precedents were not always uniform and the fact that there were involved civil and penal as well as political and diplomatic aspects made its codification even more difficult than the codification of other topics.

16. Many representatives reaffirmed expressly their support for the approach to and treatment of the question of State responsibility by the International Law

Commission and congratulated the Special Rapporteur, Mr. Roberto Ago, on his scholarly, exhaustive and precise work on the topic. The Commission and the Special Rapporteur had rightly focused their attention on elucidating the general rules of international law relating to State responsibility for internationally wrongful acts, discarding the narrow frontiers within which the topic had been discussed in the past. In doing so, the previous confusion between the law of State responsibility proper and the law concerning the treatment of aliens had been eliminated. Reference was also made with approval to the method followed by the Commission and the Special Rapporteur consisting in carefully evaluating precedents - State practice and judicial decisions - and authoritative doctrine, in the light of fundamental principles of contemporary international law embodied in the Charter of the United Nations.

17. At one time, it was recalled, the principle of State responsibility had been invoked by strong States to exert pressure on less powerful States. In this connexion, some representatives referred, as an example, to the history of the international relations of Latin American countries and to the various claims commissions established in the past to deal with international claims made against those countries. Not infrequently, at the end of the nineteenth and beginning of the twentieth centuries, foreign citizens who had suffered minor injury in Latin American countries because of civil wars, riots or other disturbances of the public order had managed to mobilize an entire political and diplomatic apparatus in their own countries in order to demand and obtain indemnity without regard, in many instances, to the sovereign rights of the territorial State. The concept of the minimum standard of civilized societies was then advanced by States who, assuming the role of international legislators, tried to impose their own scale of values.

18. As a result, the Latin American countries were obliged, as a precaution, to include in contracts with foreigners, including legal persons, the Calvo clause whereby diplomatic protection was contractually waived and aliens were placed under local jurisdiction, so as to ensure equal treatment of nationals and aliens. That position had even taken in some countries the form of a constitutional provision. The essence of the Latin American doctrine was not, however, according to the representatives referred to above, to advocate the elimination of international responsibility or to restrict unduly that responsibility, but rather to define international rules that would prevent abuses and place inter-State relations on an equal footing and a level of mutual respect, avoiding the possibility that diplomatic protection be used as an excuse for interfering unlawfully in the domestic affairs of sovereign States. The historical position of the Latin American countries had contributed to and facilitated the evolution of the law governing State responsibility and was now beginning to be accepted even in countries where the opposition had been greatest, as well as by newly independent States. For example, it was said, the Calvo clause had been praised at the 1960 session of the Asian-African Legal Consultative Committee. Those representatives were gratified to note that the Commission in its draft articles had taken up some of the essential aspects of what had been traditionally the Latin American doctrine on the subject, although certain passages in the commentaries were not very fortunate.

19. While recognizing the importance of the progress made and the difficulties involved, some representatives expressed concern at the pace of the Commission's

work on the topic and considered that the study of the subject should be accelerated, inter alia, because the lack of a final draft on State responsibility affected adversely the preparation of drafts on other topics. Half of part I of the draft had been completed but much remained to be done. Some of those representatives expressed doubts that the time-table set forth in paragraph 143 of the Commission's report would allow the Commission to continue its work on State responsibility at the pace expected by the General Assembly. Other representatives felt that to hasten excessively the Commission's work on the subject could jeopardize the excellent results already achieved. The topic being of great magnitude and touching on many sensitive areas of international law, the pace of work could not be exceedingly rapid. Generally, the goals envisaged in paragraph 143, namely, the final completion of part I of the draft in the course of the next five-year term of office of its members, were considered satisfactory.

20. Some representatives advanced comments of a preliminary nature either on the draft as a whole or on certain specific articles, particularly on those adopted by the Commission at its twenty-seventh session. Other representatives refrained from expressing comments at the present stage on the draft articles or indicated that their respective Governments would submit observations in due course after a fuller study of the matter.

### 1. Comments on the draft articles as a whole

#### (a) Form of the draft

21. The Commission's decision to give to its study on State responsibility for internationally wrongful acts the form of a set of draft articles, thus following the relevant General Assembly recommendations, was not challenged by any representative. According to some representatives the draft articles could become a basis for concluding a convention on the subject.

#### (b) Scope of the draft

22. The limitation of the scope of the draft articles under preparation to the responsibility of States for internationally wrongful acts met with general approval. Reference was, however, made to the difficulty of drawing a clear distinction between lawful and wrongful acts, particularly because seemingly lawful acts could in fact be calculated to produce injurious consequences similar to those of wrongful acts.

23. Several representatives underlined that the preparation of a draft on responsibility for internationally wrongful acts should not prevent the Commission from considering separately the question of international liability of States for injurious consequences arising out of the performance of certain activities not prohibited by international law, as recommended by the General Assembly in its resolutions 3071 (XXVIII) of 30 November 1973 and 3315 (XXIX) of 14 December 1974. Such a draft could not but highlight the need to study likewise the responsibility

of States for the risk created by certain activities which international law had not yet definitely prohibited or by activities in the grey area between lawfulness and wrongfulness. Activities involving great risks were more and more frequent in areas such as navigation, space, nuclear power, etc., rendering it increasingly necessary to regulate international liability in case of injurious consequences resulting from those activities, a matter particularly important in connexion with a better planned and more disciplined use of the natural environment. The more specialized aspects of the question continued to be the subject of special agreements and of regulations worked out in technical gatherings, but the time had come when it was necessary to identify the essential principles in that new field of the law and formulate them as legal norms. Thus, according to those representatives, it was timely and appropriate for the Commission to use its well-known competence and creativity to study this new subject. But it was also stated by certain other representatives that the Commission had been right to confine itself, for the time being, to the question of responsibility for internationally wrongful acts (for the priority to be given to the study of international liability for injurious consequences arising out of acts not prohibited by international law (see paras. 186 to 189 below).

24. It was noted with approval that the draft articles being prepared by the International Law Commission deal with the general rules of international responsibility of States for internationally wrongful acts, that is to say, with the rules which govern all the new legal relationships that may follow from an internationally wrongful act of a State, regardless of the particular sector to which the rule violated by the act may belong. In this connexion, reference was made to the intention of the Commission to concentrate on determining the rules which governed responsibility (described as "secondary" rules), maintaining a strict distinction between that task and that of stating the rules which imposed on States obligations the violation of which might be a source of responsibility (termed "primary" rules).

25. Some representatives considered that that distinction would enable the Commission to formulate a clear set of draft articles dealing with the general theory of State responsibility for internationally wrongful acts and to cover the subject in its entirety. Without questioning the soundness of such an approach which they regarded as a consequence of the nature of the subject, certain representatives asked themselves, however, whether there would be value in greater particularization of the rules embodied in the draft articles so that some uncertainties could either be resolved or at least identified. The difficulty of drawing up detailed rules in a field in which delicate and complex problems, including problems of a political nature, arose was also referred to by certain other representatives.

26. Several representatives stressed that the Commission should not confine itself to stating that a breach of an international obligation of the State entailed its international responsibility. It was necessary to go further and distinguish clearly between different categories of breaches of international obligations in the light of the importance attached by the international community to the

respect for the obligations concerned, differentiating in particular those most serious violations normally described as "international crimes". Such a differentiation was essential to deal appropriately with the question of the legal consequences attributable by international law to a given internationally wrongful act, including the distinction between material, political, civil and criminal responsibility, the distinction between wrongful acts which gave rise only to an obligation to make reparation and those which incurred a penalty or sanction, and the distinction between cases where the legal relationships arising out of the wrongful act were established solely between the State which had committed the act and the State directly injured by it and cases where such relationships were also established with other States or even with the international community as a whole. Those representatives noted with satisfaction the intention of the Commission, referred to in paragraphs 36, 45 and 49 of its report, of studying specifically the question of international crimes and other breaches of international obligations essential to the international community.

27. Some of those representatives mentioned as an example of over-all important international obligations those relating to the maintenance of international peace and security and, in particular, obligations directed to preventing the resort to armed force in contravention of the Charter of the United Nations and other important international instruments adopted by the General Assembly, such as the Definition of Aggression, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States and the Declaration on the Granting of Independence to Colonial Countries and Peoples. Recalling the relevance of the draft Code of Offences against the Peace and Security of Mankind adopted in 1954 by the International Law Commission, particularly to clarifying the determination of the degree of gravity and the different consequences attributable to an internationally wrongful act, one representative underlined the urgency of proceeding with the completion of the work on the draft Code which had been held in abeyance since the adoption of General Assembly resolution 1186 (XII) of 11 December 1957.

28. Acts of military aggression and other crimes against peace, including the threat or indirect use of force, acts against the political independence and territorial integrity of States, like political and economic aggression, economic blockade, interference in the domestic affairs, disruption of national unity and military occupation of territories of another State, colonialism and other acts against the right of dependent peoples to self-determination, including the suppression of national liberation movements and the plundering of the natural resources of dependent territories, war crimes and other crimes against humanity, and acts against fundamental human rights, like genocide, racial discrimination, apartheid, forced expulsion of populations from their territories and exploitation of foreign workers, were referred to by some representatives as examples of acts involving, inter alia, breaches of international obligations which should not be regarded as ordinary violations. The draft articles prepared by the Commission should provide for appropriate remedies for those wrongful acts and avoid subjective interpretations by giving an objective definition of the categories of violations which the international community disapproved most strongly.

29. It was also considered that the International Law Commission should study the problem of the exhaustion of internal remedies in all its aspects. To deal with the problem only in connexion with the breach of an obligation of "result" as indicated in paragraph 45 of the Commission's report, would restrict unduly the scope of the study of the question.

30. International responsibility was considered by some representatives to be one of the areas in which the progressive development of the law had a particularly important role to play. The draft articles should therefore harmonize the lex lata with those elements of lex ferenda required by the current needs of the international community. In this respect, some representatives noted with approval that in formulating the rules set forth in chapters I and II of part I of the draft the Commission had rightly put aside certain obsolete conceptions.

31. Lastly, with regard to the temporal scope of the future codification instrument, one representative suggested that it would be desirable that the Commission include in the draft articles a provision expressly restricting its validity and applicability to future events, thus following the pattern of the draft articles on succession of States in respect of treaties. The non-retroactivity of a future convention would avoid the re-emergence of settled international disputes, would remove legal uncertainties, and would facilitate ratification of the instrument by Governments.

(c) Structure of the draft

32. The general plan and structure of the draft articles on State responsibility for internationally wrongful acts laid down by the International Law Commission in paragraphs 38 to 51 of the Commission's report was not contested by any of the representatives who referred to the matter during the discussion. The draft articles so far approved by the Commission, including the six new articles (articles 10 to 15) adopted at its twenty-seventh session, received wide support. It was pointed out that as a whole those rules were in harmony with relevant general principles of contemporary international law. Furthermore, they were based on well-established State practice and judicial decisions and supported by modern authoritative doctrine. Although some of the provisions might appear almost self-evident their inclusion in the draft articles was useful in order to dispel certain doubts and erroneous interpretations which had existed in the past. Thus, it was generally recognized that the draft articles so far adopted constituted an important substantive step towards the codification of the rules governing State responsibility for internationally wrongful acts.

33. Some representatives referred in general terms to the basic principles and trends reflected in the articles contained in chapters I (General principles) and II (The act of the State under international law) of part I (The origin of international responsibility) of the draft, as well as in the learned commentaries thereto and in the explanations developed in the introduction. The notion of "State responsibility", the concept of "internationally wrongful act", the determination of the "organs" whose conduct could give rise to State responsibility, and the enumeration of circumstances which might limit the attribution of conduct

to the State as an eventual source of international responsibility, emerging from the draft articles were noted with approval by several representatives. It was said that the question of attribution to the State of conduct of its organs or other entities empowered to exercise elements of the governmental authority had never been better defined than in the draft articles adopted by the Commission. It was also stated that chapter II as a whole embodied a set of carefully thought-out principles for determining problems of attribution of conduct to the State, a delicate question on which agreement had never been reached.

34. Most of the clarifications requested or reservations advanced, involving questions of principle, were made in connexion with matters such as the existence of "damage" as a prerequisite for responsibility; the need of defining what conduct constituted a breach of an international obligation and of distinguishing between different categories of breaches of international obligations; the incidence of questions relating to the treatment of aliens and the exhaustion of local remedies on the general rules governing State responsibility; the extent to which conduct of nationals or transnational corporations should be taken into account in determining the act of the State under international law; the advisability of exceptions to the rule attributing to the State ultra vires conduct of its organs and other entities; the adequacy of the formulations contained in the draft articles as a means of distinguishing between official and private conduct of organs and of determining when a person or group should be considered as not acting on behalf of the State; the soundness of the legal grounds justifying the principle of non-attribution provided for in articles 11 to 14; the source of an eventual responsibility of the territorial State on the occasion of acts committed within its territory by private persons or by organs of another State, an international organization or an insurrectional movement; the possibility of incitement, complicity or indirect responsibility of the territorial State in connexion with those acts; the meaning of the term "insurrectional movement" and the advisability of formulating exceptions to the rules embodied in articles 14 and 15, particularly with regard to "national liberation movements" engaged in a legitimate struggle for self-determination; and the appropriateness of the principle of continuity embodied in article 15 in cases of major social revolutions.

35. Certain representatives wondered whether the inclusion in the draft of articles 11, 12 and 13 was actually necessary. The result sought by those articles would have been achieved, in their view, by placing more emphasis on the conditions laid down in articles 8 and 9. The decision of the Commission to deal with the subject-matter of articles 12, 13 and 14 in three separate articles was noted with approval by some representatives. The saving clauses contained in paragraph 2 of articles 11, 12 and 14 received wide support, although certain reservations were made concerning the formulation of the clauses in identical terms for the three articles concerned. Reservations were also expressed on the appropriateness of including in a draft on State responsibility the provision contained in paragraph 3 of article 14 (see para. 87 below).

36. Besides, some representatives wondered whether some of the expressions used in the draft articles, such as "organ of a State", "organ of a territorial governmental unity" or "organ of an entity which is not part of the formal

structure of the State or of a territorial governmental entity, but which is empowered to exercise elements of governmental authority" should not be defined with greater precision. Thus, it was asked what would be, for example, the status under the draft articles of an autonomous public corporation set up by internal law to operate a nationalized industry; and how it should be determined when such a corporation was exercising "elements of governmental authority" and whether, in case of negligence, its conduct constituted a breach of an "international obligation" within the meaning of draft article 3 (b). The view was also expressed that before an entity could be referred to as an "organ of a State" a nexus must be established between that entity and the State in question showing that at the time of the wrongful act that State exercised some control over the acts of the entity concerned. Those representatives noted the statement in paragraph 40 of the Commission's report that the Commission would consider, at a later stage, the desirability of including in the draft definitions of some of the terms used in the articles.

37. Some representatives also noted that in chapter II of part I of the draft the Commission had provided general rules as to what could be considered as an act of State under international law, without prejudging the question of the responsibility of that State which would be determined in the light of rules to be incorporated in subsequent chapters of the draft. Viewed from that standpoint the rules of chapter II, particularly those adopted at the twenty-seventh session of the Commission, became in their view more acceptable. For example, one representative indicated that in view of the existence of military-political bloc organizations the responsibility of a State might exist even if the act of the organ of another State operating in its territory was not formally attributed to it in the sense of article 12 of the draft. He stressed also, in connexion with article 15, that in the case of a new State emerging from an insurrectional movement the determination of responsibility for acts committed in the course of that movement remained a rather complicated matter in view of the provision set forth in article 3, paragraph (b).

38. The view was expressed that, having completed the examination of chapters I and II of part I, the International Law Commission should undertake now the study of the "objective element" of the internationally wrongful act (chap. III: Breach of an international obligation), followed by the examination of the remaining two chapters of that part devoted to the participation by other States in the internationally wrongful act of a State (chap. IV) and the circumstances precluding wrongfulness and attenuating or aggravating circumstances (chap. V). Thereafter, the Commission would have to study part II (The contents, forms and degrees of international responsibility) of the draft and decide about the inclusion of a part III dealing with questions concerning the settlement of disputes and the implementation of international responsibility. Considering that existing disagreements between States on the contents, forms and degrees of international responsibility could impair further progress, one representative stated that part I, once completed, could be adopted as a separate instrument. The view that part I could be more acceptable if duly supplemented by other parts of the approved plan would appear to be implied in statements made by other representatives, although different opinions were expressed concerning the desirability of adding provisions on the peaceful settlement of disputes.

## 2. Comments on the various draft articles

### Chapter I. General principles

39. Some representatives expressly supported the provisions relating to general principles (articles 1 to 4) adopted by the International Law Commission at its twenty-fifth session. Critical remarks on some aspects of the formulations embodied in those articles, particularly in articles 1, 2 and 3, were, however, made by certain representatives.

#### Article 1

40. According to one representative, if the text of article 1 was to be interpreted as disregarding the necessity for the existence of "damage", and if that basic prerequisite for responsibility, either taken alone or as part of the internationally wrongful act, was not established, it could imply that any violation of any international obligation ipso facto entailed responsibility to the international community as a whole, a responsibility which could be invoked or implemented by any State. In view of the existing state of international relations, his Government would not be ready to recognize the relevance of a provision formulated in such a general way. The question of the existence of damage as a prerequisite for responsibility should, therefore, be given more thorough study.

#### Article 2

41. In the opinion of one representative article 2 in its current form was redundant.

#### Article 3

42. Certain representatives stated that the present definition in article 3 of an "internationally wrongful act" was not entirely satisfactory. For reasons relating to the questions referred to in paragraphs 26 to 28 above, they considered it necessary to define more closely what conduct constituted a "breach of an international obligation". The Commission's decision to seek to define the different categories of breaches of an international obligation within the context of chapter III of the draft was welcomed by those representatives.

### Chapter II. The act of the State under international law

43. Comments were made on the articles of this chapter adopted by the Commission at its twenty-seventh session (articles 10 to 15) and on article 8 adopted at its twenty-sixth session.

#### Article 8

44. One representative regretted the lack of precision of the provisions embodied in article 8. Thus, subparagraph (a) was considered positive but its scope ill-

defined. There were real links between certain States and multinational corporations making it necessary to look at certain activities of those corporations beyond national boundaries as a source of responsibility for the State which protected and supported them. Subparagraph (b) went too far. The persons to whom the provision referred were not properly speaking officials of the State but persons exercising elements of governmental authority under exceptional circumstances which were not defined. Under the provision, in the event of an act of aggression, the State which was the victim could become responsible for the conduct of authorities imposed on it by the aggressor State. Attention was called to the explanation given in paragraph (2) of the commentary to article 11 concerning the scope of the rules embodied in article 8.

Article 10

45. The rule attributing to the State the conduct of its organs - or of organs of other entities empowered to exercise elements of governmental authority - acting outside their competence according to internal law or contravening instructions concerning their activities was expressly endorsed by most of the representatives who referred to the matter. Such an important rule, which supplemented articles 5 and 7, would prevent States from easily evading their international responsibility by alleging that certain actions or omissions of those organs were contrary to the provisions of their internal law. The reason behind the doctrine attributing to the State ultra vires conduct of such organs was that the stability and security of international relations required something sounder than the rules of competence set by internal law, which could be changed by the State itself, as expedient and convenient, simply by observing its own proper constitutional procedures. The competence of those organs was relevant to the internal law, but not to the international law governing State responsibility. Other States were not expected to know or inquire about that competence. Those representatives commended the Commission for having discarded obsolete conceptions of the nineteenth century and having formulated, in article 10, a rule which was necessary, reasonable, in line with current needs of the international community and in full conformity with modern State practice and judicial decisions.

46. One representative was of the opinion that the reference made in the article to "territorial governmental entities" was unclear and unnecessary in the light of other provisions of the draft. But the view was also expressed that such a reference was required in order to be consistent with the general economy of the draft, and particularly with the provision contained in article 7, paragraph 1.

47. Looking at the matter from the standpoint of State responsibility for breaches of rules relating to the treatment of aliens, one representative considered that, in its present formulation, article 10 was unacceptable. The State did not have to assume international responsibility for the conduct of organs acting outside their competence since the victim, even if he was an alien, had the right of access to local remedies. States should not be obliged to protect the rights of aliens more than those of its own nationals. Moreover, international responsibility of the State was entailed with regard to damage or harm caused to aliens only as a result of actions contrary to the provisions of

treaties in force. International law should protect the sovereignty and independent development of decolonized countries against imperialist interferences and should not itself be identified with the practices of capital-exporting countries or with the protection to foreign investors.

48. Other representatives who endorsed the principle embodied in article 10, noted that the "international responsibility" of the State would be incurred only if it was established that the conduct attributable to it as an act of the State constituted a "breach of an international obligation" and that the existence of such a breach could not be established, in regard to obligations relating to the treatment of aliens, until the injured person had exhausted local remedies. This would protect the State whose organ had acted outside its competence against possible abuses of article 10 by a prospective claimant State.

49. Another representative, who expressed doubts about the present formulation of article 10, noted that the State was responsible only when the official concerned acted within the scope of his office. The essential problems to be considered in that regard were whether the organs of the State had been the means by which the damage was caused and whether the acts performed were within the official competence of the person performing them.

50. While supporting the principle embodied in article 10, certain representatives considered that as formulated it was too categorical. Thus, one representative suggested replacing in the present text the word "considered" by the word "presumed", because the organ in question, for instance in the case of multinational corporations, could be under the control of some entity other than the State concerned. Another representative considered that the Commission should review its position with regard to the inclusion in the article of a limitation based on the concept of "manifest lack of competence". In his view, the need to limit the scope of the principle embodied in article 10 had been recognized in State practice, international judicial decisions and doctrine, since the basic idea was that, if the lack of competence of the organ had been manifest at the time of the commission of the act, the injured person should have been aware of it and could thus have avoided the injury.

51. Several representatives, however, commended the Commission for having excluded from the rule of article 10 an exception based on the "manifest lack of competence" of the organ concerned. The inclusion of such an exception would involve a dangerous weakening of the principle embodied in the article. In the field of internationally wrongful acts it would be inappropriate to make a distinction between "manifest lack of competence" and "apparent competence". In such a context, the presumed or inferred state of mind of the victim was irrelevant. Furthermore, negation of the international responsibility of the State on the basis of a "manifest lack of competence" of the organ concerned would entail the negation of any liability vis-à-vis the victim, who by definition remained without means to obtain redress. On the other hand, if the conduct in question was so strikingly outside the competence of the organ as to constitute a simple act of private individuals, article 11 concerning the non-attribution to the States of the conduct of persons not acting on behalf of the State would apply. Certain representatives indicated that their Governments would carefully study the

criterion of the "manifest lack of competence" in the light of the principle embodied in the article.

52. Some representatives were of the opinion that certain expressions in the article should be improved in order to avoid ambiguous interpretations. In this connexion several remarks were made about the meaning and need of the words "such organ having acted in that capacity". Thus, it was said that such an expression as the only criterion to be applied in attributing ultra vires conduct to the State would encounter difficulties in practice. It was not always easy to establish in a specific case whether the person had acted as an organ or as a private individual. In the case of certain individuals representing organs of the State it would be almost impossible to dissociate official capacity from private capacity. Those practical difficulties could open the way to abuse because it could quite easily be argued, in any given case, that the person in question had acted solely in a private capacity and not as an organ of the State or the other way around. Representatives sharing those views suggested, however, different solutions. Some would appear to be inclined to delete from the article the words in question. Others, on the contrary, considered that far from being deleted those words should be strengthened by redrafting them in more severe and clear-cut terms. It was also stated that the present text of article 10 could be lightened by couterposing the private conduct of organs of the State to that of private persons in a separate subparagraph of article 11.

53. Finally, one representative indicated that the words "in the particular case" should be replaced by a more general wording that would preclude any difficulty of interpretation.

Article 11

54. Several representatives stressed the usefulness of including in the draft an article stating the principle of non-attribution to the State of the conduct of a person or a group of persons not acting on behalf of the State. The State could not be held responsible for the conduct of individuals acting in a private capacity. Long-established in international law, the principle embodied in article 11 was, according to those representatives, a necessary corollary of the provisions set forth in articles 5 to 10 of the draft.

55. Some representatives considered acceptable the criterion stated in the words "not acting on behalf of the State", particularly in the light of the existence of some borderline cases. As formulated, the criterion was wide enough to cover different kinds of persons, including "parastatal" or quasi-public legal persons, which were not regarded under municipal law as private persons, as well as natural persons who possessed the status of organs of the State, or of other entities mentioned in article 7, but that in the case in question acted in their private capacity. Other representatives underlined the difficulty of determining, in practice, when a person or a group of persons was "not acting on behalf of the State". It was possible to draw a correct conclusion in the light of the statements contained in the commentary to the article or by reading paragraph 1 of article 11 in conjunction with other articles of the draft, particularly with articles 5, 7 and 8. This would have, however, the danger of involving subjective interpretations in a matter affecting the entire scope of article 11.

56. One representative, who underlined the relationship between article 11 and article 8, suggested that paragraph 1 of article 11 be reformulated as follows: "The conduct of a person or a group of persons purporting to act on behalf of the State shall not be considered as an act of the State under international law if it is established that such a person or group of persons was not in fact acting on behalf of the State". Another representative pointed out that the words "not acting on behalf of the State" related to the conduct of persons not acting on behalf of the State "either de facto or de jure". Certain representatives considered that the expression "on behalf of the State" should be understood as meaning in the "exercise of governmental authority".

57. In this connexion, the view was expressed that paragraph 1 of article 11 was intended to make clear the rule that acts of legal persons having "parastatal" status, as well as other entities which were public but which had not been empowered to exercise elements of the governmental authority, or which had been empowered only in a sector of activity other than that in which they had acted, were not to be considered as conduct of the State under international law. Two representatives stated that, in general, the attribution of conduct to the State was justified in cases where the persons in question would be entitled to claim State immunity if brought before the courts of the territorial State. But while according to one of those representatives a person was not acting on behalf of a State if he was acting on behalf of a company or other private body totally or partly owned by that State, the other was of the view that persons who acted for companies could be said to be acting for the State if the company was owned or controlled by the State.

58. One representative emphasized that in the progressive development of international law the question of State responsibility for the activities of private companies and transnational corporations was being raised with increasing frequency. It was no secret that national and transnational corporations were commonly used as a means of supporting imperialist policies of intervention in the internal affairs of sovereign countries and the economic plundering of peoples. Under the influence of socialist and developing countries, international law was now being developed on the progressive principles inspired by the Great October Revolution and the historical process of the decline of colonialism.

59. Several representatives expressed support for the saving clause contained in paragraph 2 of the article. The two paragraphs of the article reflected the dichotomy between the two legal relationships involved, one affecting private individuals and pertaining to the internal legal order, and the other affecting the State and pertaining to the international legal order. A distinction should always be made in this regard between the act of private individuals and the eventual collateral act of the State. The latter, not the former, was the eventual source of responsibility for States, the so-called doctrine of "complicity" of the State having today very little support. Private conduct of persons could not in any way be attributed to the State, directly or indirectly, as a source of international responsibility, but such private conduct might nevertheless be a catalyst of internationally wrongful acts of the State. The State might have failed to prevent the acts of the private individuals concerned, or to punish those individuals, or to dissociate itself from the acts in question, or might have tacitly encouraged

them, and by doing so it might have committed a breach of one of its international obligations. In such events, the responsibility of the State did not derive from the act of the private persons concerned, but emanated from an internationally wrongful act or omission on the part of the State itself. An express saving clause, as the one provided for in paragraph 2 of article 11, would prevent a State from evading its international responsibility for such internationally wrongful acts or omissions adopted on the occasion of a given private conduct and, therefore, would introduce greater safety in international relations.

60. One representative pointed out that the conduct of a person or a group of persons, referred to in paragraph 1 of article 11, must be presumed to take place in the territory over which the State exerted exclusive control. Consequently, the State might be presumed to be able to perform its international duties in cases where it was under an obligation, under general international law or under special agreements, to prevent unlawful acts by private persons, to protect potential victims or, if it failed to do so, to arrest the offenders concerned and bring them to justice. In his opinion that question would deserve close attention and further study.

61. Another representative pointed out that the report had failed to mention the danger of certain unduly wide definitions of responsibility which the narrower definitions had been designed to counteract. In his view, the problem lay in the fact that the text of article 11 did not clearly set forth the principle of non-liability for private acts, though admitting that the responsibility of the State could be entailed in cases falling under paragraph 2 of the article.

62. Finally, it was noted with regret that no article of the draft treated expressly the question of riots, mass demonstrations and other cases of public disorder involving group violence which a State might have difficulty in controlling. In this respect, it was also stated that very often States did not hesitate to use riots and mass demonstrations for the realization of their political objectives and that on such occasions, and to the extent that they violated their international obligations, States should be held responsible.

Article 12

63. It was pointed out that the provision in paragraph 1 of article 12 served to underline that there were no territorial limitations regarding the principle of the attribution to a State of the conduct of its organs acting in that capacity. It was important to protect the rights of sovereign States, in particular those of small nations, to proclaim in no uncertain terms that a State was responsible for its own acts even if those acts had been committed in the territory of another State.

64. In the modern world, it was stated, powerful nations had committed acts in the territory of other States which were detrimental to third States and had subsequently denied their responsibility by invoking the fact that such acts had not been committed in their own territory. On the other hand, it was likewise said, that there still existed certain forms of foreign interference in a State

from the territory of another State which benefited by the tolerance or even co-operation of the authorities of the latter State. Reference was made by certain representatives to the need of studying further the question whether there was any presumption as to liability of the territorial State or whether in situations as the ones envisaged in article 12 the territorial State could be presumed not to be fully able to exert exclusive control over its territory and hence comply with its international duties in respect of the unlawful conduct of organs of another State.

65. Recalling that the territorial State could incur international responsibility in connexion with acts committed in its territory by organs of another State, some representatives emphasized that paragraph 2 of article 12 was a vital and integral part of the rule as a whole. In their view all aspects of this question should be further clarified. The responsibility which a State might incur by its act, omission, action, negligence or passive behaviour in relation to a wrongful act by the organ of a foreign State in its territory could in some circumstances be comparable to the responsibility of the foreign State itself. For instance, the territorial State should be responsible if it had agreed to or co-operated in the wrongful act of the organ of the foreign State. Under certain circumstances undue passivity of the organs of the territorial State could be regarded as or assimilated to complicity. The possibility of indirect responsibility of the territorial State or of joint wrongful conduct by the State to which the organ belonged and the territorial State concerned should not be altogether excluded.

66. Some representatives welcomed the decision of the International Law Commission to devote to all those questions a separate chapter (chap. IV) in part I of the draft. Such a chapter tentatively entitled "Participation by other States in the internationally wrongful act of a State" was supposed to deal with matters like assistance, complicity, incitement and indirect responsibility of a State for the internationally wrongful act of another State. Those representatives underlined the particular importance of some cases of obvious complicity, for example, where a State knowingly consented to the use of its territory by another State for the perpetration of acts of aggression or other internationally wrongful acts against a third State, a case expressly referred to in article 3, subparagraph (f) of the Definition of Aggression adopted by the General Assembly in its resolution 3314 (XXIX) of 14 December 1974. In such cases, the territorial State must bear responsibility, in any event political responsibility, for having put its territory at the disposal of another State for the commission of such wrongful acts.

67. Some representatives expressed the opinion that a provision like the one contained in paragraph 1 of article 12 was useful because it negated the old notion that a State could be held responsible for everything that occurred within its territory. It clarified the rule provided for in article 9 by distinguishing between situations in which the territorial State had no control of the acts or omissions of the organs of another State (article 12, para. 1) and situations involving conduct of organs "placed at the disposal" of a State by another State (article 9).

68. It was stated that article 12 should take into account the possibility that conduct of organs of entities empowered to exercise elements of the governmental

authority might take place in the territory of another State, without an action or omission of an organ of the State properly speaking. The reference in paragraph 1 of article 12 to "an organ of a State" would need therefore to be supplemented by mentioning likewise "an organ of an entity empowered to exercise elements of the governmental authority". One representative expressed doubts about the need of the words "in that capacity" in paragraph 1 of article 12.

69. Finally, it was felt by one representative that the subject-matter of article 12, as well as of article 13, could have been dealt with together with the provisions relating to the conduct of persons not acting on behalf of the State (article 11) without the need to set up a specific category of provisions. The view that it would be dangerous to draw too close a parallel between the situations contemplated in articles 12 and 13 and those envisaged in article 11 was also expressed by another representative.

Article 13

70. Few comments were made on the provision contained in article 13. Some representatives endorsed expressly that provision. Although precedents were not abundant some already existed in practice and in international agreements, such as certain headquarters agreements, and in any case no one could deny that international organizations as subjects of international law could be considered responsible for an internationally wrongful act of its organs. Other representatives underlined that the provision in article 13 merited closer study. Any organ of an international organization situated in the territory of a given State must act in accordance with the constituent instrument of the organization concerned, comply with the agreements under which it operated and respect the internal law of the receiving State. The receiving State, in turn, was obliged to assist and co-operate with the international organization and its organs in performing functions laid down in the constituent instrument of the organization or in other relevant agreements.

71. One representative pointed out that certain clauses in technical or other assistance agreements whereby a beneficiary State assumed responsibility in the event of claims by third parties against the international organization concerned, referred to in the commentary, would appear to constitute an exception to the rule embodied in article 13. Such clauses would seem to provide for indirect responsibility or responsibility for the conduct of others. He questioned to what extent it was fair to apply indirect responsibility to developing beneficiary States as a condition for obtaining technical assistance. The Commission should study the matter and offer solutions based on justice and the juridical equality of States.

72. Another representative looked forward to a full study by the Commission and the Sixth Committee of the various aspects of relations between international organizations, participating members and host States. It should be a study in depth exceeding the limited scope of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

Articles 14 and 15

73. Several representatives referred to the criteria applied by the International Law Commission with regard to articles 14 (Conduct of organs of an insurrectional movement) and 15 (Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State). Some of the remarks made were general in character and as such of relevance to the two articles.

74. Some representatives expressed the opinion that in considering, for the purpose of the present draft, questions of attribution or non-attribution to the State of conduct of "insurrectional movements" it was correct to disregard the political or ideological characteristics of such movements. In this connexion, it was said that the political or ideological nature of insurrectional movements should have no bearing whatsoever on the attribution of conduct as a possible source of international responsibility. If such movements caused damage by acting contrary to international law, reparation must be made regardless of the political goals of the movement. The purpose of codification, especially in the area of State responsibility, was not to pursue short-term goals but to restate and develop the law in such a way that it could govern international relations over a long period of time. It would therefore be inappropriate to inject political or ideological values into international rules, since such values changed rapidly with time and were difficult to define properly.

75. Other representatives emphasized that the legitimacy of the struggle of an "insurrectional movement" could not be disregarded and that the formulations embodied in articles 14 and 15 should take into account that consideration. According to those representatives, those articles ought to be further examined by the Commission, particularly with a view to defining more exactly the meaning of the term "insurrectional movement", by making the necessary distinctions. Such distinctions would serve afterwards as a criterion for deciding when a given conduct was to be considered as an act of the State as well as when it should be considered an internationally wrongful act entailing international responsibility. "National liberation movements" were singled out by several representatives as a kind of movement which should be distinguished from "insurrectional movements" proper. In the view of these representatives "national liberation movements" struggling against colonialism, apartheid or foreign domination exercised a legitimate right - the right of peoples to self-determination - recognized by international law as well as in instruments like the Charter of the United Nations. A "national liberation movement" which had rid its country of colonialism should not be equated, with regard to the criteria governing responsibility for an internationally wrongful act, with an insurrectional movement which had overthrown an established Government. Some of those representatives added that a fascist coup d'état could not be treated in the same way as a national liberation movement against colonialism or fascism, or a movement fighting for social revolution.

76. The view was also expressed that while a justifiable exception could be made for "national liberation movements" struggling against a colonial régime that exception should not be generalized. It was not justified when the acts of insurrectional movements were directed against a country constituted as a sovereign and independent State.

77. Other representatives supported the principles embodied in articles 14 and 15, or made reservations concerning certain aspects of the formulations adopted by the Commission for those articles, without entering into the questions described in paragraphs 74 to 76 above.

78. Finally, it was also said that the issues raised in articles 14 and 15 could perhaps be dealt with more properly in the context of the topic of succession. It was not very logical to assign responsibility to insurrectional movements which acceded to power for acts committed during the struggle, while insurrection movements which failed escaped all responsibility.

Article 14

79. The importance of the provisions embodied in article 14 was underlined by several representatives. It was pointed out that the article covered either situations in which the territorial State existed side by side with the insurrectional movement or situations in which the insurrectional movement, having been suppressed by the territorial State, had ceased to exist. It was also stated that article 14 dealt only with those insurrectional movements which had international personality and were subjects of international law, movements which did not meet that criteria being covered by article 11.

80. Certain representatives commended the Commission for having put aside the problem of the requirements imposed by international law for a movement to be classified as an "insurrectional movement" under that law and having limited itself to stating in paragraph 1 of article 14 that the conduct of an organ of those movements shall not be considered as an act of a State by reason only of the fact that such conduct had taken place in the territory of that State. Other representatives stated that the Commission should spell out those requirements by providing a flexible definition susceptible of being applied to the various types of insurrectional movements intended to be covered by the article. Thus, it was pointed out that some explanations contained in the commentary were not sufficiently explicit and, therefore, left the matter unsettled. It was also added that the commentary followed too closely traditional narrow definitions of the concept of "insurrectional movement" by emphasizing certain elements such as recognition and status of belligerent. Those elements were, however, singled out by other representatives as distinguishing features of an insurrectional movement enjoying international personality.

81. Some representatives stressed that the principle of non-attribution embodied in paragraph 1 of article 14 was justified because the existence of the movement was per se ample proof of the inability of the State to control the territory under its jurisdiction, specially if the movement had acquired sufficient dimensions to be recognized as having international personality. It was also stated that the principle of non-attribution to the State of the conduct was of a nature somewhat similar to the conduct of private persons, particularly if the movement did not enjoy international personality.

82. While recognizing that as a general rule the principle in paragraph 1 of article 14 was well-founded, certain representatives wondered whether, on the basis

of considerations described in the commentary, some exceptions should not be recognized (for instance, in the case of certain administrative acts performed by organs of an insurrectional movement). In their view, the matter should be studied further and perhaps some specific relevant provisions would need to be added to the text of the article itself. Reference was made in this connexion to the practical importance of the question of the effect of the acts of de facto rebellious authorities on the creation or discharge of State obligations, for example in cases where organs of an insurrectional movement had required payments, by taxation or otherwise, from aliens.

83. So far as paragraph 2 of article 14 is concerned, some representatives underlined the exceptional nature of the responsibility of the territorial State envisaged in that provision. The very existence of the insurrectional movement was the best proof, as indicated above, of the inability of the State to control its territory. However, in exceptional cases the territorial State could incur international responsibility as a result of conduct of its own organs adopted on the occasion of acts of an insurrectional movement. Paragraph 2 of the article made provisions for those cases, namely for cases in which the State failed to fulfil its obligations of vigilance and protection as may be required by international law or international agreements. To avoid any ambiguity as to the meaning of the saving clause one representative suggested to add the words "unless it provides otherwise" at the end of paragraph 1 of article 14. Such words would cover all exceptions to the principle of the non-attribution to a State of the conduct of an organ of an insurrectional movement.

84. The need of distinguishing between responsibility for failure to exercise vigilance and to prevent or repress a simple revolt and responsibility as a result of inability to control a well organized and firmly established insurrectional movement was underlined by certain representatives. In the first case, it was said, the State should assume responsibility, while in the second case the insurrectional movements were to a certain extent capable of doing internationally wrongful acts of their own and should be held directly responsible for the conduct of its organs, although that did not necessarily imply recognizing that they possessed international personality.

85. It was likewise stated that article 14 should be reviewed in the light of contemporary experience. As formulated the provisions of the article covered certain cases of State responsibility on the occasion of activities of insurrectional movements but not all cases. For example, present provisions did not deal with situations in which the relations between the insurrectional movement and the State were so close as to be tantamount of State's complicity in the activities of the movement. When such complicity was established the acts of an insurrectional movement became acts of entities acting in concert with the State. Article 14 should therefore be revised in the light of those considerations or a new article added to cope with situations of that kind.

86. Another representative indicated that article 14 tried to deal with two different kinds of situations, namely, (a) with the conduct of organs of an insurrectional movement operating from within the territory of the State against the government of that State and (b) with the conduct of organs of an insurrectional

movement operating from within a State against the government of another State. So far as situations under (a) is concerned, it could be presumed that the State was not able to exert control on its territory and, in any event, injury done to aliens in those situations may merely be one of the consequences of the conduct of the organs of the insurrectional movement. In the case of situations under (b) the very aim of the conduct of the organs of the insurrectional movement was to do injury to a foreign State or its citizens and the presumption of the inability of the territorial State to control the activities of the insurrectional movement was not necessarily the same in all cases as in situations under (a). In the light of those considerations, the said representative concluded that paragraph 2 of article 14 dealt adequately only with situations under (a) and that the Commission should therefore consider the possibility of drafting a separate article to deal with the situations envisaged under (b). Another representative indicated that article 14 should be redrafted as to make it clear that it applied only to insurrectional movements whose acts were directed against the government of the territory in which the movement was established.

87. Certain representatives considered that the provision in paragraph 3 of article 14 did not fall within the scope of a draft devoted to "State responsibility". "States" and "insurrectional movements" were not the same type of international legal persons and did not have the same international rights and obligations. Two concrete suggestions were made. According to one the paragraph should be deleted. According to another the paragraph should be replaced by a general provision in a separate article serving as a disclaimer to the draft as a whole. Other representatives supported paragraph 3 of article 14 as formulated.

88. Finally, some representatives wondered whether, given the very nature of insurrectional movements, it was possible to speak of "organs" of those movements as did article 14. The "organs" of an insurrectional movement were not defined by law as in the case of States or international organizations. It would be safer to speak simply of the insurrectional movement rather than to refer to its "organs".

Article 15

89. Some representatives supported expressly the present formulation of article 15 which they considered to be in keeping with State practice and authoritative doctrine. Based on the principle of continuity, the rules embodied in the article were particularly important to preserve legal security and continuity in international relations following the success of an insurrectional movement.

90. For the reasons indicated in paragraph 75 above, some representatives stressed the need of making a distinction between "insurrectional movements" and "national liberation movements" struggling for self-determination. In their view, a provision should be added in article 15 or another article of the draft exonerating "national liberation movements" from responsibility for acts committed during their legitimate struggle. They should not be held

responsible for acts committed during their struggle against colonial régimes which did not grant them the right to self-determination either during the fighting or subsequently, specially where all peaceful means of removing colonial yoke had failed. It should be clear that States which denied their population the right to self-determination were responsible to third States for the acts of the national liberation movements concerned. It was also added, in view of the primacy of the legal rules set out in the Charter of the United Nations, that a third State which supported a people fighting to exercise its right to self-determination in accordance with the Charter incurred no responsibility with regard to colonial or racist régimes which denied that right to their people. The history and nature of the "insurrectional movement" was therefore an important factor that should be taken into account by the Commission. It should also be born in mind that when they were victorious insurrectional movements generally made a declaration concerning the responsibility which they were prepared to assume.

91. The point was made that it was unrealistic to attribute international responsibility retroactively to the new government or State for internationally wrongful acts committed by the organs of a successful insurrectional movement prior to its victory. Insurrectional movements did not constitute always a homogeneous entity and could not at all times exercise effective authority and control over its organs in the course of the insurrection. Furthermore, the conditions of the fighting obliged those movements sometimes to use exceptional means to achieve their objectives. It was certainly important to ensure stability and continuity in international relations, but it was not the only criterion which should be taken into account. The principle of effective authority and control, recognized in article 14, had also a role to play in the context of article 15.

92. Doubts were expressed by one representative concerning the conclusion reached by the Commission that the principle attributing to a government resulting from a successful revolution the injurious acts committed earlier by the revolutionaries should also apply to the case of a coalition government formed following an agreement between the "legitimate" authorities and the leaders of the revolutionary movement. In his view, from a legal point of view a situation of that kind was analogous to the case in which the legitimate government, after having overcome the insurrection, granted an amnesty to the insurgents and asked their leaders to participate in the government.

93. Some representatives supported the rule in the second sentence of paragraph 1 according to which the acts of organs of the preceding organization of the State would continue to be attributed to the State after the triumph of the insurrectional movement and the establishment of a new government. Certain representatives referred to the possibility of making an exception for acts of the pre-existing government directed to put down the insurrection itself and, therefore, the establishment of the new government.

94. One representative expressed the view, noted in the commentary to the article, that in certain exceptional situations, such as major social revolution brought about by a successful insurrectional movement, the wrongful conduct of the former government could not be attributed to the new State which resulted from the revolution. That qualification was justified, since in such exceptional cases the rationale of de facto continuity, which lay behind the general rule, no longer held true. For instance, if insurgents overthrew a pre-existing racist and authoritative government in order to introduce democracy and equality, it would surely not be claimed that they were responsible for acts of genocide or other gross and large-scale violations of human rights of foreigners perpetrated by the pre-existing government. The Commission should try to define criteria to cover such cases by pointing to some basic and objective requirements that a change of government should fulfil in order for it to fall within the exception. Such an exception might leave the victims of internationally wrongful acts committed by the pre-existing government without redress but that irremediable drawback was common to all systems of law. Injured persons were also left unprotected in the event of the insurgents' failure so far as the wrongful acts committed by insurgents were concerned.

95. Recalling that States were permanent while governments were transitory, another representative pointed out that the concept of an insurrectional movement as successor could weaken the responsibility of the State for acts of the predecessor government. It could always be argued that a new State, and not a new government, had been formed as a result of a major revolution, in order to evade the international responsibility incurred by the State before the triumph of that revolution. In practice, exceptions to the rule attributing responsibility retroactively to the new government could nullify the effect of the rule or lead to problems having nothing to do with the law.

96. Finally, it was stated that paragraph 2 of article 15 would be particularly important where as a result of the triumph of an insurrectional movement a new State was established by secession or decolonization. The acts of the organs of the pre-existing State were in no way attributable to the new State which had separated from it. Any succession problem which could eventually arise did not fall within the scope of the draft on State responsibility and should be considered in the context of the topic of succession of States in respect of matters other than treaties.

### C. Succession of States in respect of matters other than treaties

97. Several representatives congratulated the Special Rapporteur, Mr. Mohammed Bedjaoui, on his successful work on this subject and expressed general approval of the approach followed by the Commission. On the other hand, certain representatives felt that there had been little progress on the subject during the past session of the Commission despite the detailed report of the Special Rapporteur.

98. The difficulties in drafting the new articles on the topic were underlined by several representatives since, in addition to the very complexity and broadness of the subject, the State practice, judicial decisions and legal writings were neither sufficient nor uniform. Strong doubts were expressed by one representative as to whether an acceptable compromise could be reached in the near future on a subject with such delicate political implications.

99. Some representatives stated that the Commission should speed up its work on the subject of succession in respect of matters other than treaties and submit a complete set of articles as soon as possible. Such action was important, particularly in view of the current stage of the decolonization process and of the fact that work on the draft on succession of States in respect of treaties had almost been completed. On the other hand, other representatives were of the opinion that the draft should not be finalized until the remaining points in the question of succession in respect of treaties were cleared up.

### 1. Comments on the draft articles as a whole

#### (a) Scope and structure of the draft

100. It was suggested that the expression "matters other than treaties" should have a definition which was not merely theoretical but of practical use to States.

101. Commenting on articles 7 to 9 and 11, where the rules were accompanied by the phrase "unless otherwise agreed on or decided", one representative expressed reservations about attempting to deal with complex matters by the application of rules drafted in very general terms, particularly as they might apply in situations in which there was no opportunity for agreement between the predecessor and successor States.

102. It was suggested that, in its further work on the topic, the Commission should treat it with due regard for the principle of State sovereignty, for any attempts to use force, aggression or occupation in order to bring about succession were contrary to the United Nations Charter and international law. It was further stated that the consideration of the question of acquired rights should not be indefinitely deferred since it was a problem which arose in connexion with all aspects of State succession.

#### (b) Relationship between the draft articles on succession of States in respect of matters other than treaties and those on succession of States in respect of treaties

103. Many representatives underlined the close relationship between the questions relating to succession in respect of matters other than treaties and those concerning succession in respect of treaties. Several of them stressed that the two subjects should be dealt with on the basis of the same principles. For this

reason, according to certain representatives, it was preferable for the Commission to make substantive progress on the former questions before the latter questions were definitely settled. The opinion was also expressed that the Commission should prepare a unified text covering both subjects. Some representatives stated that the draft articles on succession of States in respect of matters other than treaties were complementary to those on succession of States in respect of treaties.

## 2. Comments on the various draft articles

### Article 3

104. Approval was expressed by certain representatives of the definition of the term "successor State" provided for in subparagraph (c) of article 3.

### Articles 5 to 7

105. Supporting draft articles 5 to 7, which had been adopted by the Commission in 1973, one representative stated that the principle of extinction of the rights of the predecessor State on the date on which the successor State assumed territorial sovereignty was an irrefutable one, and it should also be applied to property situated in foreign countries.

### Article 9

106. Many representatives either fully endorsed article 9 or stated that it did not present major difficulties. It was said that the rule contained in that article was in accordance with generally accepted State practice and well based in theory.

107. Certain representatives expressly supported the residual nature of the rule provided for in the article which left room for special arrangements. One representative, however, expressed reservations to such formulation (see para. 101 above).

108. As to the Commission's decision to make no distinction between property in the public domain and property in the private domain, one representative said it followed the standard State practice, while another suggested that the Commission should give further thought to such assimilation.

109. It was pointed out that it was not clear whether the words "or decided" used in the article referred to a decision by the parties concerned under the draft articles themselves or by some other international authority or tribunal, and that their deletion would therefore strengthen the article. It was also suggested that the reference to "property" should be made more specific so as to clarify not necessarily the public or private nature of such property, but its physical nature, since, for example, means of transport or other movable assets could be situated outside the territory at the time of succession.

110. Many representatives expressed reservations regarding the non-application of the article to State property situated outside the territory to which the

succession related. Some of them suggested that the article should be supplemented by provisions relating to State property situated outside the territory of the successor State and encouraged the Commission to pursue the matter further. This would be useful, according to a delegation, if only in the form of a general statement which acknowledged the right of the successor State to such assets as were attributable to or associated with the administration of the territory to which the succession of States related. Concern was expressed about a situation where the administering Power might transfer movable property to the metropolitan country shortly before the territory achieved independence in order to deprive the future new State of its rights.

111. The view was expressed that the subject-matter of article 9 should be treated from the point of view not only of the creditor, but also of the debtor.

112. With regard to the place of the article, it was suggested that it might more appropriately be inserted after article 5 since it would make clear the basis for the more detailed provisions of articles 6 to 8.

Article 11

113. Certain representatives said that article 11 was acceptable since it supplemented article 9; some others stated that although they had no difficulty in the substance of that article they doubted the necessity of including it in the light of articles 5 to 9. Still certain others expressed reservations about the basic approach of the article. It was pointed out that debt should not be included as inheritable property and that the Commission should not deal with the question solely from the viewpoint of creditor States. It was also stated that the rule in article 11 could render it more difficult for a predecessor State and a successor State to conduct negotiations on the question of debts based on other principles.

114. The view was expressed that the Commission acted wisely in postponing a final decision on the substance of the article because of the vastness and complexity of the subject and the existence of other question yet to be settled. It was mentioned, for example, that the nature of the succession could play a very important role and that the different kinds of debts would probably need to be considered separately.

115. With regard to some of the expressions used in the article, it was suggested that the words "or decided" should be deleted for the same reason stated in paragraph 109 above in connexion with article 9. It was also suggested that the deletion of the concept of "sovereignty" and "activity" would make the article clearer. The word "pass" was criticized as being too vague. One representative supported certain members of the Commission who would prefer to replace the words "pasarán al Estado sucesor" in the Spanish text by "pasarán a beneficiar al Estado sucesor" or by "serán transferidas en beneficio del Estado sucesor".

116. It was further suggested that it was necessary to specify the legal nature of the acquisition of debts (créances) of a predecessor State by a successor State and to determine what kind of State debts passed to the successor State. Furthermore, not only State debts but also the obligations associated with the debts in question should be mentioned.

Article X

117. Several representatives expressed their general agreement with article X, some of them attaching particular importance to it. It was pointed out that the provision clearly related also to the validity of contractual debts assumed with respect to a third State.

118. The view was expressed by certain representatives that the words in brackets "or the successor State as the case may be" should be deleted since the property, rights and interests of the third State existed before the date of the succession of States and therefore only the law of the predecessor State should be taken into account in determining their ownership. It was also pointed out that the reference merely to the internal law of the successor State might be insufficient; an appropriate reference to international law might be needed. It was suggested that instead of referring to internal laws, which might give rise to misunderstanding, the formulation "in the territory to which the succession of States relates" used in article 9 might be more consistent. It was further suggested that the article should cover properties situated outside the territory to which the succession related.

119. One representative particularly welcomed the Commission's decision to discard the proposed exception for cases in which the rule of respect for the property of third States could be contrary to the public policy of the State because the concept of public policy could change from State to State and could be altered even by the internal law of the State at its convenience. Such exceptional situations could normally be dealt with individually through specific agreement between the States concerned. Another representative underlined the importance of not making such exceptions since they would be out of place in articles relating to succession, if only for the reason that the legal system of the successor State, and consequently the concept of public order, emerged after the succession when the successor State began to exercise its authority over the territory in question.

## D. The most-favoured-nation clause

120. It was generally recognized that the International Law Commission had made substantial progress at its twenty-seventh session in the consideration of the most-favoured-nation clause, on which 14 additional draft articles had been adopted. There was general agreement with the conclusion reached by the Planning Group established in the Enlarged Bureau of the Commission that work on the most-favoured-nation clause had reached the point at which it should be possible to complete the set of articles in first reading at the Commission's 1976 session for submission to the General Assembly at its thirty-first session. The Special Rapporteur on the topic, Mr. Endre Ustor, was congratulated on his valuable contribution to the Commission's achievement.

121. It was noted that the Commission's work on the topic represented virtually the first attempt made at codifying that aspect of international law. There was urgent need for a special study aimed at the codification and progressive development of international law in that area, even if the clause was a part of the

general law of treaties. As the Commission itself had emphasized, the clause came entirely within the purview of the general law of treaties and the draft articles concerning the clause presupposed the existence of the Vienna Convention on the Law of Treaties, to which they were to be considered a supplement. The close relationship between the most-favoured-nation clause and the Vienna Convention made the clause well-suited for codification. The Commission's work would greatly help to clarify the often controversial situations arising out of the application and interpretation of the clause in international relations.

122. The importance of the clause not only in the domain of international trade but also in other fields of international relations (economic, social, legal, etc.) was generally acknowledged. The aim of the clause was to establish and maintain at all times fundamental equality without discrimination among all the countries concerned. In the view of some representatives the clause was an important instrument for enhancing commercial relations and encouraging economic co-operation among countries with different economic and social systems and at different stages of development, and for strengthening international peace and security. This had been underscored in what those representatives regarded as one of the most significant political documents of recent times, namely, the Final Act of the Conference on Security and Co-operation in Europe.

123. Many representatives commented on the draft articles on the most-favoured-nation clause provisionally adopted so far by the Commission. Those comments related to the draft articles as a whole, to their specific provisions and in particular to the pending questions to which the Commission had drawn the attention of the Assembly for guidance. A number of representatives emphasized the preliminary nature of their observations and others deferred detailed comment to a subsequent stage, when the draft would have been completed in first reading and States would be asked to submit their views in writing.

### 1. Comments on the draft articles as a whole

124. Most representatives considered the 14 additional draft articles provisionally adopted at the twenty-seventh session to be generally acceptable; together with the seven articles previously adopted and subject, perhaps, to drafting improvements, they provided a satisfactory basis for the codification of the law relating to the topic. The draft articles were clear and concise and contained valuable provisions regarding the effect as between parties of the most-favoured-nation clause. They codified the legal rules applicable on the matter, based on abundant and recent State practice, judicial decisions and legal writings. Support was expressed for the Commission's approach to the subject and it was said that if there might be grounds for some reservations they were not specifically of a legal nature.

#### (a) Scope of the draft articles

125. Several representatives referred with approval to the fact that the Commission, while recognizing the significant role played by the most-favoured-nation clause in the domain of international trade, had not confined its study to the operation of the clause in that field but had wished to extend it to the operation of the clause in as many fields of international relations as possible. However, the opinion was expressed that, in practice, the Commission had focused primarily on the operation of the clause in the field of trade, the regulation of

which as part of a broader effort to develop rules of international economic law was complicated by continuous and fundamental changes in economic relations between States. It was pointed out that after the Second World War, a number of fundamental changes had taken place in international trade. First, the General Agreement on Tariffs and Trade (GATT) had marked the beginning of a new period in which the most-favoured-nation clause had become an instrument for promoting multilateral trade relations on the basis of non-discrimination. Secondly, the emergence of State-owned trading enterprises had created new problems in the application of the clause between countries with different economic systems. Thirdly, economic unions, customs unions and free trade areas had established a new trend, which might be seen by some as constituting exceptions to the operation of the clause. Fourthly, the needs of developing countries had necessitated new rules to facilitate the access of their products to the markets of developed countries.

126. Doubts were expressed as to whether all the customary exceptions to the application of the most-favoured-nation clause had in fact been covered by the provisions of the draft articles adopted until the present.

(b) The most-favoured-nation clause and the different levels of economic development

127. In the opinion of some representatives, the Commission, in its work of codification of the most-favoured-nation clause, should keep in mind the new realities resulting from the post-war changes in the field of international trade and economic relations and should take into consideration the changes which had occurred in the sphere of international economic law with regard to both legal concepts and institutions. Others cautioned that the Commission should not venture into areas of economic policy. Holders of the former view pointed out that in some spheres, reciprocity was no longer current, and in others it had undergone fundamental changes tending towards the establishment of régimes based on equity and the development of all countries. Thus, progress had been made, in response to a demand for social justice, towards a system of generalized preferences in favour of "economically weak countries". There existed in fact a new principle of international economic and trade law, according to which different rules applied to the developed countries and the developing countries and which corresponded to the idea of a law adapted to the economic problems of under-development. This principle of the duality of systems for the two different economic worlds which now existed should be maintained pending the establishment of a single new economic order based on mutual co-operation. It was stressed that, as was shown by studies carried out in third world countries, the most-favoured-nation clause was better adapted to relations between highly industrialized countries than to relations between those countries and developing countries; it could even hamper economic relations between developing countries. It might, for instance, discourage efforts aimed at the establishment of free trade areas and the conclusion of regional, interregional and subregional integration agreements of particular benefit to developing countries.

128. Many representatives referred with approval to the passage in a memorandum by the United Nations Conference on Trade and Development (UNCTAD) explaining the meaning of General Principle VIII adopted at the first session of UNCTAD, which had been quoted by the Commission in its report. According to UNCTAD:

"... to apply the most-favoured-nations clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. This is not to reject on a permanent basis the most-favoured-nation clause. The opening sentence of General Principle Eight lays down that 'international trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment /...7'. The recognition of the trade and development needs of developing countries requires that, for a certain period of time, the most-favoured-nation clause will not apply to certain types of international trade relations."

There was general appreciation of the fact that along these lines the Commission had begun to examine the problems posed by the operation of the clause in the sphere of economic relations with particular reference to the developing countries, and intended to revert to it in the course of its future work; also, that the Commission had already adopted one draft article on most-favoured-nation clauses in relation to treatment under a generalized system of preferences. In this connexion, the opinion was expressed that the draft as a whole should take that provision as its guiding principle since its welcome inclusion was a highly important achievement towards the establishment of a new international economic order.

129. In the opinion of some representatives the Commission, in its work on the draft articles on the most-favoured-nation clause, should take into account the letter and spirit of the resolutions adopted at the sixth and seventh special sessions of the General Assembly and the Charter of Economic Rights and Duties of States. The principles of those resolutions, particularly in the field of international trade, included preferential treatment and non-reciprocity for developing countries, and treatment of imports from developed countries that was no more favourable than that accorded to imports from developing countries. Those principles were reiterated in articles 18 and 26 of the Charter of Economic Rights and Duties of States. In other words, law on the most-favoured-nations clause should take into account the special interests of the developing countries and, in particular, of the less developed among the developing countries, and contribute to efforts to establish a new international economic order.

(c) The most-favoured-nation clause and the national treatment clause

130. Many representatives addressed themselves to the question raised by the Commission as to whether the draft being prepared should extend in relation to national treatment and national treatment clauses beyond the provisions of draft articles 16 and 17. In this connexion it was recalled that the Special Rapporteur had proposed that more attention should be given to national treatment.

131. A number of those who spoke on the matter agreed that further work on the topic of the most-favoured-nation clause should be accompanied by consideration of provisions relating to national treatment, since both topics had many elements in common. There had always been a relationship in State practice between the most-favoured-nation clause and the national treatment clause, the latter having lately found wide application in the field of trade and, particularly, in the context of GATT. In view of the close connexion between the two clauses, it

was as well to make explicit mention of both in the relevant articles. It was noted that while the Commission had decided to concentrate on formulating draft rules concerning most-favoured-nation treatment, it had been nevertheless constrained by logical consideration to formulate also two articles relating to national treatment. The very fact that the Commission had adopted articles 16 and 17 proved that there was a close link between most-favoured-nation treatment and national treatment. One view was added that had the Commission proposed two sets of articles concurrently, one dealing exclusively with the most-favoured-nation clause, the other dealing with both that clause and the national treatment clause, its future work would have been facilitated and Governments would have been able, in their observations, to express their preference for one or other version.

132. In the opinion of some representatives, the national treatment clause should be embodied in the draft articles only to the extent that its relationship to the most-favoured-nation clause was considered. In this connexion, it was pointed out that national treatment and most-favoured-nation treatment were two different questions. The draft articles on national treatment proposed by the Special Rapporteur would not, however, cause much difficulty in the elaboration of draft articles on the most-favoured-nation clause, because the former treated only the mechanism in which the national treatment clause operated, without entering into the substance of the treatment itself. Moreover, that subject was not directly connected with the doctrine of equal treatment designed to produce a basic standard in the matter of international responsibility. It was also indicated that extension of the scope of the draft to cover national treatment was not objectionable provided it would not delay the work of the Commission excessively.

133. A number of representatives opposed any further extension of the draft articles in relation to national treatment and national treatment clauses. Doubts were expressed whether the connexion between the two clauses was as clear as the Commission believed. Agreement was expressed with the view already advanced during discussions in the Commission that the question of national treatment was beyond the Commission's terms of reference. Furthermore, it was considered that the Commission should not complicate its task by extending it the scope of the draft articles to cover national treatment clauses. As the Commission had already pointed out in its commentary on article 17, many practical difficulties arose when an attempt was made to link the standard of national treatment with the most-favoured-nation clause. For the sake of clarity and simplicity, it would therefore be preferable for the Commission to concentrate on formulating draft rules specifically concerning the most-favoured-nation clause.

## 2. Comments on the various draft articles

### Article 6

134. It was said that the provision in article 6 that most-favoured-nation treatment should be accorded to States only on the ground of a legal obligation was of considerable importance. In that connexion it was pointed out that the granting of most-favoured-nation treatment had played an essential role in the discussions at the Conference on Security and Co-operation in Europe. However, the view was expressed that no legal obligation within the meaning of article 6 had been established in the Final Act of the Conference.

Article 7

135. It was considered that while article 7, as well as article 20, referred to the treatment extended by the granting State to a third State, neither article dealt with the temporal aspect of that problem. For example, a granting State might permit a national of a third State to establish himself in its territory under a domestic policy then in force, but subsequently discontinue that policy prospectively while permitting aliens already established to continue the activity they had already begun. A problem could then arise if the national of a beneficiary State claimed the right to establish himself on the ground that nationals of a third State were continuing activities in the granting State under the discontinued policy. The hope was therefore expressed that the Commission would be able to give its attention to such a question which was of general and practical concern.

Articles 8, 9 and 10

136. Several representatives emphasized the importance of and expressed support for the provisions of articles 8, 9 and 10 which had been drafted in a simple, concise and comprehensive manner. The essential principle of unconditionality of the most-favoured-nation clause reflected the prevalent trends in international contemporary practice and in legal doctrine. Formulated in terms of a presumption the rule did not prevent the States concerned from deciding, within reasonable limits, on the type of clause best suited to their needs and interests. Between States with a similar level of development, the conditional or reciprocal formula was normally acceptable: when the level of development or international trade capacity of the States involved differed appreciably, it would be unjust to require that the benefits or privileges received by the State most in need should be made conditional on the automatic granting of equal benefits or privileges. Had the unconditional formula been made a sine qua non, it would discourage the conclusion of international agreements. For some States, the cost of extending the most-favoured-nation clause to all States with which it concluded any type of agreement, would be, in certain cases, prohibitive, as had been shown by GATT.

137. It was also said that the lack of opposition to the idea of a conditional most-favoured-nation clause should not be construed as implying the endorsement of interventionist or other conditions which would be inconsistent with generally recognized international law and would impair the sovereign rights of other States.

138. With reference in particular to articles 9 and 10, emphasis was put on the distinction between formal reciprocity, which was the normal exchange of most-favoured-nation treatment under clauses embodied in bilateral or multilateral treaties, and material reciprocity. Satisfaction was expressed that account had been taken in the draft articles of a modern practice, namely, the option open to contracting parties to attach conditions of material reciprocity (treatment of the same kind and in the same measure) to the modus operandi of the most-favoured-nation clause.

Articles 11 and 12

139. Several representatives expressed support for the provisions of articles 11 and 12 which dealt with the scope of and the entitlement to rights under a most-favoured-nation clause. In their view, those two articles comprehensively covered the field of the ejusdem generis rule, which was recognized in arbitral decisions and State practice as beyond dispute in relation to the most-favoured-nation clause. That useful rule itself stemmed from the principle that a State could not be regarded as being bound beyond the obligations that it had expressly undertaken. It made possible to limit the granting of most-favoured-nation treatment to specific commodities and categories of goods, and also protected the sovereign will of States. It was felt that the Commission had been right to try to avoid using Latin expressions in a legislative text, and the resulting formulation of the principle was found to be concise and meaningful. It was also indicated that both articles related to interpretation, and would always operate in the light of articles 31 and 32 of the Vienna Convention on the Law of Treaties.

Article 13

140. Some representatives endorsed the provision of article 13 which was considered to be fully in line with the general philosophy of the draft and with the provisions of earlier articles. It was said that, assuming that the clause referred to in article 13 was of the unconditional type, the article was acceptable since it reflected the main reason for the existence of the unconditional concession.

Article 14

141. Some representatives agreed with the text of article 14 which was regarded as formulating a clear-cut rule on the question of the so-called clauses reservées. It was noted with satisfaction that in dealing in article 14 with the formerly controversial question of the clauses reservées, the Commission had not resorted to old ideas which purported to admit the existence of certain special domains, agreed on by the granting State and third States and deemed to be outside the field of play of the most-favoured-nation clause. According to modern State practice, the clauses reservées were res inter alios acta and could not interfere with the most-favoured-nation clause, unless expressly intended to be used in that way, in which case the beneficiary State would have to waive the exercise of its rights. Article 14 was not jus cogens and States could decide otherwise whenever they wished. The article was, therefore, in keeping with the Vienna Convention on the Law of Treaties. The opinion was, nevertheless, expressed that article 14 was valuable in theory, but in practice it might be necessary to extend special treatment to a country. The most-favoured-nation clause must not have the effect of allowing a State to benefit from the special treatment extended to another State for very definite reasons.

142. A number of representatives referred to the question, mentioned in the commentary to article 14, of the operation of the most-favoured-nation clause in relation to free access to the sea and the exercise of the right of transit to and from the sea for land-locked States. It was recalled that, as was pointed out in the commentary on article 14, under the 1965 Convention on Transit Trade of Land-locked States the facilities and special rights accorded to land-locked States in view of their special geographical position, were excluded from the operation of the most-favoured-nation clause vis-à-vis States which were not land-locked. That rule was regarded as being derived from existing positive law. Treatment received by third States should not be invoked by beneficiary States when those privileges flowed solely from the unfavourable geographical situation of the former. It would be unsatisfactory if treatment relating to transit facilities afforded to land-locked States were to be claimed by beneficiary States relying solely on the most-favoured-nation clause. If the clause was to be invoked against any coastal State which granted concessions to its land-locked neighbours, then coastal States might be reluctant to grant such concessions, and that would retard the development of the land-locked States. Emphasis was put on the fact that the land-locked States were a sui generis case which merited exceptional treatment in the application of the most-favoured-nation clause. In this connexion, it was stated that land-locked States in certain situations were unable to reciprocate for most-favoured-nation treatment. Favourable treatment accorded to land-locked States in multilateral most-favoured-nation clauses should therefore be considered as exceptions to the general rule of reciprocity. As had been done in the case of article 21, a separate article should be formulated on the matter. That would correspond to the interests of the "economically weak" land-locked countries, which formed the majority of the least developed countries.

Article 15

143. Most of the observations made in connexion with article 15 related to the question of customs unions and similar associations of States. Some representatives, however, addressed themselves to the provision of article 15 independently of that question. They expressed support for the rule embodied in the article that any favours granted through bilateral or multilateral conventions might be invoked by the beneficiary to claim most-favoured-nation treatment, regardless of whether the treaty in question was open or restricted. That rule was deemed consistent with the principle of the unconditionality of the most-favoured-nation clause. It was said that exclusions or waivers of most-favoured-nation treatment might be negotiated and expressly agreed upon, but otherwise the general solution would be that such favours could be claimed by any beneficiary of most-favoured-nation treatment.

144. Many representatives, responding to the Commission's appeal, expressed their reactions to the question of whether a most-favoured-nation clause does or does not attract benefits granted within customs unions and similar associations of States.

145. With specific reference to the case of the European Economic Community, it was considered that the general orientation and some provisions of the draft, particularly article 15, as well as the submissions of the Special Rapporteur

concerning customs unions and similar associations of States, raised serious problems which affected the Community and its member States. The article did not allow for what was regarded as being a necessary exception to the clause, namely, to exclude from its operation multilateral treaties which set up customs unions, free trade associations and similar States groupings. For the EEC countries, an article expressed in the current terms might have some merit as a generalized proposition, but it should be qualified so as to reflect the current trend towards closer regional co-operation, which was by no means an exclusive feature of Europe but could also be seen in other areas of the world and which was justified by the widespread need to solve pressing economic problems jointly by instituting close links among States of the same geographical area.

146. As a body engaged in regional integration, EEC had sought to remove barriers with respect to trade between its members. From this standpoint three main objections were raised to the Special Rapporteur's approach on the matter. First, it was said that draft article 15 was cast in too rigid a form. It would be a serious setback if States, as a result of subscribing to a treaty on the most-favoured-nation clause, were led to shun regional arrangements. Besides, it was felt that the adoption of article 15 would result in making States extremely wary of granting most-favoured-nation treatment for fear that their hands would be tied if they wished in the future to form an economic union or to conclude agreements for regional integration. Secondly, it was stated that article 15 did not take into account the fact that in some multilateral treaties instituting economic unions, special advantages were closely linked to common institutions set up to implement and verify compliance with the rules granting those advantages. Such advantages could not be divorced from the sometimes very extensive duties imposed by the constituent treaties on each contracting State towards other members of the community. It could not be expected that States members of such unions should extend those advantages to third States which were neither subject to the scrutiny of the common institutions of the community nor under an obligation to fulfil the duties connected with such advantages. Thirdly, it was considered that the current wording of article 15 could have a disruptive effect on the current relationships between States members of existing customs unions or similar associations and third States with which those members had previously entered into agreements containing a most-favoured-nation clause, as was the case concerning EEC, where negotiation of mutually acceptable arrangements with third States had been a practical solution to the question of the effect of pre-existing most-favoured-nation clauses.

147. Besides the internal aspects of integration, it was indicated that EEC maintained a common external tariff and operated a common commercial policy and, therefore, matters relating to the application of the most-favoured-nation clause or preferential treatment in the field of trade came within the competence of the Community. The EEC had always applied the provisions of the General Agreement on Tariffs and Trade. In the case of States which were not parties to GATT and/or with which the Community had not concluded treaties providing for the application of most-favoured-nation or preferential treatment, the Community was empowered to apply either treatment on an autonomous basis, a power which it had in fact exercised with over 60 States. Since the treaties in question were the main

instruments regulating commerce between those countries and EEC their importance was obvious. Reference was made in this connexion to the recently concluded Lomé Convention.

148. A number of representatives, some of whom indicated that their countries were members of customs unions or similar associations of States, addressed themselves to the question from the standpoint of the developing countries and likewise considered that the clause should not be applied in the case of free-trade areas, customs unions or regional groupings pursuing common objectives relating to economic co-operation and development, which should not be extended to countries that were obviously more developed. Economic integration agreements had been concluded among developing countries providing for exceptions to the automatic application of the most-favoured-nation clause in order to permit the balanced development of all the States parties to them. The principle set out in article 15 might lead to the dismantlement of economic integration projects among developing countries and might cancel out the advantages which those States granted each other as members of common markets and considerably reduce the objectives of their economic and social community. It was said that in the case of various forms of economic integration (free-trade areas, customs unions) there could be no doubt that in recent practice such groupings had been considered to be exceptions to the clause. Nevertheless, it was stated that the importance of that should not be exaggerated, especially since it was dealt with in article XXIV of GATT. In the opinion of some representatives, it would be desirable to have a rule precluding the granting, by virtue of a most-favoured-nation clause, of advantages accorded under a customs union or similar associations among developing States. Besides, the draft should also take into account agreements which might be concluded between two communities or two economic integration areas. (For further views regarding associations of developing States, see paras. 155 to 164 below under article 21.)

149. Other representatives supported what they regardes as the Commission's straightforward position concerning the problem of customs unions and other similar associations and its refusal to accord them the nature of an exception to the general rule embodied in article 15. They shared the view of the Special Rapporteur that the benefits granted within a customs union or similar associations of States should not be excluded from the scope of application of the most-favoured-nation clause. In their view there were no valid grounds to exempt from the application of the clause those benefits which members of economic associations or customs unions granted to each other. Particular attention should be given to two considerations: first of all, it was clear from an in-depth analysis of the question that no general rule of contemporary international law tended to exclude the benefits granted within a customs union from the scope of application of the clause in question. The fact that certain agreements contained one or other exception to the most-favoured-nation clause confirmed the absence from contemporary international law of a rule to that effect; States were entirely free to include in their agreements any provision agreed on between them. On the other hand, the inclusion in the draft articles of a clause tending to exclude the benefits granted within a customs union from the scope of application of the most-favoured-nation clause would considerably diminish the draft's value, would

go against the trends towards the development of co-operation among States, especially States with different economic and social systems, and would not meet the legitimate needs for the development of contemporary international relations.

150. With particular reference to the arguments advanced on behalf of the EEC, some representatives expressed disagreement with the conclusion which questioned the correctness of article 15 in its current form. In their opinion, the creation of organizations designed to promote economic integration, if they were based on the principles of non-discrimination and mutual benefit, was an objective trend in the world economy. However, accepting article 15 would not pose any real danger to economic integration in any part of the world. While it was true that some economic associations did have a very complicated structure and a wide range of common institutions, that was not the issue as far as article 15 was concerned. The problem raised as regards those multilateral treaties instituting economic unions within which the special advantages were closely linked to the establishment of common institutions and could not be separated from the general social and legal context of which they formed an integral part should rather be discussed within the framework of article 7, which left it to the discretion of individual States to determine the scope of the most-favoured-nation treatment and to separate the specific advantages from the general social and legal context. Finally, it would be wrong to attribute any disruptive effect to article 15 as to economic relations among States; the fault lay rather with the refusal to extend to third countries the privileges enjoyed by the members of certain economic groupings. It was the intention of article 15 merely to state the obvious, namely, that there was no generally recognized rule which would prove the existence of an implied customs union exception. As paragraph (60) of the commentary on article 15 pointed out, no adherent of the implied customs union exception had ever offered a satisfactory solution to the formidable problem presented by those treaties which contained explicit provisions as to one or more exceptions to the clause without reference to customs unions or the like.

151. Some representatives did not express themselves firmly in favour of one or other of the positions reflected in the preceding paragraphs. It was emphasized that State practice and the opinions expressed in the writings of jurists on the question were not uniform. The opinion was also expressed that the question of whether a most-favoured-nation clause gave a contracting State the right to certain benefits granted by another contracting State to its partners in a customs union was basically a question of treaty interpretation, in other words that the conclusion to be drawn might differ from case to case. Nevertheless, it remained to be seen whether it would be reasonable to establish a legal presumption in favour of a particular interpretation, a presumption which would not apply in cases where there were sufficiently strong elements speaking in favour of a different conclusion. If there were reasons for the existence of a presumption to the effect that the most-favoured-nation clause could not be invoked with regard to customs unions and free-trade areas, that presumption should preferably apply mainly to cases where the customs union or free-trade area had been established after the conclusion of the agreement containing the most-favoured-nation clause. In such cases, it would be preferable if the most-favoured-nation clause did not have the effect of granting a right to the benefits deriving from the co-operation

characterizing a customs union or free-trade area. Conversely, if a State which was already party to an agreement establishing a customs union or free-trade area concluded with a third State an agreement containing a most-favoured-nation clause, that State should be expected to make it clear whether or not it intended to provide for an exception to the clause. In such cases, it did not seem justified to presume that the most-favoured-nation clause did not extend to the benefits granted under the original agreement. The suggestion was also made that a rule of non-retroactivity, such as the one in article 4 of the Vienna Convention on the Law of Treaties, might be incorporated in the current draft articles, which would then not directly affect the interests and positions currently maintained by States in respect of customs unions.

Articles 16 and 17

152. Most of the representatives who spoke on articles 16 and 17 supported their inclusion in the draft. The view was, however, expressed that a broad interpretation of the most-favoured-nation clause to the effect that a beneficiary State could claim national treatment under a most-favoured-nation clause on the ground that the same privilege had been granted to a third country would give rise to serious doubts. It was also maintained that the national treatment granted under bilateral agreements, whether of the unconditional or reciprocal type, should not be invoked by beneficiary States when such concessions were exclusively a result of the unfavourable geographical situation of the third State as such a measure would limit the possibilities of land-locked States of obtaining treatment appropriate to their special situation. It was suggested that special provisions be made with reference to articles 16 and 17, so as to avoid the anomaly of having national treatment granted to land-locked States relating to transit facilities to and from the sea made subject to claims by beneficiary States relying solely on the application of the most-favoured-nation clause.

153. Likewise it was stated that the national treatment which the developing countries accorded to each other in order to promote the development of the least developed among them should on no account be automatically extended to third parties as beneficiaries under a most-favoured-nation clause. It was suggested that in its work on the question of national treatment, the Commission should include a saving clause so that contracting parties would have the opportunity to include any stipulations they might wish in an agreement involving the most-favoured-nation clause.

Articles 18, 19 and 20

154. Some representatives expressed their general support for the provisions of articles 18, 19 and 20. For a specific comment made in relation to article 20, see above under article 7.

Article 21

155. There was general agreement on the principle contained in article 21 that favourable treatment extended by a developed granting State to a developing State

on a non-reciprocal basis, and within a generalized system of preferences, should not give rise to rights under a most-favoured-nation clause. Some representatives stated that the inclusion of such a provision in the draft was of the utmost importance and that the Commission could not brush aside the special situation of developing countries facing the realities of present world relations. Privileged treatment for the developing countries was necessary so that the equality of situations arising from the functioning of the most-favoured-nation clause would not result in unfair competition. The inclusion of such a provision, in the view of some representatives, testified to the Commission's concern that the draft articles should not hinder whatever steps had been already taken to assure justice of treatment for developing countries in their struggle toward economic development, such as those taken in connexion with the establishment of a new system of generalized, non-reciprocal and non-discriminatory preferences. It was pointed out that article 21, which had come into existence as a result of a proposal by the Special Rapporteur, reflected the interest shared by all members of the Commission to take fully into account the needs of developing countries. Others noted that the expression of this principle as a binding rule raised difficulties. Doubt was expressed as to the utility and appropriateness of the Commission dealing with matters of economic policy as opposed to legal principles.

156. Some representatives stressed that the article was in conformity with General Principle VIII adopted by UNCTAD at its first session, the resolutions adopted by the General Assembly at its sixth and seventh special sessions and articles 18, 19, 21 and 26 of the Charter of Economic Rights and Duties of States which contained provisions designed to establish a system of generalized non-reciprocal and non-discriminatory preferences for the benefit of the developing countries.

157. Several representatives expressed satisfaction with the article in its present formulation, which was couched in general terms and did not purport to treat in detail the problem of preferences for developing countries, while fully preserving the principle of a privileged exception to the equality rule, namely, that developed beneficiary States could not invoke most-favoured-nation treatment to claim benefits granted to the developing countries as such. The decision of the Commission to delete any express limitation of the effects of the article to the field of "trade" was welcomed. Preferential treatment should apply not only to trade relations but also to the transfer of technology, the exploitation of resources constituting the common heritage of mankind and all areas of economic life and international economic relations. Many related matters to trade could also be the object of preferential treatment, in particular shipping and port facilities and eventually other matters could also be involved in such treatment, such as those normally embodied in the so-called establishment treaties, dealing with the rights of aliens, inheritance rights of aliens, locus standi in judicio, liability for military service, and so on.

158. Also, it was felt that the Commission should not let its work be delayed by questions of definition. The term "developing country" had acquired a broad connotation within the United Nations and UNCTAD which could be further clarified by those organizations and could be used as a basis for the Commission's work. A convention on the most-favoured-nation clause should not, however, contain a

definition of that term. The Commission should endeavour to avoid an unduly prolonged discussion of article 21, which might lead to problems that would jeopardize the successful conclusion of the first reading of the draft articles the following year.

159. Nevertheless, it was considered that, although the current text was well-balanced, the door should be left open for further progress in the field of privileged treatment for developing countries. The Commission should explore new avenues to consolidate the formulation of the article and enlarge its scope in the light of State relationships in the modern world. It might be appropriate to adopt a broader and more flexible approach to article 21 which, inter alia, would cover such existing situations as the trade preferences which the developing countries had granted each other. In particular, it would be desirable to go further and provide a similar exception to the application of the most-favoured-nation clause in the case of treatment extended by a developing State to a developing third State under a generalized system of preferences.

160. The opinion was also expressed that the article left out some very vital areas of the economies of the developing world such as customs unions and free-trade areas. Since the article might not be sufficient to exclude completely the application of the most-favoured-nation clause to the developing countries, the Commission might consider the possibility of adopting at least one more article for the purpose of protecting those countries, possibly along the lines of article 21 of the Charter of Economic Rights and Duties of States. Such an article would provide protection for the developing countries against the application of draft article 15, the provisions of which should apply only to agreements concluded between developed countries.

161. In the opinion of some representatives, there were no generally accepted rules with regard to exceptions to the most-favoured-nation clause, apart from the generalized and non-reciprocal system of preferences to be granted to the developing countries, as set forth in article 21. That should be the only exception to the clause; any other exceptions would be inadmissible and would detract considerably from the effectiveness of the clause.

162. Some representatives doubted the desirability of the Commission drafting articles on the most-favoured-nation clause in an area in which the rules governing international economic relations were still subject to continuous change. Other representatives found some difficulties with the specific provision of article 21. It was said that the expression of the principle of the article as a binding rule and its inclusion in a treaty with a possible life of many years might give rise to certain problems of application, for it was difficult to draw a clearly defined line between the concepts of developed and developing States. Further problems could arise from the question of whether the developed granting State was the sole judge of what might be encompassed within a generalized system of preferences. It was also said that the problems of trade policy dealt with in various reports on trade preferences, examined in detail in the commentary on article 21, fell outside the normal scope of the Commission's work and that the draft articles on the most-favoured-nation clause did not offer an appropriate context in which to deal

with matters of economic policy rather than legal principles. The Commission should concentrate on the juridical aspects of the clause, leaving the question of its application in commercial treaties between States at different levels of economic development to other international organs, notably UNCTAD.

163. A view was also expressed questioning whether it was necessary to include a specific article on the subject, since it was a matter of treaty interpretation, and it would be totally illogical to interpret a most-favoured-nation clause so as to give a developed country the right to enjoy the benefits granted to developing countries within a system of preferences.

164. In the opinion of some representatives, the more general text proposed by a member of the Commission and reproduced at the end of paragraph (70) of the commentary to the article, namely, a provision to the effect that nothing in the articles prejudiced the special régimes which might prevail in the relations between developing and developed countries, could be considered as an alternative for the existing text. From a legal point of view such a formulation was preferable. The current system of generalized preferences, envisaged on a temporary basis for a period of 10 years, might be modified in the future, probably in favour of developing countries. In that case, the current wording of article 21 might not be sufficient to cover the new situation. It would be desirable to avoid adopting a formulation of a rule of law that was unstable and might require modification at a later stage.

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

165. Many representatives noted that during the Commission's twenty-seventh session considerable progress had been made on the topic of treaties concluded between States and international organizations or between two or more international organizations. The Commission and the Special Rapporteur on the topic, Mr. Paul Reuter, were congratulated for their excellent work.

166. The view was expressed, however, that a considerable amount of difficult work still remained to be done on the subject. Certain representatives stated that the Commission should conclude the preparation of the draft articles as soon as possible. It was also suggested that the second reading of the draft articles should be completed in 1981 or earlier, as suggested by the Planning Group.

### 1. General remarks on the draft articles

167. A number of representatives welcomed the methodology employed by the Commission to follow as much as possible the text of the corresponding articles of the 1969 Vienna Convention on the Law of Treaties. Some of them wished the Commission to go even further in placing the international organizations on the same footing with States for the purpose of the draft articles, while others

stressed the importance of not overlooking the fact that there did exist certain differences between States and international organizations. Some representatives doubted, however, the validity of the Commission's basic approach because the legal personality of international organizations differed in many substantive respects from that of States. It was stressed, in this connexion, that the legal personality of international organizations was created, modified or terminated through a joint expression of the will of the States constituting the organization concerned.

168. The representatives underlining the distinctions between States and international organizations also stated that there should be clear distinctions between treaties to which both States and international organizations were parties, on the one hand, and treaties concluded between international organizations, on the other.

169. Certain representatives welcomed the incorporation into the draft articles of relevant notions embodied in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, in addition to those of the Vienna Convention on the Law of Treaties.

170. Commenting generally on the substance, certain representatives stated that the draft articles were acceptable in principle and that they reflected accurately the international practice and modern doctrine on the subject.

171. Some objections were expressed to the introduction in the draft articles of the concept of "act of formal confirmation", which paralleled the concept of "ratification", as the means for an international organization to establish consent to be bound by a treaty. It was argued that under such a system problems would arise from the fact that final consent could not be formally given prior to a two-stage approval, a cumbersome procedure in view of the complex machinery of international organizations. Furthermore, the new term "act of formal confirmation" had no ground in the practice of international organizations and did not solve the problem. The draft would be more realistic if such attempt was discarded.

172. On the question of "reservations", it was said that international organizations should be entitled to make reservations to treaties just like States. It was in fact necessary for juridical and political reasons to maintain a liberal system of reservations for the benefit of both States and international organizations. On the other hand, it was also emphasized that particular attention should be paid to distinguish between States and international organizations in that respect.

### 2. Comments on the various draft articles

173. Comments were made regarding only the articles mentioned below.

Article 2

174. One representative noted some innovations in the new subparagraphs of paragraph 1 and suggested that the addition of a formal definition of the expression "participants in the drawing up of the treaty" would be useful.

Article 6

175. Representatives who spoke on article 6 generally agreed with the distinction which the Commission made between States and international organizations regarding treaty-making capacity. Several representatives pointed out that the capacity of an international organization to conclude treaties depended basically on its constituting instrument and that the scope and content of that capacity should not be contrary to the will of member States.

Article 7

176. Several representatives thought that it was not necessary to make distinctions between the powers of States and those of international organizations by calling them "full powers" and "powers", respectively.

177. The inclusion of paragraph 2 (e) was welcomed as being consistent with article 12, paragraph 1, of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

178. One representative suggested that the question of the representation of international organizations should be re-examined in order to determine whether there existed in most of them organs which enjoyed representational capacity "in virtue of their functions". Another representative preferred not to include an express recognition that the presentation of "powers" could not be necessary in the case of international organizations under the conditions specified in subparagraph (b) of paragraphs 3 and 4, since that could lead to confusion in the practice. Another representative thought it possible to merge paragraphs 3 and 4, although he was willing to accept the current wording if it was necessary for reasons of clarity and precision.

Article 9

179. Certain representatives thought it advisable to establish a two-thirds majority rule at certain international conferences as contained in paragraph 2. It was pointed out that the practice could not yet form the basis for a binding rule of international law since conferences were recognized as sovereign to establish their own rules of procedure and that should continue to be the case. It was suggested that the explanations of the Commission in paragraph (5) of its commentary to article 9 should be appropriately reflected in the draft articles.

Article 10

180. One representative thought it might be possible to merge the two paragraphs, although he was willing to accept the present formulation if it was necessary for reasons of clarity and precision.

Articles 11, 14, 16 and 18

181. Stressing the need to distinguish between States and international organizations, certain representatives thought that the Commission tried to assimilate them too much, for example, by dealing with them in very similar terms with respect to the means of establishing consent to be bound by a treaty by using the term "act of formal confirmation" as a term with a legal meaning similar mutatis mutandis to "ratification".

182. On the other hand, other representatives felt unnecessary and artificial the distinction between States and international organizations introduced by the Commission by using the words "an act of formal confirmation" for the latter instead of "ratification". The equal treatment of States and international organizations in that regard was reasonable since an act of confirmation was an act of ratification, whatever terminology was employed.

## F. Other decisions and conclusions of the Commission

### 1. The law of the non-navigational uses of international watercourses

183. Some representatives made references to the topic of the law of the non-navigational uses of international watercourses. Certain representatives underlined the particular interest of their respective Governments in the topic and the importance and urgency of its codification at a time when there was a continually increasing demand upon all national resources and the world community was striving to protect its natural environment. Some regretted that the Commission had been unable to consider the subject during its twenty-seventh session and supported the view that the Commission should consider it at its next session. On the other hand, it was also stated that the question had clearly not yet reached a stage when it could be worked out substantively by the Commission. Caution against a hasty treatment of the topic was also expressed in view of the complexity of the questions involved. As for the report of the Sub-Committee on the law of the non-navigational uses of international watercourses, one representative thought it constituted an adequate basis for a preliminary discussion and could be used as an initial framework for codification of the subject. The hope was expressed that more Governments would submit replies to the Secretary-General's questionnaire (for further views on the priority to be given to the study of the topic see paras. 186 to 189 below).

184. Commenting on the substance of the topic, several representatives referred to the questions of uses of water of international watercourses and of protection of water against pollution as areas for study by the Commission. The importance of

formulating general principles relating to uses of watercourses before going on to the questions of pollution was, however, stressed by one representative. Another considered that both questions should be considered at the same time. To these questions, one representative added the problem of flood control and erosion, and another the question of international liability for harmful consequences arising out of certain lawful activities entailing a high degree of risk.

185. One representative went into the substance of the matter more in detail and suggested the following points to be taken into consideration when studying the uses of international watercourses: the equitable share of all the riparian States in the uses of the water of the basin; the geographical nature and the hydrological nature of the basin; its previous and current uses; the degree of social importance of each use; present and future needs from the economic, social and development viewpoints; the existence of other water resources; and the priority in development needs, including those of the riparian States whose water resources were meagre.

## 2. Programme of work

### (a) Topics included in the current programme

186. Most of the representatives who spoke on future work on topics included in the current programme of the Commission approved the Commission's intention to continue its work on the draft articles under preparation concerning State responsibility for internationally wrongful acts, succession of States in respect of matters other than treaties, the most-favoured-nation clause, and the question of treaties concluded between States and international organizations or between international organizations. Among those four topics, the draft articles on State responsibility for internationally wrongful acts was singled out as a topic which should be dealt with by the Commission on a high priority basis. Furthermore, the preparation of the draft articles on succession of States in respect of matters other than treaties should proceed on a priority basis. It was also agreed that the Commission should complete the first reading of its draft articles on the most-favoured-nation clause at its twenty-eighth session. General support was also expressed for the continuation of the preparation of the draft articles on treaties concluded between States and international organizations or between international organizations.

187. Some representatives underlined that the Commission's attention should be focused on topics referred to in the preceding paragraphs. On the other hand, other representatives stressed the importance and urgency of codifying either the law of the non-navigational uses of international watercourses or the law relating to international liability for injurious consequences arising out of acts not prohibited by international law or both topics.

188. Some representatives wondered if it would not be preferable for the International Law Commission to concentrate on fewer topics at each of its sessions.

That would make it easier for the Sixth Committee and Governments to familiarize themselves with the Commission's drafts with a view to studying them and formulating observations. Furthermore, by limiting its work, as it had done normally in the past, to one or two subjects in a session instead of four or five, the Commission could conclude its deliberations on each topic more rapidly. To deal with several topics at once would imply carrying them over from year to year in detriment of the completion of their study and, therefore, of the effectiveness of the work of the Commission. The limitation of the number of topics studied at each session would require, it was recognized, on the part of Member States additional restraint on new requests, but it would mean likewise that the Commission itself should plan its work even more carefully and that the demands of the Special Rapporteurs would be greater, though for a shorter period. The relevance of the topic concerned in the light of current needs of the international community and the stage of advancement of its consideration were referred to by certain representatives as criteria that the Commission should bear in mind in establishing its own priorities.

189. The conclusions of the Sixth Committee on the programme of work of the Commission were embodied in paragraphs 3 and 4 of the draft resolution recommended to the General Assembly in paragraph 214 below. It was also understood that the Commission would establish its plan of work in the light of the observations made thereon at the present session of the General Assembly.

(b) Other topics

190. Noting the existing programme of the International Law Commission for the next years, certain representatives expressed the belief that considerable restraint should be exercised in referring additional topics to the Commission at the present time, particularly priority topics. Recent developments gave reason to hope that debates taking place elsewhere on matters which had become of increasing importance to the United Nations might soon lead to a consensus on certain basic principles relating to those issues. It would then be appropriate for the international community to seek to elaborate rules of particular application to those subjects. When that occurred, it might be expected that additional demands would be made to the Commission. For that reason, it was important that the Commission concentrate during the next years on the completion of its work on the subjects currently before it.

191. While recognizing the number, importance and complexity of the topics already included in the programme of the Commission, certain representatives underlined that there were times when the process of making, developing and codifying international law should proceed more swiftly than normally, in order to meet urgent needs of the international community. There were periods of urgent crisis where the process needed to be accelerated in order to regulate and resolve conflicts in international relations, including in new areas, which would otherwise be treated in a lawless way. In such situations, to consider those problems became a matter of necessity. The following topics were identified by certain representatives as being at present of particular importance for the international community: the economic rights and duties of States, the offences against the peace and security of mankind, and international food law.

192. It was also pointed out that although the items currently under consideration by the International Law Commission were important and interesting, other equally interesting and more topical items were awaiting consideration. One representative was of the opinion that the Sixth Committee should think about what other topics it would like to see examined by the Commission with a view to providing the forthcoming newly elected Commission with appropriate guidance. He referred in this connexion to items on the 1949 selected list of topics for codification, such as recognition of States and governments, jurisdictional immunities of States and succession of governments, as well as to new items, such as extradition. But the view was also expressed that the Commission should not be overburdened by referring to it additional items unless it was found absolutely necessary owing to current international developments.

Economic Rights and Duties of States

193. Recalling that the world was currently faced with a general economic crisis, one representative underlined that the most important challenge facing the United Nations was the achievement of a new international economic order, bridging the gap between rich and poor nations. He suggested that the International Law Commission should be requested to give priority consideration to the Economic Rights and Duties of States and to submit a report thereon to the General Assembly. It was a matter of importance and urgency to translate the relevant resolutions adopted by the General Assembly, and in particular the Charter of Economic Rights and Duties of States, into an enforceable international convention. He added that among the many questions which the Commission should consider in that regard were the following:

(a) What were or should be acceptable regulations on foreign investments or the activities of transnational corporations?

(b) What was or should be the international law on the nationalization or socialization of foreign property and the compensation payable thereof?

(c) By what rules should two or more States share common resources?

(d) What were the legal limits, if any, on the marketing and pricing of raw materials and commodities?

(e) What constituted economic aggression, and how was the use or threat of economic force to be defined?

194. The suggestion referred to above was welcomed by certain representatives. The law relating to economic development, including the establishment of a new international economic order, was a topic which cut across traditional categories of international law and its study by the Commission would be an acknowledgement of the growing emphasis, both within the United Nations and outside, of that emerging body of law as a part of and as a complement to the objectives of the United Nations provided for in the Preamble to and Article 1, paragraph 3, of the Charter.

Offences against the Peace and Security of Mankind

195. One representative attached the greatest importance to the completion of the draft Code of Offences against the Peace and Security of Mankind whose consideration had been delayed since the adoption of General Assembly resolution 1186 (XII) pending the adoption of a definition of aggression. Since the General Assembly had adopted the Definition of Aggression at the twenty-ninth session, it should now resume consideration of the draft Code without further delay in the interests of world legal order and international security. The Sixth Committee should take the initiative and make concrete suggestions with a view to completing the progressive development and codification of the subject, particularly at a time when aggression, military intervention and the use of force were becoming more prevalent in international relations, in violation of the most basic rights of sovereignty, territorial integrity and national independence.

International Food Law

196. Another representative pointed out that the main problems facing the developing countries were chronic food shortage and over-population. Food should no longer be treated as charity or as a purely commercial commodity of international trade. It was therefore the moral and political duty of the international community, particularly of the developed countries, to extend economic co-operation to solve permanently the problem of under-production of food in the developing countries. A new concept of international food law had to be reflected in the international law concerning international peace and security, since any State with a hungry population was a source of danger to world peace.

## 3. Methods of work

197. Many representatives welcomed the establishment of a planning group within the Enlarged Bureau of the Commission which would periodically examine the Commission's progress and formulate recommendations to it concerning the organization and methods more suited for achieving the goals required by its programme. Largely because of the work of the planning group the Commission's report gave a clear perspective of the progress on topics currently under consideration and a time-table for future action. It would be helpful not only to the Commission but also to the General Assembly in developing a closer and better understanding of the Commission's work.

198. Some representatives noted with satisfaction the general goals established by the Commission on the basis of the findings of the planning group and expressed the hope that the Commission would be able to achieve such goals. If those goals were fulfilled, the General Assembly might expect to receive a series of final draft articles in the near future. Certain representatives expressed, however, concern that on the basis of the findings of the planning group, the Commission's time until 1981 would be entirely taken up with topics already under consideration. There were a number of further topics in the Commission's programme which were deemed suitable for examination and still other subjects could be referred to the

Commission in a near future. To cope with that accumulation of work the Commission should, according to those representatives, give further thought to its methods of work. Different and perhaps simplified or even additional techniques would appear to be required.

199. Some representatives considered that, although the Commission had done considerable work leading to the elaboration of a series of drafts and conventions, it was proceeding at a rather slow pace. In order to enhance its effectiveness, and avoid these drafts from losing momentum, it was necessary to give serious consideration to present working methods and to examine the different possibilities which might be open to improve them. The efforts of the Commission to rationalize further its working methods should be focused on the need for the speediest possible completion of the tasks entrusted to it. Some of those representatives pointed out that one of the factors contributing to the slow pace of the Commission's work was the tendency of the Commission to emphasize scholarly expositions.

200. Other representatives considered that the current methods of work of the Commission were suitable for the realization of its task. The preparation of codification drafts viable for the future and acceptable to a wide segment of the international community required a thorough and careful study of relevant precedents and doctrine. Moreover, the time required for the completion of a draft resulted not only from the Commission's own proceedings but also from the different stages of the codification process and the necessary participation of States in that process. Acceptability of the drafts based on their technical quality and political relevance should not be sacrificed by undue speed.

201. Certain representatives underlined that it was important that the Commission should continue to enjoy a sufficient degree of autonomy in the conduct of its work. The Sixth Committee should refrain from issuing directions in this regard to the Commission, although the planning group of the Commission could be expected to take into consideration the views expressed during the debate of the Sixth Committee. Flexibility in this respect, it was added, was advisable in order to enable the Commission to take up eventually new matters to which the General Assembly might have attached urgency. Furthermore, the Commission had always responded to the particular difficulties involved in the codification of a given topic by adopting the methods more appropriate to cope with such difficulties.

202. Except for the question of the number of topics that the Commission should consider at each of its sessions, a matter referred to in paragraph 188 above, very few concrete suggestions were made concerning possible improvements of the existing methods of work of the Commission. The increase in the composition of the Commission, its division into sub-commissions, or the lengthening of its sessions were referred to as changes which would not provide a solution. One representative indicated that it might be useful for the Commission to use all of its members actively in the preparation of reports and draft articles, and that members might submit their comments on reports and drafts in writing, resorting to oral discussions only when formulating draft articles in their final form. Other representatives considered that the system of Special Rapporteurs was particularly commendable. It was also stated that it would be worth while to seek ways and means

of speeding up the communication to the Commission of comments and observations transmitted by Governments. Finally, reference was also made to the role of the Codification Division in assisting the Commission and its Special Rapporteurs and to the need of giving careful attention to the manning table of the Division so that it would be able fully to continue the high level of its contribution and support to the work of the Commission.

203. Reference was made by certain representatives to the presentation of the work of the Commission in the annual report submitted by it to the General Assembly. They wondered whether there was adequate justification for the length of the report in the light of the requirements of the work expected from the Sixth Committee. It was difficult for delegations to analyse a report so long and complex in the short time available between its distribution and its consideration by the Sixth Committee. Other representatives considered that the report could be somewhat more concise without being necessarily too brief. On the other hand, other representatives spoke against any substantial modification in the present form of the report. In their view, the reports of the Commission should not be evaluated on the basis of their length but on the basis of its intrinsic value as contributions to the codification of the topics referred to the Commission by the General Assembly.

204. One of the representatives who spoke in favour of shortening the report pointed out that the dissemination of scientific material was beginning to overwhelm the primary role of the report, namely, to keep the General Assembly informed about the Commission's work. This reduced the ability of the members of the Sixth Committee to study adequately the report in the limited time available to them and made it difficult to focus the discussion on the central points which called for the attention of the Sixth Committee. Opening recapitulations of the work done on a given subject at earlier sessions was necessary but there was some room for abbreviation. Furthermore, some of the materials reproduced in the commentaries could be found in the reports of the Special Rapporteurs. The commentaries could limit themselves in the intermediate stage of the consideration of a topic to explain the reasons behind the formulations embodied in the draft articles and to identify points on which the Commission would like to have the views and assistance of the General Assembly and its Sixth Committee. The scientific materials could eventually be incorporated later on in the commentaries to the final draft articles. Those views were shared by certain representatives.

205. Another representative favoured any measure aimed at relieving representatives of the strain involved in the study of the report within the very short time at the disposal of delegations. However, he considered that care must be taken not to introduce changes in procedure that could lead the Commission to feel that the quality of its work was not appreciated or that the Sixth Committee did not require the current high standards of legal scholarship. He supported the suggestion that the report should be limited strictly to the additional work done by the Commission during the year in question and that reference to previous work and research material should be confined to foot-notes.

206. Another representative recalled that there was no provision in the Commission's

Statute requiring it to submit an annual report to the General Assembly. It would therefore be open to the Sixth Committee to request a report presented in a form different from the traditional one. However, the report had taken its present form for reasons to be found in the Statute of the Commission itself. When the Commission codified a topic of international law it was required, under its Statute, to prepare its drafts in the form of articles and submit them to the General Assembly together with a commentary covering points which were duly specified in that provision. Other provisions of the Statute concerning the progressive development required also that the Commission's draft should be accompanied by explanations and such documentation as the Commission considered appropriate. In practice the Commission rarely distinguished between draft articles which were measures of codification and those which were proposals for progressive development of international law. The commentaries being a part of the process of codification and progressive development, it would be difficult to reserve them for the final draft and to provide only commentaries in a summary form in the Commission's interim reports. The fact was that they could not be dissociated from the actual text of the draft articles and that they enabled members of the Sixth Committee to see how the work of the Commission was progressing and, where appropriate, to make some preliminary comments.

207. Other representatives underlined the value of a report in its present form. The report was a self-sufficient document and a model of order and logic in its explanations and documentation. By presenting not only the conclusions of the deliberations of the Commission but also commentaries developing the purpose, meaning and justification of the proposed draft articles as well as introductions concerning the history of each topic and the plan followed in its consideration, the report was an indispensable reference work on the matters concerned. Furthermore, the suppression from the report of the sources of the Commission's conclusions would lead to difficulties for delegations, particularly for delegations of developing countries, which did not have the means to get easily all the necessary background information through their own research. The objective legal knowledge provided for in the reports of the Commission should not therefore be sacrificed to conciseness.

208. Most of the representatives who referred to the matter arrived at the conclusion that the main problem lay in the short time available between the issuing of the Commission's report and the moment of its consideration by the Sixth Committee. If, owing to the date of the closing of the Commission's sessions and the time required for the editing, translation and reproduction of the report, it would be impossible to distribute it earlier, it was necessary to think about possible remedies to the situation. Among them the following were mentioned: summaries of the report could be issued for immediate use earlier than the report itself; the report could be divided into two or more volumes or parts, the first of which would be made available sooner; the Commission could begin its sessions earlier; the Sixth Committee could consider the report of the Commission later.

209. In his concluding remarks, at the 1550th meeting, the Chairman of the International Law Commission explained the work of the Commission and its methods as well as the basic criteria guiding the Commission in the preparation and presentation of its annual report to the General Assembly.

### 4. Co-operation with other bodies

210. Many representatives expressed their satisfaction at the continued efforts made by the Commission to co-operate with various regional legal bodies entrusted with the study, development and codification of international law, namely, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee. It was pointed out that such an exchange of information among jurists dedicated, at the international and regional levels, to the common goal of promoting the rule of law in the relations between States was a very sound and useful practice. It was also noted that such co-operation meant that the international community was fully informed of all opinions emanating from the various legal systems and forms of civilizations of the world.

### 5. Gilberto Amado Memorial Lecture

211. Several representatives expressed satisfaction with the third Gilberto Amado Memorial Lecture during which the President of the International Court of Justice, Mr. Manfred Lachs, presented "Some reflexions on the peaceful settlement of disputes". Thanks were expressed to the Brazilian Government for the generous gift which made the Lecture possible and it was hoped that the Brazilian Government would continue to do so.

### 6. International Law Seminar

212. Many representatives commended the United Nations Office at Geneva and the Commission for the holding of the eleventh session of the International Law Seminar, the usefulness of which had been proved long ago. It was also stated that the Seminar should not only be continued but expanded as a means of teaching and disseminating knowledge of international law. It was of great benefit for young jurists, particularly for jurists of developing countries. Appreciation was expressed to the Governments which had provided fellowships for participants from developing countries. It was also noted with appreciation that some of those Governments had increased their contributions and the hope was expressed that Governments would continue to make fellowships available. The representatives of three Governments announced that they would again make contributions to enable nationals of developing countries to attend the 1976 Seminar which was expected to be held during the Commission's next session. Certain representatives stated that it might be advisable for a number of scholarships to be financed from the regular budget of the United Nations for the future seminars and that the matter should be studied.

## IV. DECISION

213. At its 1573rd meeting, on 26 November, the Committee adopted by consensus draft resolution A/C.6/L.1024 (see para. 214 below).

## V. RECOMMENDATION OF THE SIXTH COMMITTEE

214. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolution:

### Report of the International Law Commission

The General Assembly,

Having considered the report of the International Law Commission on the work of its twenty-seventh session, 2/

Emphasizing the need for the progressive development of international law and its codification in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 3/ and to give increased importance to its role in relations among States,

Taking note with appreciation of the draft articles prepared by the International Law Commission on State responsibility, succession of States in respect of matters other than treaties, the most-favoured-nation clause and treaties concluded between States and international organizations or between international organizations,

Noting with satisfaction that the adoption by the International Law Commission of general goals towards which its efforts should be directed in the years to come is a means of rationalizing further the organization and methods of work of the Commission,

1. Takes note of the report of the International Law Commission on the work of its twenty-seventh session;

2. Expresses its appreciation to the International Law Commission for the work accomplished at that session;

3. Approves the programme of work planned by the International Law Commission for 1976;

4. Recommends that the International Law Commission, in the light of the observations on its plan of work made at the present session of the General Assembly, should:

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2/ A/10010 (to be issued as Official Records of the General Assembly, Thirtieth Session, Supplement No. 10 (A/10010/Rev.1).

(a) Complete at its twenty-eighth session the first reading of draft articles on the most-favoured-nation clause;

(b) Continue on a high priority basis its work on State responsibility, taking into account relevant General Assembly resolutions adopted at previous sessions, with a view to completing the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts at the earliest possible time and to take up, as soon as appropriate, the separate topic of international liability for injurious consequences arising out of acts not prohibited by international law;

(c) Proceed with the preparation, on a priority basis, of draft articles on succession of States in respect of matters other than treaties;

(d) Proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations;

(e) Continue its study of the law of the non-navigational uses of international watercourses;

5. Expresses confidence that the International Law Commission will review the progress of its work and adopt in the light of such a review the methods of work best suited to the speedy realization of the tasks entrusted to it;

6. Expresses the wish that, in conjunction with future sessions of the International Law Commission, further seminars might be organized, which should continue to ensure the participation of an increasing number of jurists of developing countries;

7. Requests the Secretary-General to forward to the International Law Commission the records of the discussion on the report of the Commission at the thirtieth session of the General Assembly.

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