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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SECOND SESSION (1980)

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

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INTRODUCTION

1. On the recommendation of the General Committee, the General Assembly decided, at its 3rd plenary meeting, on 19 September 1980, to include in the agenda of its thirty-fifth session the item entitled "Report of the International Law Commission on the work of its thirty-second session" 1/ (item 106) and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 25th, 30th, 33rd, 37th, 43rd to 60th and 72nd meetings, on 21, 27 and 30 October, 4 and 10 to 24 November and 3 December 1980. 2/ At its 72nd meeting, on 3 December, the Committee adopted by consensus draft resolution A/C.6/35/L.20, sponsored by 39 Member States.

3. The General Assembly, at its 95th meeting on 15 December 1980, adopted without a vote resolution 35/163, as recommended by the Sixth Committee. By paragraph 13 of that resolution, the Assembly requested the Secretary-General to, inter alia, prepare and distribute a topical summary of the discussion on the Commission's report at the thirty-fifth session of the General Assembly. The present topical summary has been prepared by the Secretariat in compliance with that request.

DISCUSSION

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

4. Representatives generally expressed satisfaction with the amount and quality of the work accomplished by the International Law Commission at its thirty-second session. It was welcomed in particular that at that session the Commission had taken into consideration the General Assembly's recommendations contained in its resolution 34/141 of 17 December 1979 and had achieved substantial progress, successfully completing all major aspects of its planned tasks. It was observed that at its thirty-second session the Commission had concluded the first reading of sets of draft articles dealing with fundamental aspects of contemporary international law and had considered all but one of the eight items on its agenda. That was seen as an extremely satisfactory and remarkable achievement, considering the high quality of work. The Special Rapporteurs were praised for their contributions to the success of the Commission's work.

1/ Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 10 (A/35/10).

2/ A/C.6/35/SR.25, 30, 33, 37, 43-60 and 72.

5. Great importance was attached by representatives to the progressive development of international law and its codification, the primary task entrusted to the International Law Commission by the General Assembly in its resolution 174 (II) of 21 November 1947 and Statute annexed thereto. It was said that over the years, as the international community grew and developed, there was an increasing need to codify existing rules and move into new areas by the carefully balanced progressive development of international law. The commentaries and proposals contained in the report of the Commission would, it was said, play an effective role in the development of international law and the establishment of a sound and integrated legal system based on justice and equality in international relations.

6. It was said by one representative that the work of the United Nations on the codification and progressive development of international law played a leading role in the Organization's efforts to implement the principles of the Charter by drafting fair and equitable legal rules designed to ensure the peaceful development of international relations, to strengthen peace and security, to encourage the peaceful settlement of disputes, and to promote co-operation among States and the establishment of a new world economic order. From that point of view, the work of the International Law Commission deserved high praise. Over the past quarter of a century, the results of that work had found expression in a considerable number of multilateral conventions on such important subjects as the law of treaties, diplomatic law and the law of the sea. A decisive contribution to the success of the work of codification and progressive development of law in those fields had been made by: the realistic approach adopted by the Commission according to which international law emanated from the will of States; its constant concern to identify the norms of law already crystallized or in the process of being crystallized in the current practice of the States members of the international community; its prudent, critical approach to precedents and old legal theories, in the light of the new phenomena of international life and the needs of the peaceful coexistence of nations; lastly, the care it took to formulate legal norms in conformity with the purposes and principles of the Charter, which had been enshrined and developed in numerous political and legal instruments and in the practice of States, of the United Nations and of other international organizations. The emergence on the world scene of new sovereign and independent States had revealed that relations of friendship and co-operation among States were based on respect for the principles of complete equality of rights, independence and national sovereignty, non-interference in internal affairs, non-use of force, peaceful settlement of disputes and the right of every people to decide its own destiny. The Commission had had to take account of those principles and should continue to do so if it wanted its juridical work to be acceptable to the majority of Member States. The progress made by the Commission at its thirty-second session gave reason to hope that it would further increase its contribution to the progressive development of international law, bearing in mind the requirements of the establishment of a new international economic and political order.

7. It was noted with satisfaction by another representative that in its work on the development and codification of international law, the International Law Commission had gradually eliminated some of the outdated ideas and influences of the so-called traditional law of the past and had begun to pay attention to

the reasonable proposals and practice of the numerous developing countries. International law would have vitality and play a positive role in contemporary international relations only if it truthfully reflected objective reality and the requirements of the normal development of those relations. In addition, the view was expressed that although the States of the third world had succeeded in breaking the shackles of colonial domination and had become free, independent and sovereign States, the spectres of neo-colonialism, neo-imperialism, economic enslavement, hegemonism and armed intervention were still present. Customary international law still existed in a jungle of conflicting international practices in which one could always discover a precedent to support State practice, however arbitrary or unjust it might be. It was for that reason that the efforts of the International Law Commission to give international law the attribute of certainty by codifying it and progressively developing it into a system that would be acceptable to the world community were to be commended.

8. Certain representatives stressed the need for the Commission to bear in mind present-day realities and the need to find legal solutions to the pressing problems facing the contemporary international community. In order to play its part in the development of an international order based on the rule of law, the Commission should deal not only with the traditional problems it had been examining for years, but also with new issues posed by the qualitative changes in international relations. It must not ignore the needs of the peoples of the third world or fail to take part in the realization of their aspirations. Furthermore, according to one view, while it should be stressed that the Commission had done a great deal of useful work in the development and codification of international law, it must be pointed out in all fairness that the Commission dealt with some items which were quite outdated and divorced from current realities. As a result, the complicated articles on those items were of little practical significance.

9. Disagreement was expressed with the view that the Commission, owing to its very success in codifying and developing large areas of public international law, had lost some of the sense of urgency and relevance that had characterized its work during the first decades of its existence. The Commission's work, according to this view, had lost none of its interest or importance. While it might be that some of the most important areas of international law had already been dealt with by the Commission, its work programme still reflected a clear sense of continuity. The suggestion that the Commission was not fulfilling its traditional function of expanding and clarifying the corpus of international law could not be accepted.

10. At the same time, it was essential, according to this view, to ensure that the Commission lost none of its impetus and that its work remained in the forefront of thinking in the field of international law. The law must keep pace with shifting realities, while still promoting order and stability. The Commission should not shrink from undertaking new and difficult tasks or from breaking new theoretical ground. The Commission had justly acquired a high reputation in both the codification and the progressive development of international law. In the future, it would probably have to devote its energies more to progressive development than to codification. That might involve the Commission and its members in some controversy and might lead to unacceptable suggestions that it was becoming too political and should restrict itself to more

conservative codification work. Current trends compelled the Commission to take up the many challenges posed by evolving social, economic and technological conditions. There were no safe havens left, not even for international lawyers. At some point, the concern for stability must take into account the paradox that stability could be maintained only through responsiveness to change.

11. One representative said that the important role which the International Law Commission had played in the codification of international law since the Second World War had been considerably modified in recent years. The Commission had no part, for example, in the continuing Third United Nations Conference on the Law of the Sea, despite the fact that it had drafted the original text of the Conventions adopted by the first United Nations Conference on the Law of the Sea. The drafting of other conventions in such fields as outer space and the environment had likewise been undertaken by forums other than the Commission. That exclusion might well be due to a belief that the Commission was not suitable for drafting conventions in highly technical fields, but his own conviction was that the Commission could have a part to play in such areas if its methods of work could be improved. Also, the fact that a considerable number of former members of the Commission had become Judges of the International Court of Justice, though welcome in itself, should not encourage the view that the Commission was a stepping-stone to election to the Court. The Commission had its own mission, which was to contribute to international peace and the welfare of mankind by pursuing the progressive development and codification of international law, a task which was no less important than that of the International Court.

12. Referring to the international law-making process, another representative observed that over the past decades the membership of the United Nations had tripled, and as a result there had been a dramatic change in that process. The traditional rules of customary and conventional law had previously been produced by a small number of States, and were in line with the interests and notions of justice of those States. In recent years the task of international law-making had been shared by all members of the international community, in accordance with the principle of sovereign equality. Newly independent States had been able to participate on an equal footing both in the Sixth Committee and in multilateral treaty-making conferences, and had thus been able to put forward their ideas of justice. Two striking examples were the adoption of the notions of jus cogens and the invalidity of treaties imposed through the threat or use of force, which had been embodied in the Vienna Convention on the Law of Treaties in 1969. Again, at the Third United Nations Conference on the Law of the Sea, new ideas such as the exclusive economic zone and the common heritage of mankind had been introduced and were likely to be adopted. At the same time, many traditional norms of international law had been retained with the agreement of newly independent States. The new approach to international law-making had included such landmarks as the Vienna Convention on Diplomatic Relations and the Vienna Convention on the Law of Treaties, and the adoption by the General Assembly of the Declaration on Principles of International Law concerning friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and the Definition of Aggression. However, his delegation deeply regretted that international rules, even peremptory norms of international law, were still being broken; a fundamental change in the attitude of States was required if international legal order was to become a reality.

13. The Committee was reminded by one representative that in the 1960s severe criticisms had been made of the short-comings of traditional international law, precisely because that law had developed out of the practice of a group of States to the exclusion of the interests of States which were attaining independence. While that situation had to a large extent been remedied, since all Governments expressed an opinion and contributed to the perfecting of legal rules, the responsibility for the progressive development of the law must fall on every member Government without exception. With fullest realization of its role, the Sixth Committee would have itself partly to blame if ultimately the contents of international law on any given topic still failed to correspond to the needs of the overwhelming majority of nations. Within the Committee, every delegation could even state that it did not subscribe to the change in the law and felt itself bound by the old anachronistic law which could best serve its immediate interests. Fortunately, such a view was becoming increasingly rare and the statement that rules of international law could not evolve without the consent of all States was losing ground. In point of fact, new rules were emerging every day without the consent of every State and it had become generally accepted that, just as every State could participate in international law-making, none could obstruct it. Thus, there was a transition from the theory of consent to the expression of consensus, or the collective views of the members of the community of nations, regardless of their social, political or economic systems. Consequently, the notable improvements in international law over the past few years were attributable to the wider participation of States in the international law-making process. Moreover, with better rules of law, States would be better prepared to settle their disputes by peaceful means.

14. One representative perceived that in the discussion on the important questions involved in the progressive development and codification of international law, there had been a confrontation in the Sixth Committee between the international positions of States with different social systems. The position of States which were opposed to co-operation and détente with respect to the codification of fundamental principles of international law was closely linked to the policy of force pursued by those States in international relations. Old-fashioned international law, which served only the interests of a few States, recognized the supremacy of force in international relations and contained norms and institutions for the colonial subjugation of peoples, was not a just law. However, because of the changes which had taken place on the international stage, the situation had begun to evolve and international law had undergone changes aimed at the consolidation of peaceful coexistence. His delegation believed that the development of co-operation among States and the maintenance of international peace and détente, which conferred increasing importance on the role played by international law in the world, made it necessary for the Commission to intensify its work and broaden its field of action.

15. A number of representatives emphasized the harmonious interaction between the Sixth Committee and the International Law Commission. That interaction between the Sixth Committee, an intergovernmental body representing the full membership of the United Nations, and the International Law Commission, with its limited membership of experts serving in their personal capacity, was most important in ensuring that the work relating to the progressive development and codification of international law was in keeping with political realities and contemporary ideas.

It was said that the Commission's report was the corner-stone of the work of the Committee on the codification and progressive development of international law. Confidence was expressed that as a result of the traditionally fruitful co-operation with the Sixth Committee, the Commission would successfully fulfil its mission in the interest of the constant development of international law and friendly relations among States. It was said that by means of the annual resolution on the report of the International Law Commission the General Assembly maintained a dialogue with the Commission, the latter being the main instrument through which the Assembly implemented the provisions of Article 13, paragraph 1 (a) of the Charter.

16. Comments were also made by certain representatives regarding the need for Governments to increase their participation in the work of the Commission by responding more fully to requests for comments (see also the introductory statement by the Chairman of the Commission, A/C.6/35/SR.25, para. 94). It was said that attempts should and would be made to improve the record in that regard; Governments should be urged to respond as fully and expeditiously as possible to the requests of the Commission for comments and observations on its draft articles and questionnaires, and for materials on topics on its programme of work.

17. In that connexion, one representative remarked that Governments were called on to submit comments to draft articles all too frequently. It had sometimes happened that by the time comments on specific draft articles had been transmitted the Commission had adopted new draft articles, making those comments out of date. He hoped that when the Commission decided to call for Government comments it would bear that point in mind.

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

1. Comments on the draft articles as a whole

18. The representatives who addressed themselves to succession of States in respect of matters other than treaties noted with satisfaction that the International Law Commission had, at its thirty-second session, adopted four new articles on State archives, thus completing the first reading of the Addendum on that matter and, at the same time, of the whole draft on the topic in conformity with the recommendations of the General Assembly in resolution 34/141. Representatives paid tribute to the efforts of the Special Rapporteur, Mr. Mohammed Bedjaoui, whose twelve reports were an outstanding contribution to advancing the work of codification and progressive development undertaken on the topic. Support was also expressed for the Commission's decision that the additional draft articles on State archives should be submitted to Governments of Member States for their observations.

19. It was noted that the provisions of the draft would be given a second reading by the Commission at its thirty-third session, taking into account the written comments of Governments and views expressed in the Sixth Committee. In this regard, certain representatives drew attention to the fact that their Governments had submitted or would be submitting in writing their detailed comments on the draft.

20. In this connexion, one representative indicated that when studying the commentaries on the group of articles on State archives he had noticed that the Commission had not drawn only from legal materials. He therefore thought that arrangements should be made for intergovernmental or non-governmental organizations qualified in the matter of archives and historical documentation to be invited to examine the draft articles and submit their observations to the Commission. That task could be left to the Secretariat and the Special Rapporteur. One representative expressed the hope that undue time and effort would not be devoted to the second reading of those articles so that it could be completed at the Commission's next session. It was also stated that the process of the codification of international law would be significantly advanced with the emergence of a universally acceptable legal instrument on this topic that would ensure the equitable settlement of disputes which, although they did not themselves lead to conflict, carried the seeds of misunderstanding between nations.

21. It was observed that the draft on succession of States in respect of matters other than treaties was a sequel to the Vienna Convention on Succession of States in Respect of Treaties. In this regard, one representative was of the view that the draft articles on succession of States in respect of matters other than treaties should not be considered as providing complete coverage of the subject in conjunction with the Vienna Convention on Succession of States in Respect of Treaties; it was not intended as an exhaustive draft and should not be so regarded. Another representative stated that the drafting of articles on succession of States in respect of matters other than treaties had proved more difficult than expected. It had therefore been necessary, and in his view purposeful, to restrict the study to succession to State property and debts and to leave aside, for instance, matters of nationality.

(a) Title of the draft

22. Some representatives referred to the title of the draft. It was said that the term "in respect of matters other than treaties" covered a wide range of topics while the draft articles concerned only succession to State property, State debts and State archives. Thus, further study would be required on how to harmonize the title of the draft articles with their content. It was also said that the general title of the draft articles should be changed to reflect the total content of the articles, which would have one part devoted to State property and another part devoted to State debts, but would not cover such questions as nationality and acquired rights. In order not to give the false impression that all matters relating to succession of States in respect of matters other than treaties had been covered, the present set of draft articles should be entitled "Succession of States in respect of property and debts". In the view of one representative, both formulas considered by the Commission had advantages and disadvantages. In any event, the title's precision should not be sacrificed.

(b) Retroactivity of the future codification instrument

23. In the opinion of one representative, the Commission ought to indicate whether a convention on succession of States in respect of matters other than

treaties should, as he believed, have retroactive effect. Such a convention would be unusual in that parties to it would be States existing at the time but the convention would only benefit entities not yet existing as States. It was to be supposed that a "successor State", after coming into existence, would accede to the convention in order to be in a position to invoke its provisions towards the predecessor State. It was also said that the recent experiences of newly independent States showed clearly the extent of the difficulties facing those States with regard to the recovery of their archives from the predecessor State. It was to be hoped that the draft articles would rectify such situations by stipulating the principle of retroactivity with a view to the elimination of injustices in international relations.

(c) Addendum on State archives

24. Most of the representatives who spoke on the topic limited their observations to the provisions of the Addendum on State archives and especially, to the four articles adopted by the Commission at its thirty-second session. It was felt appropriate that the Commission had focused its attention on the question of State archives at its most recent session in view of the importance which many countries, and particularly those of the third world, attached to the issue. The topic was important not only for newly independent countries but also from a wider practical aspect. The significance of provisions covering succession to State archives was quite clear. State archives were not simply part of the general patrimony or cultural heritage of a State; they constituted an important element in the establishment of the State and in some cases, they could be essential to national development. Data on prospecting for natural resources, for instance, would be important in the location of townships and communities. One would hardly wish to locate a community within an area having great potential for the extraction of mineral or other strategic resources. The failure to transfer archives could therefore hinder national development. One representative observed that since the restoration of its sovereignty, his own country had consistently endeavoured to regain possession of that vital element of its national heritage. Apart from their emotional significance, archives were of considerable practical importance for administrative purposes, social and economic development and cultural progress, and it was essential that international co-operation in that field should be organized on a basis of justice and equity.

25. One representative indicated that he was not convinced that codification in respect of succession of States to archives was either possible or even desirable. It was true that many difficulties had arisen between States on that question, and that it might appear desirable to suggest specific solutions; but an international rule, even one that purported to be part of the progressive development of international law, should be based on sufficiently well-established State practice. As indicated in paragraph (20) of the commentary to article C, that was not the case for State archives.

26. On the other hand, many representatives considered that in elaborating its draft articles on State archives, and in particular articles C to F, the Commission had applied the right criterion of giving due weight to conventional practice and the practice of States, while not excluding the possibility of more

equitable and just solutions, whenever it was found necessary. Since State practice relating to that question was often deeply rooted in historical situations and was somewhat suspect, the Commission had not relied solely on State practice in developing the principles to be included in the draft but had endeavoured to provide more equitable solutions. It was not only codification but an effort to develop the law.

27. It was said that the Commission had been right to study conventional practice in that regard, and it was noted that the Special Rapporteur and the Commission as a whole had given in their commentaries as full a picture as possible of the subject under consideration, which made it possible to follow the evolution of the process of crystallization of the rules set forth in the draft articles. In this connexion it was also stated by one representative that his Government had not encountered any insuperable difficulties in obtaining access to the archives of the two imperial Powers which had immediately preceded his State, partly thanks to modern inventions for the preservation and transmission of documents. Those technological advances might have greatly facilitated the solution of the material problems of the transmission of archives and reduced the significance of the political and legal aspects of the question. During the second reading, the Commission should take another look at the articles from that practical point of view.

28. It was pointed out that in recognition of the fact that State archives were far more than just a collection of documents but were, actually, part of the cultural heritage of peoples, the Commission had acknowledged the need for separate provisions dealing with such archives to protect that heritage, in particular in the case of newly independent States. The four new draft articles were designed to apply to State archives the basic principles applicable to State property in the four different situations contemplated. There was a natural link between article C and article 10, between article D and article 12, and between articles E and F and articles 13 and 14. It was also said that the cases covered in particular by articles C, E and F could not be deduced from the general rules governing the passing of State property, and that it was therefore essential to make specific provision for such cases when State archives were passed. The four new articles effectively completed the series of provisions on State archives.

29. Some representatives stressed that State archives, which consisted of documents of fundamental interest to the State, especially those of an economic, political and strategic nature, should pass to the successor State. In particular, it was essential to ensure that the archives of newly independent States were protected. It was therefore necessary that, upon attainment of independence, there should be an obligation on the part of the predecessor State to transfer the archives to their rightful owner.

30. Many representatives emphasized that the basic rule embodied in the articles on State archives reflected the need for agreement on succession to State archives and, in the absence of such agreement, important residual principles applied which were designed to bring about an equitable result in the cases of succession envisaged. In this regard it was said that such agreements must be freely entered into; for newly independent States, the previous relationship of dependence left the parties to the agreement in unequal bargaining positions. The same applied to

the relationship between victor and vanquished at the end of hostilities. It was also stated that such agreements should not infringe the right of the peoples to development, to information about their history and to their cultural heritage.

31. Several representatives stressed the basic principles applied in regard to State property, in addition to agreement, which were used for finding a just solution to the various cases of succession to State archives. Reference was made to the indivisibility of archives, the inseparable link between archives and the territory transferred and the possibility of reproducing documents in order to preserve the integrity of archives without restricting their accessibility. Mention was also made in this connexion of the necessity of efficient administrative and State management of a given territory and of the position of third States, which although not parties to the succession, had rights and obligations vis-à-vis the predecessor and successor States.

32. In the opinion of one representative, the work done on archives over the past two years had set a standard of reasonableness from two complementary points of view. First, it ensured that a new State was equipped with its documents of title, proofs of its heritage. Secondly, it also ensured that there remained unbroken sets of archives that told a coherent story, available not only to the country in which the collection was housed, but also to other interested countries.

33. Several representatives agreed that the articles, as a whole, sufficiently protected the interests of the successor State while safeguarding the rights of the predecessor State. It was said in this connexion that by taking particular account of the interests of territories to which the succession of State archives related, but also insisting on the necessity of co-operation between successor and predecessor States when joint use of archives was indispensable, the Commission had again confirmed the significance of its role in the progressive development of international law in accordance with new relations and requirements. The draft articles on State archives were deemed by a number of representatives as constituting a suitable basis for future work on the subject.

34. Certain representatives commented on the system of the articles on State archives. In the opinion of one representative, the more geographically unified the successor State, the more absolute the need to transfer the archives. Another representative described the system as follows: in article B, the basic rule was that the archives which had belonged to the territory and had become State archives of the predecessor State during the period of dependence, and the archives for the normal administration of the territory, should pass to the newly independent State. Under article D, all State archives should pass to the successor State. In the other three cases (arts. C, E and F), only residual rules were prescribed, failing agreement between the States concerned. In all three categories, the interests of the successor State were paramount, although they were equitably balanced against the interests of other States, including the predecessor State. Thus, in the residual rules for the third category, the documents relating to the normal administration of the successor States and those which related directly to the territory to which the succession of States related should pass to the successor State (art. C, para. 2; art. E, para. 1; and art. F, para. 1). The predecessor State should provide the successor State with the best available evidence of documents pertaining to questions concerning title to the

territory or its boundary (arts. B, C, E and F). Agreements relating to the passing of archives should not infringe the rights of the peoples of those States to development, to information and to their cultural heritage (arts. B, E and F). Provision was also made for the supply of reproductions of documents to each other at the expense of the requesting State (arts. B, C, E and F). Finally, under article F, paragraph 6, the question of the unity of State archives would also be considered by the successor States.

(d) Placing of the addendum

35. It was pointed out that the Commission had not yet settled the question whether the articles concerning State archives should form a separate section of part II of the draft articles or a separate part of the draft altogether. Several representatives expressed preference for the latter solution. It was said in this regard that even though State archives were movable property, they had special characteristics arising from the need for administrative continuity and for unity to protect the interests of historical research; the immense physical and cultural value that State archives had for both the history and the destiny of the successor State could hardly be doubted. The treatment of State archives must differ from that accorded to State property in general because of their physical nature, the diversity of their contents according to country and their disparate legal, administrative, scientific, historical, cultural and educational functions. Taking into account the fact that State archives constituted a special category in that they were both State property and part of the cultural heritage of a people, the relevant provisions should, in the view of certain representatives, be inserted in the draft articles as an independent part III following article 14. The new part III would be followed by the provisions relating to State debts as part IV. It was said in this connexion that from the definition of State archives it followed that they should be classified as tangible property and should as such take priority over State debts. On the other hand, some representatives considered that the draft articles on State archives were so closely related to part II of the draft, on State property, that it would not be appropriate to make them an entirely separate section. The draft articles on State archives should be included in part II, since such archives were a specific form of movable State property, although they could form a section of their own within part II. In so doing, it was said, the text prepared, which was too extensive, could be simplified. In the opinion of one representative, archives were so obviously property that it might be sufficient to add in article 2 a definition of "property" that covered archives.

(e) Form of the addendum

36. One representative observed that in paragraph 14 of its report the Commission had indicated that it had an open mind on the ultimate disposition of articles A to F. He thought that, because of their intrinsic merits and the special nature of their subject-matter, they did not really belong to the draft articles on succession of States in respect of matters other than treaties and might well form the subject of a brief treaty, which could probably be completed in one session of the Sixth Committee, without prejudicing the other work to be done on the

succession of States. Another representative agreed that the provisions on the matter should perhaps even take the form of a small independent convention. On the other hand, one representative did not consider that the draft articles on archives should form a separate draft. They were too specific in substance and too broad in terms of the solutions proposed to form a convention of their own. Nor would it be appropriate to put them into a separate resolution, whether connected with the remainder of the draft articles on State succession in respect of matters other than treaties or not.

2. Comments on the various draft articles

37. Many representatives commented on specific articles of the draft, whether adopted at the Commission's thirty-second or preceding sessions. The comments made on individual articles, as well as on elements common to several of those articles, are summarized below under appropriate headings. Several representatives expressed in general their support for all the articles of the draft. Many representatives endorsed, also in general, the articles on State archives adopted by the Commission at its thirty-first and thirty-second sessions. Certain representatives reiterated their support for articles A and B. It was said in this connexion that they were on the whole acceptable since they seemed to take equally into account the various elements involved, namely the interests of the predecessor State and the successor State and the rights of their respective peoples. Many representatives also expressed their general agreement with the four additional articles on State archives (articles C, D, E and F) adopted by the Commission at its last session. However, one representative regretted to say that those four articles did not adequately cover the situations they were intended to cover.

Article 2. Use of terms

38. In the opinion of one representative there appeared to be a contradiction between paragraph 1 (a) and article 16 (b) (see below, article 16).

39. One representative considered that paragraph 2 was superfluous because it repeated what was said in paragraph 1 and also because every treaty was an autonomous text, a "closed system" of legal rules. Moreover, it was unnecessary to refer to the "use" of terms; the reference to "the meanings which may be given to them" was enough. If the paragraph was to be retained, the words "or in international treaties" should be added.

Article 5. State property

40. One representative proposed that in the text and the title of article 5 the words "movable or immovable" should be added.

41. In the view of another representative, article 5 contained a definition and should therefore form part of article 1. Since "property" was rights, and since the word "interests" made sense in the context only if it meant "rights", he

wondered why three words had been used to define "State property". In article 5, the words "including private international law" should be added after the words "internal law", because a State might have rights in accordance with the law of another State if the private international law of the first State so provided.

Article 7. Date of the passing of State property

and

Article 8. Passing of State property without compensation

42. One representative considered that in view of the words "unless otherwise agreed or decided" in articles 7 and 8, the decision would be either bilateral or unilateral. If bilateral it would be agreement, and decision therefore meant unilateral. There then arose the question by whom the decision was to be taken. He pointed out that article 13, paragraph 1, and article 14, paragraph 1, omitted any reference to decision.

Article 9. Absence of effect of a succession of States on third party State property

43. In the opinion of one representative, the words "including private international law" should be added after the words "internal law", because a State might have rights in accordance with the law of another State if the private international law of the first State so provided.

Article 11. Newly independent State

44. One representative considered that in the case contemplated in article 11 the predecessor State must disclose the nature of the property involved of which the successor State might have no knowledge. The obligations on the part of the predecessor State under the article also included in his view the return, free of cost to the successor State, of any property that had been removed from its territory, wherever such property might be.

45. One representative considered that in paragraph 1 (a), for the sake of legal precision, the words "having belonged to the territory" should be replaced, since property did not belong to a territory but to a person, natural or legal, such as a State.

46. In the opinion of another representative, it was quite appropriate that paragraph 4 should emphasize that agreements concluded between the predecessor State and the newly independent State not to implement the provisions of paragraphs 1 to 3 of the same article should not infringe the principle of permanent sovereignty of every people over its wealth and natural resources. However, in addition to enjoying permanent sovereignty over its natural resources, an independent State also had to have the right to adopt suitable means to exercise effective control over its resources and their exploitation. If the agreements between the predecessor State and the newly independent State merely

acknowledged the former right and made various restrictive provisions regarding the newly independent State's economic activities, then that State would still find it very difficult to shake off its economic subordination. It was completely correct that the Declaration on the Establishment of a New International Economic Order should stress that the new order should be founded on full respect for, inter alia, the principle of full permanent sovereignty of every State over its natural resources and all economic activities. He therefore proposed that the words "and all economic activities" should be added after the words "natural resources" in paragraph 4, in order to protect more effectively the interests of the newly independent State.

Article 16. State debt

47. In the opinion of one representative, the most important point in the draft articles was still the definition of "State debt". Almost the first rule of codification on a universal scale was a law of coexistence: a draft that manifestly suited the circumstances of a capitalist economy better than those of a socialist economy, or one that suited a socialist economy better than a capitalist economy, would not appeal to the world at large. It might serve a regional purpose but it was not a technique of global codification. That ultimately was why the definition of debt was so important. The draft articles could do no more than deal with the moment of time in which one State was substituted for another in responsibility for the international relations of a particular piece of territory. After that, the normal rules of State responsibility towards other States had their natural play. The present rules could only determine by which international person debts were owed; and, from the standpoint of those rules, it was immaterial whether a debt was owed to another State or to a private individual.

48. It was also said that it did not appear valid to make a distinction between debts according to the nature of the debts or the creditor, and that that part of the draft should be re-examined. It would seem elementary that, if the draft articles were to succeed, they must apply to debts arising both from foreign State loans contracted on a Government-to-Government basis, and from those raised in a free market. It might not be necessary to retain the two separate clauses of article 16 as it currently stood; but it was essential to retain the existing scope of the article.

49. One representative considered that the provisions of article 16 were very unclear as to the question whether State debts should include private debts. For example, what did "subject of international law" refer to? The problem was a controversial one. Did the words "any other financial obligation" include obligations which came about illegally? Judging from the language of article 16, the creditor might be a State, an international organization, a foreign natural or juridical person, or even a natural or juridical person of the debtor State. Actually, the purpose of that section of the draft articles was mainly to settle debts between States. The debts a State owed to private persons, especially the debts owed to its own people and enterprises, should be regulated under domestic law and were beyond the scope of the present topic.

50. Furthermore, one representative reiterated his delegation's view that since the type of debt known as "odious debts" went against the principle of national liberation and decolonization, the draft articles should have an explicit provision embodying the principle of non-succession to odious debts so as to forestall future controversy.

51. One representative was of the view that article 16 contained a definition and should be removed to article 2, paragraph 1.

52. In the view of one representative in paragraph (a) the expression "any other subject of international law" might create difficulties, since the theory that private individuals were also subjects of international law had many followers, and the use in legal texts of terms that were controversial in legal theory should be avoided.

53. According to one representative, there appeared to be a contradiction between article 2, subparagraph 1 (a) and article 16, paragraph (b); analysis of the former provision gave the impression that account must be taken only of obligations stemming from international law, namely, those referred to in article 16 (a), while article 16 (b) referred to "any other financial obligation chargeable to a State".

Article 19. Transfer of part of the territory of a State

54. In the opinion of one representative, the words "property, rights and interests" in paragraph 2 should be replaced by "State property".

Article 20. Newly independent State

55. In the opinion of one representative, the article did not seem very balanced.

56. One representative considered that paragraph 1 was far from clear and lent itself to various interpretations; it should therefore be amended.

57. In the view of one representative, paragraph 2 raised unnecessary questions which might limit the freedom of action of newly independent States, which appeared to conflict with the intention of the rest of the draft. Another representative considered that the question of the debts of a newly independent State was a complicated one, and in dealing with it that State's right to development must be taken into account and linked with the establishment of the new international economic order. The developing countries' external debt burden should be reduced as much as possible; he therefore proposed that the words "to ensure that the normal development of the newly independent State will not be affected by excessive indebtedness" should be added after the words "the fundamental economic equilibria of the newly independent State" in paragraph 2.

58. One representative welcomed the adoption of articles 19, 20, 22 and 23, which basically provided for the passing of an equitable proportion of the State debt of the predecessor State to the successor State and established the principle that

the agreement between the predecessor State and a newly independent successor State should not endanger the fundamental economic equilibria of the latter State.

Article A. State archives

59. Several representatives expressed misgivings about the definition of State archives contained in article A and hoped that it would be redrafted in second reading. In the view of one representative, the definition could have been clearer and more precise. It would have been better to omit the reference to the predecessor and successor States and define State archives in article 2 as "the collection of documents, irrespective of their kind or date, belonging to a given State". Such a definition would be more in conformity with the concept of State archives as referred to in articles B, C, D, E and F. Another representative considered that more particulars should be given of the type of documents referred to, such as maps and so forth.

60. One representative said that at the previous session his delegation had expressed satisfaction with article A since it had considered the definition of the term "archives" appropriate for the purpose of newly independent States. However, at that time his delegation had expressed doubts about the usefulness of including further provisions on State archives relating to other types of State succession. It was difficult now to accept the proposed definition for the other cases under consideration in articles C, D, E and F as the real meaning of the second requirement of the definition embodied in the words "and had been preserved by it as State archives" was difficult to perceive in the context of the very complex legal issues involved. That part of the definition seemed to be based on a circular argument, and was therefore not satisfactory.

61. One representative, reaffirming the reservation made in 1979 with regard to the definition of State archives, stated that he continued to believe that the Commission should examine the concept further, in order to avoid a situation in which the same treatment was accorded to documents dealing with facts, situations and persons linked to the territory which was the subject of the succession as to documents which served only indirectly to facilitate normal administration of the territory but which deserved to be classified in the category of works of art forming part of the historical and cultural heritage of a country in whose territory they were situated. In the opinion of another representative a definition of "State archives" as "the collection of documents of all kinds" would leave out historical objets d'art which were not documents but were highly cherished by the newly independent State because they represented the civilization and characteristics of its people. He wondered whether it might be possible to consider broadening the definition of State archives to include not only "the collection of documents of all kinds", but also "other records and cultural objets d'art which reflect historical development". If it was difficult to include historical and cultural objets d'art in the part on State archives, then the part on State property should contain necessary provisions on their disposal. Another important question was that of restitution of objets d'art to their original owners. In drafting the articles on succession to State archives, the Commission should give due attention to that point.

Article B. Newly independent State

62. In the opinion of one representative, paragraph 1 (b) of article B would remain somewhat insipid without a precise definition of State archives, since it referred to archives passing to the newly independent State as archives required for normal administration of the territory. It would be more appropriate to refer to the passing of archives belonging to the successor territory.

63. In the view of one representative, paragraph 2 assumed that archives belonging to the territory to which the successor related might not be adequate for its proper administration and consequently allowed for appropriate reproduction of other parts of the archives of the predecessor State and, in particular, of archives of interest to the independent territory. Such archives need not necessarily be of importance to the territory, since it would be sufficient for them to include any information of benefit to the territory. A distinction had been drawn between "benefit" and "interest" in paragraph 2. Another representative considered that the disposition of archives by mutual agreement was more likely to give rise to difficulties in the case of the newly independent State than in the event of the dissolution of a State provided for in article F.

64. One representative was of the view that the provisions of article B and, in particular, of its paragraph 3, were consistent with the principle of equity and would facilitate the application of the rule regarding the sanctity of boundaries, which was of such importance to the Organization of African Unity. Another representative thought that the predecessor State should undertake to provide the newly independent State with the best available evidence of documents from the State archives of the predecessor State in general and he proposed that paragraph 3 should be amended accordingly.

65. One representative, noting that the provision contained in paragraph 3 dealt with documents relating to the title to the territory and boundaries of a successor State, took the view that such important documents should be transferred to the successor State since they provided the best evidence of the limit of the terrestrial territory of that State. Although under article B the predecessor State was obliged to provide the "best available evidence", which in that case would take the form of copies of such documents or extracts from them, it none the less seemed unsatisfactory that the successor State would have to rely on the goodwill of the predecessor State in order to establish its boundary in any dispute relating to its title. Moreover, the retention of the documents by the predecessor State could jeopardize the security of the successor State. The problem was to ensure that the obligation assumed by the predecessor State under that article would be discharged promptly and without any detriment to the successor State.

66. In the view of one representative, paragraph 6 should include a reference to information regarding the frontiers of the newly independent State, in view of the fact that colonialism had created frontier problems which gave rise to disputes and wars and threatened international peace and security.

Article C. Transfer of part of the territory of a State

67. One representative supported the approach followed in the elaboration of article C by the Commission, which had relied on the provisions of various peace treaties. Being aware, however, of the victor/vanquished relationship inherent in such treaties, it had sought, instead of relying exclusively on State practice, to find more equitable solutions. The underlying principle in article C was that the part of the territory concerned must be transferred so as to leave the successor State as viable a territory as possible in order to avoid any disruption of management and to facilitate proper administration. While agreeing with the substance of article C and considering its succinctness appropriate, he felt that certain ideas reflected in the commentary could be incorporated with beneficial effects in that article. For example, whereas article C stated simply that the predecessor and successor States should resolve the problem of succession to State archives by agreement, it was explained in the commentary that such agreement should be based on principles of equity and take into account all the special circumstances. It was stated explicitly also that local administrative, historical or cultural archives owned in its own right by part of the territory transferred were not affected by the draft articles which were concerned with State archives and that the predecessor State had no right to remove them on the eve of its withdrawal from the territory or to claim them later from the successor State. The Commission might wish to consider whether those ideas should be incorporated not only in article C, but also in the provision relating to succession to State archives where the successor State was a newly independent State.

68. One representative referred to paragraph (13) of the commentary to article C, which contained a careful analysis of the problem which arose when the archives were situated in the territory of neither interested party; in such a case the responsibility of the predecessor State would stem from an obligation of result, in respect of which it would be sufficient to prove that the archives had not passed to the successor State.

69. Several representatives expressed support for paragraph 1 noting with approval that the Commission had, in article C, given precedence to agreements between predecessor and successor States. The view to that effect reflected in paragraph (23) of the commentary to article C was, consequently, endorsed by one representative. It was also observed that in paragraph (6) of the commentary the Commission had pointed out that almost all treaties concerning the transfer of part of a territory contained a clause relating to the transfer of archives. Thus the rule of international law was embodied mainly in the regulation of the matter by agreement between the predecessor and successor States. To go any further would be to risk not only conflict with a widespread practice, but failure to take account of the immense range of complex situations that existed in practice. It might often happen, for example, that succession to archives involved a number of successor States.

70. One representative pointed out that in article C the Commission had at the same time laid down the norms to apply when agreements could not be reached. Those norms were based on the administrative requirements of the predecessor and successor States and took into account both the successor State's responsibility

for administering the part of the territory transferred and the predecessor State's duty to protect the interests of the successor State. In view of the importance of determining the specific principles underlying those norms, paragraph 1 should stipulate that the agreement must be based on the principles of equity and good faith - especially since the separation of a part of territory was not normally a voluntary act but usually a result of a war or of the peace treaty concluded following a war.

71. One representative emphasized that in paragraph 2, the Commission had stated two fundamental principles, continuity in the administration of the transferred territory and the links between the archives and the territory.

72. Certain representatives considered that the drafting of subparagraph 2 (b) was satisfctory, since, in addition to administrative archives, the successor State would receive that part of the predecessor State's archives which concerned either exclusively or principally, the territory to which the succession of States related. It was said in this connexion that the "archives-territory" link should be interpreted very broadly and the principles of "territorial and functional connexion" should be taken into account.

73. Certain representatives indicated that they would prefer paragraph 2 (b) to establish the obligation of the predecessor State not only to hand over the archives in its possession but also to make every effort to do so in the case of administrative, historical or other archives that had been taken out of the territory. It was also said that all archives, whether situated outside or inside the territory in question, should pass to the successor State.

74. One representative believed that the predecessor State should be required to submit valid reasons for requesting the documents referred to in subparagraph 4 (b) and account must be taken of the principle that the security and sovereignty of the successor State must not be imperilled. In his view, since that involved an element of judgement on the part of the successor State, the principle of good faith must apply in that case. Given the importance of archives for the administration of the region affected, the draft article should also establish an obligation on the part of the predecessor State to permit them to be transferred at the same time as the territory.

Article D. Uniting of States

75. In the opinion of some representatives, article D presented no serious problems. It was said that the article duly took into account the voluntary character of the uniting of States which implied that there should be no controversy over the transfer of archives; according to paragraph 2, the constitution and internal law of the successor State were to govern the settlement of any problems arising in the matter. Reference was also made to paragraph (6) of the commentary to article D, once States agreed to constitute a union among themselves, it must be presumed that they intended to provide it with the means necessary for its functioning and administration: one of the necessary means could be State archives. One representative considered that article D did not give rise to serious problems since the archives would in any case be in the hands

of the successor State. It might be asked whether the problem did not relate solely to the internal law of the successor State; if so, it might be sufficient to retain only paragraph 2, since paragraph 1 might be regarded as an interference in the internal affairs of the successor State.

76. Certain representatives doubted the usefulness of the article. In the opinion of one representative, article 12 should apply to archives, although even article 12 did not appear to be wholly necessary, since it merely stated in so many words what happened in any case. When two States united, at that moment, under international law, their property passed to the successor State, but after that moment there was only one State where there had been two. Hence, international law could not apply and the only law that could was internal law. However, the article did not damage the structure of the proposed instrument and might perhaps rule out any claims by third States. Another representative considered that paragraph 2, in particular, merely referred to internal law a question that obviously could only be governed by internal law. One representative believed that it would be desirable for the Commission to have a fresh look at article D, as there appeared to be a discrepancy between the text and the meaning given to it in the commentary. The commentary indicated that whether the State archives of the predecessor States would pass to the successor State, would depend on the terms of the constituent agreement of the union or, if the agreement was silent on that point, on the internal law of the successor State, whereas article D, paragraph 1, appeared to set out a general rule by which, upon the uniting of States, the State archives should pass to the successor State.

Article E. Separation of part or parts of the territory of a State

77. One representative noted that under subparagraph 1 (b), not only the administrative archives would pass to the successor State, but also that part of the archives which related directly to the territory to which the succession of States had related. In his view, such a concept seemed broader than that relating to the archives concerning exclusively or principally the territory to which the succession of States related, as stipulated in article C.

78. One representative emphasized that the passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those dealt with in paragraph 1, would, under paragraph 2, be determined exclusively by agreement between the predecessor State and the successor State, because it was impossible in such a case to stipulate objective criteria. The principles on which such an agreement should be based were set out in paragraph 4.

79. One representative expressed agreement with paragraph (20) of the commentary to the effect that the Commission might revise, in second reading, the drafting of paragraph 5 to make it conform with the text of paragraph 4 of article C.

Article F. Dissolution of a State

80. In the opinion of one representative, it would be necessary to amend paragraphs 1, 3, 4 and 5 to bring them into line with the corresponding provisions of article E.

81. One representative deemed it advisable to clarify the provision in paragraph 6 since there was no reference in paragraphs 1 to 5 of that article to the question of the unity of the State archives of the successor States in their reciprocal interest.

3. Observations common to several draft articles on State archives

(a) The principle of agreement

82. Certain representatives were of the view that, when the Commission undertook the second reading, it should consider whether it might not be useful to stress the importance of agreements between the predecessor and successor States in articles E and F as well as in article C. In the opinion of one representative, based on his country's own history, the difficult questions of succession to State archives should in all cases be the subject of detailed treaty arrangements between the States concerned. It was also said that agreements were extremely important in the case of succession to archives, as both parties might have a well-founded interest in the archives in question. Since modern technology made it possible to reproduce documents rapidly, the interests of both parties could easily be met. Experience had shown that in some cases an agreement between the two parties represented the only desirable solution.

83. One representative referred to some opinions outlined in the Commission's commentary according to which administrative archives must be transferred to the successor State in their entirety, while the so-called historical archives, in conformity with the principle of the integrity of the archival collection, must remain part of the heritage of the predecessor State. In his opinion, State archives which had been removed by the predecessor State as a result of annexation or occupation by that State of the territory or part of the territory of another State should be returned to the successor State in their entirety, including all materials of a historical or cultural character. He, therefore, welcomed the provisions of article E, paragraph 1 and article F, paragraph 1, which established the primacy of the agreement between the predecessor State and the successor State and which seemed to represent the best possible solution.

84. Another representative would have preferred it if, for the circumstances provided for in articles C, E and F, the Commission had been satisfied to stipulate the obligation of the States concerned, and in particular the State where the archives were situated, to enter into negotiations in good faith with a view to concluding appropriate agreements, instead of attempting to draft subsidiary rules applicable in the absence of an agreement, rules which, because of the over-simplification of the issues involved, would create more problems than they solved.

85. Certain representatives referred to the question of what would happen if the States concerned failed to reach agreement on the apportionment of archives raised, in particular, by paragraph 2 of articles E and F. It was also asked, how, in such a case, the interests of newly independent States would be safeguarded. The Commission confined itself to recommending that the successor State should "... benefit as widely and equitably as possible" from those parts of the State archives in possession of the predecessor State. Should the text proposed by the Commission be construed as giving the successor State the right to "benefit as widely and equitably as possible" from the State archives, which, owing to the lack of agreement, remained where they had been previously? In the view of one representative that was the correct interpretation but that conclusion did not emerge very clearly from the text adopted by the Commission. The point was important, since a State that held archives which could, by agreement, have been transferred to the successor State, would not be carrying out its international obligations if it refused to make available to the other State, for the purposes of consultation or reproduction, those documents in its possession which were of administrative, historical or other importance for the other State. It was felt, therefore, by another representative, that it would be necessary to adopt additional provisions.

(b) The principles of functional connexion (or reference) and of origin

86. In the opinion of one representative, the formulations of the Commission in articles E and F could help the parties concerned to reach equitable solutions. Again, the principle of functional connexion and that of territorial origin would have to be applied. The situation in article D might appear more difficult, since it would be a case of several new States as successors to the predecessor State which no longer existed, but in practice it would not be so complicated because, as noted by the Commission, each of the successor States would receive the archives relating to its territory and the central archives would be apportioned between the successor States, if that was possible, or would be placed with the successor State they concerned most directly. Another representative pointed out that in paragraph (15) of the commentary to article C the Commission referred to the two general principles governing the "archives-territory" link, which might be termed the principle of reference and the principle of origin. In his view, the Commission had decided to include only one of those principles, the principle of reference, in the articles without giving any convincing reason for that choice. Furthermore, the language dealing with that point varied as between the articles, the words "that relates exclusively or principally to the territory" being used in article C and "that relates directly to the territory" in articles E and F. That would undoubtedly give rise to difficulties of interpretation.

(c) The right of peoples to development, to information about their history and to their cultural heritage

87. Several representatives welcomed the inclusion, in paragraph 6 of article B and in paragraph 4 of articles E and F, of a clause safeguarding the rights of the peoples of the States concerned to development, to information about their history

and to their cultural heritage. In the opinion of one representative, the introduction of that concept into international law was a major evolution of that law. He had been struck in that connexion by the resemblance and the difference between articles A to F and some provisions in the informal text of the draft Convention on the Law of the Sea (A/CONF.62/WP 10/Rev.3), which in article 149 used the expression "State of cultural origin" and "State of historical and archaeological origin". He suggested, when the Commission came to the second reading of the draft articles on succession of States in respect of matters other than treaties, it should consider co-ordinating the terminology of the articles on State archives with that used in the new law of the sea text.

(d) The principle of indivisibility (unity) of archives

88. Several representatives noted that the principle of the unity of State archives, frequently referred to in the commentary, was to be found in the articles themselve only under article F. The question of the indivisibility of certain archives was an important one. In some cases, the integrity of the archives was essential to their usefulness and preservation as a cultural heritage; in such cases, reproduction technology could also be used both to preserve the indivisibility of the archives and to meet the legitimate needs of all parties concerned. The draft articles should therefore place greater emphasis on the need to preserve the unity of archives. The problem arose not only in the case of dissolution of a State, but also in the other cases of succession of States. Provisions similar to those contained in paragraph 6 of article F should apply to other types of succession of States.

(e) Settlement of disputes

89. In the opinion of one representative, the difficulties involved in the passing of State archives were more evident in the case of the newly independent State and in the case of the separation of part or parts of the territory of a State. In those two cases provision should be made for the solution and settlement of disputes relating to archives.

(f) Observations of a drafting nature

90. With particular reference to articles C, D, E and F, the view was expressed that the Commission had followed a logical classification sequence in assigning a separate article to each kind of succession. Certain representatives considered that articles C to F, which were particularizations of the general principle set forth in article B, could be considerably shortened without damaging the essential structure. It should be possible to avoid the repetition of entire paragraphs from one draft article to another.

91. It was indicated that there were inconsistencies in wording in various parts of the draft articles which, in the opinion of one representative, could easily be removed with the assistance of the secretariat of the Commission.

92. One representative asked what was the meaning of the words "to be settled by agreement between" in article 10, paragraph 1; article 19, paragraph 1; article B, paragraph 2; article C, paragraph 1; and article E, paragraph 2. They obviously did not refer to a pactum de contrahendo or to a duty to negotiate. The draft articles did not make the meaning clear, and the commentary merely stated: "This agreement should be based on principles of equity and take account of all the special circumstances." The words in question should therefore be replaced by a usual formula, such as "unless the States concerned agree otherwise" or "in the absence of an agreement between".

93. One representative found difficulty in understanding the expression "evidence of documents" in articles B, paragraph 3; C, paragraph 3; E paragraph 3; and F paragraph 3. Article C, subparagraph 2 (b), provided that the part of State archives of the predecessor State "that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State". However, in article E, subparagraph 1 (b), and article F, subparagraph 1 (b), which were symmetrical to that text, the words "exclusively or principally" were for no apparent reason replaced by the word "directly".

94. One representative suggested that the Commission could perhaps, on second reading, have another look at such crucial phrases as "normal administration of the territory" and "should be at the disposal of the State", the meaning of which was not immediately self-evident. It would be helpful if the meaning of those key phrases could be clarified, either by some minor modification of the text or by some expansion of the commentary.

95. One representative did not agree with the word used in the Arabic text of the draft articles to reflect the term "archives", and thought that the Arabic equivalent of the word "document" was more in keeping with the definition contained in article A.

C. State responsibility

1. Comments on the draft articles as a whole (part 1)

96. The representatives who spoke on "State responsibility" noted with satisfaction the successful completion of the first reading of part 1 (articles 1 to 35) of the draft articles on this topic, and commended the outstanding contribution made in this respect by the former Special Rapporteur, Mr. Roberto Ago, now Judge of the International Court of Justice.

97. Many representatives stressed the importance of the topic since the rules relating to it touched on international relations as a whole and would further the implementation of other provisions of international law. It was noted that the codification of the rules concerning State responsibility was increasingly essential in order to ensure the normal conduct of international relations. The view was expressed that the Commission must act more quickly on the urgent needs of the international community; while the item had been included in the Commission's programme of work since 1949, real progress had been made only recently. Some representatives stated that the Commission should find ways of

ensuring that the work on part 2 proceeded as quickly as possible and that the second reading of part 1 could begin as soon as there was some idea of the content of part 2. It was stated by other representatives that the drafting of parts 2 and 3 should be completed before the second reading of part 1, so that the Sixth Committee could have a complete picture of the situation. Several representatives stated that, in view of its fundamental importance, the topic of State responsibility should continually be given the highest priority.

98. Several representatives endorsed the general approach followed by the Commission in its study of the topic. It was noted with approval that the Commission had adhered uncompromisingly to the basic distinction between "primary" rules of international law and the "secondary" rules that applied whenever an internationally wrongful act constituted a breach of an international obligation, and that it had defined the subjective and objective elements of that act, had envisaged cases in which a State was responsible for the internationally wrongful acts of another State, and had set forth the circumstances which precluded wrongfulness. One representative observed that the commentaries on the thirty-five articles adopted by the Commission could fairly be regarded as an important contribution to the development of the science of international law.

99. While many representatives commented favourably on the draft articles so far adopted by the Commission, some representatives felt that there was still much room for improvement in some individual articles. One representative expressed the view that the rigorous elimination of all superfluous elements would leave a leaner and more usable text.

2. Comments on the various draft articles (part 1)

100. While many representatives directed their specific comments primarily on the three new articles (articles 33 to 35) adopted by the Commission at its thirty-second session, there were several references to the draft articles previously adopted by the Commission.

Articles 2 to 17

101. One representative made the remark that article 2 (Possibility that every State may be held to have committed an internationally wrongful act), article 11 (Conduct of persons not acting on behalf of the State), and article 12 (Conduct of organs of another State), were unnecessary and should be deleted. In order not to create a fictio juris, the words "shall be considered as an act of the State" in article 5 (Attribution to the State of the conduct of its organs), should be replaced by the words "is an act of the State". In the definition of "act of the State", it must be stated expressly that "act" meant action or omission. In article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority), paragraph 2, article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State) paragraph (b), and article 9 (Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization), the Commission should consider the possibility of replacing the

word "elements" by the word "functions". With regard to article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), his delegation had some difficulty accepting that the conduct of a State organ acting outside its competence or contrary to instructions concerning its activity was to be considered as an act of the State.

102. With reference to article 13 (Conduct of organs of an international organization), one representative, noting that the steadily expanding scope of the activities of international organizations gave new dimension to the problem of their responsibility, considered that a draft convention on international responsibility could cover the responsibility both of States and of international organizations.

103. One representative observed that in article 17 (Irrelevance of the origin of the international obligation breached), paragraph 1, it would be better, for the sake of legal exactness, to refer to "the origin of an obligation from rules of customary or conventional law". In article 17, paragraph 2, he also stated that the words "The origin" should be replaced by the words "The kind of origin".

Article 18. Requirement that the international obligation be in force for the State

104. One representative stated that in the English version of article 18, paragraphs 1 and 2, the words "at the time" should be replaced by "during the time". With regard to article 18, paragraph 2, while the same representative supported the retroactive effect recognized in the said provision, another representative observed that its wording would lead one to believe that a peremptory norm of international law could have retroactive effect; an act which had been wrongful when it had been committed would no longer be regarded as wrongful, once a new rule of jus cogens had been established which made the act compulsory. That paragraph did not seem compatible with articles 64 and 71 of the Vienna Convention on the Law of Treaties. According to article 64 of that Convention, a treaty which was in conflict with a new peremptory norm of general international law became void and terminated; and it was explicitly stated in article 71 that that did not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. In article 18, paragraph 2, the act of a State was deprived of its wrongful character ab initio. Moreover, it might be argued that the paragraph dealt with the existence or not of an obligation and not with the consequences of a breach of an obligation, and that it should not therefore be included in a legal instrument aimed at codifying secondary rules only. It also seemed strange that the term "peremptory norm of international law" was not defined until draft article 29, paragraph 2, although the term appeared already in draft article 18. It was also stated by this representative with regard to paragraphs 4 and 5 of article 18 that they had been drafted in a complicated manner, were difficult to understand and contained rather unusual terminology, since they spoke about an act of the State being "composed of a series of actions or omissions". It would seem that the problems dealt with in paragraphs 4 and 5 could be resolved by ordinary logic.

Article 19. International crimes and international delicts

105. Some representatives expressed reservations on article 19. It was said that it expressed a new doctrine according to which international obligations would be divided in two categories on the basis of their importance to the international community. The breach of an international obligation would be a crime or a delict, depending in which of the two categories the obligation belonged. In the view of one representative, however, the justification for the theory given by the Commission was not satisfactory. The Commission had assumed that the relative importance attached by the international community to the various obligations of States was an objective criterion on which legal consequences could be based. In reality, however, he said, judgements on the question whether an obligation was essential for the protection of fundamental interests of the international community must necessarily be subjective and political. Thus he concluded that the distinction made in draft article 19 between different categories of obligations did not seem useful and could create considerable difficulties in practice.

106. Another representative stated that although his delegation agreed with the list of international crimes given in article 19, it would have appreciated the inclusion of a provision stating that international crimes would include conduct so characterized by the General Assembly or the Security Council.

Article 21. Breach of an international obligation requiring the achievement of a specified result

107. Referring to article 21, paragraph 1, one representative stated that if the conduct chosen by a State failed to achieve the results required by the obligation, there would be a breach of that obligation only if the State adopted such conduct out of either fraud or negligence, since errors might occur in good faith. In his opinion, the Commission should consider whether it was just to introduce a presumption of fraud or negligence against the State.

Article 22. Exhaustion of local remedies

108. One representative stated with reference to article 22 that his delegation would have appreciated a more explicit provision making it clear that denial of justice was not merely the refusal of the judiciary to exercise its functions, but also included wrongful delay in giving judgement. He would also have appreciated the inclusion of a separate paragraph concerning federal States, in order to make clear that a federal State was responsible for the conduct of its political subdivisions and could not evade that responsibility by alleging that its constitutional power of control over those subdivisions was insufficient for it to enforce compliance with an international obligation. In this connexion, the same representative drew attention to the fact that although there were several draft articles dealing with the moment and duration of the breach of an international obligation, there was no article dealing with the continuous nationality of claims. Though it was clearly essential for the individual or corporation suffering loss or damage to possess the nationality of the claimant

State at the time when the injury was sustained, it was not equally clear that the nationality must be retained until the date of decision. Thus, he stated that the International Law Commission should not miss the opportunity of clarifying the law in cases where a change of nationality took place after the presentation of the claim and before the award.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

109. One representative stated that the wording "is considered to occur" should be used.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

110. One representative stated that in article 25 the wording "is considered to occur" should be used. He also observed that paragraph 1 should be re-examined, as its two sentences appeared to conflict.

Article 28. Responsibility of a State for an internationally wrongful act of another State

111. One representative observed that the wording of paragraphs 1 and 2 of article 28 was both abstruse and ambiguous. He stated that the commentary to the article drew heavily on the dependent relationship of a dependent territory or a protectorate in history as well as the relationship of member states of a federation, describing in the abstract a so-called military occupation but making no reference to actual examples of contemporary international relations, thus greatly weakening the practical value of the article.

Article 29. Consent

112. Commenting on article 29 which stated that "the consent validly given by a State" precluded the wrongfulness of the act, one representative said that such a formulation was too broad and sweeping. He observed that the reality of international life showed that the State committing an internationally wrongful act always managed to obtain the so-called "consent" after the action was taken in an attempt to legalize what was actually illegal. Therefore, he said, any articles on the subject should be based on a careful examination of the issues in the light of current realities. Similarly, another representative stressed that consent could only be considered as validly given if the State concerned was not deprived of a reasonable freedom of choice. In his opinion, the fact that "consent" obtained through force, violence or intimidation could not be considered as consent was a point of vital importance for developing nations in their dealings with the developed countries. A representative stated that, though

article 29 did not make it clear that consent must be given before or at the same time as the violation, it was well known that retrospective assent would constitute a waiver of the right to claim reparation, but would not repair the breach of international law.

Article 30. Countermeasures in respect of an internationally wrongful act

113. One representative felt that the term "a measure legitimate under international law" could perhaps be more specifically explained and more amply illustrated. That inadequacy, he said, might have been apparent to the Commission, and might explain why the "countermeasures" referred to in article 30 were excluded from the reservation with regard to compensation for damage contained in article 35. Another representative observed that article 30 on countermeasures was in line with article 34, concerning self-defence in conformity with the United Nations Charter. Thus it was stated that retaliatory measures did not qualify as an exception, since they constituted an unlawful means of compelling fulfilment of a duty, and were therefore unacceptable, even if they were allegedly aimed at compensating for a prior wrongful act. In this context, one representative stated that the article on countermeasures would be better placed immediately before the article on self-defence.

Article 33. State of necessity

114. Some representatives considered the drafting and substance of article 33 concerning a state of necessity generally acceptable, bearing in mind that a state of necessity was to be distinguished from force majeure, fortuitous event, distress and self-defence. One representative noted that he agreed with the Commission that, while the principle should not be allowed to operate in dangerous situations, it could be a useful "safety valve" by means of which States could escape the inevitably harmful consequences of trying at all costs to comply with the requirements of rules of law.

115. It was stated that a correct balance had been struck between the rights, obligations and interests of the State committing the prima facie wrongful act and the rights, obligations and interests of the State which suffered the consequences of that act. It was also stated that article 33 was appropriately worded, and that the Commission's approach was adequate in leaving the matter to State practice rather than specifying concrete instances in which the principle could be invoked.

116. Some other representatives, however, considered the text of article 33 unsatisfactory, stating that the Commission should further examine the article with a view to eliminating all ambiguities. The view was expressed that the article failed to define or even indicate what a state of necessity was, and that the text should be revised to include at least the essential part of the explanation contained in paragraph (1) of the Commission's commentary to article 33. Another representative observed that, looking at the text of article 33 from the standpoint of the maintenance of international peace and

security, one could not but feel that its practical application would cause difficulties, and he expressed his serious doubts as to the necessity of including a provision on the state of necessity in the draft articles, considering the fact that in the current state of international relations, in which some States were interpreting international law to their own advantage, the application of article 33 would give rise to a dispute.

117. Several representatives, while noting that the concept of jus necessitatis had been invoked abusively by States in order to justify a breach of their international obligations, considered that the limitations set by article 33 ensured sufficient protection against abuses. The view was expressed that the invoking of that condition to justify an act that would otherwise have been wrongful could be accepted only in quite exceptional cases; hence it was preferable, it was said, to define the rule by a negative formulation in order to emphasize that its application was quite exceptional. While some representatives stated that the novel formulation of paragraph 1 of article 33 vis-à-vis the other articles of chapter V was perhaps a mistake and hoped that the Commission would find it possible to return to the Special Rapporteur's original formulation, other representatives supported the present text which they believed would reduce to the minimum the danger that the concept might be abused.

118. Several other representatives, however, expressed their fear of possible abuses under the present text, urging the Commission to formulate the article as concisely as possible in order to make any abuse impossible. It was stated that the Commission should reconsider the use of such vague terms as "essential interest" and "grave and imminent peril" and the desirability of widening the concept of state of necessity to cover cases in which there was no direct threat to the existence of the State as a sovereign and independent entity.

119. It was also observed in this context that article 33 seemed particularly unsatisfactory in that it provided a State with a pretext, namely its "essential interest", which would enable it to abrogate its international obligations and to evade responsibility for its actions; various interpretations, some of them perhaps suggestive, could be placed on the criterion of "essential interest", and it could be put to a variety of uses by the parties to a treaty as circumstances required. One representative suggested that a third paragraph describing such circumstances in detail should be added to article 33, so as to avoid the possibility of abuse. The view was further expressed that article 33 as formulated, with no definition of state of necessity, was disputable from the standpoint of the principle of the sovereign equality of States, which barred a State from deciding unilaterally what were the essential interests of another State.

120. Another representative observed, on the other hand, that the said draft article laid down such strict and inflexible conditions for invoking a state of necessity that it would be extremely difficult, if not impossible, to do so successfully.

121. Several representatives felt that the provision should be given a restrictive interpretation. In the words of one representative, the expression "essential interest" should not be understood to refer to a political interest of the State

concerned; it must refer only to situations where the State had had to act to ensure the very survival of its population, to save it from famine, for example, or to protect its natural environment from irreversible harm - and even then, there must have been no alternative to the action taken. It was remarked by another representative that article 33 was considered by the Commission as relevant to a "necessity of State" (para. (3) of the commentary to art. 33) in which the political aspects of the interest were involved. He also stated that the Commission had been right in deciding not to lay down pre-established categories of interest, because the extent to which a given interest was essential naturally depended on all the circumstances in which a State was placed in different specific situations (para. (32) of the commentary to art. 33).

122. Some representatives proposed that a reference should be included in article 33 to the use of peaceful means for the settlement of disputes in accordance with Article 33 of the United Nations Charter. The view was expressed that compulsory methods for the settlement of disputes by means of judicial or obligatory arbitral procedure, were not merely desirable but essential since a State invoking the state of necessity must not be the sole judge of the existence of necessity. However, certain representatives did not agree to the proposed inclusion because they were opposed as a matter of principle to compulsory procedures for the resolution of disputes; such procedures were deemed as running counter to the concept of State sovereignty.

123. Several representatives held the view that the term "an essential interest of the State" of paragraph 1 should include any vital economic interest of a State in a situation of grave and imminent peril. It was stated that the acknowledgement in positive international law of the possibility of invoking necessity in order to safeguard essential economic interests would help the Governments of developing countries to cope with their temporary, short-term financial difficulties without jeopardizing their international credit. The view was also expressed that the concept of "a grave and imminent peril" might be extended to cover economic peril, and in particular the possible nationalization of foreign monopolist interests by newly independent States for the purpose of obtaining sovereignty over their resources. According to another representative, article 33 did not sufficiently highlight the situation of the developing countries and the imperatives of the new international economic order. In this context, it was observed that the Commission had paid too much attention to examples of physical damage (the Torrey Canyon incident) and not enough to cases in the second category (e.g., the Russian indemnity case, the Société Commerciale de Belgique case and the Case of properties of the Bulgarian minorities in Greece). Some members of the Commission had acknowledged the importance of cases in which, for reasons of necessity, States had adopted conduct not in conformity with obligations "to act" in regard to the repudiation or suspension of payment of international debts. On the other hand, however, one representative stated that, while the commentary to article 33 cited a number of cases in which States had invoked a state of necessity to justify non-payment of a debt, it was clear from the examples cited that, at most, the plea of state of necessity would have the effect only of suspending performance of the obligation as long as the state of necessity existed.

124. Referring to subparagraph 2 (a) of article 33, several representatives noted with approval that no State could invoke the state of necessity in the case of

important international obligations arising out of a peremptory norm of general international law, i.e., the rules of jus cogens. The view was expressed that the one obligation whose peremptory character was beyond doubt in all events was the obligation of a State to refrain from any forcible violation of the territorial integrity or political independence of another State; it would therefore be preferable, it was said, at the end of paragraph (26) of the commentary, instead of indicating that the practice of States was of no great help in answering the question, to point out clearly that the state of necessity could not be invoked to justify acts of aggression. In connexion with paragraph (37) of the commentary to article 33, one representative thought that refraining from the threat or use of force in accordance with article 2, paragraph 4, of the Charter should also be included among those obligations the peremptory character of which could in no case be disregarded.

125. With regard to subparagraph 2 (c) of article 33, one representative raised the question whether there was justification for allowing a plea of necessity if the State in question had contributed to the occurrence of the state of necessity and whether, if an oil tanker went aground near a coast where there were no navigation signals, the coastal State might act, as was done in the Torrey Canyon case, in bombing the wreck with a view to preventing the risk of massive pollution of its coast. Another representative observed that he did not believe, in the case referred to above, that the coastal State could be blamed for not having installed signals along its coasts if its ships did not follow that coastal route for any significant distance; he felt it could be assumed that ships of other States would follow that route at their own risk. In any event, he did not support the argument that subparagraph 2 (c) should be deleted. One representative suggested in this connexion that the common-law concept of contributory negligence might by analogy have some utility.

Article 34. Self-defence

126. Many representatives endorsed the inclusion of a provision concerning self-defence in the draft articles. It was stated and was generally shared that the principle of self-defence as embodied in Article 51 of the Charter of the United Nations was universally recognized and its inclusion in the draft articles as a circumstance precluding wrongfulness was not open to controversy. However, one representative stated that he did not believe that a provision of that kind should be included in the draft articles, since the right to self-defence could be invoked only in a particular situation in which an armed attack had occurred.

127. With regard to the approach adopted by the Commission, the view was expressed that it was quite proper for the Commission to refrain from defining how self-defence should be understood and from giving a definitive interpretation of the Charter; such an interpretation was to be derived from the practice of the United Nations bodies and, therefore, in the final analysis, from the practice of States. It was also stated that the approach adopted corresponded to the chosen objective and fell correctly within the framework of the work on the so-called "secondary" rules. One representative noted, however, that although the Commission had no mandate to interpret the Charter, it could not avoid an interpretative mood when drafting an article on such a question. He observed that

there was an ongoing doctrinal debate on the circumstances in which a state could legitimately exercise the right of self-defence and the Commission had not been wrong to adopt the current wording of the draft article; however, it had unwittingly given the appearance of taking sides in that doctrinal debate. Another representative expressed the view that some of the discussions in the Commission regarding the scope of the concept of self-defence had gone not only beyond the framework of the topic of State responsibility but also beyond the mandate of the Commission.

128. One representative stated that he did not agree with the Commission's approach to the subject in presenting the principle in general terms without referring to methods of application; it would have been preferable for the International Law Commission to have considered the problems arising in the application of the princple, such as the definition of the expression "armed aggression" and the determination of the time at which a State could invoke self-defence; for that purpose, the Commission should be guided by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and the Definition of Aggression.

129. As for the text of draft article 34, several representatives found its wording satisfactory. It was noted with approval that, despite the fact that the Special Rapporteur had proposed making a specific reference only to Article 51 of the Charter, the Commission had chosen to make the reference more general. One representative stated in this connexion that any reference to the Charter in general was acceptable only to the extent that it was clearly a reference to the Charter as currently in force; thus, there could be no question of invoking, to justify self-defence, outdated provisions such as the one regarding "enemy States", applied to any State which had been an enemy of the victors in the Second World War. Another representative observed that article 34 was properly formulated, so long as it was understood that the words "in conformity" referred to the inherent nature of the right provided for in Article 51 of the Charter.

130. Several other representatives, however, considered that the draft article should include a specific reference to Article 51 of the Charter, which it was said made clear that the right of self-defence could be exercised only until the Security Council had taken measures necessary to maintain international peace and security. It was observed that the intention behind the omission of the reference to Article 51 appeared to be that a lawful measure of self-defence was a broader concept than Article 51 of the Charter although its precise implications depended on the facts of each particular case; it would have been preferable for the Commission to abide by the provisions of the Charter rather than keeping the reference to self-defence vague, in view of the direct bearing of such an exception on international peace and security.

131. One representative stated that the Commission should consider the advisability of replacing the reference to the United Nations Charter by a reference to international law in general.

132. Referring to the expression "lawful measure of self-defence" in the draft article, some representatives felt that the term "lawful" should be deleted, since they considered that any measure of self-defence taken in conformity with the Charter was a lawful measure and that unlawful measures were not self-defence. One representative suggested that, if it was necessary to qualify the measure of self-defence, some other word such as "proper" or "appropriate" could be used. However, another representative stressed that the adjective "lawful" was very important; according to him, although Article 51 of the Charter partially answered the question whether a given situation justified resort to self-defence. In the context of State responsibility, it was not sufficient to determine whether or not the situation justified resort to self-defence, since measures of self-defence not in conformity with the international obligations of a State were not all necessarily lawful. He therefore regarded the inclusion of the word "lawful" in the text as essential, although the word "légitime" in the French text might seem at first glance to make it redundant.

133. Some representatives did not consider that the draft article should contain a reference to "an act of a State not in conformity with an international obligation of that State", because no act of a State constituting self-defence was contrary to any international obligation; the wording given in foot-note 179 of the Commission's report would be more appropriate.

134. With regard to the commentary to article 34, a few representatives expressed reservations. One representative stated that he found it surprising that paragraphs (19) to (22) of the commentary evoked controversial questions in a manner that was not appropriate by way of commentary to an article. He therefore urged the International Law Commission to shorten its commentary to article 34, particularly by omitting paragraphs (19) to (22). Another representative also stated that he did not agree with paragraphs (1) to (22) of the commentary, which had elucidated the question of the fulfilment of requisite conditions for the situation of self-defence as well as the essential character of the concept of self-defence on the basis of the Charter of the United Nations. He considered that the Commission should not have referred to the provisions of the Charter on self-defence, because it had no mandate to do so and because it was not examining the question of self-defence as such but only the preclusion of State responsibility for acts of self-defence in case of an armed attack against it. It was also stated that in some parts of its commentary, the Commission had loosely referred to "armed attack" in a manner which might tilt the Commission's position in favour of one school of thought contrary to the posture it had tried to maintain; that was the case in paragraphs (8) and (9) and he hoped that during the next reading of the draft articles, the Commission would scrutinize the wording of the commentary scrupulously so as to leave no doubt on its position.

135. Some representatives referred to other questions relating to self-defence and the draft article thereon. The view was expressed that self-defence assumed full validity in cases of aggression, in those concerning the right of peoples to self-determination, and in those related to the struggle against colonialism, oppression and all forms of foreign domination contrary to modern international law. It was also stated by one representative that he hoped that the Commission would be able to define the limits of self-defence, so that that principle would not be used to protect or strengthen illegal situations. Self-defence, he said,

presupposed prior unjust aggression and must be in proportion to that aggression, i.e. sufficient to repel it; that principle was embodied in the United Nations Charter and in customary international law, but its inclusion in article 34 would be desirable.

136. One representative observed that it would have been worth while to further refine article 34 by incorporating the concept of proportionality as a vital element of self-defence, and by unequivocally prohibiting reprisals, which should in no circumstances be endowed with any form of legitimacy. Another representative, however, stated that the question of proportionality should not be raised in the case of self-defence against an armed attack, because self-defence was aimed solely at preventing the attack from succeeding. His delegation took the position that preventive self-defence or preventive strike was inadmissible de lege lata.

137. One representative held the view that measures of self-defence did not constitute a violation of international law and their function as a legal consequence of an armed attack, or as a measure intended to restore and ensure the implementation of the legal rules violated, had not been fully exhausted; the question of self-defence should therefore be dealt with in part 2 of the draft in connexion with other legal consequences which might result from an aggression. In that case, a distinction must be made between aggression and other international crimes.

138. In the course of the debate regarding article 34, the view was expressed that it might be appropriate to add a provision which would include, among circumstances precluding wrongfulness, the case provided for in Article 25 of the Charter in connexion with decisions of the Security Council. Another representative also remarked that, since the list of circumstances enumerated in the draft was not absolutely exhaustive, and since that fact was not reflected in any of the provisions of the draft, the Commission might in second reading, consider the possibility of including a general reservation in that connexion.

Article 35. Reservation as to compensation for damage

139. Several representatives endorsed the inclusion of article 35 as a useful reservation, both important and necessary. The view was expressed that the circumstances precluding wrongfulness of an act of a State did not preclude State responsibility similar to that which would arise from the same act committed in other circumstances. In particular, there might be a duty to compensate. The existence of a so-called circumstance precluding wrongfulness could have the simple effect of substituting for a State's primary duty of performing an international obligation that of compensation for damage caused by the non-performance of that obligation.

140. Several representatives noted that the Commission would have to review both the content of the article and its placement after the completion of part 2 of the draft and also in the context of the topic of international liability for the injurious consequences of acts not prohibited by international law. Some representatives expressed their preference of dealing with this matter in part 2

of the draft, while others stated that it would be more in place in the articles to be formulated on international liability for risk.

141. Some other representatives expressed their skepticism about the wisdom of including article 35 in the draft. It was stated that the question of damages should be determined at some other time and in some other forum.

142. The view was also expressed that article 35 was appropriate as a rule of law. Although in domestic jurisdiction there had been a clear distinction between penal prosecutions to ensure the punishment of the guilty party and civil actions to obtain compensation, in international law it was not easy to distinguish between the two. It was also said that if the wrongfulness of the act of a State had been precluded by virtue of the provisions in question, it could not be maintained that a separate action concerning compensation for damage caused by that act was still possible; thus it was incorrect to state that the preclusion of wrongfulness could not prejudge any question in regard to compensation; on the contrary, it irrevocably prejudged it. According to this observation, any other interpretation would open the way to a legal instability that would render pointless the regulation of the substance of the establishment of international responsibility.

143. One representative felt that the means of vindicating the claim for compensation could have been more clearly delineated. It went without saying, he observed, that compensation for damage must be founded on the basic principle of good faith, since - for individuals just as for States - those who sought equity must be deserving of equity.

144. Finally, some representatives stated they had no comments to make for the time being, as article 35 was a saving clause, transitional and provisional in nature.

3. Part 2 of the draft

145. Several representatives commended the Special Rapporteur, Mr. Willem Riphagen, on the high quality of the analyses and data which he had supplied in his preliminary report on part 2 and expressed their agreement with the approach adopted by him in connexion with the parameters he established for discussing the content, forms and degrees of State responsibility.

146. The first parameter, the new obligations of the State bearing the responsibility, would, observed one representative, be divided into obligations covering the ex tunc aspect (particularly payment of damages as reparations), the ex nunc aspect (restoration of the rights of the injured State) and the ex ante aspect (possible guarantees against future breaches of the same obligations). In setting out those three categories of obligations of the State, the representative noted that account would no doubt be taken of the distinction made in article 19 between international delicts and international crimes and that the rule of proportionality would be applied. He expected that the same rule would also be applied to the "new" rights of the injured State, which of course corresponded in large measure to the "new" obligations of the State bearing the responsibility and

which must be defined accordingly. Other "independent" rights had also been mentioned: the right to terminate a treaty, in accordance with article 60 of the Vienna Convention; and the right to apply countermeasures, in conformity with article 30 of part 1 of the draft articles.

147. The chapter dealing with the legal position (rights and obligations) of third States would, this representative believed, include specific indications as to what such States could or should do. It was indeed possible that in some cases third States might maintain a neutral position, but in others some formal action or abstention from action might be required of them. There was a traditional concept that a wrongful act did not create a new legal relationship between the State committing the act and so-called "third States". However, it had been pointed out in the Commission that the differentiation between injured States and third States tended to disappear for a broad category of internationally wrongful acts. He hoped that the draft would achieve a proper balance between the two concepts through an inductive approach.

148. Attention was drawn to pargraph 18 of the Special Rapporteur's report addressing the question whether the legal consequences of breaches of international obligations which were not wrongful acts should be dealt with in part 2 of the draft articles. One representative was inclined to think that it should not, since the draft articles currently under consideration dealt with international responsibility and should not go beyond the scope of that responsibility. According to article 1, international responsibility was a consequence of an internationally wrongful act of a State. The breach of an international obligation was one of the elements of such a wrongful act, but did not in itself engender international responsibility. It would seem logical, therefore, not to deal in part 2 with the consequences of situations that did not involve such responsibility.

149. It was also noted that the view had been expressed in the Commission that the exclusion of wrongfulness did not exclude the possibility that different rules might operate in cases of breaches of international obligations and place upon the State obligations for total or partial compensation which were not connected with the commission of a wrongful act.

150. Another representative was of the view that part 2 of the draft on State responsibility should be concerned essentially with the consequences of a wrongful act and the rights afforded to the injured State. The position of third States affected by the internationally wrongful act was a secondary aspect; and he therefore had some hesitations about the concept that "new legal relationships" inevitably arose in all cases where an internationally wrongful act had been committed, particularly in the case of material breach of a treaty obligation. Consequences might flow from that material breach. As article 60 of the Vienna Convention on the Law of Treaties had made clear, the other party or parties might be entitled to terminate the treaty, to suspend its operation, to seek reparation or even, depending on the circumstances, to seek restitutio in integrum. In principle, it would be wise to eschew doctrinal questions in formulating part 2 of the draft, and to concentrate on determining the rights of the injured State in the various contingencies contemplated. In a definition of those rights, the obligations of the State which had caused the injury would simultaneously be

defined. He therefore hoped that the Special Rapporteur would bear in mind that the normal remedy in cases of breach of an international obligation was reparation and that the application of countermeasures or other forms of sanction was admitted only exceptionally - namely, in circumstances where the essential interests of the injured State could not be protected by reparation alone.

151. There was also expressed the view that in formulating a definition of the different forms of responsibility, two factors should be taken into account: firstly, the greater or lesser importance which the international community attached to the rules at the origin of the obligations violated and, secondly, the greater or lesser gravity of the breach itself. In defining the degrees of international responsibility, it was necessary to determine the role to be played by the concepts of reparation and sanction. The Special Rapporteur had suggested a method whereby the international community could determine the response proportional to the breach of a particular obligation. Accordingly, the Committee would have to await the new report of the Special Rapporteur in order to decide whether the proposed plan of work was satisfactory.

152. A number of representatives observed the possible link between the issues treated under part 2 and part I of State responsibility and those examined under the topic "International liability for injurious consequences arising out of acts not prohibited by international law". A question was accordingly raised as to whether article 35 on reservation as to compensation for damage included in part I of State responsibility properly belongs to that part dealing with secondary rules, or to part 2 dealing with content, forms, and degrees of international responsibility or whether the question of compensation should appropriately be treated under the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

153. There was also a question raised with respect to the link between article 34 of self-defence included in part I and the issues to be covered under part 2. One representative observed that measures of self-defence did not constitute a violation of international law and their function as a legal consequence of an armed attack, or as a measure intended to restore and ensure the implementation of the legal rules violated, had not been fully exhausted. The question of self-defence should therefore be dealt with in part 2 of the draft in connexion with other legal consequences which might result from an aggression. In that case, a distinction must be made between aggression and other international crimes. It would appear, he noted, that the comments of the former Special Rapporteur regarding defence against armed attack, and Article 51 of the Charter of the United Nations, gave a more precise description of self-defence in contemporary international law than the text proposed by the International Law Commission, which involved a danger of misinterpretation.

154. Most of the representatives expressed the view that work on part 2 should proceed as quickly as possible and in harmony with part I.

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

1. Comments on the draft articles as a whole

155. Many representatives expressed satisfaction at the substantial progress made by the International Law Commission at its thirty-second session on the draft articles on treaties concluded between States and international organizations or between international organizations, by adopting articles 61 to 80 and an Annex, thus completing the first reading of the entire set of draft articles. Tribute was also paid to the Special Rapporteur, Mr. Paul Reuter, who had made a remarkable contribution to the Commission's monumental work on the topic and who had displayed a flexibility which had made possible the reconciliation of divergent views on the degree to which international organizations could be subjects of international law. It was noted that the articles and the Annex adopted at the thirty-second session were transmitted to Governments and international organizations for comments.

156. Many representatives stressed the contemporary significance of the Commission's work on the topic in view of the increasing role played by international organizations in many fields, notably the maintenance of peace and security and the promotion of economic co-operation among States, and the interaction with each other and with States. The Commission's work on the topic responded to the need for legal regulation of relations between international organizations as well as of their relations with States. The draft articles closed the gap resulting from the decision that the Vienna Convention on the Law of Treaties should apply only to treaties between States. The Commission had had many problems because the law on the topic was not yet sufficiently developed, due to the recent appearance of international organizations on the scene as contracting parties. The legal regulation of treaties to which international organizations are parties would necessarily be accompanied by innovations, especially with regard to the treaty-making capacity of international organizations and their contribution to the international legal order. Provisions such as that of article 6 on the capacity of international organizations to conclude treaties represented a major and timely contribution to the codification and progressive development of international law as it related to international organizations. The elaboration of special rules that would permit the strengthening of the position and influence of international organizations within the framework of the existing international legal order, deserved support. The new set of rules concerned with the treaty-making role of international organizations was of particular interest to States which served as hosts to international organizations and would be most useful to legal advisers of Member States, particularly small Member States, in their treaty negotiations with international organizations.

157. In relation to the increasing role of international organizations reference was made to the World Bank and the International Monetary Fund which had over the years concluded numerous agreements with States within their respective spheres of competence, as well as to the Agreement establishing a Common Fund for Commodities and the future Convention on the Law of the Sea which provided for legal arrangements between States and international organizations or among

international organizations. It was also stated that the European Economic Community, which had a juridical personality and the capacity in international law to conclude treaties with States or other entities, considered itself entitled to treatment not less favourable than that given to international organizations by the Commission's draft articles. Within the limits of its competence, the Community was a party to many international treaties in the fields of commercial policy, fisheries and environment and to several commodity agreements.

158. Several representatives noted with approval the Commission's intention to start the second reading of the draft articles without delay in the light of comments and observations received from Governments and international organizations. The hope was expressed that the second reading could start at the Commission's thirty-third session and that it would not entail unnecessary time and effort. Several representatives indicated that their Governments would submit detailed comments in writing on the draft articles and, with regard to articles 1 to 60, would seek to adhere to the limit of 1 February 1981 set by the Commission. In this connexion, one representative believed that it was difficult for Governments to comment constructively on individual parts of a complete set of draft articles under preparation in the Commission, since they naturally wished to have a sight of the complete draft in order to assess whether early provisions on which they might have had some doubts or reservations had been qualified by later provisions.

159. Certain representatives considered that in order to formulate, in second reading, rules that were as close as possible to State practice, the Commission should make a fuller and more thorough study of treaties concluded by States with international organizations or between the latter, in order to single out the specific characteristics of that category of treaty. The conclusions of that study of existing treaties, including the most recent treaties, such as the agreement establishing a Common Fund for Commodities and the forthcoming Convention on the Law of the Sea, would subsequently be reflected in the commentaries on the articles.

160. In the opinion of one representative, there appeared to be a tendency in the Commission to make statements without specific authority, on the grounds of progressive development or of discussions that had taken place in the Commission. That was no doubt due to shortage of time, and he hoped that it could be remedied. In this connexion, another representative, referring to paragraph (10) of the commentary on article 66, felt that it was too general for his delegation to express an opinion concerning the Special Rapporteur's view, which had not been endorsed by the Commission. In view of the fact that the Commission's summary records were not easily and rapidly accessible, the Commission should summarize in its future reports the various views expressed in its meetings when such cases arose.

161. With reference also to the commentaries, one representative stated that he had been struck by the fact that the commentaries of the Commission on the draft articles, especially those adopted at its thirty-first session, in some cases varied considerably from the original commentary submitted by the Special Rapporteur although the Commission's Yearbook did not indicate that they had been formally discussed or adopted by the Commission. Moreover, in one case at least,

the commentary adopted in 1979 on article 56 (A/34/10, p. 436) not only did not correspond to the parallel commentary adopted by the Commission in 1966 on what had become article 56 of the Vienna Convention, where examples of treaties to which that article referred had been deliberately excluded, but in some respects proceeded from a different conception of the question. He stressed in that connexion that commentaries were of the greatest importance and must be adopted with care. He therefore requested that the editors of the ILC Yearbook should revert to the earlier practice of indicating the formal adoption of each paragraph of each commentary before the adoption of the report as a whole and that, if necessary, the Commission should make the necessary adjustments in its procedure for adopting its report.

(a) Method of work and scope of the draft

162. The representatives who spoke on the matter generally agreed with the Commission's decision to base its work on the Vienna Convention as a framework and to model the draft articles after the provisions of that Convention. This method, it was said, had made it possible to avoid serious controversy. In reference also to the Commission's method, certain representatives considered that the Commission had succeeded in adapting the Vienna Convention which was now in force, to the particular needs of treaties to which international organizations were parties, without disturbing the basic structure of the Vienna Convention. That was especially important in view of the fact that the Vienna Convention could rightly be considered as the written expression of contemporary international customary law on the subject. The Convention reflected a very delicate balance between the various interests involved and should not be jeopardized by alterations that might compromise its credibility. Although the drafting of the articles had revealed some inaccuracies and deficiencies in the Vienna Convention, great caution must be exercised in remedying them.

163. Some representatives, while recognizing the analogy between the articles being drafted and the Vienna Convention, pointed out that there were limits to that analogy in view of the special nature of international organizations, which could not be placed on an equal footing with States. There were substantial differences between States and international organizations in regard to their treaty-making capacity which should always be kept in mind in order to avoid any facile analogy. The treaty-making capacity of international organizations was restricted by the statutes of the international organization and by its rules, which were adopted by sovereign States. It was precisely those differences which at times caused considerable difficulties in endeavours to "transfer" the rules regulating legal relations between States as laid down in the Vienna Convention to the sphere of action of international organizations. Those representatives considered that, on the whole, the articles adopted by the Commission seemed to embody workable solutions bearing in mind the substantial distinctions existing between States and international organizations and the fact that such organizations were dependent on their member States. Some modifications had been introduced to the corresponding articles of the Vienna Convention to take account of the fact that international organizations had a more limited competence than States and to ensure that the provisions were appropriate no matter whether the parties to a treaty were States as well as intergovernmental organizations or only

intergovernmental organizations. In the view of certain representatives, some of the articles appeared not to reflect sufficiently the distinction between States and international organizations and, consequently, some changes would have to be made to take account of the special circumstances that arose when international organizations were parties to a treaty.

164. One representative stressed his preference for the original proposal by the Special Rapporteur that the draft should be based, mutatis mutandis, on the Vienna Convention. In his view, the existing draft articles showed that there was a danger of regarding international organizations as having some sort of second-class status, whereas in fact they derived their status from international law. In the light of existing practice, the current draft could not be regarded as progressive. The areas of distinction explored in 1978 and 1979 between States and organizations were not useful because they tended either to confuse the issue by indicating a difference when no real difference existed, or to be demeaning to international organizations, as for example in article 42. It had been suggested that treaties between States and international organizations and those between international organizations needed separate treatment for reasons of drafting, but if there was no real difference, the requirements of drafting could not justify making one. The distinction conflicted with the experience of recent years and should be eliminated. On the other hand, one representative, referring to the draft articles as a whole considered that, as subjects of international law, international organizations had not been assigned a secondary status. It was true that States possessed the attributes of sovereignty, whereas international organizations were no more than their members wished them to be, and the draft articles must take that fundamental difference into account.

165. One representative, emphasizing that certain rules applicable to States in their international relations could not be transposed automatically in the case of relations between two or more international organizations, cited as an example the case of reservations to treaties. In his view, formulations like those contained in articles 19 and 19 bis did not adequately reflect the specific aspects of the two categories of subjects of international law. He indicated that the same comment was valid with regard to the relationship between internal law and the rules of an international organization (art. 27). To assimilate mechanically the relationship between international law and the rules of treaties concluded between States, on the one hand, to the relation between internal law and the rules of international organizations, on the other, would lead to the sanctioning in international legal relations of the subordination of internal law to the rules of an international organization, which would be unacceptable, because that would infringe on State sovereignty, which was a fundamental principle in law and in international relations. For these reasons, he considered that the specific elements of relations between States and international relations, on the one hand, and between two or more international organizations, on the other, should be reflected more strictly in the draft articles as a whole, and not only in the last part adopted at the Commission's thirty-second session.

166. In the opinion of some representatives, the draft articles involved a degree of compromise as a result of some difference of view about the capacity of international organizations to act in international law. With regard to the legal status of international organizations, the Commission had succeeded in empirically

striking the proper balance between different situations of States and international organizations and between the traditionalist viewpoint and views which equated the status of international organizations with that of States. In this connexion it was said that the Commission had noted that the competence of international organizations was limited to their rules (art. 6), but had provided that that limitation could not become an excuse for depriving treaties of their binding effect unless the defect was one which had been apparent, or should have been apparent, to another contracting State or organization (art. 46). Reference was also made, particularly to articles 6, 7, 13, 16, 18, 19, 19 bis, 19 ter, 20, 20 bis, 36 bis, 62, 65, 66, 73 and 75 as evidence of the Commission's balanced approach.

167. Several representatives referred to the structure of the draft, to the manner in which the articles had been cast and to the terminology used. In this regard it was pointed out that at the outset of its work on the topic, the Commission had noted the extremely close relationship between the rules governing treaties between States and international organizations and the rules governing treaties between States themselves as reflected in the Vienna Convention. The Commission had stressed the desirability of bringing the terminology and wording of the draft articles into line with the Vienna Convention in advance, so as to form a homogeneous whole with that Convention. The Commission had been faithful to its initial approach and had now completed the laborious task of analysing the Vienna Convention and seeing how far its provisions had to be adapted to establish a set of self-contained rules on the topic. The draft articles were not intended to interfere with the Vienna Convention; their purpose was to provide an adjunct to it.

168. Nevertheless, it was said, the Commission's pursued policy of not reopening matters that had been settled in Vienna might sometimes be obscured by the denseness of the language used in the draft in an attempt to cover all possible situations; at the current stage the aim must be to simplify the wording. For example, in cases where there was a substantive difference between provisions dealing with treaties to which only international organizations were parties and provisions dealing with treaties to which both States and international organizations were parties, there must be separate provisions. However, more frequently the substantive rule was the same, and there seemed to be little purpose in distinguishing the two cases in parallel provisions. Reference was made in this respect to the section on reservations, where a distinction was repeatedly made between treaties to which States and one or more international organizations were parties, and treaties to which international organizations and one or more States were parties. But the draft articles at no point provided that those apparently different types of treaty should be governed by different rules. The whole composite phrase used seemed only to distinguish between treaties to which there were three parties and bilateral treaties; if that was indeed the only purpose of the phrase, which gave the impression that the intention was to depart from the Vienna model, it should be possible to simplify the language, and perhaps to use one or more phrases in the definitions article that would serve the same substantive purpose and leave the text more spare.

169. In the opinion of one representative, the draft articles contained too much detail, perhaps as a result of following the Vienna Convention too closely. Several other representatives noted that the draft articles contained many provisions that were merely taken over from the Vienna Convention. In their view, the Commission should now streamline the text and draft a relatively brief instrument which would concentrate on the changes to be made in the Vienna Convention and avoid mere repetition of its terms. In this regard it was said that, in doing so, the Commission should not lose sight of the need to draft a new legal instrument that was not identical to existing instruments. It was also said that the many literal repetitions of the provisions of the Vienna Convention might be reduced by using a system of cross-references.

170. Addressing himself in more detail to the question, one representative observed that a quick glance at articles 61 to 80 revealed that six articles from the Vienna Convention had been taken over without any change of language whatsoever, that eight articles from the Vienna Convention had been taken over with only minimal drafting changes or other changes necessary to accommodate the special circumstances of international organizations, and that only six articles from the Vienna Convention had been subject to slightly more substantial adaptation. In his view, the question was whether the methodological approach hitherto adopted should now be reviewed. Prima facie, the set of draft articles would appear to be suitable for transformation into an international convention that would complement the Vienna Convention. There was, however, a great risk that the submission of the draft articles to a plenipotentiary conference could open the way to amendments that would undermine the authority of the Vienna Convention by reopening issues which had been solved only with the greatest difficulty at the United Nations Conference on the Law of Treaties. If the Commission decided to recommend that a convention should be concluded on the basis of its preparatory work, it should conduct a thorough review of the draft articles between first and second readings with a view to recasting them in the form of the necessary modifications to the Vienna Convention. The advantages of that admittedly difficult task far outweighed the disadvantages. In the opinion of another representative, a reason for not trying to reword the Vienna Convention was that if the Vienna articles were submitted to a number of codification conferences the texts based on it might vary, as a consequence of different explanations of what the Vienna text meant, and thus the law of treaties embodied in the Vienna Convention might be eroded. He accordingly reiterated his appeal for a return to the Special Rapporteur's suggestion that the text of the Vienna Convention mutatis mutandis should be used as the basis for the draft articles.

171. One representative considered it possible, for example, to recast article 65 to read:

> "Article 65 of the Vienna Convention on the Law of Treaties shall apply to treaties to which the present articles apply, it being understood that any notification or objection made by an international organization shall be governed by the relevant rules of that organization."

In his view, it might be possible to shorten the draft radically if that technique could be employed. The Commission could even consider dealing with whole groups of draft articles in that way, specifying only those adaptations to the basic

articles of the Vienna Convention that would be necessary. The recasting of the draft articles in that way would not necessarily involve any change of substance. It could, however, result in a substantial reduction in the number of draft articles. That would in turn considerably ease the task of any plenipotentiary conference that might be convened to consider the draft articles, thereby bringing about considerable financial savings. Above all, it would substantially reduce the risk of damage to the structure and authority of the Vienna Convention. The Commission had been punctilious in adhering strictly to the text of the Vienna Convention, except when it considered that some modification or qualification was necessary because of the special nature of the treaties covered by the draft. It could not be assumed, however, that such rigorous self-discipline would be applied as effectively in a wider forum.

172. With regard to the scope of the draft, one representative held the view that treaties concluded between two or more international organizations only were a separate question altogether, which raised delicate problems (for instance, treaties concluded between two subsidiary organs of the General Assembly) and that the Commission's task would be greatly simplified if that aspect, which did not meet any international need, were to be dropped.

173. Another representative wondered whether the draft articles were sufficiently flexible to apply to the wide variety of treaties that could be concluded by an international organization. In his view, that question concerned several of the articles of the draft submitted by the Commission. In fact, the draft articles made no distinction between (a) treaties concluded between an international organization and one or more of its member States, (b) treaties concluded between an international organization and an "external entity", whether that entity was a non-member State or another international organization with a substantially different composition and (c) treaties between two or more organizations of substantially similar composition. According to that representative, the rules codified by the Vienna Convention, which referred to treaties between States, were based on the coexistence of entirely distinct entities, namely, sovereign States. In principle, applying those rules to category (b) called merely for certain amendments of a technical nature which were introduced in the draft articles prepared by the Commission. But he wondered whether more profound and fundamental amendments would not be necessary in order to apply those articles to categories (a) and (c). It might seem strange to apply rules which concern relations between States to relations between an international organization and its member States (category (a)) and to relations between international organizations made up of the same States (category (c)). In his view, it would seem normal, with regard to treaties in category (a), to attach greater importance to the internal rules of the organization in combining the rules, whereas in the case of treaties in category (c) it would seem more normal to regard those treaties as constituting an implicit change in the internal rules of the two organizations. He observed that the foregoing were only presumptions, which might be contradicted by the terms of the treaty or by the nature or special function of the rule of the organization involved.

174. Moreover, he said, the distinction between the three categories of treaties applied perhaps more to the solution of legal questions which had not yet been dealt with in the draft articles and which were "reserved" by article 73 of

the draft, particularly questions which might arise by reason of the termination of the existence of the organization or the termination of participation by a State in the membership of the organization. From article 73 it followed that the draft articles failed to define, inter alia, the legal consequences, with regard to a treaty to which an international organization was a party, of certain events mentioned in that article. It would be possible, for instance, to maintain that article 42, stipulating that the validity of a treaty or the validity of the consent to be bound by a treaty could be impeached, and that the termination of a treaty, its denunciation, the withdrawal of a party or the suspension of the operation of a treaty which could take place "only through the application of the present articles", did not necessarily apply to the cases mentioned in article 73. By that interpretation, it would seem that a treaty between an international organization and one of its member States - specifically, a mandate agreement concluded by the League of Nations - could be regarded, after the disappearance of the League of Nations, as remaining in force between the United Nations and the Member State involved and as being unilaterally terminable by the United Nations without having to resort to the procedure provided for in article 65 et seq. and in the Annex to the draft articles. That solution would be consistent with the conclusions reached by the International Court of Justice in its advisory opinions concerning Namibia.

(b) Form of the draft and final stage of the codification of the topic

175. Several representatives expressed the hope that the formulations adopted after the receipt of comments by Governments and international organizations and after the second reading would provide a basis for the adoption of a universal convention which could be signed by the greatest number of States. Only then would it be possible to say that the codification work in that area had been completed and, with it, the codification of the international law of treaties as a whole. In the opinion of certain representatives, the draft articles should not emerge merely as an appendage to the Vienna Convention. One representative believed that consideration should be given to recasting the essential articles in the form of a supplementary protocol to the Vienna Convention, a procedure that would be both more expeditious and less dangerous. Also in this connexion, other representatives stated that, bearing in mind that the draft incorporated the articles of the Vienna Convention with only minor changes, the question arose as to whether such a duplication of effort might be avoided by proposing amendments or modifications to the rules appearing in the Vienna Convention.

176. It was pointed out that the form which the final stage of work on the topic should take was a question to be decided by the General Assembly after the completion of the Commission's second reading of the draft. In the view of several representatives, if the Commission decided to recommend to the Assembly the convening of a plenipotentiary conference for the adoption of a convention, the question might arise as to whether international organizations should also be invited to participate in that conference, and if so, which organizations should be invited and in what manner. It was said that the Commission should give careful consideration to those delicate issues when it made its recommendations to the Assembly. In this connexion the opinion was expressed that, in the event of

a conference, international organizations must be invited to participate as full members and not merely as observers. It was further stated that any international organization to which the draft articles applied should be able to take part in the preparation of the final text.

177. Several representatives deemed it prudent for the Commission not to include final provisions in its draft, since in most cases that was a matter for consideration by the body entrusted with the task of elaborating the final instrument of codification. In their view, however, if the draft took the form of an international convention, international organizations ought to be treated like States, as to the manner of becoming bound by such a convention, that is to say, they should be able to become full parties to it by normal procedures. The convention should be open for signature and ratification by international organizations, including the European Economic Community, when their constitutions permitted them to conclude such a convention.

2. Comments on the various draft articles

178. Many representatives commented on specific articles of the draft, whether adopted by the Commission at its thirty-second or previous sessions. Those comments are summarized below, on an article-by-article basis. Some representatives made general observations on groups of articles. Thus, in the opinion of one representative, it was clear from the commentary to articles 62, 65, 66, 73 and 75 and the Annex that the Commission had proceeded extremely cautiously, perhaps even over-cautiously. Another representative considered that articles 60 to 63 were based on the principles of municipal law. It was also said that the special position of international organizations had been covered in detail in articles 65, 66 and 73. Several representatives expressed in general their support for articles 61 to 80, subject in some cases to specific reservations reflected below under the corresponding articles.

Article 1. Scope of the present articles

179. In the opinion of one representative, the scope of the draft articles could profitably be made more specific. The term "one or more States" in paragraph (a) could refer either to member States or to non-member States of the contracting international organization, while in paragraph (b), the contracting "international organizations" could have either substantially the same membership or varied memberships. Given those additional subdivisions, the different situations could then be accorded distinct treatments appropriate to each.

Article 36 bis. Effects of a treaty to which an international organization is party with respect to third States members of that organization

and

Article 37. Revocation or modification of obligations or rights of third States or third international organizations

180. Some representatives supported the retention of article 36 bis which was still between brackets, and drew attention to the importance which the European Economic Community attached to it. It was said that the article differed in thrust and intention from the corresponding section of the Vienna Convention. In that Convention a third State was thought of as outside the scope of the contract between the parties to the treaty, but in the current draft a third State could be a State which was a member of an organization that was a party to the treaty, and that was a different relationship. It was stressed that there were important organizations which, in fact and in law, disposed of matters that would otherwise be within the control of individual member States and that it would be of great practical value to States dealing with those organizations if the text could include provisions that took due account of those developments. According to one view, that was undoubtedly a question of some novelty which would need careful thought on second reading, and would require goodwill and co-operation from all the various groups of States, so that the result might be a practical one reflecting existing conditions.

181. Other representatives wondered whether it was necessary to deal with the question mentioned in article 36 bis at the current stage of development of international law and proposed its deletion since it had not been unanimously approved by the Commission. It was said in this connexion that paragraph (a) of that article conflicted with the generally accepted rule of international law that treaties could not create rights or obligations for any third State without its consent. The provisions of paragraph (a) referred to supranational organizations and not to international organizations as defined in article 2 and were modelled on the features of a single organization, the European Economic Community. It was further stated that in practice the application of that article even to that very organization would lead to confusion, because the relevant rules of the organization, rules to which the article referred, did not always provide an exact answer as to whether the member States of the organization were or were not bound by the treaty concluded by the organization. The International Law Commission's draft consisted of general rules on the conclusion of treaties to which international organizations were parties. From the legal standpoint there was no justification for an attempt to formulate provisions valid for only one organization, whose character was basically different from that of the great majority of international organizations.

182. One representative said he found some difficulty with the principle set forth in article 36 bis. In his view, the inclusion of a provision which contradicted the legal precision of the "third-party" clause in contractual matters had apparently been motivated by the desire to maintain the required balance in the text of article 35. However, it was difficult to envisage a State which had not requested the establishment of a right in its favour remaining obliged to assume

the consequences of an act of which it was ignorant. In addition, if draft articles 36 bis and 66, paragraph 3, were interpreted in conjunction with one another, it would be noted that a third State could be involved in a controversy about a treaty to which it was not a party by the simple fact of being a member of an organization.

183. One representative, referring to both article 36 bis and article 37, paragraphs 5 and 6, emphasized the necessity of dealing with the legal effects of a treaty to which an international organization was party with respect to the States members of that organization who were not themselves, as such, parties to the treaty. In his view, it would be neither equitable nor realistic to treat States members of an international organization, with regard to a treaty concluded by that organization, on the same footing as States which had nothing whatever to do with that treaty - in other words, as third States. The States members of an international organization were required to enable the organization to fulfil its obligations under a treaty which it had validly concluded, unless the second part of paragraph 2 of article 27 applied - in other words, unless the performance of the treaty, according to the intention of the parties, was subject to the exercise of the functions and powers of the organization. With regard to the rights arising from such a treaty, a rule similar to that stated in paragraph 2 of article 27 applied. In other words, the terms of the treaty itself in the first instance indicated whether and to what extent States members of the organization could exercise individual rights under the treaty. In either case, the importance of the terms of the treaty concluded between an organization and another organization or a State, including what the parties to the treaty had agreed, was emphasized by paragraphs 5 and 6 of article 37.

184. He considered that the rules of the organization, which established the legal relations between the member States and the organization must be combined with the rules laid down in the treaty concluded by the organization if the principle of pacta sunt servanda was to apply to both those sets of rules. Normally, it was the latter set of rules - the treaty concluded by the international organization - which should contain the provisions concerning the manner in which the two sets of rules were to be reconciled. In fact, when the two sets of rules were incompatible, the treaty could not be concluded or, if concluded, was invalid (art. 46, paras. 2 and 3). Moreover, article 27, paragraph 2, showed that the intention of the parties to the treaties concluded by the organization might be that "performance of the treaty" is subject to the "exercise of the functions and powers of the organization", in which case the "[internal] rules of the organization" clearly prevailed. He was of the opinion that, except for those two extreme cases, the aforementioned combination might involve the rights and obligations of the organs of the international organization other than the organ which actually concluded the treaty and, possibly through those organs but also directly, the rights and obligations of the States members of the organization. Everything depended on the express or implicit terms of the treaty concluded by the organization, including any other relevant expressions of the intention of the parties to the treaty and of the "parties" to the "[internal] rules of the organization" at the moment of the conclusion of the treaty. Article 36 bis and article 37, paragraphs 5 and 6, merely stated presumptions concerning the intention of the parties and concerning the manner in which that intention could be expressed. He believed that, on the whole, those presumptions were realistic.

In any event, there was nothing to prevent the treaty itself from expressing a contrary intention, for instance by including a clause providing that the States members of the organization could not, in implementation of the treaty concluded by the organization, exercise certain rights or be bound by certain obligations. Thus, the articles were sufficiently flexible to apply to the wide variety of internal rules of the various international organizations.

Article 51. Coercion of a representative of a State or of an international organization

and

Article 52. Coercion of a State or of an international organization by the threat or use of force

185. One representative stressed that there were legal rulings establishing a difference between coercion of the representative of a State and coercion of a State. In his view, most jurists were of the opinion that coercion of a representative rendered a treaty void. That concept had been codified in article 51 of the Vienna Convention. Where the coercion was applied to a State, it was forced to conclude a treaty which it would not have concluded in normal circumstances, and the concept set forth in article 52 of the Commission's draft should therefore be widened. Moreover, it could not be agreed that, for the purposes of the draft, consent was invalidated by coercion. The nullity arose not from the coercion but from an act which violated international law.

Article 53. Treaties conflicting with a peremptory norm of general international law (jus cogens)

186. In the opinion of one representative, norms of jus cogens constituted a guarantee that the basic principles on which the international community relied would be implemented, and under article 53 of the Vienna Convention, in his view, the concept of general law was incorporated into conventional law. However, article 53 of the Commission's draft was contradictory in providing that a peremptory norm of international law could be modified only by a subsequent norm of general international law having the same character. For that representative, article 53 did not include generality as one of the elements of a legal norm, whether under national or international law, despite the fact that that was one of the characteristics of law. The difficulty arose when the norm of international law derived from an international treaty, since it was necessary to determine whether or not article 53 applied to such norms. The article ended where it should begin and, because it did not specify that characteristic made a general norm a norm of jus cogens, it left a gap which it was essential to fill.

Article 61. Supervening impossibility of performance

187. In the opinion of one representative, it would be appropriate to place greater emphasis on the special position of international organizations, particularly with regard to cases in which a legal situation governing the application of a treaty

ceased to exist. In practice the disappearance of such legal situations would occur more often in the case of international organizations than of States, since international organizations could not act independently of their member States. Another representative agreed with the interpretation of article 61 that cases of impossibility of performance had to do more with the application of the treaty than with the parties or the conduct of the parties. With regard to the commentary to article 61 and in particular paragraph (4) of the commentary, one representative pointed out that, if, in the case referred to in the paragraph, namely non-performance by an international organization of a treaty to which it was a party owing to lack of financial resources, the question of the international responsibility of the organization could be raised - a question which, according to article 73, lay outside the scope of the draft articles - it was also possible to speak in the appropriate case, of the legal impossibility of performance or laesio enormis, for example, where the number of States members of the organization fell below the minimum number required to enable the organization regularly to meet its major financial obligations.

Article 62. Fundamental change of circumstances

188. Some representatives expressed in general their support for the provision of the article.

189. Referring to the article as a whole, one representative considered that it would have been preferable to indicate explicitly that, in the event of a dispute, the decision as to whether there had been a fundamental change of circumstances would have to be taken by a judicial body, once the conciliation procedures had been exhausted. Furthermore, there should be some restrictions to the exception relating to fundamental change of circumstances, so as to avoid any possibility that a treaty might cease to have effect following a unilateral decision. Another representative indicated that, as noted in paragraph (2) of the commentary to article 62, a number of fundamental changes could result from acts which took place inside and not outside the organization. Those acts were not necessarily imputable to the organization as such (although in some cases they were), but to the States members of the organization. For instance, while States could not ground the non-fulfilment of a given international obligation on changes in their domestic legislation, a change in the constituent document of an international organization could substantially change its legal capacity and impede the fulfilment of the obligation assumed by it.

190. Most of the representatives who spoke on article 62 addressed themselves to the provision of paragraph 2. It was said in this respect that the preclusion in paragraph 2 of the application of the rule of a fundamental change of circumstances to treaties establishing boundaries took particular account of the special importance of State boundaries and treaties on boundaries in the preservation of world peace and the development of good neighbourly relations. It was further said that paragraph 2 reflected the idea of the stability of treaties establishing boundaries, since the rebus sic stantibus clause could not be invoked in such cases.

191. It was also stated that with respect to paragraph 2, the question was posed as to whether an international organization could be said to "establish a boundary" for a State by completing a treaty with it, thereby subjecting such a treaty to the stabilizing effects of article 62. Some representatives supported the conclusions reached by the Commission and in particular the remarks made in the commentary with regard to the applicability, even to international organizations, of the clause dealing with treaties establishing a boundary.

192. Other representatives, however, took a different position. Paragraph 2 was interpreted as referring to the concluding of agreements between States with the participation of international organizations. Doubts were expressed in this connexion as to the legal competence of international organizations to conclude treaties establishing boundaries. It was said that the term "boundaries" referred to the limits of the territory within which a State exercised its jurisdiction; they were imaginary lines separating the territory of one State from the territory of other States; in concluding treaties of that nature, States acted on the basis of their own legal and constitutional order. In the opinion of those representatives, the term "boundary" as used in the article could only refer to the boundaries of a State, since international organizations did not enjoy sovereignty and were not entitled to territorial integrity. The article should apply only to those treaties by which the territory of States - i.e. the territory wherein States exercised their full and unlimited sovereignty - was established or modified. In the opinion of one representative, it should be noted that one of the requisites for statehood under customary international law was that a State must have a defined boundary. Although international organizations were endowed with juridical personality, they could only acquire property in accordance with their status, and in practice no situation had arisen in which an international organization had a boundary with a State. According to paragraph (5) of the commentary to the article, the term "boundary" denoted the limit of the terrestrial territory of a State, and, in his view, it therefore followed that, since an international organization had no territory, it had no boundaries in the traditional meaning of the word and could not, therefore, establish a boundary for itself. For that reason it seemed to him far-fetched to apply the notion of "boundary" as provided in article 62, subparagraph 2 (a), of the Vienna Convention, to international organizations.

193. One representative, stressing that difficulties continued to exist with respect to treaties determining boundaries to which at least one of the contracting parties was an international organization, drew attention to the results of the Third United Nations Conference on the Law of the Sea which might shed some additional light on that matter. In this connexion, another representative referring to the prospective International Sea-Bed Authority, acknowledged that there would be a boundary line on either side of which national jurisdiction and international jurisdiction would be exercised; however, the present text of the Convention on the Law of the Sea envisaged only that that line would be established unilaterally by the coastal State taking into account, as appropriate, the recommendations of the Commission on the Limits of the Continental Shelf. It was possible, however, to envisage an agreement between the coastal State and the International Sea-Bed Authority concerning the dividing line between national and international jurisdiction. In his view, the Commission

should therefore not have ruled out such a possibility entirely when drafting paragraph 2. Some representatives, however, did not consider that it was appropriate that the traditional term "boundary" - within the meaning of paragraph 2 - should also apply to the delimitation of maritime areas in which States exercised only limited rights, for example, in the contiguous zone, the economic zone, or the continental shelf. In their view, the delimitations of the continental shelf and the sea-bed referred to as examples in the Commission's report, and future delimitations of the moon and other celestial bodies for purposes of economic exploitation, could not be compared to the exercise of State authority and would require a different solution in each case.

Article 63. Severance of diplomatic or consular relations

194. In the opinion of one representative, article 63 failed to introduce any new provision governing relations between States and international organizations or between international organizations themselves. Paragraphs (2) and (3) of the Commission's commentary did state that the severance of relations between a State and an international organization did not affect their respective obligations. That was not reflected, however, in the text of article 63, possibly because the Commission had been hesitant to describe relations between States and international organizations as "diplomatic relations".

195. Some representatives considered that the article was based on the principle that diplomatic and consular relations could exist only between States. It was pointed out, however, that the European Economic Community had established external relations with States not members of the Community and international organizations in order to be represented in those third States and those organizations. Similarly, many States had permanent representation in the institutions of the Community. Consequently, it was said, the status of the relations thus established by the Community was sui generis owing to the nature of the capacities inherent in the Community, and was based to some extent on the status of diplomatic and consular relations between States. For those reasons, doubts were expressed about the wording of draft article 63. It was suggested that perhaps the title of the article could be reworded to refer to "diplomatic or consular or other formal relations", and the text might be amended to read: "... between parties to a treaty ..." instead of "... between States parties ...".

Article 64. Emergence of a new peremptory norm of general international law (jus cogens)

196. In the opinion of one representative, article 64 created a new dimension in international law by declaring existing treaties void if they were in conflict with a new peremptory norm of general international law.

197. Another representative considered that the wording of article 64 was not sufficiently precise; if there emerged a new peremptory norm of general international law which invalidated an existing treaty conflicting with that norm, the treaty could not be said to be void, because it had actually been in force during the period prior to the entry into effect of the new peremptory norm.

However, the authors of the Vienna Convention had not established any criteria for identifying in a treaty what constituted peremptory norms of general international law, and that therefore became a matter for judicial interpretation. In the case of a country which tried to evade its contractual obligations on the ground that the treaty which it had signed was in conflict with general international law, there would be, in his view, two possibilities: if its contention was correct, the treaty would become void because the obligation to comply with international law must prevail; if it was incorrect, that country would have violated its obligation to act in good faith and would incur international responsibility in accordance with the applicable general norms.

198. It was also stressed that, as the concept of a peremptory norm of international law was of recent date and had no decisive precedent, it would be necessary to include in the text of article 64 a provision dealing with the role that would have to be played by the International Court of Justice in that connexion.

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

199. One representative, pointing out that article 65 maintained the period of three months laid down in the Vienna Convention, recalled that, although it had been recognized during the debate in the Commission that such a moratorium, which was appropriate for States, might be too short for an international organization, it had been decided not to alter it, on the grounds that an international organization could always present an objection within the three-month period and withdraw it subsequently. In his view, that was not a very satisfactory argument, and article 65 should be improved in that respect, because international organizations should not be left with no choice but to present objections that might have only the slightest of foundations, just to meet the deadline.

Article 66. Procedures for judicial settlement, arbitration and conciliation

and

ANNEX. Procedures established in application of article 66

200. Most representatives who spoke on the question, referred jointly to the provisions of article 66 and the Annex. Certain representatives indicated that, under article 66, when a dispute arose between a State and another State, the provisions of the Vienna Convention would apply, and those provisions had been included in paragraph 1 of the article. If there was a dispute regarding jus cogens, any party might submit it to the International Court of Justice unless they agreed to refer it to arbitration. Other disputes concerning the invalidity, termination and suspension of the operation of a treaty could be referred to conciliation, the procedural details of which were set out in the Annex. It was further stated that, on the other hand, no such distinction between jus cogens and

other provisions was made when one or both of the parties to a dispute were international organizations. The Commission had been obliged to take account of the fact that currently, pursuant to Article 34 of the Statute of the International Court of Justice, only States could be parties in cases before the Court. Accordingly, the possibility of recourse to the Court in contentious proceedings on any dispute concerning the interpretation or application of the jus cogens articles in the draft had to be excluded if an international organization was party to that dispute. The Commission had recommended in paragraphs 2 and 3 of article 66 that such disputes should be subject to the compulsory conciliation machinery provided for in the Annex. Bearing the distinction reflected in article 66 in mind, the procedures for the establishment of a Conciliation Commission had been formulated in the Annex. Because of the divergency of opinion among the members of the Commission, the question whether an international organization should be invited to nominate two conciliators to constitute the list of conciliators had been put in square brackets.

201. In the opinion of some representatives, the Commission was to be congratulated on its willingness to grapple with the problem of the settlement of disputes in the context of part V of its draft by proposing linked provisions corresponding to article 66 of the Vienna Convention and the annex to that Convention. The Commission, it was said, had taken due account of the fact that the international community was increasingly anxious that procedures should be established for the settlement of disputes which would enable a third party - the International Court of Justice, another permanent judicial body or an ad hoc body - to settle disputes regarding the interpretation of contractual obligations. In this respect, it was indicated that note had been taken of the reasons why the proposal adopted by the Commission limited the sphere of application of draft article 66 and the relevant annex to part V of the draft articles.

202. Some representatives expressed their full support for the Commission's decision to include article 66 and the Annex in its draft. It was said in this regard that those procedural provisions relating to compulsory conciliation formed an integral part of the set of substantive rules on the question and were not superfluous. It was gratifying to observe that the Third United Nations Conference on the Law of the Sea took the same approach in establishing compulsory procedures for the settlement of disputes as an essential element of the new law of the sea. One representative, however, favoured the replacement of draft article 66 by the relevant provisions of the draft Convention on the Law of the Sea, since, in his view, that would make it possible to achieve a consensus.

203. Other representatives expressed reservations concerning the provisions of article 66 and the Annex because they incorrectly equated the rights of international organizations and States. According to this view, those provisions constituted an innovation and extended to international organizations certain provisions of the Vienna Convention applicable to States. In this connexion, it was said that the experience relating to the Vienna Convention which had not entered into force until 11 years after its adoption and to which some countries were not sure that they could become parties, should be borne in mind. On second reading of the draft, the Commission should give more attention to procedures for the settlement of disputes. If it consistently based its work on the Charter and on the Statute of the International Court of Justice and kept

in mind the differences between States and international organizations, it would no doubt be able to arrive at an acceptable solution. Under the Charter, international organizations could not have recourse to the International Court of Justice, as was implied in paragraphs 2 and 3 of article 66.

204. In the opinion of one representative, the proposed rules contained in the provisions relating to the procedure for the settlement of disputes were somewhat too detailed to be of practical use, and it would therefore be desirable to substitute simpler formulations which contained only the basic procedures for settling disputes and which would allow for a certain degree of flexibility in their application. Furthermore, since article 66 covered any disputes which affected the termination and invalidity of treaties, the settlement of such a dispute might affect the interests of States or organizations which, though not parties to the dispute, were parties to the treaties in question. Due care should be taken to give adequate protection to the other parties to the treaties.

205. With reference to the details of article 66 and the Annex, some representatives saw no valid reason why, if the draft articles became a universal treaty, an international organization bound by that treaty should be deprived of its right to appoint conciliators as was recognized in the phrase between brackets in paragraph 1 of the Annex. It was said in this connexion that when procedures were established for the settlement of disputes, the principle of equality of the parties must be recognized. It was, therefore, considered essential that international organizations, particularly the European Economic Community, should be able to nominate the same number of candidates as States could for inclusion in the list of qualified conciliators which, as provided by the Annex, would be drawn up and maintained by the Secretary-General of the United Nations. As the draft of the Annex left that point open to doubt, the provision in question being in square brackets, some representatives considered that the Commission should remove that reservation. On the other hand, some representatives found no justification for international organizations to be given the right to nominate conciliators to be included in a list. It was said in this connexion that the Commission should give further thought to paragraph 2 bis of the Annex in view of the inherent difference between a State and an international organization.

206. With regard to paragraph 2 (c) of the Annex, one representative said that there were circumstances in which the Secretary-General would not be the appropriate person to appoint the conciliators. It was therefore fitting that the President of the International Court of Justice should in those circumstances perform the functions normally conferred upon the Secretary-General. In the opinion of other representatives, paragraph 2 (c) of the Annex could give rise to serious political difficulties.

207. It was pointed out that according to paragraph 6 of part II of the Annex, a report of the Conciliation Commission would be no more than a recommendation and the question therefore arose as to what would happen if there was no amicable settlement. In this connexion, many representatives expressed regret that the Commission had not proposed some form of compulsory and binding dispute settlement. It was pointed out that the system proposed, namely the establishment of a conciliation commission, was close to that provided for in the Annex to the Vienna Convention. However, much to the disappointment of a number of delegations,

it had not been possible for the United Nations Conference on the Law of Treaties to agree on a full-fledged system of compulsory and binding dispute settlement. The choice of conciliation reflected an over-pessimistic view of the willingness of the international community to accept compulsory and binding dispute settlement in major law-making treaties. The Commission should provide an opportunity for the consideration of a form of binding and compulsory settlement by the international conference that would ultimately be convened to discuss the adoption of a convention on treaties involving international organizations. If the conference refused to accept binding and compulsory dispute settlement, at least it would have had to study and decide on the issue. It was also indicated that the Vienna Convention provided for binding settlement in some cases, on the model of the Convention on the Privileges and Immunities of the United Nations and the Headquarters Agreement between the United Nations and the United States. Thus, it was said, binding settlement did not represent a leap in the dark, but was based on existing practice. In the light of these considerations, it was felt that that aspect of the draft articles should be given further study.

208. Several representatives stressed the importance they attached to the concept that at least those disputes arising out of the interpretation or application of the jus cogens articles in the Vienna Convention should be the subject of a binding judicial determination. In the view of certain representatives, it might have been preferable to retain the normal rule that, if conciliation failed, there should be some other machinery for the peaceful settlement of disputes, such as recourse to the International Court of Justice. It was also said that the Commission had envisaged the possibility of a procedure leading to a binding advisory opinion, and it was regrettable that it had ruled out that solution which would, undoubtedly, have been more satisfactory. In this regard the opinion was expressed that recourse to arbitration remained a possibility if the parties so agreed, but questions relating to the existence of peremptory norms of international law were questions in which a decision by the principal judicial organ of the United Nations would be desirable. It was believed that in those cases a pronouncement of the International Court of Justice, even in the form of an advisory opinion, would be most desirable. Although that possibility was not excluded by the present text of article 66, it should be expressly mentioned in the article. International disputes concerning the existence of peremptory norms of international law were too important for conciliation to be the only mandatory procedure for their settlement, although such a procedure had often emerged, in the area of the law of the sea for example, as a happy compromise between those who insisted on a binding third-party procedure and those who did not accept such a procedure.

209. The view was also expressed that in spite of the doubts to which certain ambiguities in the commentary on article 66 might give rise, the possibility for an international organization to have recourse to an advisory opinion of the International Court of Justice in an effort to settle a dispute between it and another international organization, should be encouraged. Such an approach was, in fact, a perfectly legitimate means of settlement, since article 65, paragraph 3, referred to Article 33 of the Charter. Moreover, the conclusion of arrangements to make the Court's opinion binding on the two organizations involved in the dispute should be promoted. It would also be altogether legitimate and appropriate to consider practical measures to enable the Court to play a role,

through its advisory opinions, in disputes between States or between a State and an international organization. It was, of course, not necessary tc refer to that possibility in the draft articles under consideration, but it must be borne in mind.

210. In the view of several representatives, further thought should be given to the possibility of requiring that disputes of that nature should be made the subject of arbitration if the parties to the treaty in question had not accepted the option of referring them to the International Court of Justice for an advisory opinion which they would accept in advance as binding. In this regard, it was recognized that difficulties were created by the fact that there was currently no standing for international organizations as parties to a dispute before the International Court of Justice and recourse to an advisory opinion of the Court would not be an adequate and workable solution. Nevertheless, it was said, if the idea of asking for advisory opinions of a binding nature from the International Court of Justice was considered too rash, arbitration could be tried. Certain representatives failed to see, why in the case of the jus cogens articles, recourse to arbitration should not even be mentioned with respect to international organizations. In their view, that was a short-coming of the text. One of the keys to the adoption of the Vienna Convention had been the adoption of provisions regarding the settlement of disputes. The draft articles on treaties should follow the pattern of the Vienna Convention as closely as possible. They should provide for mandatory recourse to arbitration when one of the parties to a dispute was an international organization.

211. In the opinion of one representative, it was regrettable that the Commission had proposed compulsory conciliation in cases where it should always be optional and contingent upon the agreement of the parties to a dispute. The Commission should rather recommend obligatory arbitration and, if one party to a dispute refused to co-operate in designating an arbiter, the arbiter should be appointed by someone such as the President of the International Court of Justice, at the request of the party initiating the arbitration proceedings.

212. In the opinion of another representative, there was in any event a need to clarify the relationship between what the Commission was currently proposing for the settlement of disputes and the rights and obligations of States under article 66 of the Vienna Convention. Admittedly, article 3 (c) of the Vienna Convention appeared at first sight to offer some safeguard. It must be made clear, however, that nothing in article 66 of the present draft derogated from or prejudiced the rights and obligations of States parties to the Vienna Convention under article 66 of that Convention. It should also be made clear that nothing in the present draft taken as a whole was intended to derogate from or prejudice the operation of particular procedures for the settlement of dispute embodied in treaties between States and international organizations or between two or more international organizations.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

213. Some representatives expressed in general their support for the provisions of the article.

Article 73. Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization

214. Some representatives expressed in general their support for the provisions of the article.

215. One representative pointed out that article 73 had been divided into two paragraphs, one applying to States and the other to international organizations. Paragraph 1 used the language and the concepts of the Vienna Convention, while paragraph 2 adapted to the cases covered therein the nomenclature traditionally used for States.

216. Another representative explained his understanding of the reasons why the Commission had been led to formulate article 73 in the existing terms: it was clearly necessary to specify those questions that might arise in regard to a treaty not covered by the draft. In his view, paragraph 1 presented no problem. Paragraph 2 was new, and his Government would wish to give it further study, especially in view of the c ose relationship between that paragraph and article 36 bis.

217. Several representatives emphasized that article 73 dealt with very important and complex juridical problems, in particular those covered in paragraph 2, namely, the determination of the consequences of the international responsibility of an international organization towards its member States and third States and other organizations with which it had concluded a treaty; the consequences of the termination of existence of an international organization and the consequences of the termination of participation by a State in the membership of an organization. In this connexion one representative thought it evident that the intention of paragraph 2 was to extend to international organizations the principle of international responsibility set forth in paragraph 1.

218. It was also stated by another representative that from a careful reading of paragraphs (8) to (10) of the commentary on article 73, it was understood that the Commission wished to preserve the freedom of action of member States in the event of the dissolution of an international organization. It was also understood that the Commission was deliberately refraining from pronouncing on the legal consequences for member States (or for the international organization) in relation to treaties concluded by the organization or by a member State with the organization, should that member State cease its participation in the organization. In the opinion of several representatives, the issues involved in paragraph 2 were delicate and difficult and the Commission had been probably well advised not to take a firm position thereon but to limit itself to making a reservation. Otherwise, it was said, the draft articles might go beyond the framework of the topic.

219. Some representatives pointed out that the Commission did not intend to make an exhaustive list of the cases subject to reservation. While agreeing with this position, certain representatives considered that a number of situations called for more detailed consideration. Reference was, in particular, made to the case of so-called succession of international organizations, which was mentioned only in the commentary on the article in question. In this connexion, however, it was stated that the possibility of the succession of a State to an international organization and that of the succession of an international organization to a State were so remote that they need not, perhaps, have been provided for in the draft.

220. In the opinion of one representative, difficulties would arise in connexion with article 73, because according to the Charter, international organizations could not have recourse to the International Court of Justice.

Article 74. Diplomatic and consular relations and the conclusion of treaties

221. Some representatives indicated that their observations on article 63, particularly as regards the European Economic Community, applied equally to article 74, including the suggestion to reword the title to refer to "diplomatic or consular or other formal relations". It was also suggested that the first sentence of article 74 might be amended to read "... between two or more States or between a State and an international organization or among international organizations".

Article 75. Case of an aggressor State

222. One representative stressed that the Commission had decided not to refer to cases where an international organization might be regarded as an aggressor. In his opinion, that problem had not been obvious in the context of the Vienna Convention, which dealt only with treaties concluded between States; however, that question arose with regard to the draft articles under consideration, especially since the explanatory note annexed to article 1 of the Definition of Aggression adopted by the General Assembly indicated that in the Definition the term "State" included the concept of a "group of States" where appropriate. In his view, a reference in article 75 to an international organization among entities that could be regarded as aggressors could not be considered as affecting the Vienna Convention. That Convention must not be used as an excuse for not solving problems.

Article 77. Functions of depositaries

223. One representative endorsed the Commission's decision not to amend subparagraph 1 (g) of article 77 concerning the registration of treaties in view of the need not to affect the provisions of the Vienna Convention. In his view, even though that clause might give rise to doubts, it would be relatively simple by means of interpretation, to reach the conclusion that treaties between

international organizations should be registered with the Secretary-General of the United Nations where appropriate, that was to say, if, by reason of their subject-matter, they were normally subject to registration.

224. In the opinion of another representative, subparagraph 1 (e) was unclear with regard to time.

Article 78. Notifications and communications

225. In the opinion of one representative, it was to be noted that the time at which notification or communication would be considered as received was not specified in paragraph (c).

Article 80. Registration and publication of treaties

226. Some representatives expressed reservations on article 80 since, in their view, it failed to indicate the difference between international organizations and States in the matter of the registration and publication of treaties by the Secretariat of the United Nations, despite the fact that under Article 102 of the Charter, which referred only to the registration of treaties "entered into by any Member of the United Nations", there was no obligation to register with the United Nations any agreement between international organizations.

227. One representative, while agreeing that article 80 was in keeping with article 102 of the Charter so far as treaties between States were concerned, queried whether it was desirable for international agreements between international organizations to be registered with the United Nations Secretariat, and felt that the question of the registration of such agreements or of agreements between a State and an international organization should be given further thought.

228. In the opinion of another representative, the principle of the registration of international treaties required that Governments publish the treaties that they had concluded so as to avoid the adverse effects that could result from secret agreements. In the case of treaties concluded by international organizations, it would be sufficient to register them with the Secretariat of the United Nations and article 80, paragraph 1, should be amended to that effect.

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

229. Many representatives who spoke on the Commission's work on "the law of the non-navigational uses of international watercourses" generally welcomed the progress achieved on the topic during its 1980 session. It was said that since 1971 the Commission had played an important and positive role with regard to the topic and had made notable progress by laying down a generally acceptable basis for further work aimed at regulating this exceptionally sensitive area of international law. It was also noted that the Commission had at its last session harmonized terminology among various language versions. The Special Rapporteur, Mr. Stephen M. Schwebel, was praised for his having produced a most valuable collection of legal and technical data on the subject. Other representatives stressed that the work on the topic was still at a preliminary stage. Some were of the view that in its study of the topic, the Commission had faced a series of fundamental problems which it had not succeeded in clarifying; a serious difference of opinion had emerged concerning the principles and methods to be applied. It was also said that the Commission had introduced several new concepts which did not seem to be substantiated by State practice. Certain representatives considered the method followed and provisions formulated unsatisfactory.

230. It was stressed by one representative that it should be recognized that the complex and highly technical nature of the subject and its strong correlation to vital State interests did not make for easy solutions. The process of bringing about compatibility between the conflicting interests of States in order to draw up the general principles of a convention containing residuary rules was a very long one, and, consequently, expressions of dissatisfaction would probably still be heard for some time to come until a final all-embracing solution was found.

231. A number of representatives remarked on the vital importance of the topic not only for their respective countries but for mankind as a whole as well. It was described as a difficult and controversial topic; the codification and progressive development of international law in that area would be of great benefit to all Member States of the United Nations.

232. The law of the non-navigational uses of international watercourses was perhaps the most important topic before the Commission, it was said, because water was a basic prerequisite for life itself. In the twentieth century, the approach to the question of the use of watercourses had undergone a fundamental change, owing to rapid population growth (particularly in the third world), industrial development, the acute need for hydroelectric power, the increase in water pollution, and the extraordinary rise in the demand for water for irrigation. Safeguarding the supply of water for human consumption, agriculture, industry and the generation of electricity was of great concern to all. The international community had become aware that the world's resources were limited and that countries sharing natural resources such as water should seek to ensure their equitable and rational use. The topic was considered to be one of particular importance to newly independent countries, which could benefit greatly from the formulation of a series of equitable principles that could form the basis of agreements governing the use of the available resources.

233. Furthermore, it was pointed out the Commission's work on the topic drew an inevitable consequence from a permanent factual situation - the hydrologic cycle of a river under the jurisdiction of several States. It was that continuous natural movement of water which increased the possibility of conflict between actual and potential uses in one State and those in another State. The prevention and resolution of that conflict was, it was stressed, the aim of the rules of international law to be codified and progressively developed in that area.

234. Some representatives who spoke on the topic voiced support for the Commission's efforts and methodology of work in relation thereto. Stress was placed on the need for the General Assembly to support the Commission's approach to the topic and to the draft articles thereon as the only one capable of providing a legal solution to the pressing problem of the non-navigational uses of international watercourses, which was of particular concern to the third world countries. Hope was expressed that priority be given to consideration of the topic and that the Commission's work would be pursued with a convention on the multiple uses of international watercourses in mind. It was stressed that the Commission, as well as continuing its traditional function of codifying international law, must also be at the forefront of the development of new law and the promotion of new ideas. The texts to be formulated should take into account current and forseeable uses of watercourses so that they would not be made meaningless by technological developments in a few years. Any topic involving the sharing of natural resources was, it was remarked, bound to involve controversy, even between States which had friendly relations with one another. Nevertheless, the possibility that controversy might arise should not be taken as a signal to withdraw from potential controversy.

235. Other representatives urged that extreme care had to be applied in the elaboration of rules on the law of the non-navigational uses of international watercourses. There was possible danger underlying the work of the Commission on this particular topic, which presented special problems because of the nature of the question and the wide variety of the non-navigational uses of international watercourses. Stress was placed on the importance of compiling and analysing all relevant materials on State practice before undertaking the substantive study of the rules of international law relating to the non-navigational uses of international watercourses. It was stated that such a study should also cover flood control and erosion problems, pollution and sedimentation, as well as the interrelationship between navigational uses and other uses. The number of replies received to the questionnaire prepared earlier by the Commission was considered inadequate for the determination of State practice.

236. One representative emphasized that while such uses had given rise to a number of conventions and bilateral treaties, the topic had always been considered at the regional level, in the light of particular geographical or other requirements. In the past, the main purpose of international watercourses had been navigation and there had been no generally accepted rules of international law on non-navigational uses. The principles of international law on the matter were, it was maintained, neither clear nor universal, nor had there been any development of law in connexion with non-navigational watercourses. For some years, however, international organizations had been taking an interest in the matter, and social and economic needs as well as the requirements of industrialization had

accentuated the great importance of codifying rules. The material was not easy to codify, it was said, since the relevant juridical rules were closely related to historical, geopolitical and technical considerations. It was felt that the work on that topic should therefore be carried out with the greatest care, bearing in mind national sovereignty, the special characteristics of each of the international rivers, and the variety of views regarding the uses of non-navigational international watercourses. In determining how water resources were to be equitably and reasonably distributed, the factors he had noted must be kept in view, above all the human factors and the requirements of each particular case. The special problems arising between States should be resolved through agreements based on the recommendations of impartial technical committees, in the light of the principles of sovereign equality, non-interference, co-operation and friendly relations among States, in accordance with the purposes and principles of the Charter of the United Nations.

237. It was also stressed that in its work on the topic, the Commission must maintain a balance between the requirements of national sovereignty, on the one hand, and those of good-neighbourliness and the prohibition of abuses, on the other. There must also be regard for the increasingly widespread view that ecological resources must be regarded as a common heritage. Another view held was that the Commission should adopt an approach that would take into account not merely the necessity of regulating the common uses of international watercourses in the technical sense of the term, thus over-emphasizing the importance of the principle of shared natural resources, but also the legal position of riparian States as users of watercourses. In that respect, more attention should be paid to the rights of those States, to the right of peoples to permanent sovereignty over their natural resources and to the principle of good-neighbourliness, which should provide a basis for the common uses of international watercourses.

238. One representative reaffirmed his delegation's position that the problems of the utilization of international waters must be tackled in the light of the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, which must be strictly observed. In order to solve problems arising between neighbouring States with regard to watercourses or lakes separating or traversing them, States should negotiate agreements, in the spirit of the principle of co-operation, according to which States should conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention, a principle reaffirmed in the Mar del Plata Action Plan. The solution of such problems would be further enhanced in international law once the principle of good-neigbourliness was formulated. Any legal construction, formulation or codification proposal that did not take into account the rights and interests of States as sovereign entities recognized in contemporary international law would, far from helping States, create difficulties in their efforts to promote friendly relations and co-operation, to consolidate peace and to strengthen international security.

1. Scope of the draft

239. A number of representatives noted that the Commission did not at this juncture in its work on the topic, intend to prepare a definition of "the international watercourse" or "the international watercourse system" which would be definitive and to which the Commission or States would be asked to commit themselves. Rather, the Commission had prepared a working hypothesis, subject to refinement and indeed change, which would give those called upon to compare and criticize draft articles on the topic an indication of their scope.

240. Certain representatives were of the view that the study of the relevant factors determining the scope of the draft could not be postponed indefinitely. The problem of defining the scope of application of the draft articles needed further discussion and specification, it was said. Moreover, it was urged that the difficult task of defining an "international watercourse" should be undertaken as soon as possible, since that really involved defining the field of application of the codification under review. The failure to provide such a basic definition meant, according to one view, that the subsequent draft articles were equally lacking in specificity. Another view expressed was that since it was essential to know the exact content of rules on the subject, if no agreement was possible on a definition, the definition already accepted under customary international law should be adopted.

241. As to the working hypothesis which set out the Commission's tentative understanding of what is meant by the term "international watercourse system", some representatives supported its provisions believing that its formulation marked a distinct advance by the Commission, helping to clarify the scope of the topic. The working definition was viewed as a useful and suitable one by virtue of its very generality, covering the essential issues. Inasmuch as the definition did not prejudge the scope of the term "international watercourse", it provided a technically solid basis for the formulation of principles which could be sufficiently general to be applicable to all international watercourse systems. Although it could be argued that the expression was lacking in legal content, it was a useful device for studying the various aspects of the subject.

242. Certain representatives specifically called attention to the working hypothesis as an indication that the Commission had already touched on one of the basic rules governing the topic by stating that the components of a watercourse system, such as rivers and lakes, constituted by virtue of their physical relationship a unitary whole. That was an application of the principle of coherence, based on hydrological facts and was the main idea underlying the Helsinki Rules on the uses of waters of international rivers, adopted by the International Law Association in 1966. Although the tentative description of what constitutes an international watercourse system was subject to refinement, it was believed that the concept it embodied relating to the interdependence of the various parts of the system should remain intact. It was also emphasized that if "an international watercourse system" was understood to be a single unit, then the activities relating to its use by one system State might directly affect its use by other system States.

243. It was stated that a small group had advocated more conservative provisions in the Commission's draft, particularly in regard to the definition and shared use of international watercourses. Some States and some members of the Commission had expressed a preference for the 1815 Congress of Vienna definition. That definition, however, referred to the navigational uses of rivers, whereas the Commission's mandate concerned the non-navigational uses of watercourses. To rely on a definition so outdated and irrelevant to the Commission's mandate would, it was emphasized, be to spend valuable time on a futile exercise in legal archaeology. It was suggested that the adoption by the Commission of the traditional nature of an international river as its basis of work would undoubtedly give rise to innumerable problems. Furthermore, while it was noted that according to the tentative working hypothesis, the term "international watercourse system" could not be equated with the definition of an international river for purposes of navigation which had been adopted at the Congress of Vienna, it was stressed that at the same time, it was not a term which could be equated with the drainage basin; the Commission's description of its tentative understanding of what was meant by the term was not simply another way of saying "drainage basin".

244. One representative noted with approval that according to the working hypothesis, the international character of a watercourse was not an absolute, but a relative one. Thus, in the case of a specific use by a small number of States, such as the inland water transport of timber, those States alone had the right to decide the régime governing that particular use. Another representative, however, foresaw difficulties in that relative character. According to that view, it was important to ensure that a watercourse passing from one State to another, or through many States, was given an international character, and that any diversion or any other use of water which was in any way detrimental to any State should be made absolutely illegal.

245. Other representatives found the tentative working hypothesis imprecise and unsatisfactory or expressed serious reservations or misgivings concerning its contents. It was stated that the new working hypothesis of an international watercourse system based on the hydrographic elements, had not solved the problems involved in the creation of legal norms relating to international rivers, lakes or canals which formed or traversed international boundaries. In that context it was stressed that, whereas in the first decades of the twentieth century treaties dealing with international rivers had been multilateral, there had since the Second World War been a constant increase in the number of bilateral agreements in State practice on the subject. That tendency could probably be explained not only by the increasing political and legal complexity of contemporary international relations but also by the need to settle many new technological problems. Certain representatives supported the view that every State had the sovereign right to decide the uses of watercourses in its territory, and therefore opposed the inclusion in the draft articles of any provision that the uses of inland waters would be regulated by the law of non-navigational uses of international watercourses. Hence, serious reservations were expressed about the working hypothesis of an international watercourse system, which was not specific enough and might create a danger of the uses of inland water also falling within the scope of application of the articles.

246. Serious reservations were also voiced concerning the concept of an "international drainage basin" becoming the basis for the Commission's work. That concept was not appropriate to the codification of the relevant law, because it impeded efforts to reach a compromise which met the different interests of States. Disagreement was expressed with what was said to be the suggestion put forward by the Commission that the entire international drainage basin, consisting of tributaries, lakes and canals, should be included in the ambit of international watercourses. Every State should be able fully to utilize water within its territory for legitimate means and without external pressure, provided that it allowed an adequate volume of water to flow on to the other riparian States.

247. The view was also expressed that the intention of the Commission should not be to eliminate the natural inequalities among States or to diminish the importance of the principle of national sovereignty over natural resources. States sharing an international watercourse had an obligation to take due account of the interests of other riparian States, but the future provisions should not place undue restrictions on the use by States of their resources or put the legitimate interests of a riparian State at the mercy of other riparian States. Consequently, it was stated, the central element for the construction of appropriate rules to safeguard the interests and rights of all parties was the international watercourse and the quantity and quality of its water at the point where it crossed the frontier or in the stretch where it formed the boundary between two States. However, the idea of taking the existence of a system as a starting-point, with the assumption that any change in any component of the system must produce consequences affecting all the system States, was much too broad and must be modified immediately, in order to avoid endless consequences or obvious abuses. Unfortunately, in attempting to clarify the question the Special Rapporteur appeared to have utilized the concept of the drainage basin as a basis; that was the only possible interpretation to be given, even though the Special Rapporteur had earlier appeared disposed not to prejudice the possibilities for the success of the Commission's work by introducing the concept of drainage basin. A better approach, it was suggested, would be to stick to the traditional definition of the term "international river". In that connexion, agreement was voiced with the view expressed by a member of the Commission in paragraph 94 of its report. In addition, it was maintained that neither the hypothesis nor articles 1 and 2 defined anything, since the elements of the international watercourse system were not identified and the relationship between them not explained.

248. One representative agreed with the orientation of the Commission, as reflected in the tentative working hypothesis, to avoid using the geographical concept of international drainage basin used in the Helsinki Rules. The concept of an international river or international watercourse was one of the most controversial in international law. A review of the literature would show that there was still no generally acceptable definition of the concept. On the other hand, it had been unanimously established in international law that rivers and lakes belonged to the States in whose terrritories they were situated and that State borders established the limits of State sovereignty over rivers and lakes that separated or traversed two or more States. International rules currently in force concerning navigation treated rivers as separate entities which only became international to the extent that multilateral treaties established international

régimes governing their navigation. The concept of river systems contained in certain provisions of the Versailles Treaty had not been confirmed by subsequent State practice. The concept of international rivers had not fared any better, having been replaced, in the 1921 Barcelona Convention, by that of "navigable waterways of international concern".

249. Another representative drew attention to the idea expressed by the Special Rapporteur in 1979 to the effect that consideration might be given to including in the draft articles an optional clause that would enable States to specify that, as far as they were concerned, the articles applied to successive or contiguous rivers, to river basins or to international drainage basins. That idea was worth taking into consideration because such an approach would allow interested States to exercise their right to choose the best régime for their particular circumstances. Obviously, the fact that the Commission had accepted only one working hypothesis meant that all the other articles were biased and, a fortiori, that the definition of the terms and general principles to be formulated were predetermined by the hypothesis. He felt that the Commission should stick to its original approach and provide for the possibility of States opting for a more limited or restricted definition of the international watercourse.

2. Character of the draft

250. Most representatives who spoke on the matter agreed with the Commission's conception of the character of the draft articles to be prepared on the topic, that is, a set of articles containing basic principles and rules applicable to all international watercourse systems, a so-called framework instrument, to be coupled with distinct and more detailed agreements between States of an international watercourse system, which would take into account their needs and the characteristics of that particular watercourse system, so-called systems agreements. It was said that this flexible approach had the advantage of leaving States free to regulate the uses of watercourses in which they had an interest, while conforming to the provisions of the basic framework agreement. Thus future draft articles on the law of the non-navigational uses of international watercourses should constitute a kind of framework instrument embodying fundamental norms derived from the general principle sic utere tuo ut alienum non laedas and allowing for closer co-operation on the basis of agreements between the States interested in or affected by the uses of watercourses.

251. While not opposing the treaty-making system contemplated which would facilitate individual watercourse agreements and at the same time further the application of the general principles contained in the proposed framework treaty, one representative considered that the final and most important goal of the Commission's work would be the codification of the material rules of the law itself, which should be applicable in all cases when needed, irrespective of the existence of any supplementary agreement.

252. Similarly, another representative accepted the basic thesis that the sharing of the benefits of an international watercourse should be worked out within a framework agreement between the States concerned, but expressed concern that such an approach might not carry the law very far forward. In an extreme case it might

even be argued that there was no legal basis for the sharing of the benefits of an international watercourse unless such agreements had been made. In the view of his delegation, the Commission should not confine itself to elaborating draft articles suggesting the need to conclude framework agreements; it should rather state the legal principles upon which the sharing of the benefits of an international watercourse were to be determined. The sharing of the benefits of international watercourses had often given rise to serious international controversy since it raised fundamental problems of sovereignty over natural resources. In that area, emphasis on sovereignty alone would be unlikely to provide a workable solution. A functional approach was far more likely to provide a basis for the elaboration of solutions reflecting the interests of all States concerned. Such a functional approach had greatly assisted the development of new rules of international law in many areas and, in the view of his delegation, it could do the same for the law governing the non-navigational uses of international watercourses.

253. The Commission's intention to later examine the advisability of formulating within the framework instrument concept additional draft articles on specific uses of international watercourse systems and their waters was viewed by one representative as basically correct and reasonable. There were several obvious reasons, it was remarked, why the formulation of general rules should be given priority over provisions dealing with specific uses. Codification should, of course, begin from basic principles upon which the structure of more detailed provisions could be founded. There was a need to prepare a framework treaty within which interested States could conclude treaties for individual watercourses; for that purpose, the framework treaty could not be too circumstantial. The Commission, having taken into account intergovernmental and non-governmental studies on the subject in accordance with General Assembly resolution 2669 (XXV), was now in a better position to codify the general principles of the international law of waters than it would be if it had started its work with provisions relating to specific uses.

254. Most representatives also agreed that at the outset, the primary goal of the Commission should be the formulation of general principles applicable to legal aspects of the uses of international watercourses. The need was emphasized to prepare a set of draft articles laying down those principles in terms sufficiently broad to be applied to all international watercourse systems and at the same time flexible enough to take into account the singular nature of an individual watercourse and the various needs of the States concerned. It was considered necessary to establish general principles that guaranteed a balance between detailed rules that were difficult to apply and general rules that, owing to their generality, tended to be ineffective. It was remarked that the set of basic rules that was to be applied to international watercourses should be based on the principle of goodwill, the positive use of law, humanitarian concerns, co-operation among the user States of watercourses and their responsibilities in the context of fundamental rules.

255. According to certain representatives it was important to postulate general principles such as those of good-neighbourliness, abuse of rights, permanent sovereignty of States over their natural resources and economic activities, sovereign equality; equity and co-operation. It was also said that in the

formulation of the framework instrument and of the supplementary specific agreements, due regard must be paid to national sovereignty and the primary importance of agreement between the parties as the basis of the régime applying in each case.

256. The view was also maintained that once a decision had been taken that neither State could use exclusively the benefits of a watercourse running through the territory of two States, it became necessary in the interests of both to determine the basis upon which they would share those benefits. According to this view, that need to share was already enshrined in international law, which should be drawn upon in the elaboration of draft articles on the topic. The main difficulty arose in determining an appropriate basis for sharing the resources in individual cases; emphasis on sovereignty alone would be unlikely to provide a workable solution.

257. Another representative stressed that water was so vital a resource that no State could be permitted to appropriate it to the detriment of another State, nor should it be allowed to interfere with the flow of water to such an extent as to make the soil of the neighbouring State dry. In drafting further articles on the topic, the Commission should, he said, bear in mind the need for observance of the principle of "equitable apportionment".

258. As to the general principles to be reflected in the draft articles, one view put forward was that the Commission should not delay the formulation of such general principles, since that was fundamental if States were to appreciate the scope of the draft articles, particularly in the light of what had been termed the nexus problem between the framework instrument and system agreements which, despite opinions to the contrary, must be given priority if the goal was to formulate a viable draft international treaty. In that regard, one representative said he had been able thus far to find allusions to only two principles, namely, the right of all States to participate equitably in the use of waters and the obligation of all States not to use their own waters in ways that might cause harm to others. Another representative stressed that the elaboration of general rules of law should be based on principles which served both as grounds for the rules themselves and as a guide for conduct. Except for the concept of equitable sharing indicated in paragraph (14) of the commentary to article 3, there were no such attempts, he said. Furthermore, there should be an indication as to what were the parameters and criteria of equitable sharing and whether they were to be juridical, technical, pragmatic or theoretical.

259. One representative who supported the idea that the Commission should try to establish general principles applicable to the non-navigational uses of international watercourses stressed that only after there had been at least a preliminary formulation of the over-all body of principles to be followed in the matter would it be possible to have a clear idea of the meaning and scope of any proposed text. No principle could be considered in isolation without taking account of its implications for the whole body of principles. The Commission should not be asked to decide on isolated articles but should be given the opportunity to see the draft articles in perspective. Neither the Special Rapporteur nor the Commission, however, had followed that course in their work, it was said. Chapter III of the report of the Special Rapporteur (A/CN.4/322 and Add.1) dealt only with the general principle of the concept of

water as a shared natural resource. The Commission had apparently examined none of the other principles, although one was mentioned in paragraph (58) of the commentary on article 5 and another in paragraph (14) of the commentary on article 3. Nevertheless, it was to be assumed that other principles were to be considered for inclusion in the text; that piecemeal approach was not conducive to good results.

260. Another representative agreed that it would be possible to give general principles of law applicable to the subject definitive consideration only when they had been completely set forth. The optimum would be to have a set of general principles in extenso, all at once, but that might not be practical in the present case; as in the case of many other topics, it might be necessary to approach the subject a step at a time. Indeed, he said, the Special Rapporteur's report referred to two further principles which were to be placed before the Commission.

3. Comments on the draft articles as a whole

261. A number of representatives made reference to the draft articles formulated in the topic as a whole. (Comments on specific draft articles are reflected in the next section.)

262. Some representatives commented favourably on the six draft articles provisionally adopted on the topic at its thirty-second session. They were viewed as representing a careful first step towards preparation of a framework agreement, and as such they were only part of the intended, more comprehensive treaty. The positions taken by the Commission were said to be in the main well-grounded, but a few points were said to exist which might necessitate reconsideration of some conclusions. The remark was also made that the draft articles were well explained in the Commission's commentary.

263. The draft articles would serve primarily as a basis, once the Commission had received the replies from Governments to the questionnaire circulated in 1976 and was in a position to complete work on the draft. It was suggested that the general principles reflected in the draft articles could be adopted as guidelines in the formulation of bilateral or multilateral conventions.

264. Other representatives were of the view that the six draft articles were vague, ambiguous and exhibited short-comings. It was stressed that the meaning and scope of the articles being prepared was not clear from the material which had been submitted to the General Assembly. The articles were said to have considerable short-comings, mainly related to the ill-conceived concept of the international watercourse system. They were also said to be inadequately argued from a legal point of view. One representative believed that, although the Commission was moving in the right direction, it should be aware of the danger that certain draft articles (arts. 3, 4, 5 and X) could become a destabilizing factor in international relations. His delegation did not wish to discourage the Commission; it simply wished to indicate the possible danger underlying the work on that particular topic. It was suggested that the draft articles should be fundamentally reformulated, a task which should be undertaken with great caution.

265. Additional or supplementary articles were suggested by certain representatives. One view expressed was that it would seem to be necessary to include a separate provision prohibiting pollution of watercourses or at least obliging States to take all possible precautions to avoid it. General norms for solving technical problems or settling controversies which might arise from the use of the watercourses were also lacking. According to another representative, the first part of the draft articles must be implemented with guarantees against abuses by some system States which would presumably be affected by partial agreements or unilateral actions or other system States that might make exploitation of the resource impossible or that might be tantamount to the imposition of a veto. It would be sufficient to establish a rapid and efficient mechanism for consultations and settlement of international disputes arising from differences of interpretation in that regard.

4. Comments on the various draft articles

Article 1. Scope of the present articles

266. While some representatives were in broad agreement with article 1 and found it satisfactory, other representatives viewed the article as unclear.

267. Most representatives who referred to article 1 commented upon the word "system" and the concept "international watercourse system", the tentative understanding of which was touched upon earlier (see "Scope of the draft", above). Some representatives supported the new concept and the use of the word "system" as the basis for the drafting of the articles. It was noted that the term "system", which was used to embrace all components of international watercourses, had already been employed in a number of treaties and had a scientific connotation. It was also emphasized by some representatives that the use of the word "system" did not purport to settle differences over the definition of an international watercourse.

268. According to one representative, "international watercourse system" was a serviceable term; the use of the word "system" made the concept broader, since "international watercourse" strictly speaking covered only rivers, creeks and other running waters. However, it was perceived that the Commission had introduced the new working term without clearly distinguishing between it and the concepts applied earlier by other international bodies. The starting-point was the old concept of "international river". The Institute of International Law referred to "watercourse or hydrographic basin" and the Helsinki rules to "international drainage basin", while there were also in use such terms as "rivers and lakes of common interest", "international waters" and "international water resources". No final choice of a term could be made before the Commission had examined the relevant factors determining the scope of the future framework treaty. Another representative believed that although the physical or hydrographic limits of the system had not been specified, it appeared that the system would be delimited by the watershed or drainage basin. The new concept was wider than that of the surface waters of a river or a lake, and could help in formulating substantive rules for the optimum utilization of such waters in a manner that was fair and equitable for the States concerned. Although it was only

a working hypothesis, the new concept marked a distinct advance by the Commission, it was stressed.

269. Other representatives who referred to the introduction of the word "system" in the draft, expressed opposition or dissatisfaction with its use. The term "international watercourse system" was deemed unsatisfactory to certain representatives because it was considered complex, requiring a precise definition which had not been provided by the vague formulae found in the draft articles. It was felt preferable to use the expression "international watercourse" which could be defined on the basis of existing international law. Also suggested as a possible alternative expression was "riparian States" which had been used in certain treaties establishing river basin commissions. In the French text, it was urged that the term "système" should be replaced by "réseau".

270. Comments were made on those portions of the Commission's report which explained, with examples, that the word "system" was frequently used in connexion with rivers, and on the statement in the report that it was a serviceable term that would permit progress in the work on the topic on a basis that was not unduly confining. One representative considered that, precisely because a watercourse system was the sum of its hydrographic components, it was not a "serviceable term" for the purposes of the articles now being prepared. The only difference between a unitary whole of hydrographic components and a geographical area of surface and underground waters flowing towards a common collection point was that one was called a "watercourse system" and the other a "drainage basin". In his view, the concept of the drainage basin was being introduced into the draft articles by semantic subterfuge. Another representative found it difficult to understand why the Commission had referred to the Paris Convention instituting the definitive Status of the Danube of 1921 without mentioning the legal status of that Convention, which was no longer in force among the States which administered the Danube. It could therefore not be used as a basis for advocating the concepts of river systems or international rivers. The 1948 Belgrade Convention regarding the Régime of Navigation on the Danube had not retained any of the concepts introduced by the old school favouring the internationalization of rivers.

271. As to the terms of paragraph 1 of article 1, one representative said the formulation of the last part of article 1, paragraph 1, was not quite clear; for instance, flood control and flow regulation were not exactly uses of an international watercourse, nor could they really be defined as measures of conservation related to the uses.

272. Certain representatives supported the provisions of paragraph 2 of article 1, it being noted that the situation of non-navigational uses of waters affecting or being affected by navigation was one that might occur often. One representative wished to give further study to the implications of the provision contained in the paragraph, which had the indirect effect of bringing navigational uses of international watercourses within the scope of the draft. Another representative had objections regarding article 1, paragraph 2. He felt that the phrase "or are affected by navigation" was not relevant inasmuch as that situation came within the scope of responsibility of States.

Article 2. System States

273. Some of the representatives who referred to article 2 expressed satisfaction therewith and considered the article acceptable and sufficiently concise to leave no room for ambiguity. Other representatives, however, were of the view that the article did not clearly define the concept "system State". One representative commented that if article 2 laid down a geographic requirement, as stated in paragraph (2) of the commentary, the question arose how was that to be aligned with the views expressed in paragraph (36) of the commentary to article 3, which indicated that the working hypothesis adopted by the Commission put on an equal footing a State contributing no more than ground water and a State which had hundreds of miles of the river flowing through its territory. The problem was, he believed, a serious one, in the light of the duty to negotiate laid down in article 3, paragraph 3.

Article 3. System agreements

274. Several representatives welcomed the inclusion of article 3 and expressed support for its underlying rationale, the character of the draft articles as a framework instrument (see "Character of the draft" above). The provisions governing system agreements in articles 3 and 4 were considered essential to the principle of rational and equitable use of water and to the obligation not to adversely affect, to an appreciable extent, third States belonging to the system. The wording of article 3 was said to allow the States concerned sufficient latitude with respect to the scope of future agreements on all or part of an international watercourse system.

275. Article 3 also had the advantage, it was said, of allowing for the conclusion of agreements relating to subsystems, which might differ from each other to such a degree that they constituted virtually independent systems. Naturally, any subsystem agreement must take into account the interests of the other system States which were not parties to that agreement; equity and good faith both in negotiations and in the application of the agreement were essential. In that connexion, it was suggested with regard to both articles 3 and 4 that the system agreements referred to should be open to renegotiation in the event that new uses arose that might affect the interests of any of the States concerned. It should be remembered that it was not always true that upstream States were indifferent to what happened downstream. For example, a downstream State might release into a river cooling water from a power plant, and the higher temperature might prevent certain fish from travelling upstream as they had previously, and interfere with fishery activities upstream.

276. Certain representatives, however, considered the concept of "system agreements" reflected in the article unclear and unacceptable, since it granted certain States in the system the "right" to apply the provisions of the articles. Agreement was expressed with the reservations set forth in paragraph (36) of the commentary to the article which reflected the views of a few members of the Commission who did not accept the article.

277. One representative observed that paragraph 1 of article 3 created no legal problems.

278. Turning to paragraph 2 of the article, some representatives viewed the paragraph favourably. Support was expressed for the views of specialists reflected in the commentary that the best way of dealing with a watercourse was to deal with it as a whole, as had been done with regard to the Amazon, the Plata, the Niger and the Chad basins. There was no doubt that some issues arising out of watercourse pollution necessitated co-operative action on the part of all riparian States, which required the establishment of unified treatment and the conclusion of agreements among the parties concerned. What was involved was an obligation that flowed from customary international law. One representative noted that the expression "to an appreciable extent" used in paragraph 2, would provide added flexibility, in that it would give greater opportunity to one or more other system States to raise objections if the use of the waters of the watercourse was adversely affected.

279. Some other representatives, however, expressed doubts concerning the paragraph. The meaning of the provision therein concerning limited system agreements was not, it was said, quite clear because States should not in general conclude any treaties or take unilateral measures which would adversely affect the interests of a third party. The Commission would have to study the classic problem concerning the limits of the sovereign rights of co-riparian States of a watercourse over the water resources within their territories. That problem was closely connected with one of the basic principles of international water law, that of equitable utilization, which principle and its applications still needed careful study and elaboration by the Commission.

280. One representative felt that, as a matter of principle, the right of all riparian States to participate in any negotiation on a system agreement should not be qualified.

281. Certain representatives commented that certain ideas involved in the paragraph were hard to define, such as "to an appreciable extent, affected adversely". The use of such expression would, it was feared, create unnecessary problems of interpretation. While the expression "appreciable extent" might have the advantage of flexibility, it could also be a source of controversy among system States; it might be safer, it was urged, to use the concept of a "substantial extent".

282. The rule set out in paragraph 3 of article 3 was welcomed by some representatives who stressed that the paragraph constituted a special application of the principle recognized in Article 33 of the United Nations Charter as one of the methods for the peaceful settlement of international disputes, as the International Court of Justice had stated in the North Sea Continental Shelf Cases and would prove very useful in the regulation of international watercourses. It was also described as a hopeful progressive step to promote co-operation.

283. Besides the principle that system States must negotiate in good faith, as provided in paragraph 3 of article 3, it was indicated that the principles of justice and fairness in the use of international watercourse systems should also

be added. Reference was made to the examples in paragraph (3) of the commentary to article 3 dealing with international watercourses, namely the 1923 Geneva Convention and the 1969 Brasilia Treaty on the River Plate Basin. Those agreements were of a general nature and did not inhibit the parties from entering into specific or partial agreements, bilateral or multilateral, tending towards the attainment of the general objectives of developing the basins in question. The belief was expressed that the sole manner in which joint use of watercourses could be regulated, with particular reference to combat pollution, was by the conclusion of such agreements.

284. Disagreement was expressed with the argument made that the obligation reflected in the paragraph was not meaningful, since the States concerned would themselves decide whether or not to negotiate. It was none the less considered to be far better if there was a process of third-party judgement which could oblige States to take one or another interpretation of an international obligation. Indeed it was noted that there were cases in which riparian States had set up commissions with judicial powers to regulate projects and programmes governing their international watercourses, endowing such commissions with the competence to act on their behalf.

285. One representative noted that the wording of article 3, paragraph 3, indicated that the obligation to negotiate would not be restricted to cases where conflicting interests made such a procedure necessary. The Commission had concluded that there was a general principle of international law requiring negotiation among States in dealing with international fresh water resources. His delegation did not wish to object to that conclusion, but pointed out that the question of an obligation to negotiate should be considered not in abstracto but in relation to a dispute or a situation where measures planned or undertaken by one basin State might adversely affect the interest of another and negotiations were necessary to avoid a conflict.

286. Other representatives took issue with the contents and drafting of the rule enunciated in paragraph 3. The concept of duty to negotiate seemed likely to conflict with the sovereign rights of every State over its territory and its national sovereignty. The question was posed who would be empowered to state that the uses of a watercourse "required" the negotiation "in good faith" of a system agreement. The subjective nature of such expressions might give the impression that it would be relatively easy to undermine the content of article X, referring to other treaties in force. If the reply to the question (who would decide whether an agreement was necessary) was that the interested States must conclude such an agreement, the article would be superfluous. It would be very difficult to maintain that the obligation to negotiate system agreements stemmed from customary international law. Indeed that question was simply irrelevant. Any provisions in that connexion, it was stressed, must unequivocally stipulate that the riparian States of an international watercourse were completely free to make such agreements as they considered appropriate.

287. Finally, the assertion in the commentary concerning an analogy between the duty to negotiate agreements in this area and the duty to negotiate which was found to exist by the International Court in the North Sea Continental Shelf Cases

was challenged by one representative. The opinion was expressed that the delimitation of maritime boundaries and the use of international rivers were basically different situations; there was no analogy between a question of finium regundorum between two States and the question of the use of rivers by a State within its national boundaries. Another representative, however, stated that while both cases were important from an economic point of view, that of watercourses raised a vital issue.

Article 4. Parties to the negotiation and conclusion of system agreements

288. Indications of general satisfaction with article 4 were expressed by certain representatives. The statement was made that the solution proposed in the article was technically unimpeachable, although it did entail the risk of some uncertainty.

289. It was also remarked, however, that the article contained ambiguous terms which would make it impossible to apply its text. In addition, the concept underlying the article was thought likely to be in conflict with the sovereign rights of every State over its territory and its natural resources. Certain representatives remarked that the text of article 4 did not provide for the possibility that a system State might refuse to participate in the negotiations provided for thereunder. In addition, the question was raised whether an agreement concluded as a result of negotiations from which a State had been wrongfully excluded would be unlawful vis-à-vis that State, or merely unenforceable. A further question was what would be the legal situation with regard to the problem of non-recognition. The existing draft article 4 was said to have left room for serious disagreement. It was therefore suggested that provisions for compulsory recourse to procedures for settling disputes such as arbitration, should be included for cases in which negotiations on system agreements had been unsuccessful.

290. One representative explained that one of the reasons his delegation had difficulty in understanding the current draft articles and the commentary thereto was that it was inclined to share the view that if an international watercourse was hardly used, then no obligation to negotiate arose. The relationship between that statement and the statement that if there was a duty to negotiate, there was a complementary right to participate in the negotiations led to the conclusion that if there was no duty to negotiate, there could be no question of a third State's having the right to participate in negotiations between States which because of their geographical situation did have an interest in concluding a watercourse agreement. What seemed obvious in the case of a watercourse consisting of successive and contiguous rivers and even of a river basin seemed somewhat incompatible with the proposed concept of a watercourse system. The Commission itself, in paragraph (2) of its commentary to article 4 had stated that the purpose of the agreement would be stultified if every system State was not given the opportunity to participate. His delegation wondered, therefore, what was the exact meaning of the term "opportunity to participate" if there was no indication of what the consequences would be for a third State that did not make time use of that opportunity.

291. Agreement with paragraph 1 of article 4 was expressed by one representative.

292. Paragraph 2 was considered by one representative useful in that it corresponded to current thinking on the question of a riparian State's use and enjoyment of the resources of an international watercourse. The criterion most frequently adopted for determining the extent of the use or enjoyment of an international watercourse was the term "an appreciable extent", an expression which in his delegation's view provided an acceptable yardstick.

293. Certain other representatives believed that the present drafting of the text entailed the risk of some uncertainty, since it would not be possible to define precisely what constituted an "appreciable extent", thus opening the way for divergent interpretations and possible conflict between various system States. The term "substantial" was again suggested as a useful replacement for "appreciable" in the text. Reference was made in connexion with the criterion of "appreciable extent" to paragraph (10) of the commentary to article 4 where it was stated that the extent of those effects could be established by objective evidence (provided that the evidence could be secured) and that there must be a real impairment of use. In that case, too, it might be asked at what point in time the criterion of "real impairment" became operational and whether it could be substantiated at the stage of the planning of a particular project, at the stage of its execution or only after the project had come into operation; in the last case, it should be asked whether it was realistic to assume the possibility of amendment of the project or its abandonment. Reference was furthermore made to paragraph (9) of the commentary where it was stated that [illegible]n "effect" could be quantified, it would be far more useful; however, that w[illegible]nsidered not practical, in the absence of technical advice. In the circumstances, it was asked why not take technical advice, since that was a possibility which the Commission had not foreclosed, as was stated in paragraph 82 of its report.

Article 5. Use of waters which constitute a shared natural resource

294. Several representatives who referred to article 5 welcomed its inclusion among the draft articles. It was viewed by these representatives as particularly important and vital because it contained the substantive rule governing the use of the waters of an international watercourse system. The latter system was a typical example of shared natural resources whose use must be regulated in a spirit of equity, co-operation and solidarity. The codification of the notion of "shared natural resources", on the basis of the obligation to co-operate in that area, as stated in the Charter of Economic Rights and Duties of States, and to the legitimate interests of States, as set forth in article 3 thereof, would represent a significant contribution to international law and international co-operation and would be extremely important for protecting the environment.

295. Certain representatives, referring to the view held by some that the concept of shared natural resources had not been properly defined, noted that several United Nations and other bodies had already devoted considerable effort to the question. The concept of shared natural resources could be found, it was emphasized, in the Charter of Economic Rights and Duties of States, in the Mar Del Plata Action Plan adopted at the United Nations Water Conference,

in General Assembly resolution 3129 (XXXVII) and in the draft principles of conduct in respect of shared natural resources prepared by an Intergovernmental Working Group of the United Nations Environment Programme.

296. Attention was drawn to paragraphs 2 and 3 of General Assembly resolution 34/186, in which the Assembly had used the words "takes note" instead of "adopts" in reference to the report of the Intergovernmental Working Group and the draft principles it had elaborated. Since the Working Group had covered the whole range of shared natural resources, more States were likely, it was said, to be opposed to some aspects of those draft principles than if only shared water resources had been dealt with. Moreover, despite that particular wording of the resolution, paragraph 3 did request all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States.

297. In addition, it was considered illusory to try to apply the principle of permanent sovereignty over natural resources to water that flowed in an international watercourse through various successive territories. In that case, the concept of a shared natural resource was inevitable, it was stated. A riparian State should not be allowed to exclude other riparian States from the habitual use of its waters by causing drastic changes in the flow of water. Unilateral actions should give way to consultations and the adoption of concerted measures. Having reached that important conclusion, the Commission would have to examine questions which arose in connexion with the methods and criteria for the use and equitable distribution of shared resources.

298. Support was expressed for the qualification in the draft article that only to the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, do the waters constitute a shared natural resource. That qualification was considered an important and realistic provision that would prevent undue interference by one State with what another State could do in its own territory. On the other hand, it was held that such a narrow definition might not be quite adequate for the purposes of the future framework treaty.

299. Stress was placed on the concept of "shared natural resource" as a legal tool. Its introduction had procedural consequences and consequences in terms of the rights and obligations of States. But for the moment the only consequence drawn from it was the duty to negotiate system agreements and to participate in the negotiation of such agreements. The system agreement itself determined both the waters to which it applied and the particular project, programme or use involved. The Commission would define other consequences of the concept of shared resources, as announced in article 5. It would also draw inspiration from paragraph 2 of General Assembly resolution 34/186. The principle of shared natural resources as applied to international watercourses was not tantamount to a comprehensive legal régime, and the Commission did not suggest that it was; however, it was a sound antecedent for such a régime because it implied the obligation of States to act co-operatively and to use the waters of an international watercourse in accordance with principles such as equitable use and sic utere tuo ut alienum non laedas. The Commission itself recognized that, when

the draft articles were enlarged, they must include principles which would give concrete meaning to the parameters of that shared natural resource and would indicate how that resource was to be treated.

300. As to the UNEP draft principles submitted to the General Assembly, they did not postulate common management of shared resources, nor did they imply that a State sharing a resource with one or more other States would thereby lose its territorial sovereignty. The keynote of those principles was the duty of all States to co-operate in the conservation and harmonious utilization of such natural resources. In fact, such a duty was the counterpart of the classic principles of international law relating to responsibility for damage caused by one State to another, as applied to the particular situation arising from the natural movement across several frontiers of components of a shared natural resource. Moreover, it was a mutual duty. It was perhaps interesting to note in that connexion that if the whole of the hydrologic cycle was taken into account, together with the possibilities provided by modern technology in the field of weather modification, the distinction between upstream and downstream States lost some of its significance.

301. One representative did not object to the concept of a "shared natural resource" but felt that the meanings and elements of the concept needed to be clarified. Applying to a watercourse, the concept could relate to the use to which the water was put, or to the common interest which the States in question had in it. Thus, when an international river was used for navigation, such use could be called a shared use and the waters of the river could be called a "shared natural resource". The same could be said of the waters of a river or lake marking a frontier. Under the current wording of draft article 5, such uses did not appear to be covered because the use of waters for navigation by one State could not per se affect the use of waters for that purpose in any other part of the river.

302. Strictly speaking, navigation should be practised, he said, in such a way as not to affect the use of waters for the same purposes in other parts of the river. But, applied to the non-navigational use of water systems, the concept of a "shared natural resource" indicated that each system State would be entitled to an equitable share of the waters in the system. Each State would have the freedom to determine the manner in which it would use the equitable share of water to which it was entitled; no other system State could have a say in such determination or affect the autonomy of the former State. There could, of course, be rules or prohibitions regarding the use of waters so that such use did not affect the quality of the water or the environment, but that in itself would not make the waters of such a system a "shared natural resource". In other words, to say that every system State was entitled to an equitable share in the use of waters of an international watercourse system was different from saying that the waters of such system were a "shared natural resource". His delegation thus looked forward to a further refinement of the concept by the Commission in regard to particular uses of such waters, such as irrigation and economic and industrial applications.

303. Another representative noted that although treaties generally accepted the principle of equality in the sharing of boundary waters between two riparian States, sharing in equal portions was not the only method employed. It was furthermore suggested that perhaps the term "shared natural resource" was not the most appropriate.

304. Opposition to the inclusion of article 5 in the draft was voiced by other representatives who viewed the article as irrelevant, unsatisfactory, controversial and ambiguous. It was pointed out that the Commission itself had admitted that the concept of a shared natural resource was relatively new and had not been accepted as a principle of international law. Furthermore, it had proved highly controversial both when the Charter of Economic Rights anbd Duties of States had been prepared and when the Intergovernmental Working Group of Experts of UNEP and the General Assembly had considered the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States. An opinion expressed was that the Commission had tried to justify the inclusion of the concept in the draft articles on the basis of a strange interpretation of a decision of the Permanent Court of International Justice in the River Oder Case and of one contemporary arrangement.

305. Certain representatives were not convinced that the concept was widely accepted; they considered that such acceptance would have no intrinsic value, since it would not be clear that a comprehensive legal régime had been created, and States would not know what their rights and obligations under that régime would be. No reason was seen for the inclusion in the draft articles of a concept that would perforce make the Commission's work more difficult. In addition, there appeared to be no relevance of the term "shared natural resource" to the consideration of the topic in question.

306. It was recalled that the UNEP draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States had not been adopted by the General Assembly because of the fundamental objections enumerated in paragraph (20) of the Commission's commentary to article 5. The objection based on the principle of permanent sovereignty over natural resources was stressed; the view could not be accepted that that principle did not apply to a shared natural resource.

307. Another reason given for the unsatisfactory nature of article 5 was that it supposed the existence of international watercourse systems which constituted a shared natural resource and others which did not. It was hoped that the idea, which would obviously give rise to many difficulties, would be deleted from the draft articles.

Article X. Relationship between the present articles and other treaties in force

308. Some representatives welcomed the provision made in article X which preserved treaties in force relating to a particular international watercourse system or any

part thereof. Further thought would, it was stated, no doubt have to be given to the relationship between article X and other articles as the draft was further refined. The belief was held that article X was a technical clause and, when a complete set of draft articles had been prepared, it should be included among the general provisions or final clauses.

309. According to one view expressed, while article X preserved the treaties in force relating to a particular international watercourse system, it was important to recognize that such treaties were valid only if they had been negotiated "in good faith", as required under article 3, paragraph 3. If the treaty had been entered into without the free will and consent of one party, or if there had been an element of coercion or intimidation, the criterion of "good faith" had not been met and the treaty concerned did not deserve protection under article X.

310. Other representatives expressed their conviction that article X gave rise to new problems and difficulties. It was deemed unsatisfactory since it had no legal content. Furthermore, the question was raised whether article X was broad enough for its purpose - the Commission had to be careful to avoid reopening situations that had been settled for the time being by practice or by treaty.

F. Jurisdictional immunities of States and their property

1. Comments on the draft articles as a whole

311. Many representatives who spoke on the topic "Jurisdictional immunities of States and their property" noted with satisfaction the progress made thereon. It was stated that the Commission had successfully begun the process of elaborating a set of draft articles on the basis of the excellent reports prepared by the Special Rapporteur, Mr. Sompong Sucharitkul. Certain representatives, however, believed that the method followed was not satisfactory and that the draft articles provisionally adopted by the Commission were not acceptable.

312. Most representatives considered the early drafting of uniform rules on this topic desirable and necessary. Many of them hoped that the first reading of the Commission's work on this topic would be finished as soon as possible. It was stated that the Commission should devote more time to this question in order to clarify differing positions and bring them closer together, whereupon it would be easier to undertake the further drafting of the text. It was also observed that the draft articles should indicate the circumstances in which jurisdictional immunities applied and what those immunities were. The topic should be considered in conjunction with other fundamental principles of international law, such as the sovereignty, equality and independence of States. One representative stated that he would request the Commission to postpone consideration of the question until it had finalized part 3 of the proposed draft convention on State responsibility; it was premature to consider the question of jurisdictional immunity until the procedure to be followed for the enforcement of State responsibility was known.

313. Regarding the scope of the topic and its title, one representative stated that the title could be maintained for the time being, although there was still a possibility of changing it in the future in order to make it conform more closely

with the realities of State practice. According to this representative, the term "immunities of State property" referred only to the scope or extent of application of the rules concerning State immunities. Nevertheless, no study on the topic could be considered complete if it did not make reference to different aspects of jurisdictional immunities relating primarily to State property; thus express reference to State property in the title itself was not altogether purposeless. Another representative observed, however, that property could not enjoy jurisdictional immunity, since it was not a subject of law. This representative, referring to the principle of State immunity in respect of State property used in connexion with diplomatic missions, stated that it would be desirable to make it clear whether the articles on the subject would refer only to immunity from jurisdiction, or would also cover the topic of inviolability. He drew attention to the fact that the 1961 Vienna Convention contained no explicit provisions on the immunity from jurisdiction of diplomatic missions because it had been assumed that that subject was covered by the immunity from jurisdiction of States; consequently there appeared to be a gap in the proposed draft articles, and he wished to point out that the immunity from jurisdiction enjoyed by a diplomatic mission was broader in scope than that recognized in current practice in respect of the immunity of the State. It was also stated that the question of immunity from execution of judgement should be left aside for the time being.

314. With regard to the method of work, many representatives stressed that the Commission should orient its work towards a detailed study of national legislation and the practice and jurisprudence of States with different social systems in order to arrive at a balanced formulation of the rules on this topic. It was noted that the Commission had decided to renew the requests addressed to Governments to submit relevant materials on the topic and that it had also requested the Secretariat to proceed with the publication of the materials and replies already received. It was also stated that, in continuing with its preparation of the draft articles, the Commission must take into account the general principles of international law and the practice of States with regard to the topic. Furthermore the view was expressed that the Commission should seek to formulate international norms which could be applied by all States without detriment to their interests. It was also said that the Commission should attempt to formulate the principles through an inductive approach, after analysing trends which would be found in the practice of States, in national legislation and in such international conventions as the European Convention on State Immunity.

315. One representative, however, expressed the view that it would be highly dangerous, in a field involving both international law and internal law, and both public and private international law, to open the way for provisos taken from internal law. That would leave the legal situation hopelessly confused, he said, since practice concerning which activities enjoyed immunity would differ according to the constitutional situation of the State claiming immunity; there must be an international definition of immunity which would be the same for all States. Another representative observed that it was necessary to begin by resolving questions of principle in order to determine future work. In his opinion, a valid approach would be first to prepare a detailed list of existing rules and then to formulate the new rules necessitated by contemporary international relations.

316. As to the method of formulation of draft articles, many representatives agreed with the approach that the Commission had taken by first setting out general rules and then dealing with details, including those relating to exceptions to immunity. However, the content and drafting of such exceptions were certain points of controversy (see comments on draft article 6 below). Commenting on some of the articles included in the report of the Special Rapporteur which the Commission had left for future consideration, one representative said that the meaning of such concepts as "state property", "trading or commercial activity", "organs" and "agencies and instrumentalities" of the State would have to be made clear; in his view, however, it was not mandatory to include a special provision containing definitions and interpretation. The view was also expressed that the Commission should, in due time, define the terms relating to the topic, such as "immunity", "jurisdictional immunity" and "State property". One representative, however, stated that it would be somewhat premature to discuss the substance of definitional problems.

2. Comments on the various draft articles

Article 1. Scope of the present articles

317. Most representatives who referred to draft article 1 generally agreed with the text, bearing in mind that the Commission had adopted it only tentatively. The view was expressed that this article was necessary because the scope of the draft articles must be defined, even if only approximately, so that the Commission could proceed with the work. However, certain representatives considered the text unsatisfactory because it did not set forth any legal norm and confined itself to describing a situation.

318. Furthermore, some representatives expressed the view that the question of the immunity of State property belonged to a level different from that of the immunity of a State itself. It was stated that since it seemed that the one and only foundation of the draft articles was the concept of State immunity and any rules relating to State property would be only consequential to that basic concept, it would be possible to omit the reference to State property in article 1.

319. The view was also expressed that the reference to "questions relating to" immunity could be deleted and that it should be maintained only if the Commission considered that the draft would not be comprehensive enough to encompass all the aspects of jurisdictional immunity, which seemed not to be the case, in view of paragraph (3) of the commentary to article 1.

Article 6. State immunity

320. Many representatives who spoke on draft article 6 supported the Commission affirming in a positive way the existence of State immunity, as an application of the principle "par in parem imperium non habet". The view was generally shared, however, that this article which was the first in the section of the draft on general principles, must be approached with great caution and realism, since there were differences of opinion regarding the general rule it embodied. It was

recalled that, as a basic text, it did not prejudge the scope of State immunity. It was also stated that although it had its source in customary law, its relationship with the important principle of State sovereignty was still insufficiently defined.

321. Certain representatives, however, observed that the current wording of article 6 had obvious short-comings: not only did it fail to fulfil its objective, but it also created new complications. It was said that the principle of the jurisdictional immunity of States should be set forth as a general rule, and subsequent articles should then describe the exceptions to that general rule. It was also viewed as contrary to international customary law in that, in their view, it denied the existence of the fundamental principle of the immunity of States with respect to the jurisdiction of other States. These representatives preferred the wording of article 6 as proposed in foot-note 406 of the Commission's report.

322. A question was raised by some representatives whether State immunity was truly a rule or, rather, an exception to a rule of international law, namely, the exclusive sovereignty of the State. One representative held the view that the jurisdictional immunity of States was a well established norm of international law to which exceptions could be made only if certain conditions were met, and he interpreted paragraph 1 of article 6 in that sense. The view was also expressed that while it might not be necessary for the Commission, at the present stage of its work, to form a view on the question whether there was a basic principle of State immunity from which exceptions could be made, or a basic principle of exclusive territorial jurisdiction from which exceptions could also be made, the difference between the two approaches was yet crucial: the first required that exceptions to a basic rule of immunity must be justified, while the second required that exceptions to the overriding principles of exclusive territorial jurisdiction must be justified. Thus, it was stated that the Commission should keep an open mind on the point, and that its tentative decision to adopt article 6 in its current form should not prejudge the further work on that topic by imposing any particular burden of proof as regards exceptions to the basic rule, given that the nature of the basic rule was itself controversial.

323. A number of representatives spoke on the question of exceptions to the rule of jurisdictional immunity of States and the criteria for laying down the exceptions. Many such representatives held the view that, while a State was undoubtedly immune with regard to official acts performed in the exercise of its sovereignty (acta jure imperii), the immunity should not be extended to its non-sovereign activities (acta jure gestionis) such as trading and other commercial activities. The view was expressed that, unlike the time when States exercised few functions, all of which were official, the modern trend was for a narrow view of immunity from jurisdiction, on grounds of equity, since in some countries the State conducted activities which in others remained in the private sector. It was stated that the major concern here was that the draft articles to be prepared by the Commission should not give undue immunity to State property which was involved in commercial activity. Where commercial activity was involved, it was said, there was no justification for a claim of State immunity, either as a matter of general policy or as a matter of existing international law.

324. Some representatives urged a functional approach when considering the question of exceptions to State immunities in respect of its commercial activities. The difficulty arising out of the concept of functionally limited jurisdiction was the question of determining what was an act jure imperii and what was an act jure gestionis. As one representative observed, it would be intolerable if different standards were applied in different countries in the reply to that question; the answer could be found only in the sphere of international law. It was also noted by a few representatives that many of the developing States, which had followed the traditional approach on absolute immunity, were leaning towards the doctrine of restricted immunity with a view to ensuring reciprocity. In any case, it was said, States should always display good faith in exercising the immunity granted to them.

325. On the other hand, certain other representatives observed that because the general immunity of States from jurisdiction arose out of the principle of the sovereign equality of States, the distinction between acts jure imperii and acts jure gestionis was artifical and resulted in the same State conduct being interpreted in different ways. According to one representative, such a distinction was impossible for a socialist State, where political and economic activities constituted a unity, to make such a distinction. Thus he expressed his hope that the principles underlying the policy of socialist States and their commercial activities would be taken fully into consideration in the codification of jurisdictional immunity of States and their property.

326. A few representatives stated that paragraph 2 of draft article 6 was not correct and contained incongruities. It was said that the paragraph could profitably be deleted.

G. International liability for injurious consequences arising out of acts not prohibited by international law

327. Representatives commended the Special Rapporteur, Mr. Robert Q. Quentin-Baxter, for his excellent preliminary report. While some of them reserved comments on the topic until a later date pending further work thereon by the Commission, others made detailed observations on a number of issues surrounding the study of this topic.

328. As reflected in the report of the International Law Commission before the Committee (A/35/10), some of the main questions which the representatives addressed included: (1) the question of the title of the topic and the problem of terminologies; (2) the nature and scope of the topic; (3) the identification of the relevant primary obligation; and (4) the question as to whether the topic is indeed ready for or even amenable to the codification exercise.

329. On the question of the title, it was observed that the title of the topic on the Commission's work programme was not quite the same as that adopted by the General Assembly; in particular the words "acts not prohibited by international law" were the Commission's interpretation of the General Assembly's resolution, as could be seen from a comparison of the opening lines of Chapter VII, with foot-note 551 to the Commission's report (A/35/10). Thus it was wondered whether

the real scope of the topic was truly established to the general satisfaction. It may be recalled in this connexion that, in the Commission, there emerged a broad agreement that the present title of the topic, though abstract and rather wieldy, was at the present stage of development an extremely valuable guideline: it enumerated each of the four key elements in the topic and was in itself a directive endorsed by the General Assembly.

330. On the question of terminologies, it was pointed out that there was a problem of finding in many languages other than English two appropriate words to render the English legal concept of "responsibility" and "liability", which were often confused even in the Anglo-American law itself. It was recalled, in this connexion, that in earlier occasions, the Commission's duty with regard to maintaining the integrity of the lexicon of international law had been pointed out. Thus a similar need for care, with respect to terminologies, existed in the context of the Commission's current work on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law.

331. On the same question of terminologies associated with the topic, it was further observed that, while in English the words "responsibility" and "liability" were used to mean different things, such a distinction could not be readily made in other languages. An illustration of this point was given by reference to the draft articles currently before the Third United Nations Conference on the Law of the Sea. In those articles, whenever the phrase "responsibility" and "liability" occurred in the English text, the French text used periphrases to try to reflect whatever the distinction between these terms might be in the other language. It was further observed that perception of lawyers, accordingly, varied considerably about the meaning of the word "liability". For example, a Russian-speaking lawyer, expressing views on the topic in another forum, seemed to have experienced no difficulty with the word "liability". To him the word "liability" signified an idea that was logically necessary since it described, in terms of primary rules, what the word "responsibility" described in terms of secondary rules. However, with respect to some Spanish-speaking lawyers, it was noted that the word "liability" had an entirely different connotation: to them the term referred to the consequences of responsibility. In that sense, "liability" meant not the very substance of an obligation, but the consequences of that obligation.

332. On the nature and scope of the topic, there was support for the position taken by the Commission in paragraph 138 of its report to the effect that its approach to the subject must be in terms of elaboration of primary rules as distinguished from the secondary rules being codified in Part I of the topic on State responsibility.

333. The view was accordingly expressed that the topic belonged to the field of primary rules. The argument was that, in law, the question of responsibility arose after the breach of an obligation laid down by a primary rule. With that breach, it was said, a new legal relationship came into play between the parties that was in turn governed by a secondary rule. Thus, in dealing with the question of acts not prohibited by international law, most of the concepts usually introduced in the context of responsibility were not applicable. As an illustration of liability for lawful acts, it was noted that article 2 of the

Convention on International Liability for Damage caused by Space Objects established a primary obligation to pay compensation if damage occurred. Only in the event of failure to pay such compensation did the new legal relationship come into being and the secondary rule established liability for the breach of the primary obligation. It was thus clear that the conduct imposed by the primary rule belonged to the legal province of contractual obligations governed by the Vienna Convention on the Law of Treaties.

334. The view was also expressed that, if secondary rules were to be understood as rules which came into play when primary rules were not respected, then the rules on liability for injurious consequences arising out of acts not prohibited by international law were not secondary. Unlike the rules on State responsibility it was noted, the rules on liability were not connected with the breach of an international obligation established by a primary rule, nor did they require the existence of a previous legal relationship between the States concerned. The scope of the topic would thus be determined by preparing draft articles in two parts: the first part would attempt to define the origin of international liability on the basis of the two elements mentioned herein, with due care being taken to define what might be considered an "act of State" for the purposes of the articles. The second part would, following the structure of the article on State responsibility, deal with the form, content and degrees of liability.

335. It was further observed that an obligation to compensate for damage should in this context be considered the only consequence of liability notwithstanding the contrary view that the régime of liability should first and foremost be directed towards prevention, and the greater prominence should be given to preventive than to compensatory measures. Thus, while it could be generally agreed that legal norms should not deal only with redress and punishment, in the specific case of liability for acts not prohibited by international law, it was possible to envisage a framework in which the rules on liability could encompass also the possibility of preventive action. The recognition of a legal consequence - liability for damage - to certain lawful activities might act as a deterrent and lead States to be particularly careful when undertaking activities likely to entail liability and even to seek agreements with other States, if that was considered necessary.

336. In further support of the Commission's view that the topic deals with primary rules, it was observed that there was a practical problem in deciding how to relate the distinction between primary and secondary rules in describing the nature and scope of the topic. It was noted that indeed the term "liability" itself suggested secondary rules. From the beginning, the argument continued, the concept of liability was compared and contrasted with that of responsibility as if these rules as to liability could be thought of in parallel with secondary rules of State responsibility. Continuing to do so would, however, be to ignore the fundamental premises on which the work of the Commission on State responsibility were based. Those premises were that one set of rules existed to deal with the consequences of wrongfulness and that obligation which did not arise out of wrongfulness arose out of primary obligations. Therefore, the decision to describe the topic as lying in the field of primary rules was no more than a literal application of previous decisions taken by the Commission over the years in relation to the subject of State responsibility.

337. It was moreover pointed out that the Commission and its members had repeatedly said that all obligations were of two kinds, either they arose from wrongfulness or they arose from the rule of primary obligation. Thus, when one considered the enormous investment of time and effort in developing the subject of State responsibility, and the continuation of the present effort, it would hardly be acceptable to introduce a dichotomy of secondary rules. It was conceptually neater to begin with the established notion that secondary rules came into play only when primary rules were broken. Thus, whatever the parallels between the new topic and that of State responsibility, obligations that arose without wrongfulness must be described systematically in terms of primary norms.

338. But there was also the view which stressed the difficulty existing in accepting the Commission's characterization of the topic as one dealing with primary rules as supported above. It was noted that the Commission had made a distinction between the secondary rules being elaborated in Part I on the topic of State responsibility and the primary rules to be elaborated under the topic of liability for injurious consequences of acts not prohibited by international law. However, there were some doubts as to whether such a fundamental difference really existed between the two topics. It was accordingly argued that the Sixth Committee as a whole, without perhaps going too deeply into the matter, had assumed that in dealing with this topic, the Commission would be following the same general approach as in the case of State responsibility, namely, that it would take the "primary" rules for granted and would deal with "secondary" rules relative to liability as such, especially such aspects as imputability and release or satisfaction. While under this view the distinction made by the Commission between the two topics was doubted and the conclusion reached that the liability topic was assumed to deal with secondary rules, a similar conclusion was reached but from the viewpoint which clearly stressed that the Commission should make a clear distinction between responsibility of States for wrongful acts and international liability for injurious consequences arising out of acts not prohibited by international law. In respect of the latter, it was asserted, the Commission should consider only secondary rules.

339. The determination of the scope of the topic was also examined in the context of the question recalled in the Commission's report (A/35/10 para. 131), namely, whether the topic should, for the sake of convenience, be limited to matters arising from the use or management of the physical environment. The view was expressed that it seemed premature to restrict the scope of the rules to be elaborated to the question of the environment. It was pointed out in this connexion that article 35 in part I of the draft articles suggested other matters which might be regulated, in particular, matters relating to highly dangerous activities. The article, it was further observed, left open the possibility that a State might be liable for damages in cases in which its responsibility was excluded because certain circumstances precluded the wrongfulness of an act contrary to an international obligation. It was thus considered possible to induce from those rules more general rules on liability, care being taken to avoid giving the concept of liability a wider meaning that would equate it with state responsibility. The concept of liability, it was recalled, could be traced as far back as the Roman concept of obligationes quasi ex maleficio, in domestic law, but had admittedly not achieved the same universal acceptance as the concept of State responsibility in international law.

340. There was also the view which emphasized the fact that liability of States for injurious consequences arising out of acts not prohibited by international law derived solely from the close link which existed between the hazards caused by such activities and the injurious consequences which might result from them. Thus it was observed that the Commission's work on the topic would lead to the recognition of the principle that anyone who engaged in an activity involving substantial risk should assume liability for the danger thereby created. Liability would thus attach without any action or omission attributable to a State, exclusively on the basis of the chain of causality between the act "attributable" to one of the parties and the injury suffered by the other. This idea was based on theory of risk which had been recognized in certain international conventions and international case-law. It was stressed, in this connexion that, in adopting the view, the Commission's work would provide the possibility of incorporating certain principles and rules previously developed in internal law of States. Thus, the rules on liability for injurious consequences arising out of acts not prohibited by international law would carry over into the international sphere the principle known in Spanish internal law as responsibilidad sin culpa (liability without fault), a principle that was essential in a just society, for maintenance of harmonious relations among its members.

341. The view was also expressed recognizing the wide spectrum covered by the topic and pointing out that there were two extremes involved. At one extreme, there were activities involving a very low probability of transfrontier injurious consequences but a high degree of damage. At the other extreme, there were activities involving a high probability of effects on another country which would generally be minor. The cases in between the two extremes would thus involve various degrees of probability of damage and extent of damage. Thus, it was noted, any rules formulated to deal with these activities would entail different rights and duties of States. For the low probability/ultra-hazardous activities the emphasis must be on preventive and control measures to be adopted by the State under whose jurisdiction those activities took place. It was further noted that, while in the view of some authors, permitting such activities in a territory of a State entailed strict liability for the State concerned, current State practice did not support such an extreme view.

342. Strict liability for ultra-hazardous activities, it was added, had been established, in such fields as outer space activities and transport of nuclear material, in the relevant conventions, ut it did not appear that a general rule of international law to that effect had developed beyond the scope of those conventions. However, there were general rules of international law that imposed on the State permitting activities with potentially severe trans-frontier implications the obligation to prevent armful consequences to the greatest possible extent to minimize injurious consequences in the event of an accident and to provide for adequate compensation for the victims of any such accident. Thus, the obligations of the controlling State also included the duty to inform States that might be affected, and to enter into consultations in good faith with the States likely to be affected in case of accident, in order to reach agreement on such questions as regional plans in the case of the operation of nuclear power plants. It was hoped that the Commission, in its future consideration of the topic, would address itself specifically to the obligations of States allowing potentially dangerous activities within their territory or control. Such

obligations would have to be taken into consideration in discussing acts which were not prohibited by international responsibility of the State concerned. Activities at the other extreme, with high probability of effects or even permanent effects but minor harm, called for completely different treatment. Accordingly, the Special Rapporteur was correct in saying that the various degrees of harm played a central role (A/35/10, para. 144), particularly in determining when a degree of harm had been caused to bring about the liability of the controlling State.

343. Similar focus upon the identification of various activities for the purposes of determining the scope of the topic lead to the suggestion of approaches to the subject, having regard to the concern with the physical environment. It was, accordingly, observed that on some of the matters relating to the physical environment, including the question of shared natural resources, broadly acceptable general principles had already been elaborated. But it was still to be determined whether the circumstances peculiar to the use of shared natural resources were not different from those related to the exclusive resources of a State. Thus, the clear legal principles concerning shared natural resources could not axiomatically be extended automatically to the physical environment in general. Another approach to the topic would be based not on territorial jurisdiction, but on the risks involved. Some activities, it was noted, had harmful consequences for other States either at all times or if certain precautions were not taken; either they should be prohibited or there should be a legal obligation to take such precautions. If despite the prohibition or the obligation to take precautions, a State engaged in such an activity or failed to take the precautions, it thereby breached a primary obligation and thus committed an internationally wrongful act. That would, however, be outside the scope of the topic. If, on the other hand, damage occurred through misadventure or a fortuitous event despite the precautions taken, the situation would fall within the scope of the topic. It was not, however, readily apparent as to whether rules should be laid down for such evidently infrequent occurrences.

344. But there were other activities involving a great risk of accidents or a normal risk of large-scale accidents, such as the launching of objects into space or the transport of petroleum by super ankers. Such activities could be prohibited without the risk of impeding human progress and depriving the world of the benefits of certain technological developments. States, it was noted, had concluded agreements to deal with such eventualities and would no doubt conclude further agreements as required. Under this approach the final category would be the activities which did not as a rule have harmful consequences or which had such consequences only as a result of misadventure or a fortuitous event. Because of the few exceptions to that general rule, there was no need to formulate legal rules. States, it was again observed, usually settled matters in that area through bilateral negotiations. There was no doubt that the international community wished to have legal rules relating to the physical environment. It should not be forgotten, however that the mandate entrusted to the Commission referred to the liability of States for acts not prohibited by international law a topic whose scope and context might be easier to define once the work on responsibility for wrongful acts had been completed.

345. Continuing this line of discussing the scope and nature of the topic by identifying various categories of activities, there was the view that actually three categories of acts not prohibited by international law existed and were linked to the draft articles in Part 1. Thus it would be preferable to complete the discussion of the articles of Part 1. The three categories of activities were identified as follows: the first related to the ultra-hazardous nature of the activity and would include injury caused by space objects or space vehicles, activities relating to atomic energy, carriage of nuclear material or incidents involving nuclear-powered ships or ships carrying oil or other pollutants. In such cases, the liability was absolute or strict and was without the need to prove fault. The second category related to the doctrine of abuse of rights, where the requirement of due care and caution might be applicable. Such acts might be conducted within the territory of a sovereign State but might cause injury to the territory of another sovereign State or even in an area not belonging to any country. Such a category was controversial and required careful study. A solution might be found by defining the elements of the nature of the act, the quality of care required and the degree of injury caused directly. The third category consisted of cases mentioned in article 35 of the draft articles on State responsibilty, namely, acts which were not wrongful, because they were covered by the exceptions specified in articles 29 to 34.

346. But there was the view that a distinction between exceptional hazards and ordinary hazards would arbitrarily restrict the application of the draft articles, and that a State should be liable for any activity which had injurious consequences in the territory of another State or even in areas outside the jurisdiction of any State. The sovereignty of a State engaging in such lawful activities should not preclude that State's international liability. Naturally, it was noted, such a major contribution to the law relating to good neighbourly relations must take due account of the political, economic, social, scientific and technological realities of the contemporary world. It was important, therefore, that law should blaze a trail in areas where the inadequacy of preventive measures might lead to extensive damage that went beyond political boundaries. It was important in that connexion to avoid any unduly restrictive interpretation of the term "environment", since questions relating to ecological damage constituted at most only part of the topic. It would perhaps be illusory to think that so-called "objective" liability would provide a universal answer to all the problems raised by damage resulting from industrial and technological activities. It might therefore be necessary to go beyond the scope of liability as such and to concentrate on the concept of obligation, by radically refining and extending the traditional concept of diligence. In that context the furtherance of the "secondary" rule of "objective" liability must rest firmly on the extension of the "primary" rule of obligation to exercise diligence.

347. There was the view which also stressed the need for the Commission not to lose sight of theoretical legal problems while adopting a practical attitude in the process of drafting rules that struck the proper balance between necessary technological progress on the one hand and the protection of the environment, in the broadest sense, on the other. It was further stressed, in support of this point that, account should be taken of the evolving nature of international law in this field. Thus, what had formerly been allowed might be prohibited as a consequence of a necessity recognized by the international community. As a

minimum measure of protection, the adoption of draft articles on this subject would be particularly beneficial to States less developed industrially, taking into account that international law lagged behind the advance of science in response to the economic needs of nations. This train of thought was reflected in another comment which mentioned specific activities. For example, an activity which currently entailed considerable danger at the transnational level was the trade in chemicals, pharmaceuticals and similar products of dangerous nature, the use of which was banned in the country where they were manufactured.

348. In this connexion, it was stressed that the Commission's study should include certain issues of contemporary socio-legal interest, such as the question of harmful consequences caused to developing countries as a result of restrictive economic policies of other States. At a time when those countries were engaged in the urgent task of economic development, the evolution of principles designed to support and safeguard those aims and aspirations would be welcome. It was further believed that the International Law Commission should continue its work on the topic, giving it high priority, with a view to further developing the principle of the duty of States to take into account the interests of other States which might be affected by acts not prohibited by international law. Such a study was of great interest in the context of the preservation of the environment, in the current era of unprecedented scientific and technological advancement.

349. The same view focusing upon the inadequacy of international law, called upon the Commission to consider different régimes of liability and to recognize that certain activities called for different régimes not only with respect to the degree of liability, but also with regard to the question of enforcement. An activity such as space exploration, it was noted, required a very different régime of liability than that which would be applicable to the use of nuclear energy or the development of the biosphere. In any event, there was doubt whether it was possible to limit such a régime to the two parameters of care commensurate with the nature of the danger, on the one hand, and of guarantees related to the occurrence of injury, on the other, as it appeared from paragraph 137 of the Commission's report. Indeed, in the area of activities such as those that had been mentioned as examples, the injury could be so extensive that the State in whose territory the act causing injury had occurred would be unable to make compensation. It was easy to imagine the abuses that could be committed by carrying out highly dangerous activities in small countries that would not be able to provide the compensation to which the activity might give rise. Furthermore, if activities, although dangerous, were carried out for the general purpose of developing science and technology and benefiting mankind as a whole, it might be possible to envisage the establishment of international systems, modelled after certain systems in domestic law for providing financial guarantees for any injuries that might occur.

350. It was accordingly noted further that international law on the subject was not satisfactory since it provided only a few solutions in connexion with outer space and marine pollution. New technology, particularly relating to nuclear energy, called for the establishment of legal solutions which would promote co-operation among States. It was a delicate question because it affected activities that were subject to the sovereign jurisdiction of States, and the latter usually denied the dangers which such activities sometimes entailed.

To find suitable solutions, attention would have to be focused on cases of activities which caused damage within the territory under the jurisdiction of a State and the injurious consequences of which were also felt in the territory of other States. The task was a complicated one, because in the case of that topic the Commission was not only codifying existing international law but also developing it. In performing this task the Commission was urged again to note that, while, theoretically, it may be said that acts not prohibited by international law were different from wrongful acts giving rise to State responsibility, in practice, the distinction was not that clear. In support of this view, it was noted that while in traditional law there was hardly any prohibition or restriction on industrial activities that might harmfully affect the environment, the new international environmental law imposed - and increasingly so - restrictions on activities of that kind. Many acts that had not been prohibited in the past would, therefore, be wrongful in the future. In many cases it might be difficult to prove that a State had acted with such intent or negligence as would make the act wrongful under international law. The future rules were, therefore, likely to be applied also to many acts that might well have been wrongful but whose wrongfulness could not be fully shown to exist.

351. There was, it was noted, no contradiction in speaking of liability for an act not prohibited by law. The concept of liability in such cases meant that a State was permitted to perform certain acts but only on condition that it took upon itself the financial consequences for any damage that might result from the act. For example, it was observed that the benefits to be derived from an industrial activity that gives rise to pollution or other harmful effects should be weighed properly. Normally there should be obligation to pay for damage resulting from the activity. But where, in the case of pollution the harmful effects were minor and tolerable, there would not arise a claim for compensation.

352. Clearly, it was further observed, one could cite various multilateral treaties which, while not prohibiting certain activities, required States parties to compensate damage arising from such activities. However, where State responsibility was concerned, certain circumstances precluded wrongfulness in an act that would otherwise be wrongful, the position here was, as it were, reversed since in certain given circumstances a State was liable for the compensation of damage either arising from acts that were otherwise not objectionable. It remained to be seen whether it was possible to define those circumstances, in other words, to determine in the abstract the fields of activity to which such liability applied. The question could thus be approached from two different though not actually exclusive viewpoints: certain activities could be regarded as inherently dangerous, or certain common interests, such as the environment, could be regarded as extremely vulnerable. If those two viewpoints were fully developed, one would soon reach a point at which there was an inherent conflict between technology and nature, and that, in turn, led to the supposition of a conflict of interest between States which were at different technological levels. While all States had a common interest in the careful determination of the fields in which the concept of liability for the injurious consequences of acts not prohibited by international law could play a useful role in the progressive development of international law, no abstract distinction should, however, be made between the field of applicability of the concept, the origin of the liability, and the content, forms and degrees of such liability.

353. Moreover, it was noted that the question of the applicability of the concept of liability required a different way of envisaging relationships between States, deriving from the elements of hazard in the link of causality between the actual conduct of one State and the potential conduct of another State. That was another mirror-image of circumstances precluding wrongfulness, since in the case in point it was a fortuitous conflict between abstract rules of international law which disturbed the normal legal link between breach of norms and remedy or sanction. Indeed, in both cases, norm and sanction were fused into a single rule, in the first case by the exceptional absence of the normal legal consequences of a wrongful act, and in the second case by the exceptional duty to compensate damage caused, notwithstanding the absence of anything that could be blamed on the actor. Hazard was an ever present fact of life, and States must determine in common the levels of hazard which generated the liability of a State for injurious consequences. From that point of view, the concept of liability for injurious consequences of acts not prohibited by international law lay midway between the "right" of each State to use its own and the "wrong".

354. That, it was pointed out, explained why, in practice, States were often willing to agree on a duty to take preventive measures in order to obtain an acceptable level of hazard without prejudice to the question of liability, and why such liability might turn into responsibility or disappear, depending on whether any wrongful act could be blamed on one or the other party. It was also why international conventions in that field often were limited to uniform rules of civil liability as between actor and victim and left aside the question of liability and responsibility between States. The matter was often solved in a practical way by uniform international rules relating to legal relationships between individuals; such an approach made it possible to define the impact of relationships between individuals on State responsibility in the cases of "consent" and "distress" (arts. 20 and 32 of the draft articles on State responsibility). The vulnerability of the environment inspired the search for international rules relating to liability for injurious consequences of acts not prohibited by international law. Obviously, prevention of damage was particularly important in that field and, in the case of an ecosystem under the jurisdiction of two or more States, required effective international co-operation. From that point of view, the concept of State responsibility for acts not prohibited by international law led on to the concept of shared natural resources.

355. There was, thus, the view stressing the fact that the Commission would evidently face great difficulties in establishing new principles as primary rules of international law, dealing with all the areas, owing especially to the lack of State practice in those essentially new fields of activities. It was accordingly suggested that a realistic approach to the work of the Commission on the topic would be an attempt to draw up a legal framework, taking into account the contents of the existing agreements in areas such as outer space activities, the uses of atomic energy, and the prevention of marine pollution, and try to make the rules contained in such agreements more general. In the process of constructing such a legal framework, it was noted, emphasis should be placed on the conclusions reached in paragraph 137 of the Commission's report, namely that the Commission should attempt to minimize the possibility of injurious consequences and, in providing adequate redress for such consequences, it should avoid as much as possible those measures which would prohibit or hamper the creativities, including economic activities of each State.

356. Concerning the identification of the primary rule of obligation, it was observed that the question of liability for injurious consequences arising out of acts not prohibited by international law was closely connected with Part 2 of the study on State responsibility, especially the acts which, at the time of commission, had not constituted an internationally wrongful act. It was stressed that an act of a State resulting in injurious consequences would engage its liability regardless of the absence of wrongfulness. However, should the law prohibit such an act at the time of commission, that would engage State responsibility in a general way. This type of liability, it was noted, was what the Rapporteur had identified with the maxim sic utere tuo ut alienum non laedas (the duty to exercise one's own rights in ways that do not harm the interest of others).

357. While the use of that maxim, known in the domestic law of various legal systems, in the development of this topic was generally welcome, it was observed that there were pitfalls that might attend its application. The view was therefore expressed that great care would have to be exercised in extending the application of the maxim from the sphere of private law to that of relation among States, where the degree of interdependence was less.

358. It may be observed that most of the representatives who spoke on the topic seemed convinced that the topic was ready for codification and generally supported the thrust of the topic as described in paragraph 137 of the Commission's report.

359. There was accordingly the view that it would be best for the Commission to proceed on the simple assumption regarding the topic that wrongfulness arose when rules were broken, but that obligations existed even prior to such infringements, and that some of those obligations could be described systematically in terms of primary norms. He further noted that, in seeking to define the scope of the topic of international libility or injurious consequences arising out of acts not prohibited by international law, one representative had asked whether the cardinal issue was not in fact the question of reparation for injury, and therefore, a matter of secondary rules. Such an interpretation, the other representative said, was unduly narrow.

360. There were, it was emphasized, precedents in international law for the view that when countries engaged in activities which were liable to have deleterious effects on other countries, they had at least an obligation to consult those countries in order to determine an acceptable course of action. That obligation was central to the issue of the non-navigational uses of watercourses, for example, which likewise raised the question of a State's right to act as it pleased within its own territory without reference to the interests of neighbouring countries. In determining international liability it was important to steer a middle course between granting permission to States to proceed as they thought fit, on the one hand, and requiring them to defer completely to the interests of their countries, on the other. The essential principle to be borne in mind was that embodied in the maxim sic utere tuo ut alienum non laedas, which underlay the primary concept of invasion of sovereignty.

361. In determining the scope of the topic it was also important to avoid facile analogies with domestic law and to recognize that the distinction between a crime and a rot, i.e. between criminal and civil wrongfulness, was not valid for international law. The effort to codify international liability for injurious consequences arising out of acts not prohibited by international law was in no way intended to add to the responsibility of States; it was rather an attempt to confer on the process of accommodation and negotiated settlement, a much needed legal objectivity.

362. But there was the view pointing out that the topic was not ready for codification at the present stage. Assessing the nature of the topic and suggesting an approach of its study, it was observed that a great deal of work still remained to be done by the Commission.

363. Doubts were accordingly expressed as to the possibility of elaborating, at the present stage of development, general principles on a subject having such vast parameters. Acknowledging, however, that the impact of new technology and the increased danger to the physical and human environment posed problems for all States, the point was still made that a number of specific international conventions had already regulated many of the more immediate transnational problems which arose in that context. Thus, no doubt, the process of specific regulation of particular injurious consequences would be further expanded to deal with new problems as they arose.

364. The Commission should, therefore, adopt an inductive approach in its consideration of that topic, and should continue to gather relevant materials before seeking to embark on a substantive study. It was felt that such additional general preliminary examinations of a number of facets were called for, and that the differences within the Commission itself must be eliminated.

365. Thus, it might be premature for the Commission to adopt any articles before a further general discussion was held both in the Commission and in the Sixth Committee. Much would be gained, it was stressed, from another general examination of the nature and scope of the Commission's task with regard to the topic.

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

366. Many representatives referred to the Commission's work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, as reflected in chapter VIII of the Commission's report. Some representatives indicated that they would postpone their comments on the topic until the Commission had made substantial progress on the basis of further reports by the Special Rapporteur.

367. Several representatives stressed the practical importance of the topic in view of the ever-increasing dynamics of contemporary international relations. The development of those relations together with the ease and speed of communications, the use of couriers ad hoc and the widespread practice of the diplomatic bag not

accompanied by diplomatic courier, made existing international agreements on that topic inadequate and called for additions or amendment thereto. Many issues relating to the topic were either omitted from the existing conventions or required further elaboration. There was need to adopt new and more exact rules for the new circumstances of contemporary international life, since the existing agreements had gaps. The formulation of rules on the topic, to be incorporated in an international legal instrument, would supplement the existing conventions and fill their legal gaps. Such an exercise would be a valuable contribution to the further codification and progressive development of international diplomatic law and to the stricter observance of existing conventions, and would help to strengthen mutual understanding and co-operation between States and reduce the danger of disputes. It would also possibly put an end to the violations which unfortunately were now occurring. The important functions of diplomatic couriers made it necessary that their facilities, privileges and immunities should be regulated in greater detail. It was also said that the elaboration of norms safeguarding the inviolability of diplomatic couriers and bags was particularly important to the developing countries, with their limited human and material resources. Many such countries did not have diplomatic couriers and were obliged to use diplomatic bags not accompanied by diplomatic couriers.

368. In the opinion of some representatives, the international agreement on the topic should be embodied in an additional protocol to the Vienna Convention on Diplomatic and Consular Relations. Other representatives, however, considered it premature to dwell on the final form that the codification should take and some reserved their final position until a complete set of draft articles had been submitted.

369. In the view of several representatives, the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier had been adequately regulated in existing international treaties, namely, the Vienna Conventions on Diplomatic and Consular Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. Doubts were, therefore, expressed about the advisability and the urgency of elaborating a further legal instrument on the subject. The establishment of detailed rules on the matter would not necessarily guarantee respect for the fundamental norms involved. The case for a new legal instrument was unconvincing, even to solve the problem of the abuse of bag facilities. The problem was not so much one of lack of regulation as one of the political will of States to observe the norms established in existing international conventions. Besides, more time was needed to assess the effects of those conventions.

370. Some representatives expressed the wish that the International Law Commission would be able to present to the Sixth Committee in the not too distant future the first formulations of a set of clear international rules which would receive wide support from States. It was also said that an additional protocol to the Vienna Convention on Diplomatic Relations should be prepared as soon as possible. On the other hand, in the opinion of some representatives the topic did not merit urgent attention. Disproportionate time and effort should not be expended on elaborating principles already embodied in existing multilateral and bilateral conventions and

the Commission should not distract itself from more pressing matters by focusing on what was deemed to be a peripheral issue.

371. Several representatives welcomed the work on the topic done by the Commission and, in particular, the excellent report prepared by the Special Rapporteur, Mr. Alexander Yankov, which would provide a useful basis for further work. They considered that that report contained all the basic elements for the preparation of draft articles, and expressed the hope that the Commission would begin work on the draft articles to be proposed by the Special Rapporteur at its next session.

372. In the view of some representatives, the Commission faced a difficult task in seeking to work out a suitable international legal instrument to fill the existing loop-holes in the system of legal norms regulating the use of the means of communication in inter-State relations. It must take into consideration the legitimate interests of the receiving State and the transit State, the necessity of respecting their State sovereignty and national legislation, and the observation of sensible security rules. They emphasized the need to achieve a proper balance between the secrecy requirements of the sending State and the security and other legitimate considerations of the receiving and transit States; between safe and rapid delivery of the bag and respect for the sovereignty and national laws of the receiving State; and between immunity of the bag from checking and security requirements, particularly in relation to the safety of international civil aviation.

373. Several representatives agreed with the suggestion reflected in paragraph 159 of the Commission's report that the draft articles should formulate the fundamental principles of international law underlying the four codification Conventions, such as freedom of communication for all official purposes, respect for the laws and regulations of the receiving and transit States and the principle of non-discrimination.

374. In the opinion of some representatives, the debate in the Commission had shown the necessity of drafting specific rules based on the practice established to date and on the four relevant Conventions concluded under the auspices of the United Nations. On the other hand, the view was expressed that the Commission should limit its work to an examination of the question solely on the basis of the Vienna Convention on Diplomatic Relations, on which the practice of States was most firmly established.

375. Several representatives agreed with the suggestion in paragraph 153 of the Commission's report that a comprehensive approach should be adopted which might lead to the elaboration of a coherent and uniform set of draft articles embracing all types of official couriers and official bags. They endorsed the concept of "official courier" and "official bag" elaborated by the Special Rapporteur, whose approach was considered to be the most effective method for the comprehensive protection of all means of communication used by official missions maintained by States abroad.

376. In this connexion, it was stated that the best course would be to concentrate first on the definition of diplomatic courier and diplomatic bag, since that definition must be applied to all forms of official courier or bag. Also with

regard to the issue of the terminology to be used, the terms "diplomatic courier" and "diplomatic bag", it was said, did not fully and precisely convey the sense of the notions concerned. Nevertheless, some representatives did not object to the use of those terms, provided the future legal instrument would ensure the unrestricted and uniform regulation of the questions concerning all kinds of official envoys and pouches with official correspondence as used by States to maintain links between their domestic authorities and their official missions abroad. In their view, the elaboration of definitions of the diplomatic courier and the diplomatic bag would contribute significantly to the completion of some of the tasks facing the Commission and would have a beneficial effect on the development of diplomatic law as a whole.

377. In the opinion of one representative, the specific rules to be elaborated on the topic should be designed to supplement the principles set forth in the existing conventions and not to extend the privileges and immunities of the diplomatic courier. Other representatives considered that in determining the status of the diplomatic courier and the diplomatic bag, the emphasis should be placed on the functional aspect of the question, i.e., the necessity of ensuring conditions facilitating the implementation of the right to official communication among States. The purpose of the facilities, privileges and immunities accorded to the diplomatic courier and bag was not to benefit the person, but to create the conditions necessary for the normal and effective performance of the functions concerned.

378. The opinion was also expressed that courier and bags were means of communication instrumental in the exercise of official functions recognized and protected under international law and that the courier should be accorded all diplomatic privileges and immunities. In that connexion, it was essential to include in the text clear definitions also of the functions of a courier; that would also help to solve the issue of possible abuses. It was further stated that, provided that the future legal instrument ensured absolute inviolability of the courier and the bag and contained clearly defined criteria relating to the use of monitoring systems, a regulation concerning measures by the receiving State to protect its security and other legitimate interests could be agreed to; the only basis for such a provision would be the generally recognized principle that every person enjoying privileges and immunities under international law was obliged to respect the legal order of the receiving State.

379. Some representatives, sharing the opinion of the Special Rapporteur that the relevant draft articles should cover a broad range of issues requiring progressive development and codification, expressed the wish that all the issues raised and discussed so far be included in the draft in a normative form. In that connexion support was expressed for the structure of the future draft as proposed by the Special Rapporteur, which guaranteed a balanced proportion between general provisions and specific practical rules, as well as for the idea of including rules on bags accompanied by diplomatic courier. Nevertheless, it was stressed that the main purpose of the codification in that field should be the clear and uniform regulation of the status of the courier as an official diplomatic person and of the bag not accompanied by courier as a means of accomplishing official governmental functions. That, of course, included the regulation of the rights and obligations of the receiving or transit State.

380. In the opinion of one representative, it should be borne in mind that there was a difference between the status of the diplomatic courier and the status of the diplomatic bag. The precepts of that difference could be traced to article 27 of the Vienna Convention on Diplomatic Relations, paragraph 5 of which defined the personal immunity of the diplomatic courier and immunity from arrest and detention and paragraph 3 of which referred to the inviolability of the diplomatic bag without making any distinction as to whether it was accompanied or not. The privileges and immunities of the diplomatic courier and other agents who carried out similar functions should approximate as much as possible, both in character and in scope, those granted to diplomatic representatives. Particular attention should also be paid to the question of the status of the courier ad hoc, to the privileges and immunities enjoyed under the duties of his special mission, and to the particularities of his status during the period between delivery of one diplomatic bag and reception of the next.

381. Another representative expressed the hope that the functional approach would prevail in respect of the status of the diplomatic courier and of the unaccompanied diplomatic bag, although the order in which the various subtopics were listed in the preliminary report might seem to indicate otherwise. It should be recalled that the primary principle underlying the whole topic was the freedom of communication between representatives of a Government, acting as such on the territory of another State, and their Government. The diplomatic bag was an important instrument - but only an instrument - to secure that freedom of communication. Similarly, the bearer of that bag was only an instrument for bringing the bag untouched from its origin to its destination. From that point of view it made no difference whether the bearer was the captain of a ship or aircraft, a so-called ad hoc courier, an official courier or a diplomat of the State concerned. In a functional approach it would therefore seem appropriate to concentrate first on the status of the bag itself and to draw from its function the consequences for the status of the person to whom it was entrusted for the purpose of transportation. That did not necessarily mean that all bearers of a diplomatic bag should be in the same legal position or that the scope of the bearer's privileges should be limited to the time-span in which he actually carried the bag. But a careful analysis of what was really necessary to secure freedom of communication in the various situations was obviously appropriate. So, it would seem, was the consideration of provisions to ensure, to the extent possible, that the bag was actually used only for the purpose of official communication between the representative and his Government.

382. In the view of one representative, another task facing the Commission in determining the status of the diplomatic bag was the question of the specifics of the unaccompanied bag in the context of the norms contained in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. In this connexion, it was said that it would be useful if the Commission could study consular regulations, which could provide information on current State practice.

I. Other decisions and conclusions

1. Programme and methods of work of the Commission

383. Members of the Sixth Committee welcomed the considerations and recommendations contained in the report of the Commission on questions having a bearing on the nature, programme and methods of work of the Commission and the organization of its sessions with a view to the timely and effective fulfilment of the tasks entrusted to it. The establishment again by the Commission of a Planning Group to consider the organization, programme and methods of work of the Commission was also welcomed.

384. Most representatives who spoke on the matter endorsed the programme of work of the Commission, in particular with reference to the programme of work envisaged by the Commission for its thirty-third session in 1981. It was stressed that priority should be given to the completion in 1981 of the second reading of some of the sets of articles already provisionally approved on first reading, as the composition of the Commission would be changed in 1982.

385. It was also said that the list of other subjects which the Commission intended to examine in 1981 (A/35/10, para. 183) seemed unduly long. Steps should be taken to reduce the number of projects on which the Commission was working. Priority could not be given to all of them, and the Commission must therefore exercise restraint at least until it had completed its work on the priority topics which were already on its agenda.

386. According to one view expressed, although the Commission had accomplished much that was worth while in connexion with its chosen topics, it was still not functioning with the requisite efficiency because it was involved in the simultaneous consideration of several sets of draft articles and was unable to concentrate on those on which work might be concluded. It was hoped that the Commission would not reduce its effectiveness by taking up new topics. Another representative said that the Commission's workload was currently so heavy that if it was to maintain its customary high standards it must either hold longer sessions or reduce the number of items on its work programme. Since the former course was not advisable, for a number of reasons, the Commission should streamline its agenda. All the items currently under consideration were of great interest to many countries, but the Commission should consider postponing some of them, particularly those on which the work had not yet reached the stage of detailed consideration of specific draft articles.

387. It was emphasized that the Commission's work programme should continue to reflect a balance of both traditional and innovative topics. Another view maintained was that the Commission should attach greater importance to realities in selecting topics for consideration. (See also Section II A above.)

388. Many representatives found acceptable the present working methods of the Commission and expressed confidence that it would continue to keep the progress of its work under review and to develop the methods of work best suited to the speedy completion of the tasks entrusted to it.

389. It was said that one of the original and most significant functions of the United Nations was to promote the codification and progressive development of international law. When the work was accomplished with dedication, integrity and skill, as it had been over the years by the Commission, all Member States stood to gain from it. The Commission was fortunate in the quality, range and strength of its membership. It was composed of distinguished jurists from many parts of the world, representing the principal legal systems. High satisfaction was expressed at the success and high quality of work of the Commission which was said to be due to a set of circumstances which must be maintained. The work accomplished by the Commission was described as impressive in volume, considering that the Commission had comparatively few members. In addition, the important function carried out by the Commission's Drafting Committee was highlighted.

390. One representative observed a change in the composition of the Commission's membership. Diplomats and practising lawyers currently outnumbered the academics who had previously made up a larger percentage of the membership. Such a change was not necessarily bad in itself, since the experience of diplomats directly exposed to the realities of international relations was just as necessary as the detailed knowledge and theoretical sophistication of learned professors.

391. That representative believed that there had also been changes in the ways in which discussion was conducted within the Commission. It seemed to him that the genuine exchange of views which had characterized debate in the early years of the Commission was disappearing, and it was no longer unusual for the Commission to hear a series of individual statements, followed by comments or a summing up from the special rapporteurs on the subject concerned. He believed that improvements should be made to permit a more active exchange of views between members. There was also a growing tendency for members to express views reflecting the attitudes and needs of their respective States. While it was quite natural that members should put forward opinions from the viewpoint of the legal systems of their countries of origin, it would be a matter of concern if a Government were to endeavour to influence the deliberations of the Commission in order to further its own short-term interests.

392. Another representative, however, stressed that it was important to look into the reason for the trend that had been perceived of members of the Commission moving away from dialogue towards unilateral declarations. The classical approach to international law within the Commission was coming to an end, as the Commission moved from classical topics to topics of relevance to the very existence of the people. Within the past two years, the Commission had had before it draft articles dealing with such matters as the generalized system of preferences and the privileges accorded by one developing country to another. The more the Commission involved itself in "bread-and-butter" issues, the more the experience of members with regard to those issues would be reflected in its deliberations. It was no coincidence that members from third world countries had more or less a common outlook on such issues.

393. It was noted that inevitably not all members of the Commission were able to attend its session for the whole 12-week period. Many of them held high office in their own countries and faced many conflicting commitments. Personal and even financial considerations might also weigh against the ability of some members to spend three months in Geneva each year. Satisfaction was expressed by one representative at the improved record of attendance at the Commission's thirty-second session and at the response of Governments and institutions to the General Assembly's appeal contained in paragraph 7 of its resolution 34/141 concerning the need to enable Commission members, especially Special Rapporteurs and officers, to have adequate time available for the fulfilment of their responsibilities to the Commission, especially at its sessions.

394. Another representative remarked that while the Commission was increasingly urged to improve its efficiency, one of the factors undermining that efficiency was the busy schedule of the Commission's members. It would therefore be desirable for Governments to refrain from placing too heavy a burden on diplomats who were members of the Commission, at least during its annual session. Such special consideration was particularly important when the diplomat concerned was a Special Rapporteur. In some instances Special Rapporteurs were submitting draft articles on their topics at the rate of two or three each year, which meant that a considerable number of years elapsed before the Commission was able to conclude its first reading of the whole series of draft articles on a given topic. Finally, it was said that if some members of the Commission faced financial or administrative impediments to attending the Commission during the duration of its sessions, it was the responsibility of the Sixth Committee to study them and make appropriate recommendations. (See the section below entitled "The level of the honoraria paid to Commission's members and other financial matters".)

395. Certain representatives stated that the Commission has been fortunate in past years to have a high quality of Secretariat personnel to assist it in its work. It was essential that the Secretariat should maintain that high quality of service. Support was expressed for a reaffirmation by the General Assembly of its previous decision concerning the increased role of the Codification Division of the Office of Legal Affairs.

396. One representative stressed that support for the Commission's Drafting Committee was a vital part of the Secretariat's contribution. The Secretariat greatly assisted the Commission and the Drafting Committee especially in connexion with second readings, by helping to collate the comments of Governments with the debates in the Commission and in the Drafting Committee. They also did valuable research work. One notable example of major research work by the Secretariat was the monograph on force majeure (document A/CN.4/315, reproduced in Yearbook of the International Law Commission, 1978, vol. II, Part One) which had been prepared to help the Special Rapporteur on the topic of State responsibility. If the Secretariat staff assisting the Commission were to maintain their level of excellence in research, it was important that they should be given the opportunity of including selected work in the publications of the Commission as well as helping the Commission and its Special Rapporteurs. He noted that a whole volume

of the United Nations Legislative Series was devoted to the work done by the Secretariat for the Special Rapporteur on succession of States in respect of matters other than treaties, which was in itself a contribution to the progressive development and codification of international law.

397. It was stated by another representative that the Commission's methods of work could also be improved if the services of the Office of Legal Affairs of the Secretariat were more fully utilized in the preparation of reports and the drafting of preliminary articles. The Special Rapporteur would be responsible for the reports and for their presentation to the Commission. Such a reform would improve the Commission's efficiency, but would require the recruitment of additional personnel in the Legal Office to devote their energies full-time to the work of the Commission.

398. With regard to the conclusions and recommendations of the Commission on specific questions having a bearing on its methods of work, it was observed that the Commission's success was due to a set of circumstances which must be maintained if it was to continue fulfilling its functions as set forth in Article 13, paragraph 1 (a) of the Charter. Those circumstances related to the unique nature of the Commission, the duration of its sessions, which provided the minimum time necessary for it to complete the tasks assigned to it by the General Assembly, and the exceptions that were made on its behalf to otherwise very sound rules. As long as the Commission was able to continue functioning with its current characteristics, its success would be assured. Its vitality reflected the vitality of the movement aimed at using international law as an effective tool to ensure the peaceful and orderly coexistence of nations.

399. Some representatives agreed with the Commission's conclusion that the duration of the yearly session of the Commission should, as a minimum, be maintained at 12 weeks. Representatives were also of the view that the publication of summary records of the meetings of the Commission should in no circumstances be discontinued, as they were considered indispensable; it was said that previous Assembly decisions concerning the need for continuing provision of summary records of the Commission's meetings should be reaffirmed. It was furthermore stressed that with regard to Commission documentation it should be as comprehensive as the Commission itself considered necessary. Exceptions to what might otherwise be considered sound rules or regulations must be made on behalf of Commission documentation in order for it to continue functioning successfully.

400. Certain representatives took note of the Commission's opinion that it should refrain from making any suggestion on the question of the manner by which the Sixth Committee of the General Assembly considers its report. At the thirty-fifth session of the General Assembly, the Sixth Committee had before it a working paper submitted by one delegation on the organization of the Committee's debate on the item. After considering that paper, the Sixth Committee, at its 37th meeting on 4 November 1980 and on the suggestion of its Chairman, agreed as an experiment to adopt a flexible approach for the consideration of the Commission's report and to invite representatives to deal with it either by sections or as a whole, as

indicated in the working paper. 3/ The representative who introduced on behalf of 39 sponsoring delegations the draft resolution in the Sixth Committee which was eventually adopted by the General Assembly as resolution 35/163 said that many delegations believed that the method adopted experimentally by the Sixth Committee for its discussion of the Commission's report was worth while and should be continued.

401. That representative also indicated that there was a feeling that the Committee should take up the Commission's report at the same time every year perhaps in mid-October. In that connexion one representative regarded it as essential for the effective working of the Sixth Committee and the International Law Commission that the date for the debate on the latter's report should be fixed in advance and should be respected, if necessary by interrupting any other business under consideration, because many members of the Commission came to New York especially to participate in that debate.

3/ The working paper (A/C.6/35/CRP.1) read as follows:

"I. Four meetings focused on:

Succession of States in respect of matters other than treaties; and

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

"II. Five meetings focused on:

State responsibility; and

International liability for injurious consequences arising out of acts not prohibited by international law.

"III. Five meetings focused on:

The law of the non-navigational uses of international watercourses;

Jurisdictional immunities of States and their property;

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; and

Other decisions and conclusions.

"IV. Two meetings reserved (to leave flexibility).

* * *

"It is understood that delegations which wish to deliver one statement on all aspects of the report of the Commission are free to do so at any time of their choosing."

402. Appreciation was expressed to the Chairman of the Commission at its thirty-second session, Mr. Christopher W. Pinto, for his presentation - considered lucid, comprehensive and masterly - of the Commission's report. The representative who introduced the draft resolution which was to become Assembly resolution 35/163 said that many delegations appreciated the fact that the Chairman of the Commission had introduced the report well in advance of the actual debate on the item.

2. The level of honoraria paid to members of the Commission and other financial matters

403. Most representatives who addressed themselves to the question of the level of honoraria paid to members of the Commission supported an increase in that honoraria, which had remained unchanged for more than 20 years, some referring in particular to the need to increase the honoraria paid to Special Rapporteurs and to the Chairman of the Commission. One representative observed that attendance at the whole of the Commission's 12-week session, together with travel time, took up roughly one third of a member's productive time. If a member was also a Special Rapporteur, he must, in addition, find the time needed to prepare the reports on his topic. It was possible that the rather meagre emoluments offered to members were a factor in preventing full atendance at the Commission's sessions, and might also affect the actual membership of the Commission. In the current circumstances it was very difficult for anyone who was self-employed to absent himself for three months to attend a session of the Commission. He noted that experts who were called in to do legal or other work in connexion with other United Nations activities received consultant's fees. However, members of the Commission considered themselves fortunate in belonging to a stimulating group engaged in worth-while work. Although the question of emoluments were not a governing factor it was still important in terms of the efficiency of the Commission, partly because, if members of the Commission were to be selected in accordance with the proper considerations of geography and merit, it must not be made too difficult or too expensive for any individual member to participate in its work.

404. The view was expressed that if some Commission members faced financial impediments in attending the Commission during its full 12-week session, it was the responsibility of the Sixth Committee to study such impediments, and make appropriate recommendations. Failing such an effort, there was the danger that only persons having the financial support of their own Governments might be able to serve on the Commission. Such a development might well affect the independence or appearance of independence of the Commission. On the other hand, the view was expressed that the Sixth Committee was not competent to take a decision in the matter and should confine itself to bringing it to the attention of the Fifth (Administrative and Budgetary) Committee of the General Assembly. Other representatives, while believing it was clearly the responsibility of the Fifth Committee to determine the amount of an increase in the honoraria, appealed to the Sixth Committee to raise the matter with that body so that it could take the necessary measures.

405. At its 54th meeting, on 19 November 1980, the Sixth Committee authorized its Chairman to send a letter 4/ to the Chairman of the Fifth Committee regarding the honoraria payble to members of the Commission, its Special Rapporteurs and Chairmen. 5/

4/ The letter (A/C.5/35/L.20), dated 19 November 1980, read as follows:

"The Chairman of the International Law Commission, when introducing the Report of the Commission on the work of its thirty-second session on 21 October 1980, emphasized the Commission's view that the level of the special allowance paid to members of the Commission pursuant to article 13 of its Statute was inadequate, and that there was a need for an increase in the honorarium forming part of that allowance.

"The Committee is aware that, while the 'subsistence' element of the special allowance has been adjusted periodically to reflect in some measure the changes in the cost of living, no corresponding adjustment has been made in the honoraria of members ($US 100 per week up to a maximum of $US 1,000 per session) and Special Rapporteurs of the Commission (an additional $US 1,500 conditional on the preparation of special reports or studies between sessions of the Commission), which was established by the General Assembly some 23 years ago at its 729th meeting on 13 December 1957.

"Earlier efforts to resolve this matter have not borne fruit and the Committee is aware that the Fifth Committee expects once again to take up the Reports of the Secretary-General (A/C.5/31/2 and A/C.5/33/54) on what was believed to be an appropriate level of increase in 1976.

"It is the sense of the Sixth Committee that non-adjustment of honoraria paid to the members, Special Rapporteurs and chairmen of the International Law Commission has, over the years, eroded the level of the special allowance fixed in 1957, and that its chairman should so inform you, and through you request the Fifth Committee to give consideration to this problem as early as possible.

"Should you or any member of the Fifth Committee desire any further information or clarification, the Chairman of the Commission, or I, would be happy to discuss the matter with you.

(Signed) Abdul KOROMA
Chairman of the Sixth Committee"

5/ On the basis of a recommendation made by the Fifth Committee (A/35/780), the General Assembly adopted resolution 35/218 of 17 December 1980 entitled "Comprehensive study of the question of honoraria payable to members of organs and subsidiary organs of the United Nations" by which the level of honoraria paid to members of, inter alia, the International Law Commission, was increased.

406. As to the financial and administrative matters referred to in paragraph 195 of the Commission's report, one representative believed that the proper initial approach would be to request the competent authorities of the United Nations to prepare a proper plan to implement the suggestions and to submit the plan to the Commission, so that in 1981 the latter could inc ude relevant comments in its report. He felt that in the current financial circumstances of the United Nations and of the Governments which funded it, it would not be possible for the Sixth Committee to give a blanket endorsement to the suggestions contained in paragraph 195, without having some idea of the financial implications. His delegation did see that in many instances there would be great advantages in making it possible for the Special Rapporteurs to be able to consult with appropriate officials of the Codification Division and others, and to have other appropriate assistance. His delegation would naturally be open to any solution that would commend itself to the Commission and the Sixth Committee on the one hand, and to the Fifth Committee and the other competent budgetary organs and authorities of the United Nations on the other hand.

3. Co-operation with other bodies

407. Representatives expressed satisfaction with the close co-operation maintained between the International Law Commission and such regional legal bodies as the Arab Commission for International Law, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee. The Commission's practice of inviting observers of such regional legal bodies to attend its meetings was commended and said to promote rapprochement between the various legal systems and strengthen the principles of international law. The wish was expressed that the Commission continue to enhance its co-operation with legal organs of intergovernmental organizations whose work is of interest for the progressive development of international law and its codification.

4. International Law Seminar

408. Representatives noted with satisfaction the success of the sixteenth session of the International Law Seminar, organized by the United Nations Office at Geneva during the thirty-second session of the International Law Commission. A number of representatives reaffirmed the inportance their Governments attached to the Seminar, particularly to the participation therein of nationals of developing countries. It was said that the Commission provided a forum for the teaching of international law to advanced students and junior government officials. This aspect of the Commission's work was commended and gratitude was expressed to those Governments and private organizations which had contributed financially to the holding of the sixteenth International Law Seminar.

409. The wish was expressed that seminars will continue to be held in conjunction with sessions of the Commission and that an increasing number of participants from developing countries will be given the opportunity to attend those seminars. Certain representatives announced that in 1981 their Governments, as in previous years, intended to make available scholarships which would enable nationals from developing countries to participate in the Seminar. One representative felt that the time had come to defray the cost of the Seminar through the United Nations budget, in order to ensure its continuity.
