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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-NINTH SESSION (1987)

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

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INTRODUCTION

1. At its forty-second session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 18 September 1987, to include in the agenda of the session an item entitled "Report of the International Law Commission on the work of its thirty-ninth session" 1/ (item 135) and to allocate it to the Sixth Committee.

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

3. The Sixth Committee considered the two items at its 35th to 49th and 58th meetings, held between 29 October and 12 November and on 25 November 1987. 2/ At the thirty-fifth meeting, the Chairman of the Commission at its thirty-ninth session, Mr. Stephen C. McCaffrey, introduced the report of the Commission. At the 58th meeting, on 25 November, the Sixth Committee adopted draft resolution A/C.6/42/L.17, entitled "Report of the International Commission on the work of its thirty-ninth session", and A/C.6/42/L.13, entitled "Draft Code of Crimes against the Peace and Security of Mankind". Both draft resolutions were adopted by the General Assembly, at its 94th plenary meeting, on 7 December 1987, as resolutions 42/156 and 42/151 respectively.

4. By paragraph 14 of resolution 42/156, the General Assembly requested the Secretary-General, inter alia, to prepare and distribute a topical summary of the debate held on the Commission's report at the forty-second session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

5. It should be noted that section B of the present report is entitled "Draft Code of Crimes against the Peace and Security of Mankind" in the light of paragraph 1 of General Assembly resolution 42/151, whereby the Assembly agreed with the recommendation in paragraph 65 of the Commission's report to amend the title of the topic in English, in order to achieve greater uniformity and equivalence between different language versions. It should also be recalled that at its thirty-ninth session the Commission, in view of its practice not to hold a substantive debate on draft articles adopted on first reading until the comments and observations of Governments thereon are available, did not consider the item "Jurisdictional immunities of States and their property" or the item "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", pending receipt of the comments and observations which Governments had been invited to submit by 1 January 1988 on the sets of draft articles provisionally adopted by the Commission at its thirty-eighth session on the two topics in question. Neither did the Commission consider the item "State responsibility", as it felt it appropriate that the newly appointed Special Rapporteur for the topic should be given an opportunity to make his views known. The discussion in the Sixth Committee therefore focused on the remaining items on the agenda of the Commission at its thirty-ninth session. The present topical summary has been organized accordingly.

TOPICAL SUMMARY

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

6. A number of representatives congratulated the International Law Commission on the work it had accomplished at its thirty-ninth session. The remark was made that the Commission had functioned well - as evidenced by its current report, which was up to the usual high standards - and deserved praise for having made commendable progress while at the same time adjusting to the more limited resources available to it. The view was expressed that the Commission had once again made a useful contribution to the promotion of international law and the strengthening of the Charter of the United Nations and had, at its thirty-ninth session, endeavoured to continue its work more systematically and methodically. It was recalled that the Commission, which was approaching its fortieth anniversary, had in the past done much to further the codification and progressive development of international law. The Commission, it was observed, had led the effort of the international community in this area because its members were all eminent jurists who had a deep insight into, and rich experience of, the realities of international life while also demonstrating independence vis-à-vis their home countries. One representative however held the view that the Commission had not done quite as much as might have been expected. While acknowledging that it had needed time to settle down in its reconstituted form and that its session had lasted only 11 weeks, that representative observed that the temporary removal of some items from its agenda had been fortuitous and could not be relied upon in the future.

7. Several representatives commented on the relationship between the development of international law and the improvement of the international climate. The remark was made that if Governments would try to conform their national policies to the minimum obligations of international law there would be greater security for all and that it was necessary to continue to draft a corpus of legal rules respected by all States on matters of potential international dispute in order to achieve the objective of preserving world peace. Emphasis was placed on the importance of using the full potential of international law to affirm genuinely democratic standards of international relations and on the need for strict observance by States of the generally recognized principles and norms; the further development of international law, it was stated, was essential to establish a comprehensive security system as a reliable foundation for a non-nuclear, non-violent, demilitarized world, which would ensure the primacy of international law in politics. Attention was also drawn to the contribution which the codification and progressive development of international law, in particular the work of the International Law Commission, made to the strengthening of the role of the United Nations.

8. A number of representatives commented on the relationship between the International Law Commission and the Sixth Committee. The remark was made that the latter would be in a better position to exercise an influence over items of the type dealt with by the former if its expertise were more consistently relied upon for the formulation of legal instruments. The Sixth Committee and the Commission,

it was stated, ought to be principally responsible for assisting the General Assembly in discharging its obligation under Article 13, paragraph 1 (a), of the Charter. The remark was also made that the Sixth Committee handled many items which were either political in nature or apt to give rise to deliberations hampered by political controversies and that for the Committee to resume its original function as a body which monitored developments in the legal field within the United Nations system and formulated policy thereon it should function as a clearing-house for the many legislative activities undertaken within the United Nations, the specialized agencies and expert non-governmental organizations such as the International Law Association and the Institut de droit international. Other ways of improving the international law-making process which were suggested included enhancement of the law-making process in the United Nations system, computerized data handling and better co-ordination among legal bodies.

9. The importance of a continuing dialogue between the Commission and the Sixth Committee was highlighted by several representatives. It was said in particular that the discussion of the report of the Commission by its parent body should be more focused so as to give a clear picture of the position of States on the most important and controversial issues. That discussion, it was stated, should enable the latter organ to provide guidelines to the former and allow for a comprehensive review not only of the activities of both but also of the distribution of work between them and ad hoc committees of the General Assembly. Concern was expressed that secondary matters might receive, in the framework of subsidiary bodies of the Sixth Committee, a disproportionate amount of time and attention, to the detriment of more important issues, and the question was asked whether such issues should not be given prominence in the Sixth Committee or in sessional working groups thereof.

10. A number of representatives commented in general terms on the current agenda of the Commission. Some observed that the topics considered during the Commission's thirty-ninth session were of tremendous interest to the international community. It was stated in this connection that the draft Code of Crimes against the Peace and Security of Mankind, which reaffirmed the international community's abhorrence of wars of aggression and war crimes and implied a desire for some form of judicial mechanism to determine guilt for such wars and to satisfy a sense of justice, also represented a warning that international action would be taken against war crimes and against those who planned and started wars. Attention was also drawn to the topicality of the three other issues discussed at the Commission's thirty-ninth session, two of which concerned the environment, its proper use and its conservation, and the third one, the relations between States and international organizations. Other representatives called for increased receptiveness to new challenges and priorities, which required a new method of identifying the needs of the community in the development of international law. The view was expressed in this connection that the Commission had made practically no use of its right to select topics whose codification and progressive development were becoming particularly timely, and that it should concentrate on urgent subjects which had particular topicality and practical significance.

11. On the pace of the Commission's work, some representatives held the view that there was a need for considerably more productive activity. Others, however, remarked that the current deliberate pace of the Commission resulted merely from

the fact that most of the topics presently under consideration were controversial and covered areas where the law was either very rudimentary or in the process of evolving.

12. Several representatives insisted on the need for the Commission to approach its work realistically. The remark was made in this connection that any law which failed to take fully into account the realities of life in the society it purported to regulate was condemned to remain a dead letter and that contemporary society had seen a proliferation of instruments which were too ambitious and too idealistic and which States had brandished against other States for political reasons. Several representatives emphasized that the success of the Commission's work was subject to the acceptance of its drafts by the community of States and that a body whose members were independent experts should not present specific rules as reflecting existing international law before it had determined that the vast majority of States actually applied such rules and recognized them as legally binding. Knowledge of the positions of States was therefore viewed as absolutely essential to the Commission and as conducive to a more expeditious and more satisfactory handling of the issues at stake.

13. As to the orientation of the Commission's work, the remark was made that codified international law based both on customary law and on the careful breaking of new ground would, when construed by independent and impartial organs, provide a means of peaceful settlement of disputes between sovereign States. The view was also expressed that it mattered little, from the practical point of view, whether specific draft articles came under codification or the progressive development of international law. Support was finally voiced for solutions that consisted both in laying down general principles and in drawing up lists of situations: it was observed in this connection that, since lists could never be exhaustive, the general rules or principles should make it possible to determine whether a given provision was applicable in situations that were not expressly provided for.

B. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND 3/

1. General observations

14. Many representatives expressed satisfaction at the progress made by the Commission at its previous session on the elaboration of a draft Code of Crimes against the Peace and Security of Mankind. It was remarked that the provisional adoption of five draft articles of the Code represented a major step forward which should be endorsed and that, although much remained to be done, the work accomplished so far provided a sufficiently solid foundation to guarantee success. The view was also expressed that the Special Rapporteur should be particularly commended for submitting 11 draft articles which took fully into account the comments and recommendations made during the consideration of the topic in the Commission and the Sixth Committee, and the Commission was congratulated for having fully complied with the recommendations addressed to it by the General Assembly at its forty-first session and with the provisions of Assembly resolution 41/75 of 3 December 1986.

15. The importance of the topic was stressed by a number of representatives. It was stated that the drafting of the Code of Crimes against the Peace and Security of Mankind was one of the most important issues before the United Nations in the field of the codification and progressive development of international law and a task of high political, moral and legal importance, particularly in view of the current threats to the peace posed by nuclear weapons, continued regional conflicts, acts of aggression, terrorism and apartheid.

16. One representative, after recalling that the idea of taking action against those who resorted to aggressive wars and against war criminals had been developed after the First World War, noted that, while after the Second World War the Charter and the Judgement of the Nürnberg Tribunal had formed a good basis for the prosecution and punishment of those found guilty of launching aggressive wars or committing war crimes, no permanent judicial mechanism for that purpose had been established. He stressed that the inclusion in the Commission's agenda of the topic concerning the drafting of a code of crimes against the peace and security of mankind constituted a reaffirmation of the international community's abhorrence of aggressive wars and war crimes and of its desire for the establishment of a judicial mechanism to make it possible to punish the perpetrators of such acts, adding that in view of the currently strained state of international relations, every opportunity, means and method must be used to preserve international peace and strengthen the security of States. He therefore considered the elaboration of a legal instrument to prevent and punish international offences that threatened the peace and security of mankind as a task of great importance. In his view, the Code could become a vital instrument in the prevention of the use of force in international relations and would deter individuals and their régimes from committing offences involving the massive violation of human rights; it would be a means for strengthening peace and security in the world and would encourage States to behave in a manner consistent with the rules and principles governing relations between States.

17. Another representative pointed out that for his country, which had been the victim of brutal military aggression, continuing occupation and massive human rights violations, the draft Code was far from an academic exercise. His country's trials had been occurring before the eyes of the international community, whose members, for a variety of reasons, had been unable or unwilling to act effectively in order to implement the resolutions for which they had voted. His country was a test case for the relevance of international law and the effectiveness of the United Nations. Therefore, his Government, although it did not believe that the draft Code was a cure-all, any more than the Definition of Aggression had proved to be salutary, considered that an effective draft Code, with appropriate penalties and jurisdiction, might at least serve as an important building-block for constructing the edifice of international legal order, and as a deterrent to aggressors and other violators of its provisions.

18. Several representatives shared the view that the completion and speedy adoption of such a code would strengthen the peace and security of peoples, inasmuch as it would deter individuals and some political régimes from perpetrating serious crimes and encourage States to base their conduct on the principles that should govern their relations. They therefore considered that the topic should

continue to be a separate item in the Assembly's agenda and should receive priority in the Commission's work.

19. In this connection, the view was expressed that the results achieved so far were not sufficient. It was pointed out that the task of drafting a code of crimes against the peace and security of mankind, which had been entrusted to the Commission virtually from the time of its establishment, had not progressed at a pace commensurate with current requirements and that a speedy completion of the text would unquestionably enhance the Commission's prestige and authority. The Commission, it was also remarked, had come no closer to completing the draft Code than it had a decade earlier, because its members were divided on a few theoretical issues, even though the majority were of the same mind regarding several basic questions such as the content ratione personae and the content ratione materiae of the draft. The wish was expressed that some acceleration of the work on the Code could take place in the near future. One representative suggested that the Commission should consider whether it could organize its work in such a way that the first reading of the draft could be completed not later than 1990, instead of 1991, as envisaged in the annex to the Commission's report.

20. Other representatives doubted whether the exercise of preparing a draft Code of Crimes against the Peace and Security of Mankind could produce worthwhile results and whether, in the current era of limited resources, the Commission should attach any priority to consideration of it. One representative observed that the debate in the Commission demonstrated that there was still no agreement on such fundamental questions as the subject of the Code, the crimes it would cover and the means of enforcing it. Another expressed scepticism about the usefulness of a draft Code and drew attention to the difficulty of determining when individual responsibility under international law arose, which was an essential requisite for the future Code to be used for purposes of criminal proceedings. He added that the provisionally adopted draft articles did not take away that scepticism, and that the important question of an implementation mechanism had yet to be solved. Still another representative remarked that if the projected Code was to have the same fate as the Convention on the Prevention and Punishment of the Crime of Genocide it was legitimate to wonder whether the work of drafting it was justified, and that although her country had always been in favour of such a code and would continue to contribute to the study of that subject the current state of international relations raised legitimate fears of its being used in a politically partisan manner. Concern was expressed in this connection that the draft Code might not be free from political influences which would distort the eminently legal character that it should possess.

21. General comments on the characteristics of the future Code focused on its scope ratione materiae, its scope ratione personae and its implementation. On the first point, it was said that the draft Code should contain a general definition of the crimes in question, covering such basic criteria as the internationally wrongful nature of the act and the fact that the act harmed the international community's fundamental interests, and should also provide an exhaustive list of those crimes. The remark was furthermore made that one of the basic principles of criminal law was the need to characterize offences and their constituent elements clearly and that the crimes to which the draft Code referred were of a special

nature which must be clear from the formulation of its provisions and from the elements constituting the commission of those crimes. Reference was made in this connection to the principle nulla poena sine lege, which reflected the need for precisely defined offences and for specific provisions regarding the grounds for exoneration and the penalties to be incurred. One representative observed in this context that the need for precise wording applied to rules governing attempts to commit an act and participation in an act, if those concepts were to be taken into account at all in defining criminal offences under international law. He added that it was not acceptable that whole population groups should be exposed to the danger of being treated as criminals and subjected to the jurisdiction of foreign criminal courts because of their alleged contribution, in one form or another, to condemnable acts or omissions. Also referring to complicity and attempt, another representative expressed the view that complicity should be treated as a separate offence rather than being dealt with under the general principles, and that the Commission should take into account the extended concept of complicity in international law and include both complicity of a superior and concealment. With regard to attempt, he said that the Commission should make a choice between the various solutions offered by internal law and should determine what criterion would make it possible to define that concept. He added that, while it was true that in the internal law of some countries attempt was not punished when it was linked to offences which were not sufficiently serious, the draft Code covered the most serious crimes and must therefore sanction attempt.

22. Among the acts to be covered by the Code, several representatives singled out the planning, preparation, initiation or waging of a war of aggression, the forcible establishment or maintenance of colonial domination, genocide, apartheid and violations of the laws or customs of war. Some representatives also referred to possible inclusion of mercenarism in the draft Code. One representative was of the view that the Commission should not await the outcome of the work in the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which seemed to have stalled. Another felt that the Commission should keep in close touch with the discussions of the Ad Hoc Committee dealing with that subject. He indicated that his delegation could support the provisions on mercenarism as a crime against peace contained in paragraph 8 of the draft article 11 proposed by the Special Rapporteur in 1986 4/ but not the suggested definition of a mercenary, which applied to mercenary activities only in international armed conflicts and disregarded the fact that the Code was also intended to outlaw and punish the recruitment, use, financing and training of mercenaries as crimes against peace. One representative furthermore suggested the possibility of incorporating in the draft Code the use of chemical weapons. The Commission, he said, had agreed that crimes against the peace and security of mankind were characterized by their serious effects on human society, and such were the consequences of the use of chemical weapons, which could have massive effects and harm civilians, even if they were used only in combat zones. Attention was drawn in this connection to a generally accepted international instrument prohibiting the use of chemical weapons, namely the 1925 Geneva Protocol for the Prohibition of the Use in Wars of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare. Other acts which were mentioned included the threat of aggression, terrorism and racism as well as acts constituting a conspiracy with a view to perpetrating crimes against the peace and security of mankind, and direct incitation to commit such crimes.

23. As regards the scope of the draft Code ratione personae, a number of representatives felt that the draft Code should focus on individual criminal responsibility and deal only with physical persons. The view was on the other hand expressed that crimes committed by States should be covered, since that was the only way of ensuring that the legal instrument under preparation fulfilled its fundamental purpose, which was to discourage the perpetration of crimes against the peace and security of mankind. It was also recalled that even though it had been decided that the Code should, for the time being, cover only individuals the decision in question was without prejudice to consideration at a later stage of the issue of the international criminal responsibility of States.

24. As to the implementation of the Code, some representatives stressed that effective penalties or sanctions should be provided. With regard to the competent jurisdiction, the view was expressed that it was most appropriate, at least at the current stage, to rely on the original competence of national courts, because the idea of establishing an international criminal court had given rise to a prolonged discussion which could delay progress towards finalizing the draft Code. The Commission, it was added, should be in no hurry to adopt a definitive decision on the establishment of an international criminal court, so as not to impede the work of drafting the Code.

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

Article 1. Definition

25. Several representatives supported the Commission's approach in adopting a definition by enumeration referring to a list of crimes individually defined in the draft Code. This sort of definition was characterized as realistic. It was said that every offence, according to a fundamental principle of criminal law, must be precisely characterized as to all its constituent elements and that a conceptual or generic definition which might lead to subjective and elastic interpretations and should be avoided. It was furthermore recalled that the discussion in the Commission had shown that it might be difficult to reach agreement on the elements of a conceptual definition beyond the criterion of seriousness. One of the representatives in question, after stressing that the International Law Commission should not ignore the valuable lessons to be drawn from negative experiences made in the past when seeking to define crimes against the peace and security of mankind and after observing that the enumeration envisaged in draft article 1 of the draft Code pointed in the right direction in that it dispensed with generalizing rules and analogies and warned against incorporating in the draft new categories of offences that were supposedly punishable under international law, adding that some of the examples given by the Special Rapporteur and individual members of the Commission gave grounds for fearing that the Commission might stray to areas outside its purview. In his opinion, respect for the rule of law which the Commission was called upon to uphold might ultimately be weakened by a proliferation of criminal provisions and jurisdictions. He added that penal law had to be foreseeable and precise and should contain safeguards against arbitrary application because its consequences for the person involved were so serious.

Another representative supported a definition by enumeration to be supplemented from time to time through new instruments as new types of behaviour classifiable as crimes against the peace and security of mankind emerged.

26. Other representatives, although not objecting to a definition by enumeration, insisted on the merits of a conceptual definition. It was said in particular that such a definition would contribute to a clearer understanding of the special nature of the draft Code which was designed to eliminate crimes having certain characteristics in common and that it would strengthen the preventive value of the draft Code and fill any gaps in the list of crimes against the peace and security of mankind. Some of the delegations concerned viewed a definition by enumeration as a temporary solution. They noted in this connection that the Commission itself, as stated in paragraph (1) of the commentary to article 1, had decided to return at a later stage to the question of such a conceptual definition, thereby implicitly acknowledging, as one representative put it, the importance of certain elements which, taken together, would precisely delineate a crime against the peace and security of mankind. The remark was made that in attempting to define more clearly the concept of the offences under consideration in order to draw up the definitive list of crimes covered by the Code, which should not be too lengthy, the Commission would have to investigate carefully whether the acts to be included in the list were really violations of the legal rules accepted by States and whether those violations were considered by States to be sufficiently serious for them to be characterized as crimes against the peace and security of mankind. It was added that if the Commission were to include acts covered by certain conventions already in force it would have to take into account the nature of the crimes in question because, although qualified as "international crimes", they might not constitute crimes against the peace and security of mankind; it would also have to take account of the extent to which the existing instruments were accepted and decide whether it should simply refer to such instruments or try to redefine the crimes in question and the punishments applicable to them.

27. Still other representatives expressed disappointment at the fact that the definition adopted in article 1 was not of a conceptual character. Thus one representative was of the view that, rather than provisionally opt in favour of a definition by enumeration, the Commission should have proceeded first to a conceptual definition establishing the essential elements of the concept of a "crime against the peace and security of mankind". Another representative regretted that article 1 should not lay down criteria for defining crimes against the peace and security of mankind and insisted on the need for an overall definition of the fundamental characteristics of such crimes. Article 1, said one representative, should provide a common thread and basis for the characterization of acts as crimes against the peace and security of mankind. Concern was expressed by some representatives that the Commission might encounter serious difficulties in its further work on the topic as a result of its decision to defer to a later stage the elaboration of a conceptual definition. It was noted in particular that although the Commission had emphasized in very broad terms that the crimes under consideration were those "which affect the very foundations of human society" there were always grounds for concern to the extent that the single test of extreme seriousness, while essential for the kind of offence being dealt with, was not in itself enough. Until proper criteria were established, it was added, there was

bound to be considerable disagreement as to whether or not any particular activity should be regarded as an offence against the peace and security of mankind. Regret was expressed that the Commission should have merely put off a task which was likely to prove very difficult.

28. Some representatives pointed out that the two types of definition, conceptual and enumerative, were not mutually exclusive but, rather, complementary, inasmuch as the conceptual definition would facilitate the assessment by the judge, enabling him to base his decision on pre-established criteria in order to determine whether the case involved one of the offences enumerated in the Code. As regards the enumerative part of such a mixed definition, attention was drawn to the danger inherent in a non-exhaustive formula, which could lead to a violation of the principle nulla poena sine lege. Serious doubts were furthermore expressed about the wisdom of drafting an expanded code, since it was unlikely that a code which included new acts, in addition to those identified at the Nürnberg and Tokyo trials, would gain general acceptance. An expanded code, it was observed, was a tempting possibility, but an aura of futility would cling to any draft that did not secure the general approval of sovereign States. As for the conceptual element of the definition, emphasis was placed on the seriousness of the acts under consideration to be measured either by the extent of the disaster, its horrific character or both, and irrespective of political motives. In this connection, some representatives suggested that article 1 should contain a second paragraph highlighting certain of the specific characteristics of such acts. The following text for such an additional paragraph was proposed: "The crimes against the peace and security of mankind are the acts which jeopardize the most vital interests of mankind and violate the fundamental principles of international law."

29. Some representatives elaborated further on the elements which they felt a conceptual definition should contain. Reference was made in this connection to the seriousness of the crime, to its massive or systematic nature and to the extent of its consequences. Also considered as falling within the category of crimes against the peace and security of mankind were acts which constituted a threat to the survival of mankind and civilization or of whole nations or ethnic groups, a violation of the most fundamental of human rights, namely the right to life, or a violation of the fundamental principles of international law.

30. Different views were expressed with regard to the words "under international law" appearing between brackets in article 1.

31. Some representatives favoured the retention of those words. It was said in this connection that there was no reason for abandoning the wording adopted by the Commission as early as 1950 in the formulation of the Principles of International Law as recognized in the Charter and the Judgement of the Nürnberg Tribunal and in 1954 in the first draft Code of Offences against the Peace and Security of Mankind. The remark was made that although an individual was generally subject to his or her national penal jurisdiction it had been generally accepted, since the Nürnberg and Tokyo trials, that in the case of crimes against peace, war crimes and crimes against humanity the individual criminal responsibility of persons who had committed such crimes arose directly from international law, a principle which, aside from being in accordance with the statutes of the Nürnberg and Tokyo military

tribunals and having been expressly reaffirmed by General Assembly resolution 96 (I) of 11 December 1946 relating to the crime of genocide, formed the common foundation of Nürnberg Principles I to VII and had been included in article I of the draft Code of 1954. A further argument in favour of the retention of the bracketed words was that those words would dispel doubts over the content of the article and provided a link with the concept expressed in article 2 on characterization. The view was also expressed that while the reference to international law should be retained, particularly in order to draw attention to the seriousness and importance of the crimes, there was at the current stage no need to consider whether the rules governing a given crime were of a customary nature and what their place was in the legal hierarchy or what relationship there was between international law and domestic law; it would be sufficient to indicate that the rules in question originated in an international context and that their purpose was to govern offences against the interests and values of the community of nations. Various drafting suggestions were made, including placing the words "under international law" after the words "constitute crimes"; moving them to the end of the article; and replacing the present text by: "The crimes against the peace and security of mankind, enumerated in this draft Code, constitute crimes in international law."

32. Other representatives expressed doubts regarding the inclusion in article 1 of the words "under international law". It was said in particular that those words would raise the question whether crimes against the peace and security of mankind fell under rules of general international law independently of the draft Code, as well as the question of the possible jus cogens nature of those rules. The remark was also made that the words in question opened serious problems such as whether and to what extent the Code had implications for States, as opposed to individuals, and whether the crimes to be enumerated, especially if viewed as extending to States, might be covered by rules of general international law, independent of the Code. Those fundamental concerns, it was observed, were difficult, if not impossible, to address in the abstract, without any enumeration of crimes to be covered by the Code. A further remark was that crimes of exceptional seriousness against the peace and security of mankind defined in an international document such as the draft Code must automatically be crimes under international law. The idea of a crime under international law, it was added, had been appropriate in the Charter of the Nürnberg Tribunal because it indicated that the crimes were not subject to any internal legislation, but under the draft Code it was the internal law of each country which was applicable.

33. Still other representatives favoured the deletion from article 1 of the words "under international law". It was said in particular that these words might introduce confusion in the interpretation of the article by raising the question of the relationship between international and internal law and that their retention would necessitate the addition of wording calling upon States to incorporate international obligations into their internal law. The fear was expressed in this connection that the bracketed phrase might create a loophole by which certain States could allow offenders to go unpunished, as crimes "under international law" were not defined ipso facto as crimes under domestic law. The phrase in question was also viewed as unnecessary because if, as article 1 provided, the crimes dealt with were those defined in the draft Code, there was no need to characterize them

as crimes under international law: once accepted by a country and entered into force, the draft Code would become an integral part of the national legal order and crimes punishable in accordance with the Code would therefore be added to the list of offences punishable in conformity with the norms of the national legislation.

34. The view was expressed that the disagreement over the retention or elimination of the bracketed phrase was in fact indicative of a disagreement about the legal source to be reflected in the draft Code and about its scope. That was therefore not merely a question of form but a question of substance, which could not be dealt with at the present stage of the Commission's work. It was suggested that the phrase in question should be provisionally kept between square brackets until the list of crimes to be covered by the Code had been completed or until the work on the Code had been finalized.

35. Several representatives addressed the question referred to in paragraph (3) of the Commission's commentary to article 1, of the inclusion in the definition of the element of "intent".

36. Some representatives indicated that they did not favour the inclusion of that element in the definition. It was pointed out that the subjectivist psychological predisposition of the offender was inherent, indeed evident, in the nature and serious consequences of the acts in question. In this connection, it was observed that crimes such as genocide and apartheid necessarily implied intent and did not need proof of intent. It was also remarked that intent could be deduced from the massive and systematic nature of the crime and must be deduced when those elements were present, and that the Code was intended to cover acts the consequences of which created a presumption of intent. Attention was furthermore drawn to General Assembly resolution 96 (I) of 11 December 1946, which stated that no motive could justify genocide, and to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, which excluded motives in the commission of the crime. A second argument adduced against the inclusion of intent and motive in the definition was that such an inclusion would seem to preclude State criminality, an issue which was not yet settled and was the subject of controversy. In this connection, one representative indicated that, to the extent that offences such as aggression, apartheid and colonialism were the acts of States exercising their sovereignty in the form of laws, institutions and policies, the exclusion of State culpability at the current stage would not be a sufficient basis to include elements such as intent in a definition that could prejudice the emergence of State criminality as squarely within the scope of the conceptual underpinnings of the draft Code.

37. Other representatives took the opposite view. It was pointed out that the presence of criminal intent, far from being of minor importance, was essential to the establishment of individual responsibility for a criminal act and that intent was a basic requirement of criminal law and a fundamental element of a criminal behaviour, an element which had to be established and not merely presumed. One representative, while acknowledging that in the case of crimes such as apartheid intent to commit a crime within the meaning of the draft Code could easily be presumed from the nature of the act committed, the same might not necessarily be true of other crimes. Hence he did not consider that intent should be eliminated

as an ingredient in a crime contrary to the Code or that the requirement of proof of intent should be treated as a procedural issue. The Commission should therefore address the question whether intent was to be presumed in all cases of crimes.

Article 2. Characterization

38. Some representatives questioned the need for article 2 in the draft Code. One of them said that, while exception could not reasonably be taken to the contents of the draft article, its sense might well be clearly implied in article 1. In his view, the article should be reviewed at the time of deciding on the final form of article 1. The remark was made in this connection that article 2 might become unnecessary if the bracketed words "under international law" were eventually kept in article 1. Another representative expressed doubts on article 2, pointing out that, whatever legal order a country might have, once the draft Code had been accepted and had entered into force it would become part of the legal order of that country. Article 2 was viewed as more logically belonging in a text which would grant jurisdiction over the crimes in question to an international tribunal, rather than in a text which, by leaving punishment to States, ruled out the possibility of a divergence between internal law and the rules laid down in the Code. In this connection it was observed that the Commission was handicapped in its work by the continuing uncertainty about the implementation of the future Code and that while, at the current stage, it would be more realistic to work on the assumption that domestic courts would be responsible for seeing that the draft Code was implemented, the entire text of the draft articles would have to be reviewed if the establishment of an international jurisdiction was eventually deemed feasible.

39. Other representatives supported article 2 as provisionally adopted. It was observed that the article asserted both the independence from internal law of the characterization of an act as a crime against the peace and security of mankind and its corollary, namely that whether an act was or was not punishable under internal law did not affect the characterization, thus recognizing, as did many internal systems of law, the supremacy of international law over internal law. The remark was made that the analogy of the conflict in a federal system of government between a State statute and the federal constitution was indeed valid, and the view was expressed that there was also such a hierarchy of rules in international law itself, with jus cogens prevailing over other rules of international law. The Commission was commended for upholding in the draft article the concept of the autonomy of international penal law, which was derived from practice and from the decision of the Nürnberg Tribunal, later reaffirmed by the Commission in the "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal". Individual perpetrators of particularly serious offences which affected the very foundations of the international community, it was remarked, should not be able to avoid punishment for their crimes by exploiting differences between the legal régimes of various countries.

40. Some representatives pointed to the desirability of further addressing the question of the relations between the draft Code and internal law, either by ensuring that States parties, when incorporating the Code into their internal legislation, made provision for the imposition of corresponding penalties or by

asking States to bring their national legislation into line with the Code once it was completed and adopted by the General Assembly, or by including in the draft Code a provision making it incumbent on States to introduce changes in their national legislations by adopting effective measures for the punishment of crimes against the peace and security of mankind. Concern was expressed that the practical utility of the Code might be greatly compromised if, as indicated in paragraph (2) of the commentary, article 2 was to be regarded as being "without prejudice to internal competence in regard to ... criminal procedure, the extent of the penalty, etc. ...", because national laws could provide for procedures or penalties that would flout moral standards and international law. It was also pointed out that the obligation of States to characterize as crimes, in their internal law, the acts or omissions referred to in the draft Code could be stated in article 2, or in a subsequent article, as had been done in other international conventions or agreements concerning crimes.

41. The wording of the first sentence was criticized on the ground that it might imply that, once the Code was adopted, the characterizations under the Code would constitute a sort of jus cogens, which could be imposed on States even if they had not agreed to be bound by the Code. As for the second sentence, some representatives felt that it was not strictly necessary, as its substance could be considered to be entirely contained in the first sentence. The question was asked whether its contents should not be included in the commentary. Other representatives found that the second sentence was useful and added clarity and precision to the provision. It was however asked why the wording of Nürnberg Principle II, referred to in paragraph (1) of the commentary, had not been retained. Concrete suggestions included the proposal to replace "internal law" by "municipal law" or "national law" and the suggestion to reintroduce in article 2 the expression "crime under international law" in accordance with the Special Rapporteur's earlier draft of the provision.

Article 3. Responsibility and punishment

42. Support was voiced for article 3 as provisionally adopted. The question was however asked why the Commission had not expressly focused the article on the international criminal responsibility of the individual acting in some kind of legal or de facto relationship with the State. It was remarked that crimes against the peace and security of mankind such as aggression, apartheid or genocide could be committed only by States or by individuals abusing the authority of the State.

43. As regards paragraph 1, one representative observed that, if factors such as racial or national hatred, religion or political opinion were an essential part of the definition of an offence under the draft Code, they had to be established and proved in the same way as any other ingredient of the offence and that if in fact the definition of the offence had made such factors part of the offence's constituent elements, it was not correct to say that the factors were irrelevant to the commission of the offence because they were motives. He referred in that connection to paragraph (3) of draft article 12 presented by the Special Rapporteur, 4/ pointing out that a conviction for the offence dealt with in that draft article required proof that the relevant acts had been committed on one of

the bases set out in that provision and that if the intention was to treat as offences the acts based on other grounds the provision would have to be so formulated that the enumeration of the grounds was open-ended and non-exhaustive. The difficulty with a provision so formulated, he went on to say, was that it would lack the certainty so essential for the definition of a criminal offence. In his view, the phrase in question should be deleted or the paragraph redrafted to say simply that an individual who committed a crime against the peace and security of mankind was responsible for such crime irrespective of the motives for the commission of the crime.

44. Some representatives shared the view that the words "irrespective of any motives invoked by the accused that are not covered by the definition of the offence" were unclear. It was suggested to delete them on the ground that the question of "motives" was not important enough to justify its inclusion in an article setting out a far more fundamental principle and could furthermore be disposed of in the framework of the provisions of the Code indicating acceptable defences. It was also remarked that the question of motive did not arise if a person accused of a crime against the peace and security of mankind was found to have guilty intent and that, rather than a mention of motive, article 3 might contain a reference to draft article 9, for example in the form of a new sentence providing that the only exceptions to the principle of criminal responsibility were those set out in draft article 9. Attention was drawn to the fact that the definition in article 1 made no mention of any motive. The motives, it was added, were not a constituent element of the crime, although in some cases they could be pleaded before the court with a view to obtaining mitigation of the punishment.

45. Other representatives held the view that the Code should clearly indicate that the motives for committing an offence could not be invoked to justify it. It was suggested to include in the text an article along the lines of article III of the International Convention on the Suppression and Punishment of the Crimes of Apartheid (General Assembly resolution 3068 (XXVIII), annex).

46. With reference to paragraph 2, numerous representatives supported the distinction drawn by the Commission in that paragraph and in paragraph (3) of the commentary between the concept of the criminal responsibility of the State, which they rejected, and the notion of the international responsibility of the State in the traditional sense of that expression as it derives from general international law, for acts or omissions attributable to the State by reason of offences of which individuals are accused. The State, it was said, should not be permitted to exonerate itself of responsibility by invoking the prosecution of the individuals who had committed the crime, and could be called upon to pay compensation for injury and losses caused by the crimes concerned. It was suggested to specify in paragraph 2 that it was the responsibility attributable to a State as a result of acts or omissions for which individuals were held responsible under the Code which was being asserted.

47. With specific reference to the question of the criminal responsibility of States, the concern was expressed that, notwithstanding the view expressed by numerous delegations in the Sixth Committee that discussion should for the moment focus on individual responsibility, the Commission's debates should still reflect a

concern with the question of the criminal responsibility of States, even though such an approach was inconsistent with the use of national courts to try crimes under the draft Code, as was at present contemplated by the Commission. The view was expressed that a realistic approach should be adopted which recognized that progress would depend on the extent to which the Commission proved able to concentrate on matters on which common ground was achievable and to avoid areas where ideologies clashed and emotions ran high.

48. Some representatives however maintained that, sooner or later, the Commission would have to address the question of the international criminal responsibility of States, particularly when the crimes had been committed by agents acting on behalf of the State. It was pointed out in this connection that it was in fact States which practised colonialism and foreign domination, as well as racial discrimination and apartheid, and that the future Code would be useless if those most able and inclined to defy mankind were excluded from its scope.

49. While agreeing that the Commission had rightly decided to confine its work at the present stage to the international criminal responsibility of the individual, inasmuch as the criminal responsibility of States was a thorny question on which an early consensus could not be expected, one representative observed that the difficulties involved should not prevent States themselves from exploring the matter further.

50. Concrete suggestions included a proposal to include in the draft Code provision for the punishment of non-State organizations which committed crimes against the peace and security of mankind and a suggestion to bring the drafting of paragraph 2 in line with that of the draft articles on State responsibility.

Article 5. Non-applicability of statutory limitations

51. Numerous representatives supported article 5 as provisionally adopted. It was stressed that the article, as noted in the commentary, enhanced the deterrent effect of the draft Code. The fact that the rule enunciated therein already existed in a number of legal systems and had also been embodied in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was viewed as an additional reason for its inclusion in the draft Code. It was also pointed out in support of article 5 that crimes against the peace and security of mankind were of such gravity that the guilty parties should not be allowed to evade criminal justice and that the fear that, with the passing of time, it might prove somewhat difficult to secure evidence and locate witnesses had proved baseless in the cases of, for instance, Klaus Barbie, Andrija Artuković and Ivan Demyanyuk.

52. Other representatives, while supporting article 5, reserved the possibility of re-examining the provision in the light of the offences to be enumerated in the draft Code as crimes against the peace and security of mankind. They felt that the question should not be tackled in general terms. The view was expressed in this connection that the rule on statutory limitations in article 5 was justified provided that the Code defined the crimes, since the rule might otherwise

legitimize indefinitely legal proceedings before national courts for reasons completely alien to the concerns to which the Code sought to respond.

53. Still other representatives felt that the article raised questions concerning fairness to an individual who was charged with offences covered by the proposed Code that must be carefully studied to ensure that justice was done in each case. The remark was made in this connection that the purpose of statutes of limitations was to protect innocent people from a miscarriage of justice that might result from stale evidence or faded memories, and not to shield the guilty from prosecution and punishment, and that article 5 should be considered along with the procedural guarantees set out in article 6, as well as the manner in which the Code was to be enforced. It was suggested to delete article 5 and to leave the matter to national legislations, an approach which would enhance the chances for general acceptance of the draft Code and would dispose of a problem that was largely of theoretical interest inasmuch as the practical problems involved in securing witnesses and evidence long after the event would often preclude prosecution.

54. A number of representatives commented on the question of the scope of application of the article.

55. Some representatives were of the view that the rule set out in article 5 should not apply indiscriminately to all offences. In support of this idea it was said that, while the characteristic gravity of crimes against the peace and security of mankind would justify, in the eyes of those countries whose criminal legislations established the contrary principle, the rule set forth in the draft article, there was a need to make a distinction between war crimes, which should be subject to statutory limitation, and crimes against the peace and security of mankind, in respect of which greater strictness could apply from the point of view of the non-applicability of statutory limitations. Agreement was expressed with the idea of attempting a distinction on the basis of the Charter of the Nürnberg Tribunal, notwithstanding the difficulty of drawing a line between war crimes and crimes against humanity. The remark was made in this connection that it might seem doubtful from a legal standpoint whether the particular circumstances of the commission of an offence constituted a sufficient criterion for war crimes to become crimes against humanity, and due note was taken of the fact that the Special Rapporteur envisaged a different timetable to deal with the respective articles, which suggested that he intended to maintain a distinction between the two categories.

56. Other representatives were against the introduction of any distinction in the scope of applicability of article 5. It was said in this connection that it would be unrealistic to limit the rule of non-applicability of statutory limitations to crimes against humanity and exclude war crimes since, as the commentary to article 5 stated, it was "not always easy to distinguish between war crimes and crimes against humanity", a conclusion which, it was observed, was borne out by the recent Barbie trial in France, which had led to the conclusion that statutory limitation was not applicable to certain exceptionally serious war crimes. The present formulation of the article was therefore viewed as satisfactory.

57. The question was finally asked why in the French version the word "crime"

appeared in the singular, and the reference to French law contained in the commentary prompted the remark that it would be preferable for the Commission to avoid interpreting internal legal practice.

Article 6. Judicial guarantees

58. Many representatives welcomed and supported article 6 as provisionally adopted. It was pointed out that the guarantees spelt out in the article were part of basic human rights and provided an essential protection for the accused and that they were recognized not only by most systems of national legislation but also by contemporary international law. In the view of some representatives, the provisions contained in article 6 could even be considered as forming part of jus cogens in present-day international law.

59. Several representatives commented on the relationship between article 6 and the relevant provisions of other international instruments. Emphasis was placed on the desirability of adhering as closely as possible to the relevant provisions of the International Covenant on Civil and Political Rights, and satisfaction was expressed at the fact that the Commission had modelled article 6 after article 14 of the Covenant, thereby avoiding the proliferation of texts addressing the same subject-matter and enhancing the acceptability of the draft Code to States.

60. Comparing article 6 of the draft Code with article 14 of the International Covenant on Civil and Political Rights and article 75 (8) of Additional Protocol I to the 1949 Geneva Conventions, the latter of which stipulated that no provision of the article might be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1 of the article, one representative held the view that the draft Code should contain a similar provision. He added that such an addition would still leave unanswered the question of whether a State party to the Covenant and to the Code would not, in a situation where the Covenant was more favourable than the Code, be obliged, as distinct from being entitled, to grant rights as enshrined in the Covenant. He tentatively concluded that, since the list of rights set out in article 6 was not exhaustive, a person charged with an offence under the Code would, in relation to a State party to the Covenant and the Code, be able to insist on a more favourable standard of human rights under the Covenant.

61. As regards the text of the article as provisionally adopted, it was suggested to replace the title by "Legal safeguards".

62. With reference to the opening paragraph, comments focused on the expression "minimum guarantees", on the phrase "with regard to the law and the facts" and on the words "without discrimination". On the first point, the view was expressed that, while the use of the expressions in question made sense in article 14 of the International Covenant on Civil and Political Rights, it could in the context of article 6 give the impression that there might be additional guarantees. The remark was made that while the legal instruments referred to in paragraphs (1) and (2) of the commentary established an international "minimum" supplemented by domestic judicial guarantees, the situation was different in the case of the draft

Code. Deletion of the word "minimum" was suggested, as was also that of the phrase "with regard to the law and the facts", which was viewed as unnecessary. Such details, it was remarked, belonged more in the commentary than in a normative provision. It was also suggested to delete the words "without discrimination".

63. As regards the listing in paragraphs 1 and 2, some representatives held the view that the article should contain a general provision relating to judicial guarantees without attempting to list them, since they had in any event a non-restrictive character and could only be illustrative. The remark was on the other hand made that it would be advisable at a future stage to include also procedural guarantees in the light of existing international instruments and national legislations, so as to protect the defendant's rights at the stage of pre-trial investigation. Thus it was proposed to incorporate in the article the right of calling for an appeal.

64. As regards paragraph 1, it was suggested to delete the words "have the right to", as they would only confuse the application of the presumption of innocence. A parallel comment was made in relation to those same words in paragraph 2.

65. In relation to subparagraph 2 (a), the view was expressed that the meaning of "independent tribunal" should be made specific because there was no way of knowing what the tribunal was independent of. It was also suggested to provide for an exception to the right to a public hearing, in order to protect certain interests such as national security or public order which could in certain cases justify an in camera trial for an offence against the peace and security of mankind. Another suggestion was to provide either in the statute of an international criminal code or in the draft Code for the granting of legal aid in proceedings against alleged perpetrators of crimes against the peace and security of mankind.

66. One representative observed that article 6 could be taken into account in drafting the provision of the future convention against the recruitment, use, financing and training of mercenaries relating to the issue of the guarantees to be afforded to individuals accused of having committed offences dealt with in the draft convention. He pointed out that, since the most serious such offences were to be classified as "crimes against the peace and security of mankind", the general agreement reached in the Commission on the judicial guarantees laid down in draft article 6 should indicate that similar guarantees were warranted where the offences dealt with in the draft convention were concerned.

3. Observations made on draft articles 4 and 7 to 11 as submitted by the Special Rapporteur

Draft article 4. Aut dedere aut punire

67. It was suggested to replace the current title by "Duty to try or extradite", "Duty to extradite or prosecute" or "Aut dedere aut judicare".

68. Numerous representatives supported paragraph 1 of the draft article, pointing out that it was essential to ensure the implementation of the Code by preventing

individuals who had committed crimes against the peace and security of mankind to avoid punishment and that draft article 4 was a good step in that direction and would increase the acceptability of the draft Code by Member States.

69. Several representatives, while supporting the principle laid down in paragraph 1, felt that the paragraph should establish a system of priorities so as to avoid the potential problem of conflicting jurisdictions requesting the extradition of the alleged offender. Thus it was proposed that priority should be given to the State where the crime had been committed, then to the contrary which had suffered its consequences and, lastly, to the State of which the perpetrator was a national. Another suggestion was that first should come the State in the territory of which the crime had been committed, second the State whose interests or those of its nationals had been jeopardized and third the State in which the perpetrator had been apprehended.

70. While some representatives, as indicated above, advocated the principle of territoriality as the first priority for extradition in case the State in which the alleged offender was found decided not to persecute, other representatives spoke in favour of the principle of territoriality as laid down in the Charter of the Nürnberg Tribunal and against the principle of universal jurisdiction, which they considered contrary to the sovereignty of States. They considered their approach to be corroborated by such international instruments as the Moscow Declaration of 1943, the London Agreement of 1945 and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, as well as by paragraph 5 of General Assembly resolution 3074 (XXVIII) of 3 December 1973, and as procedurally sound since it was usually much easier to gather evidence in the country in which the offence had been committed. Furthermore, it was observed, experience showed that States sometimes acted indulgently towards their nationals. In this connection, one representative suggested that paragraph 1 should be formulated as follows:

> "Persons against whom there is evidence of the commission of offences against the peace and security of mankind shall be liable to be tried and, if found guilty, punished in the countries where they committed those offences."

and that it be supplemented by a paragraph 2 which would stipulate the obligation of States to co-operate in the extradition of such persons and, to that end, to take all the internal measures of a legislative or any other nature needed to create, in accordance with international law, conditions needed for extradition.

71. Some representatives proposed the inclusion in draft article 4 of additional obligations for States. Thus it was pointed out that the draft article should clearly indicate that the concept of political offence could not be invoked as a defence in connection with the crimes covered by the draft Code and, in particular, could not prevent the extradition of the alleged perpetrators. In that connection, reference was made to instances in which certain States had refused or delayed the extradition of war criminals on such grounds. It was further pointed out that the granting of asylum for perpetrators of crimes against humanity should be explicitly prohibited. On this point one representative, stressing that the Commission had so far paid almost no attention to prohibition of the granting of asylum to those suspected of having committed crimes against peace, crimes against humanity or war

crimes, noted that a provision on that issue had been included in the Declaration on Territorial Asylum, adopted by the General Assembly in its resolution 2312 (XXII) of 14 December 1967, as well as in the draft Convention on Territorial Asylum prepared for the diplomatic conference held at Geneva in 1977. He emphasized that the asylum problem could have considerable impact on the possibility of effective prosecution of the perpetrators of crimes against the peace and security of mankind, as far too many examples during the post-war period had demonstrated. Another representative pointed out that draft article 4 was silent on the case of crimes against the peace and security of mankind committed by individuals who abused the State authority. Recalling the principle that States had responsibility for the conduct of their officials and agents, he stressed that they should not escape responsibility when it was attributable to them. Still another representative advocated the inclusion in the draft Code of a provision binding States to co-operate in good faith with regard to the extradition of individuals being prosecuted for crimes under the Code.

72. With regard to paragraph 2 of draft article 4 and the possibility of setting up an international criminal court to deal with violations of the Code, some delegations held the view that the mandate conferred on the Commission by the General Assembly did not extend to the preparation of the statute of an international court of criminal jurisdiction competent to try individuals. They did not totally exclude the possibility of establishing such a court and could therefore go along with paragraph 2 of article 4 even though, in the eyes of one of them, that paragraph was unnecessary and weakened the territorial principle. In the opinion of those delegations, most States believed that the creation of an international criminal court was unrealistic under current circumstances. They concluded that, since the drafting of the Code did not necessarily depend on solving that problem, a decision could be taken at a later stage.

73. Many other representatives were of the view that the Commission's mandate should also cover this aspect and therefore extend to the preparation of a statute of a competent criminal jurisdiction for individuals. Most delegations favouring this approach pointed out that in order for the draft Code to be really effective such an international jurisdiction should be established, accompanied by a system of adequate penalties. It was stressed that it would be of little use to prepare a code of crimes, whether crimes against the peace and security of mankind or ordinary crimes under national law, if it could not be effectively implemented and that the preparation of a code therefore had to involve the establishment of a competent judicial body to implement it. It was also said that realistic arguments to the effect that the international community was not yet ready for the establishment of an international criminal court were subjective and not conducive to the progressive development of international law and that States which recognized the existence of jus cogens in international law for the protection of the interests of the peoples of the world should also be prepared for the rulings of a court of justice appointed by the community of nations, as a way of ensuring that national interests were not mistaken for those of the international community.

74. Also in favour of the establishment of an international criminal court, it was said that granting jurisdiction to a large number of national courts would give rise to a number of questions, for example what State had the right or even the

duty to prosecute; whether a violation could be prosecuted against the wishes of the primary injured State; and what State should be entitled to seek extradition in the event that the crime was not prosecuted by the State in which the person concerned resided. Thus, it was concluded, the establishment of an international criminal court seemed indispensable. A further argument was that, despite the difficulties involved, endeavouring to establish an international criminal court as part of the Commission's mandate concerning the draft Code could help to eliminate obstacles to the preparation of the draft Code's substantive rules. One such case was that of the non bis in idem principle, which had not found its way into customary law because in many cases States did not have sufficient trust in the administration of justice by other States, especially where offences with political aspects were concerned. If jurisdiction were to be attributed to an international criminal court, it was observed, no such problem would arise, although it would be necessary to establish that the jurisdiction of such a court precluded the jurisdiction of national courts.

75. A number of representatives felt that the Commission should act with great prudence on the question of an international criminal jurisdiction and proceed on a step by step basis. Thus it was suggested to await clarification of the underlying substantive issues. It was also said that the question could not be dealt with definitively until the Commission had received from the General Assembly the opinions it had requested in subparagraph 69(c)(i) of its report on the work of its thirty-fifth session. 5/ Another view was that in order to avoid giving the impression that it was basing itself on two working hypotheses at the same time - the hypothesis of a parallel jurisdiction and the hypothesis of an international criminal jurisdiction - the Commission should establish norms applicable in all cases as a first stage, and that nothing would prevent it from subsequently preparing the statute of an international criminal jurisdiction. Emphasis was also placed on the need to weigh all the advantages and disadvantages of the two systems carefully and to explore all possible alternative solutions. Preparation by the Commission of a statute for a competent international criminal court was viewed as very useful for reaching a considered decision on the matter, and it was suggested that the Commission should draw up several statutes, covering, on the one hand, the hypothesis of the establishment of an international criminal court and, on the other hand, various types of machinery for applying the Code.

76. Several other approaches to the problem were suggested. Thus, some representatives favoured the idea of establishing a criminal international jurisdiction but only on an optional basis, provided that it did not take precedence over national jurisdiction. States, they pointed out, should have the option of referring a case either to an international court or to their own national courts. It was suggested in this connection that the Commission should tackle the question of the relationship between an international criminal court and jurisdiction of the national courts of States which might not be parties to its Statute, even if they accepted the Code itself. This approach gave rise to objections. It was pointed out that if an international criminal jurisdiction were to be competent at the same time as internal courts, some delicate issues would arise, in particular with regard to the application of the non bis in idem principle. Another suggestion was to establish ad hoc international tribunals as and when required. Still another possibility which was mentioned was that of using

national courts on which judges of other nationalities would be invited to sit, such as judges from the State of the accused and from selected third States.

Draft article 7. Non bis in idem

77. Several representatives expressed satisfaction with draft article 7 as submitted by the Special Rapporteur and stated that it was in conformity with general and universally accepted principles of criminal law and justice. Some of them suggested that the Latin title should be replaced by another title, since it was difficult to find its exact equivalent in certain legal systems not based on the classical tradition.

78. Some representatives commented on the way in which the principle of non bis in idem would operate in case jurisdiction was to be exercised by domestic courts, and attention was drawn to the conflict that would arise in such a situation, not only between universal and national jurisdiction but also when application of the territorial principle involved the jurisdiction of two or more States.

79. The remark was made that, even assuming its current text were changed so as to emphasize that the individual concerned had been acquitted or comdemned by a court that derived its competence from the provisions of the Code, the draft article would mean that once a trial had been regularly held no trial for the same crime could be held. Such a result was viewed as running counter to the legislation of those countries in which an individual who had been tried before a foreign court for acts that constituted crimes against their laws could be tried once again. It was said in this connection that general international law did not impose on States an obligation to recognize as valid judgements delivered by the authorities of another State in criminal cases, and attention was drawn to possible implications conflicting with the force of res judicata, unless the States concerned were bound by an agreement on the matter.

80. Concern was furthermore expressed that the application of the rule in the draft article might be used as a means for the offender to evade responsibility and trial and punishment by the most affected State. While the principle that no one should be punished twice for the same crime and that sentencing by the first court should therefore be taken into consideration by the second court in determining the penalty was described as a reasonable principle which did not give rise to any problems and should be set forth in the general part of the Code, the view was expressed that providing that the exercise of competence by the courts of one State would preclude entirely any action by the courts of another State entailed the risk that a State would decide to put an individual on trial in order to prevent another trial from taking place in another State in which a heavier penalty might be imposed. In order to meet this concern, it was suggested that consideration be given to a flexible formula that might include some form of review of the foreign judgement. Mention was made in this context of the possibility of having all domestic judgements delivered in implementation of the draft Code submitted to a flexible machinery for consultations for an opinion on the extent to which they were in compliance with the provisions of the draft Code.

81. Also with reference to the operation of the non bis in idem principle in case jurisdiction was to be exercised by domestic courts, it was stated that if despite the establishment of a system of priorities the Code still left room for the exercise of more than one jurisdiction the parties to the Code could be called upon to decide, either directly or through a specifically established organ, what jurisdiction should actually be empowered to hear the case. The view was expressed that the question should be considered carefully and that a solution should be included not in the general principles set forth in the first part of the Code, but in the section devoted to the definition of jurisdiction and competence.

82. Some representatives also commented on the operation of the non bis in idem principle in case an international criminal jurisdiction were to be established and on the applicability of the principle in case of conflict between such a jurisdiction and that of a State. While some took the view that in such a situation the principle would give rise to no problems, others were of a different opinion. Thus the remark was made that the statement in paragraph 37 of the Commission's report was based upon a misconception, for there was no primacy of international criminal law allowing an international criminal court to try an offender under the Code who had already been tried by a domestic court vested with jurisdiction to try such an offender. It was observed that the criminal law which an international criminal court would apply in relation to an offence under the Code would be the criminal law applied by domestic courts with regard to a similar offence and that the question of the primacy of the jurisdiction of an international criminal court arose in relation to such domestic courts unless the relevant States parties expressly made provision for such primacy in the relevant agreements. In the absence of such a provision, it was remarked, it would be wrong to assume that the international criminal court enjoyed some kind of priority over such domestic courts; both courts were best seen as courts of first instance to either of which an offender under the Code might be brought to trial.

83. Emphasis was placed on the distinction to be made between the jurisdiction which a domestic court had under any of the international conventions dealing with the suppression of a specific crime and the jurisdiction which the same kind of court would have under the Code. It was remarked that, while the conventions in question required a State party to punish the guilty persons in accordance with its internal law so that the body of law which the domestic court applied in that situation was wholly internal and national, the body of law to be applied under the Code would be international to the extent that it would consist of such rules as were embodied in the Code or which reflected customary international law. The view was expressed that while, in a situation in which a domestic court exercised, in accordance with its internal criminal law, jurisdiction over an offender for a crime such as murder or hostage-taking, it would be proper for an international criminal court to try that offender for the acts which had given rise to the murder or hostage-taking, but which might bear a different nomenclature in that jurisdiction, the plea of non bis in idem should be open to the person concerned where the body of law applied by the domestic court and the international criminal court was the same.

84. On the question of whether States parties to human rights conventions could agree to an abridgement of the rights enshrined in those conventions in

circumstances not covered by them, it was pointed out that by allowing derogation from the non bis in idem rule in time of public emergency posing a threat to the life of the nation article 4 of the International Covenant on Civil and Political Rights raised the question of whether the trial of a person for an offence under the Code for which he had already been convicted or acquitted in circumstances not covered by the exceptional situation referred to in article 4 was not in breach of the non bis in idem rule. Attention was also drawn to article 75 of Additional Protocol I to the 1949 Geneva Conventions under which the non bis in idem rule applied even in situations of armed conflict, although it was made clear that it only prohibited a second trial by the same party and under the same law and judicial procedure. The question was accordingly asked why the rule could not be included in the Code as also applying to situations not involving armed conflict, and doubts were expressed as to whether the sense of moral outrage instilled by a serious or heinous offence against the peace and security of mankind justified derogations from obligations under those conventions.

85. As to the Special Rapporteur's proposed paragraph 2 6/ to the effect that the non bis in idem rule "cannot be pleaded before an international criminal court, but may be taken into consideration in sentencing if the court finds that justice so requires", it was viewed by some representatives as providing a basis for solving the question of how to uphold the principle without prejudice to the guarantee that States could punish persons who committed criminal acts listed in the Code. The inclusion of such a paragraph, it was also pointed out, should not be construed as reflecting a lack of confidence in any particular national legal system but rather as recognition that greater confidence would be placed in an international criminal court to implement international criminal law.

86. Other representatives were however of a different view. Thus it was said that the proposed paragraph could only be founded on an implicit suspicion regarding the integrity of the court which had tried the individual the first time and that no such provision would meet with the general approval of the community of nations. It was recalled that protection of the rights of an accused against whom popular sentiment ran high was just as important as protection of the rights of an accused whose alleged offence aroused no such reaction among the public. It was also pointed out that the proposed second paragraph presumed that all States subscribing to the statute of the future international criminal court would accord it the necessary jurisdiction to determine matters regulated by the Code. Doubts were expressed as to the validity of such an assumption as well as to the discretionary application of the rule limited only to the sentencing of offenders, and the remark was made that the issue of conflicting jurisdiction as between internal courts and an international criminal court suggested that questions of jurisdiction would, in practice, evolve somewhat unevenly, with the consequence that the determination of the competent oourt for the trial of offences regulated by the Code would not be simple - a reality of which the proposed paragraph did not take cognizance. It was further remarked that the proposed second paragraph exposed an accused to a second trial in spite of his conviction or acquittal and should therefore be thoroughly examined before it was incorporated in the draft Code.

87. Some representatives found it difficult to take a definitive position on the draft article at that stage and were in favour either of re-examining its contents or deferring its adoption to a later stage. The view was expressed in this connection that the wording of the draft article would need to remain pending until the fundamental question of who was to exercise jurisdiction under the draft Code was finally settled.

Draft article 8. Non-retroactivity

88. Paragraph 1 was considered as correctly based on the fundamental principle nulla poena sine lege. It was also viewed as satisfactory and in keeping with the general principles of criminal law which excluded retroactive punishment for crimes.

89. Different views were expressed on paragraph 2. Some representatives found it absolutely necessary to preserve the content of the paragraph. It was stated in this connection that the principle nulla poena sine lege should not constitute an obstacle to punishment for an action or omission generally recognized by international law as a war crime or a crime against the peace and security of mankind.

90. Other representatives expressed reservations concerning paragraph 2. It was said in particular that its text made the offences against the peace and security of mankind seem imprecise and ambiguous. It was also pointed out that the paragraph referred to another source for the charge of crimes against the peace and security of mankind, namely "the general principles of law recognized by the community of nations" and that, transposed to some internal laws, that concept created a risk of uncertainty precisely where the lawfulness principle sought to eliminate it. Emphasis was placed on the need for greater clarity, especially if, by virtue of the principle of universality, several jurisdictions were to have competence. It was observed that the difficulty of determining the contents of the "general principles of law" referred to was well known, the question having already arisen in connection with article 38 of the Statute of the International Court of Justice and that if the International Law Commission found it difficult to enumerate forms of conduct which constituted crimes against the peace and security of mankind it could readily be imagined how complex it would be to specify, without infringing the rights of the accused, what should be understood under general principles of international law or general principles of law recognized by the community of nations. It was added that even if, as the report implied, controversy over the Nürnberg Judgements had today died down the fact remained that subsequent international instruments enshrined general principles as a source of international law on an equal footing with customary and treaty law. Concern that the reference contained in the paragraph to the "general principles of law recognized by the community of nations" might allow room for interpretations that were too broad and would be at complete variance with the principle nullum crimen sine lege prompted some representatives to favour the deletion of paragraph 2.

Draft article 9. Exceptions to the principle of responsibility

Draft article 10. Responsibility of the superior

Draft article 11. Official position of the perpetrator

91. Draft articles 9, 10 and 11 were criticized on the ground that they did not, in their current form, preclude the possibility that perpetrators might escape responsibility for the offences concerned, notwithstanding the fact that the draft Code was intended to ensure that all persons guilty of crimes against the peace and security of mankind would be punished.

92. Draft article 9 was described as requiring considerable additional work, as the automatic transposition of provisions from criminal law might weaken the significance of the Code. The question was asked whether or not some of the exceptions given in draft article 9 were exceptions in the strict sense of the term or merely mitigating factors. In this connection reference was made to article 8 of the Charter of the Nürnberg Tribunal which stipulated that the fact that the defendant had acted pursuant to an order of his Government or of a superior would not free him from responsibility but might be considered in mitigation of punishment. Mention was also made of Nürnberg Principle IV. The view was expressed that article 9 should be formulated along the same lines as those two provisions and should stipulate that no ground whatsoever should be recognized to justify exemption from punishment for offences against the peace and security of mankind. It was added that the fact that a person had acted under orders might be considered a reason for mitigating punishment and that that consideration, as well as coercion and state of necessity, should be covered under a separate article. Error of law and the order of a Government or a superior were similarly described as constituting, at best, mitigating circumstances but certainly not circumstances precluding criminal responsibility altogether. The view was expressed in this connection that there was no reason to abandon or modify the stipulation of article 8 of the Charter of the Nürnberg Tribunal.

93. As regards the listing in draft article 9, it was suggested that each of the exceptions should be formulated in a separate article clarifying its content. With respect to subparagraph (a), emphasis was placed on the need to define the criteria which determined cases of self-defence. Reference was made in this context to Article 51 of the Charter. Subparagraph (b) was criticized on the ground that it made no clear distinction between the concepts of coercion, state of necessity and force majeure.

94. With regard to draft article 10, some representatives supported the proposed text, which was viewed as consistent with the Nürnberg Principles and with article 86, paragraph 2, of Protocol I to the Geneva Conventions. One representative indicated that, although he deemed to be logical the position that responsibility of the superior could be based on the theory of complicity, he was not opposed to the inclusion of a special provision on that question.

95. As to draft article 11, it was suggested that it should be drafted along the lines of article 7 of the Charter of the Nürnberg Tribunal, which stipulated that

the official position of defendants, whether as heads of State or responsible officials, would not be considered as freeing them from responsibility or mitigating punishment. It was also suggested that the words "under international law", which appeared in Nürnberg Principle II, should be inserted in the text after the words "criminal responsibility" so as to make it clear that no head of State or any other official could claim immunity. The remark was made in this connection that consideration would have to be given to the relationship between draft article 11 and the immunity from jurisdiction that usually protected heads of State or Government.

96. Other comments included the remark that draft article 11, on account of its particularly important nature, should be placed among the first provisions of the draft Code and the observation that the commentary to the draft article unduly reduced its impact by referring only to the official position of heads of State or Government.

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

1. General observations

97. A number of representatives stressed the importance of the topic. Emphasis was placed on the need for rational management of the earth's water resources, considering the dimension of the problems related to the scarcity of fresh water. It was recalled in this connection that one person in two did not have a sufficient supply of clean water that 29 per cent of the world's population did not have easy access to drinking water and that, according to the World Health Organization, 80 per cent of diseases affecting the world's population were directly related to water. The remark was made that since many countries shared international watercourses, international rules were necessary if each State were to be assured an equitable share in such uses and if pollution of the water were to be avoided. Work in this area was therefore viewed as essential both for international law and for stability and good-neighbourly relations between States.

98. The Commission was commended for the visible progress made at its thirty-ninth session, reflected in particular in the provisional adoption of six draft articles. The hope was however expressed that the topic would receive the priority it deserved and that the draft would be completed in the course of the current quinquennium. It was remarked in this connection that, given the many years which had been spent considering the question and the wealth of data which had been gathered, it should now be possible to move away from theoretical debates and arrive quite quickly at specific solutions acceptable to States. The Special Rapporteur was urged to maintain his pace of work, and the Drafting Committee to devote more time to the topic.

99. A number of representatives stressed that the topic was a complex one in that it required reconciling a variety of concepts, principles and interests, and attention was drawn to the host of political, legal, economic, geographical and other factors that had to be taken into account.

100. Some representatives placed particular emphasis on certain principles of international law, particularly the principle of territorial integrity and the principle of the sovereignty of States, especially the permanent sovereignty of States over their natural resources. Thus it was said that in view of the diversity of international watercourses the Commission should base its work on the permanent sovereignty of States over their natural resources, seeking to resolve the question of the shared optimum use of the resources of the watercourse by international watercourse States in the light of the special characteristics of the watercourse concerned. The view was also expressed that the draft articles should recognize more clearly the right of territorial sovereignty over water resources without excluding mutually advantageous co-operation among States.

101. Other representatives observed that if among the elements to be considered in developing articles on the law of the non-navigational uses of international watercourses the sovereignty of the State in whose territory a given portion of an international watercourse lay should be considered of overwhelming importance all problems could have been dealt with through the application of the rules on territorial sovereignty and on international responsibility, so that there would be no need for the Commission to study the topic. It was also said that the topic enabled the international community to give concrete meaning to genuinely progressive notions of interdependence and that it was the approach taken towards such issues, more than high-flown rhetoric about new collective security systems, that fostered or hindered the interdependence of States in the last decades of the twentieth century. Interdependence and security, it was added, were recognized and fostered when it was recognized that the sovereign equality of States was made truly meaningful by recognition of the fact that the right of one State to use a watercourse was correlative with the rights of the upstream and downstream States to do likewise.

102. A number of representatives shared the view that it was necessary to strike the right balance between the interdependence of riparian States on the one hand and their sovereign independence and right to benefit from the natural resources in their territories on the other, between upper riparian States and lower riparian States and between the various uses of the waters. Thus it was remarked that while States were extremely sensitive to the notion of sovereign use and its political and legal implications it was especially important, since the physical expression of watercourse systems was such that specific uses had clear consequences for the rights of other States situated along the watercourse, to evolve international standards of use that gave concrete expression to interdependence and co-operation not merely as politically desirable but also as legally mandated. The view was also expressed that although from the standpoint of international law States had the permanent right, which was an attribute of sovereignty, to decide matters concerning their natural resources it was widely recognized that in exercising that right within its territory a watercourse State had the obligation not to cause substantial injury to other watercourse States. It was furthermore remarked that the use of a watercourse by all the States of that watercourse taken together might even affect the interests of the international community as a whole - a situation which required a careful balancing of various legal rules. As appears from the summmary of the views expressed in relation to draft article 10, many representatives viewed the duty of States to co-operate as a key element in reconciling the various concerns involved (see paras. 165-171 below).

103. Other principles or concepts were mentioned as being relevant to the topic. Among them, the doctrine of equitable and reasonable utilization was hailed by some representatives as an appropriate basis for the topic. The view was however expressed that it was impossible to define what was reasonable and equitable and that it would have been preferable to develop the law of international watercourses on the basis of the principle of not causing harm. The remark was made in this connection that although from the standpoint of international law States had the permanent right, which was an attribute of sovereignty, to decide matters concerning their natural resources it was widely recognized that in exercising that right within its territory a watercouse State had the obligation not to cause substantial injury to other watercourse States.

104. The concept of refraining from acts which might result in heavy damage to the watercourse was favourably commented upon, as was also the concept that all States sharing water resources had the right to optimum use of such resources. In connection with the latter concept, however, it was remarked that the optimum utilization of the resources of an international watercourse was, in the first instance, a matter of economic planning and had no direct bearing on the doctrine of equitable utilization, even though there was a link between the application of that doctrine and integrated water resources management, a link which was constituted by the proposed procedural rules concerning co-operation between watercourse States.

105. The concept of a "shared natural resource" was supported by some representatives; other representatives, however, viewed it as incompatible with the principle of the permanent sovereignty of States over their natural resources and rejected the idea that only recourse to that concept would make it possible to prevent any infringement of the interests of the other riparian States.

106. A further principle which it was felt should be incorporated in the future instrument on the topic was the principle of acquired rights by States by virtue of their prior use of a watercourse and the extent of their dependence on such use. It was observed in this connection that while acquired rights must be taken into consideration the interests of the riparian States did not necessarily conflict with such rights.

107. As regards the aim of the Commission's work on the topic, some representatives held the view that since the issues involved were usually settled by means of treaties concluded directly between the States concerned the purpose of the exercise should be to harmonize national interests with those of other riparian States through the adoption of principles of a recommendatory nature, leaving riparian States sufficient latitude when drawing up a watercourse régime. The remark was made in this connection that because watercourse systems had different geographical, hydrological, historical and social characteristics it would be extremely difficult to elaborate a régime sufficiently general to cover all of them and at the same time specific enough to regulate inter-State co-operation in their utilization and that, in any event, neither State practice nor arbitral decisions supported the elaboration of binding rules applicable to all watercourses. It was therefore suggested that the Commission should elaborate a model agreement of an auxiliary nature which could serve as a basis for treaty relations among the States

of a particular watercourse system based upon bilateral or regional agreements, an approach which was not new, for in 1949 the Commission had deemed it more advisable to elaborate model rules of arbitration rather than an international treaty of a universal character. Such a document was viewed as useful in that it would provide guidance to States in an area where current legal practice was very varied, and as of much greater practical value than "residual norms" possessing binding force.

108. Other representatives, while recognizing that the doubts which had been expressed by some members of the Commission as to whether State practice and arbitral decisions could provide a sufficient basis for the elaboration of binding rules were to a certain extent justified, observed that the law of international watercourses had a long history and did not derive only from recent State practice and modern arbitral jurisdiction. It was recalled that the purpose of the initiative which had led to the adoption of General Assembly resolution 2669 (XXV) of 8 December 1970 had been primarily to apply, as material for the codification of the subject, intergovernmental and non-governmental studies and drafts such as the Helsinki Rules on the Uses of the Waters of International Rivers, and emphasis was placed on the value of the work done by the International Law Association and the Institute of International Law as well as by the Food and Agriculture Organization of the United Nations (FAO), the Economic Commission for Europe (ECE) and the Asian-African Legal Consultative Committee (AALCC) and other international organizations. It was furthermore recalled that, according to its mandate, the Commission had to study the law of international watercourses with a view to its progressive development and codification. Attention was drawn to the many treaties which had been signed since the Middle Ages between neighbouring States in that field and to the customary rules which had emerged and currently served as a basis for codification. The concern was expressed that undue emphasis on the legal consequences of the diversity of watercourses might be contrary to the aims of codification.

109. Still other representatives pointed out that, in any event, the intervention of the Commission was useful in order to consolidate, clarify and develop the relevant principles. The view was expressed that the ongoing work, because it helped to clarify existing principles of international law, taking into account not only existing practice but also the principles governing related areas and new rules which were being developed in response to the need for better international protection of the environment, was of an explanatory nature, responding to growing needs, rapid developments and changing views and aimed at establishing a legal framework, encouraging the formulation of specific rules and principles and defining their content, thus setting general standards for co-operation in an area in which disputes between neighbouring States had not been uncommon.

110. A number of representatives commented on the framework agreement approach, which, it was recalled, had been developed by the Commission in response to the doubts expressed about the possibility of drafting general principles that would apply universally and which meant that watercourse States might, by a watercourse agreement, apply and adjust the general provisions of the future convention to the characteristics and uses of a particular international watercourse.

111. Some representatives favoured the approach in question, which was viewed as

providing the necessary degree of integration for comprehensive codification while preserving the option for States to make modifications to fit particular circumstances. Support was expressed for the formulation of general principles and rules which would apply in the absence of specific agreements between the States concerned and provide guidelines for the negotiation of future agreements. Such an approach, it was stated, had the advantage of taking account of the following three fundamental factors: the specific nature of the question, given its political dimensions, the possible serious consequences in the event of the convention being rejected by one or several States and the fact that watercourses, despite having elements in common, possessed individual characteristics, so that rules which were laid down for all watercourses could not be considered truly binding in each individual case. Attention was however drawn to the desirability of proceeding, in formulating general and residual rules, from certain principles which stipulated obligations where such obligations were requisite for the rational, beneficial and orderly use of watercourses in their unitary whole, in the interest of all the States concerned. The view was also expressed that, in addition to drafting general rules applicable to all international watercourses, the Commission should formulate general recommendations or guidelines on certain topics including the administration and management of international watercourses, which could be used by States as models for negotiating future agreements or for adopting measures of co-operation and engaging in joint activities.

112. As regards the nature of the rules to be included in the framework agreement, some representatives held the view that such rules, even though they would have to be residual, i.e. applicable in the absence of bilateral or multilateral agreements, should be binding upon States. The remark was made in this connection that, notwithstanding differences of opinion as to how far customary international law already covered the subject, it seemed that some general principles such as that of the equitable and reasonable utilization of the international watercourses and their corollaries, such as obligations of consultations and co-operation, were already crystallized customary law or were in the process of becoming so. Other comments included the observation that there might be circumstances in which the framework agreement would have to set out mandatory non-residual rules, and the remark that it would be useful to include a clause whereby the provisions of bilateral or multilateral agreements would not take precedence over those of the framework agreement if the first-mentioned provisions affected States that were not parties to those agreements.

113. Other representatives expressed reservations concerning the framework agreement approach. Some questioned whether any binding general rules could be prescribed even if only for residual purposes. In their opinion, it might be more realistic merely to indicate certain recommendations or guidelines on which States could draw when negotiating agreements for the particular watercourses which concerned them. Others also disagreed with the framework agreement approach, but for the opposite reasons. It was remarked that, while the framework agreement approach lay in the diverse nature of the natural and geographic characteristics of individual watercourses and the human needs they served, neither geography nor the law bore out the conclusion that those differences were such as to prevent the elaboration of a uniform instrument setting forth the rights and duties of riparian States. Reference was made in this connection to the United Nations Convention on

the Law of the Sea which, although it dealt with a physical phenomenon, and one in which the natural and geographic characterisics and the human needs to be served were also not identical, clearly delineated the interests of the various groups of States. The remark was made that the wide acceptance of that instrument should cast doubt on the proposition that, in the case of the topic under consideration, a framework agreement was necessary to ensure acceptability. The view was expressed that the differences in the characteristics of watercourses were largely immaterial for the purposes of the codification and progressive development of the law - a process concerned mainly with standardization which, for the sake of certainty in the law, had to gloss over certain differences - and that the remedy lay in careful drafting, more specific rules and the establishment of fact-finding machinery and machinery for the settlement of disputes. It was added that the value of a framework-agreement approach was further diminished by the fact that the proposed régime would depend almost entirely on negotiations between States the outcome of which would depend on such variables as the relative strength of the negotiating States and the skill of the negotiators, and that the end result of a combination of general residual rules, on the one hand, and the prominence of negotiations, on the other, might be the very opposite of what the international community had intended when it had entrusted the Commission with the topic. The view was also expressed that the dualistic system of a framework agreement appeared somewhat ambiguous and that it was difficult to agree with the characterization of the general principles and rules as residual in character. The remark was made in this connection that, while a future convention could certainly contain provisions which entitled waterourse States to arrange their mutual relations with regard to the uses of the watercourse by agreement in a way that differed from the rules and principles governing those uses in general, as long as their agreement did not infringe the rights and interests of third States, a framework-agreement system which overshadowed the codification of the law of international watercourses by putting into a secondary position the general rules and principles, some of which were well established as part of customary international law, gave rise to serious misgivings.

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

114. Several representatives expressed general support for articles 2 to 7 as provisionally adopted by the Commission at its thirty-ninth session. It was noted that those articles were based on the corresponding provisions which the Commission had already adopted provisionally in 1980. The point was also made that the articles, although they were rather conservative in nature, were broadly consistent with a sound perception of the scope of the topic and its relationship to navigational uses.

115. As regards the expression "international watercourse[s] [systems]", several representatives opted for the first alternative. Thus, the view was expressed that it would actually be preferable to delete the word "system", as it did not reflect reality and was likely to introduce an artificial component into the draft. The remark was made in this connection that, since each international watercourse had specific characteristics on the territory of each State that it crossed and formed

part of a territorial whole, it was necessary to take account of that specificity where the uses of each individual watercourse were concerned, instead of seeking to enclose them in an imaginary "system". Other comments included the observation that the term "system" was too broad and might prevent the general acceptance of the draft articles and the remark that giving preference to the term "international watercourse" would not mean that the Commission was confining itself to the consideration of surface waters and neglecting other elements of the resources in question. It was furthermore recalled that the system concept had been the subject of much discussion in 1980 and had been abandoned by the preceding Special Rapporteur in 1984, and the point was made that the retention of that concept was not in keeping with the purpose of the Commission's work, which should lead to a simple technical instrument devoid of any doctrinal aspect and legal superstructure of any kind whatsoever. It was added that the system concept had legal implications and imposed binding legal obligations because it was not confined solely to the "water" component, and therefore opened the door to possible claims by a riparian State to the natural resources situated in that part of a watercourse which fell within the jurisdiction of another sovereign State.

116. Other representatives expressed preference for the term "system". This term was viewed as more accurate and better reflecting the geographical situation. Reaching a consensus on that point was deemed very important and it was suggested to seek the assistance of experts in working out a clear, concrete and scientific definition. The remark was also made that, while an expression such as "water basin", instead of the expressions "international watercourse" and "international watercourse systems", would have enabled the scope of the draft articles to be better delimited, the second of the latter two expressions as defined in the working hypothesis adopted in 1980 was preferable. Satisfaction was expressed in this connection at the Commission's decision, reflected in article 2, to proceed on the basis of the working hypothesis in question. It was observed that, while it might not always be necessary or even possible to agree upon a formal definition, to have identified at an early stage, the basis concept involved in the topic under discussion was a prerequisite for progress.

117. While considering the term "international watercourse" to be the better of the two alternatives, one representative felt that it might give rise to confusion because of the analogy with international rivers, which brought to mind a régime under which third parties as well as riparian States could make use of a joint watercourse. The term "plurinational watercourses" was suggested as a substitute.

Article 2. Scope of the present articles

118. Referring in general terms to the question of the scope of the draft articles, one representative observed that it should be specified whether the expression "non-navigational uses" was to be construed in a narrow or a broad sense. He remarked that in the latter case it would be necessary to consider questions relating to the protection and rational utilization of the waters, and to ensure that the provisions being prepared did not create a right to interfere in the economic activity of the riparian State, particularly with regard to the distribution of the living resources of the watercourse which fell within the exclusive competence of that State.

119. Several representatives expressed support for the text of article 2 as provisionally adopted by the Commission. The term "uses" was viewed as having the merit of taking into account the diversity of possible situations.

120. While the application of the articles both to uses of the watercourse itself and to uses of its waters was considered by one representative as unobjectionable, another representative found the distinction between "international watercourses" and "their waters" to have no raison d'être, because logically, as the radical "water" indicated, the term "international watercourses" referred not only to the actual channel of the watercourse but also to the waters that the channel contained. Referring to paragraph (3) of the commentary, one representative said that he did not find it appropriate to define an international watercourse as also including the waters thereof and that a framework agreement should deal with the diversion of waters from an international watercourse which adversely affected other States, but not with the diverted water itself.

121. As regards the expression "measures of conservation", it was interpreted by one representative as covering the various forms of co-operation involved in the utilization, development and promotion of the optimal utilization of international watercourses. Another representative felt that while the expression had the advantage of taking into account the diversity of possible situations it would have been preferable to say "measures of conservation, protection and development". Agreement was expressed in this connection with the broader interpretation of the reference to measures of conservation, as set forth in the commentary to article 2, and it was suggested that express stipulations on the subject be included in the draft articles.

122. As regards the link between paragraphs 1 and 2, it was suggested to clarify it by specifying in paragraph 1 the activities to which the draft articles applied and, in paragraph 2, the situations which would be excluded from the scope of the draft articles, or else to recast paragraph 2.

123. As for paragraph 2, it was supported by one representative who agreed that navigational uses which affected or were affected by non-navigational uses were to that limited extent within the scope of the draft articles. The paragraph was however viewed as too vague by another representative, who observed that navigation always affected other uses or was affected by them and that it was thus not possible to exclude navigation from the scope of the draft article as a whole, a possibility that was offered by the wording of paragraph 2 since that paragraph would no longer be in keeping with paragraph 1, and with the draft as a whole.

Article 3. Watercourse States

124. Several representatives indicated that they had no substantive objections to article 3. The view was however expressed that the definition should appear in article 1, together with the other definitions. In this connection, one representative reserved the right to comment on the article once the Drafting Committee had decided upon the definitions to be included in article 1.

125. One representative furthermore indicated that he interpreted the article as applying only to border-crossing or border-forming watercourses.

Article 4. [Watercourse] [system] agreements

126. Several representatives expressed satisfaction with the manner in which the Commission had dealt with the problems relating to watercourse system agreements.

127. Article 4, which set out the basic elements of agreements between States on the use of international watercourses or any part thereof, was viewed as particularly important, since the draft Convention was intended to serve only as a framework agreement upon which to base future agreements of that type. This approach, it was observed, appropriately recognized, on the one hand, the diversity of watercourse systems and the consequent need to leave States enough freedom and, on the other hand, the widely perceived utility of a framework of residual general principles and rules, such principles being able to facilitate the conclusion of specific agreements among system States.

128. While noting that article 4 seemed to bring out the main feature of the framework agreement, namely its residual character, and while conceding that the framework agreement must, in general, be residual in character so as to allow for adjustments to meet the needs of a specific watercourse, one representative wondered whether all the provisions could be adjusted without doing real violence to some of the fundamental principles of the law of the non-navigational uses of international watercourses. Another representative held that article 4 should make it clear that the draft articles were without prejudice to any watercourse agreement in force, as the former Special Rapporteur had proposed in his second report, albeit on certain conditions.

129. As regards paragraph 1, the view was expressed that the term "adjust" was somewhat ambiguous and ought to be interpreted as covering not merely a further refinement of the draft articles but also, where necessary, a deviation or derogation from them. The words "apply and adjust" were furthermore viewed as requiring reconsideration inasmuch as, if read strictly, they could be interpreted as only allowing the articles to be applied as they stood or subject to agreed adjustments and excluding the possibility of non-application of the articles, an approach which was viewed as unduly restricting the right of the watercourse States to reach whatever agreement seemed to them best suited to the particular circumstances with which they were faced, if necessary in disregard of whatever general rules might be set out in the articles.

130. With respect to paragraph 2, the view was expressed that the proviso contained therein was in order, since it was intended to prevent a situation in which a few States appropriated a disproportionate amount of the benefits of an international watercourse or unduly and adversely prejudiced the use of its waters by watercourse States not parties to the agreement in question. The paragraph however gave rise to some criticisms. Thus, one representative viewed it as coming close to questioning the treaty-making capacity of States, inasmuch as the effect of the second sentence was to prohibit States from entering into an agreement relating to

an entire watercourse system, a part thereof or a particular project if the agreement adversely affected, to an appreciable extent, the use of a watercourse by another watercourse State. In his opinion, the framework agreement should confine itself to prescribing general rules to be followed by watercourse States as to the utilization of a watercourse system, which would make it unnecessary to provide that a watercourse agreement might be concluded with regard to a part of a watercourse only if it did not adversely affect, to an appreciable extent, the use of the watercourse by another watercourse State.

131. Another representative remarked that it did not seem justified to require, as did paragraph 2, that a watercourse agreement between two or more watercourse States should never adversely affect to an appreciable extent the use by another watercourse State. He pointed out in this connection that while it was true that a watercourse agreement concluded between two or more watercourse States could not affect the rights of other watercourse States - by virtue of the well-known rule of treaty law that a treaty did not create either obligations or rights for a third State without its consent (confirmed by article 34 of the 1969 Vienna Convention on the Law of Treaties) - it did not, however, follow that every use by a watercourse State or by two or more watercourse States, as agreed by them in a watercourse agreement, that would adversely affect a use by one or more other watercourse States was necessarily unlawful. In his view, it would be unlawful only if it were inconsistent with the equitable and reasonable utilization of the watercourse by the watercourse States concerned.

132. The same representative wondered what the precise link was between paragraph 2 of article 4 and paragraph 2 of article 5, since the former prohibited two or more watercourse States from entering into a watercourse agreement which adversely affected the use by one or more other watercourse States while the latter provided that a watercourse State whose use might be adversely affected to an appreciable extent by a proposed watercourse agreement was entitled to become a party thereto. That, in his view, presupposed that in the first case the watercourse States were in principle permitted to enter into the watercourse agreement. Furthermore, he said, if the watercourse agreement did not adversely affect the use of another watercourse State to such an extent that it was inconsistent with the equitable and reasonable utilization of the watercourse by the contracting parties, the question might be raised as to why the affected watercourse State should have a right to become a party to the watercourse agreement.

133. Several representatives commented on the phrase "to an appreciable extent". It was pointed out that, according to paragraph (15) of the commentary, the word "appreciable" did not mean "substantial" but "capable of being established by objective evidence" and that if the criterion "to an appreciable extent" was to be a matter for objective determination some provision would have to be made to ensure such determination. It was also suggested that indication should be given of the nature and extent of any possible harm and that use should be made to that end of the assistance of technical and other experts and of existing precedents.

134. It was proposed that paragraphs 1 and 2 of article 4 should be merged into a single provision, as follows:

"An agreement or agreements concluded by watercourse States, whether relating to an entire international watercourse system or with respect to any part thereof or a particular project, programme or use, may apply and adjust the provisions of articles [...] to the characteristics and uses of a particular international watercourse system or part thereof. Such agreements, which for the purposes of the present article shall be called watercourse system agreements, shall define the waters to which they apply."

135. As regards paragraph 3, satisfaction was expressed at the solution found whereby if one watercourse State considered that a watercourse agreement was required because of the characteristics and uses of a particular watercourse the other States concerned were then under an obligation to enter into consultations with it, although they were under no obligation to conclude an agreement. Such consultations, it was observed, would not necessarily lead to an agreement but they could offer an opportunity for an exchange of views and, if conducted in good faith and in a spirit of co-operation and good-neighbourliness, could produce a preliminary agreement on whether or not a watercourse agreement was needed, failing which the States concerned would have to try to solve the problems on the basis of the convention that would embody the articles being prepared.

136. Several representatives felt it necessary to make it clear that the conclusion of agreements did not constitute a pre-condition for the use of watercourses, as each watercourse State would otherwise be afforded the power to veto a use by other watercourse States by simply refusing to reach agreement. The view was expressed that paragraph 3 was unclear in this respect and should specifically prescribe that the watercourse State concerned could require other watercourse States to consult with a view to negotiating one or several agreements.

137. It was further remarked that only when an agreement was applicable to the entire international watercourse could all co-riparian States of the watercourse ask to participate in its negotiation and its conclusion and that in other cases such an opportunity should be offered only to those States which were directly concerned or were likely to sustain substantial injury from the application of such an agreement.

138. The concept of "application" in the phrase "adjustment or application of the provisions of the present articles ... because of the characteristics and uses of a particular international watercourse" was viewed by one representative as unclear. In his opinion, the difference between adjustment and application was that in the former situation an adaptation of the draft articles was necessary because the characteristics of the particular watercourse rendered them unsuitable to its needs while in the latter situation no adaptation of the draft articles was necessary because they were appropriate for the needs of the particular watercourse and could therefore be applied without adjustment. Thus, he said, it was not clear why in paragraph 3 of article 4 application of the articles was required because of the characteristic uses of a particular international watercourse.

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

139. The view was expressed that article 5, like article 4, recognized that the diversity of watercourses and of uses made it impossible for a single international instrument to solve all the problems that might arise and that the solution of the problems specific to any watercourse could only be sought through agreements concluded between the riparian States concerned. It was noted that, by distinguishing between agreements which applied to the entire watercourse and in the negotiations of which all watercourse States were entitled to participate and other agreements in the negotiations of which only those international watercourse States which might be affected to an appreciable extent by the agreement were entitled to take part, article 5 provided the required degree of flexibility. The point was however made that the recognition in article 5 of the right of a State to participate in the negotiation of, and become a party to, any agreement that applied to all or a part of a watercourse which affected its territory would be incomplete if the article did not include a provision establishing the obligation of other States to refrain from negotiating such agreements without the participation of a third State whose territory the watercourse in question also affected, especially if such an agreement might affect, even if minimally and not "to an appreciable extent", the interests and rights of that third State. Such an addition was viewed as consistent with the prohibition contained in draft article 9.

140. Some doubts were on the other hand expressed in relation to article 5. The broad concept of the rights of watercourse States reflected therein was viewed as being at variance with general practice, and the point was made that by expanding the rights of third States the article would create a new situation which called for further consideration by the Commission. More specifically, the question was raised as to how the right of watercourse States to participate in consultations and negotiations on agreements affecting their interests would be given practical effect.

141. As regards paragraph 1, the principle reflected therein that all riparian States should be entitled to become parties to watercourse agreements that applied to the entire international watercourse was favourably commented upon. The text was however viewed as lacking in precision in that it gave the impression that some States could consider concluding an agreement on the whole of a watercourse, without participation in the negotiations by all the other States concerned. The exact intention behind the paragraph was queried. Thus the question was asked whether, in case two watercourse States were having bilateral consultations about the operation of an agreement affecting the entire watercourse system, a third watercourse State would always be entitled to participate in those consultations. The remark was made in this connection that even if the phrase "relevant consultations" was intended to refer only to consultations about agreements being negotiated rather than to agreements already in force - an intention which the text did not clearly bring out - it still seemed unrealistic to try to exclude the possibility of bilateral consultations between States with particular common interests.

142. Paragraph 2 gave rise to various criticisms. The remark was made that the thrust of the provision was that, if the use of a watercourse by a State was not affected to an appreciable extent, that State did not have the right to participate in the negotiation and conclusion of an agreement on a part of an international watercourse, the rationale for that (as reflected in paragraph (6) of the commentary) being that the introduction of one or more watercourse States whose interests were not directly concerned in the matters under discussion would mean the introduction of unrelated interests into the process of consultation and negotiation. That argument was viewed as being in contradiction with the statement in paragraph (9) of the commentary that paragraph 2 should not be taken to suggest that an agreement dealing with an entire watercourse or with a part or aspect thereof should exclude decision-making with regard to some or all aspects of the use of the watercourse through procedures in which all the watercourse States participated.

143. The fear was furthermore expressed that difficulties might arise in practice between riparian States as to who would determine the "appreciable" extent of the damage. Emphasis was placed, notwithstanding the explanations provided in paragraph (1) of the commentary, on the need to establish who was to collect the evidence and on the basis of what criteria. Also in relation to the word "appreciable", the view was expressed that while it was admittedly difficult to find precisely the right adjective the Commission might usefully seek to replace the term "appreciable". Attention was drawn in this connection to some possible inconsistency between different definitions of the term which the Commission itself gave in different parts of its report. Reference was made in particular to paragraphs (15) and (16) of the commentary on article 4, which indicated that while "appreciable" meant that there "must be a real impairment of use" it was not used in the sense of "substantial", as well as to paragraph 130 of the report, where it was stated that "appreciable" signified "of some magnitude". It was therefore suggested that the Commission should re-examine its use of the term in those two contexts.

144. The phrase "to the extent that its use is thereby affected" was viewed as extremely vague and imprecise, and it was suggested to replace the last part of the paragraph by "... those elements of the agreement the implementation of which will affect its use of the watercourse and to become a party thereto".

145. Other comments included the remark that the relationship between the term "appreciable harm" and the term "equitable and reasonable utilization", defined in articles 6 and 7, was unclear as well as the observation that the reference to implementation of an agreement was difficult to interpret in that it could relate to an instrument already concluded or to a draft since the end of the article referred to the matter of negotiating an agreement.

146. One representative held the view that a rigid stipulation as contained in paragraph 2 was neither generally acceptable nor practicable and that a more realistic solution would be to provide for an obligation of States parties to the original agreement to engage in negotiations with third States, should they so wish, for the safeguarding of the interests of those States.

Article 6. Equitable and reasonable utilization and participation

147. Article 6 was described as the cornerstone of the draft articles inasmuch as it contained the general principles that should be respected by States in the non-navigational uses and conservation of international watercourses, and as a significant provision, especially with regard to the optimum utilization of international watercourses, in view of the current problems of limited natural resources. The principle of equitable and reasonable use of watercourses was viewed as a sound one in the light 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 of Recommendation 90 of the United Nations Water Conference held at Mar del Plata in 1977, and also because, in cases where agreements had been entered into which, on the basis of the dubious concept of "acquired historical right", had given certain riparian States inequitable control over watercourses, there had been a striking lack of agreement.

148. Support was expressed for the position summarized as follows in paragraph (3) of the commentary:

> "Attaining optimum utilization and benefits does not mean achieving the 'maximum' use, the most technologically efficient use or the most monetarily valuable use. Nor does it imply that the State capable of making the most efficient use of a watercourse - whether economically, in terms of avoiding waste, or in any other sense - should have a superior claim to the use thereof. It rather implies attaining maximum possible benefits for all watercourse States."

149. Some delegations commented on the relationship between the principle of equitable utilization and the "no harm" principle. Thus it was said that, in making it obligatory for States to utilize watercourses in an equitable and reasonable manner, article 6 prohibited States from utilizing a watercourse in such a way as to affect adversely to an appreciable extent the use of that watercourse by another watercourse State and that the draft article protected all watercourse States whether or not they were party to a watercourse agreement, the implication being not that watercourse States were prohibited from entering into an agreement in relation to a part of a watercourse if that agreement adversely affected the interests of another watercourse State but that the implementation of such an agreement would engage the international responsibility of its States parties. Also referring to the "no harm" principle, one representative suggested that, stating as the commentary appeared to do, that a use which deprived other States of their right to equitable utilization was not "an equitable and reasonable use" might be tantamount to affirming, in a different way, the principle in question. He remarked in this connection that the wealth of material presented in the commentary in support of the principle of equitable utilization could also be used to justify the "no harm" principle, and that some of the documents, such as the Declaration of Asunción and Principle 21 of the Stockholm Declaration on the Human Environment (paras. (16) and (17) of the commentary), were in fact more suited to be a justification for the latter principle.

150. The point was also made that the exact nature of the relationship between the principles of equitable utilization and of prevention of appreciable harm required further study. It was recalled in that connection that, while the third Special Rapporteur had assumed that the two principles could conflict and, on that basis, had reformulated draft article 9 in his second report submitted in 1984 so as to give priority to the prevention of appreciable harm, the present Special Rapporteur had reverted to the formula suggested by the second Special Rapporteur, whereby appreciable harm caused to another watercourse State would be allowable if the use of the watercourse by the first State fell within the context of its equitable utilization. The view was expressed that the formula proposed by the third Special Rapporteur was preferable, bearing in mind that, once the threshold of appreciable harm had been breached, compensation might be impossible, particularly in the case of uses which had the effect of permanently altering the characteristics of a watercourse.

151. On the other hand, the doctrine of equitable utilization gave rise to objections. Thus, one representative stated that he could not go along with the conclusion that the balance of interests between watercourse States was to be brought about on the basis of that doctrine as a general rule of law and that such balance of interests should rather be achieved on the basis of the principle of mutually advantageous co-operation. He further expressed agreement with those members of the Commission who regarded the principle of co-operation as a necessary element of the principle of the sovereign equality of States which enabled "the sovereignties involved to coexist positively while preventing possible abuses". He therefore suggested that paragraph 1 should reflect, in accordance with the basic principles of international law, the sovereign right of each watercourse State to the utilization of the portion of a watercourse situated in its territory, along with the obligation to take care that those uses did not adversely affect to an appreciable extent the territories of other States or areas not subject to any sovereignty and that paragraph 2 should embody the principle that the watercourse States, in the interest of the rational utilization and the protection of the waters, agreed, for their portion of the watercourse or jointly for the watercourse as a whole and on the basis of sovereign equality, equal rights and mutual advantage, to co-operate in preventing and controlling transboundary water pollution, providing protection against sudden and unforeseeable disasters and safeguarding the agreed uses. He added that such an approach would take account of the close connection between sovereign equality and co-operation and would do justice to the different positions of upstream and downstream States on international watercourses, eliminating the risk, especially where border-crossing watercourses were concerned, of upstream States being unilaterally prompted into a certain line of action entailing a restriction of their right of utilization, which was incompatible with the basic principles of international law.

152. Also in connection with the underlying basis of the article, one representative noted with satisfaction that the principle of "shared natural resources" had been dropped, remarking that that principle conflicted with the principle of the territorial sovereignty of States over the portion of an international watercourse situated in their territory and with the principle of the permanent sovereignty of States over their natural resources.

153. Another representative identified in the emerging international law of transboundary natural resources relevant general principles that were applicable, including juridico-ecological principles, such as that of optimum sustainable utilization, and other typical principles of general international law, such as those of good faith, good-neighbourliness, abuse of right and liability for damage. With regard to the use of right, he expressed the view that use should be made of the progressive way in which that principle had been codified in article 300 of the 1982 United Nations Convention on the Law of the Sea in conjunction with the concept of good faith and that a similar exercise of incorporation into the draft articles should be attempted in relation to both draft article 6 and draft article 9, on the basis of article 104 of the Convention on the Law of the Sea, relating to liability for damage.

154. Other comments concerning article 6 included, on the one hand, the remark that the rule formulated in the draft article on the obligation of watercourse States to co-operate in the use, protection and development of an international watercourse should take into account the erga omnes principle laid down in article 36 of the Vienna Convention on the Law of Treaties, to the extent that a third watercourse State, or a group of watercourse States to which it belonged, derived benefits therefrom and, on the other hand, various observations on the phrase "equitable and reasonable". While the view was expressed that any problem related to the interpretation of that phrase could be solved on the basis of the factors referred to in article 7, some representatives stated that they did not find article 6 to be sufficiently specific, since it did not mention the need to take account of a whole range of factors, such as geographical considerations, social and economic needs, population density and the existing uses of the watercourse in question. The view was expressed that paragraph 3 of article V of the Helsinki Rules, referred to in the commentary, could with some amendment be usefully added to draft article 6, which provided a non-exhaustive list of factors relevant for determining equitable and reasonable utilization.

155. As regards the commentary, the view was expressed that the reference to an "equitable share, or portion, of the uses" in paragraph (2) was not a very felicitous one, but could be accepted if it was just a way of saying that in an international watercourse, taken as a whole, there was an aggregate of uses by different States and that the use by each State in its own territory was considered to be a "share" or "portion" of that aggregate of uses. As to paragraphs (8) and (9) of the commentary, they were viewed as providing a good illustration of the use that should be made of a commentary inasmuch as they clarified in a most useful manner the principles of equitable utilization and equitable participation and would significantly assist watercourse States and third-party adjudicators in the settlement of differences between such States. It was remarked that the commentary was correct in identifying the basic principle of sovereign equality of States as giving rise to "an equality of right", and provided an excellent explanation - consistent with State practice as well as with conventional, judicial and arbitral interpretations of the role of equity in the delimitation of maritime boundaries - of how the principles of equitable utilization and equitable participation were to be applied in practice.

Article 7. Factors relevant to equitable and reasonable utilization

156. Article 7 was viewed as an important provision which should be retained in the draft articles and as a necessary complement to paragraph 1 of article 6, since it indicated factors and circumstances to be taken into account in ascertaining whether a watercourse was being used in an equitable and reasonable manner.

157. Several representatives welcomed the fact that by providing that "all" relevant factors should be taken into account the draft article clearly indicated that the list set forth therein was illustrative and not exhaustive, thereby taking account of the wide diversity of international watercourses. The approach reflected in the article was viewed as preferable to that adopted in article V of the Helsinki Rules, and satisfaction was expressed at the neutral wording used, which reduced the risk of disputes among watercourse States, especially between upstream and downstream States. The statement in paragraph (3) of the commentary that no priority or weight was assigned to the factors and circumstances listed was also favourably commented upon.

158. One representative however remarked that the list of criteria and circumstances was much smaller than that of the previous draft and that the draft article had been simplified to such an extent that the enormous step forward which had been taken with the previous version - in which the original list, contained in article IV of the 1966 Helsinki Rules, had been expanded - had been lost. He regretted that, for example, the criteria relating to the past utilization of the waters of the basin, including existing utilization and the population dependent on the waters of the basin in each State, should have been dropped and that a backward step should have been taken in such an important matter. He urged the Commission to reconsider this change and also expressed concern at the contrast with studies such as that carried out by the United Nations Development Programme's group of experts on the harmonious use of transboundary resources, or that conducted by the group of experts of the World Commission on Environment and Development, the latter of which had submitted an important report several days earlier to the General Assembly, adding that in his view such efforts should be taken into account by the Commission, because it was alarming how differently they reflected the international practice of States.

159. Specific comments on the list included: (a) the remark that the phrase "existing and potential uses" in subparagraph (d) was unclear and that a better formulation was to be found in article V (2) (g) of the Helsinki Rules and in article 3 (a) of the revised draft propositions of AALCC; (b) the remark that the commentary was too sweeping in its interpretation of subparagraph (f), referring to other means of compensation not involving the use of water; and (c) the observation that a reference to the particular obligations and duties of watercourse States with respect to the protection of the marine environment should be included, inasmuch as pollution of national or international watercourses was one of the most important sources of marine pollution.

160. With reference to paragraph 2, the view was expressed that the meaning of "watercourse States concerned" should be made specific and the question was asked whether the intention behind the provision was that when a watercourse State

requested consultations his request should be agreed to by the other watercourse States.

3. Observations made on article 1, on draft article 9 as referred by the Commission to the Drafting Committee in 1984 and on draft articles 10 to 15 as submitted by the Special Rapporteur

Article 1. Use of terms

161. Support was voiced for the Commission's decision to defer for the time being consideration of the issue of the terms used, particularly the word "system", because it would be difficult to draw up a list of such terms at the current stage.

162. On the other hand, regret was expressed that the Commission should have so far been unable to solve the terminological problems which were very closely connected with the content of the document being formulated, its form, its purpose and its scope of application, and that the Drafting Committee should have again deferred consideration of draft article 1, thereby complicating further work.

Draft article 9. Prohibition against activities with regard to an international watercourse causing appreciable harm to other watercourse States

163. Some representatives commented on draft article 9 as referred by the Commission to the Drafting Committee in 1984 and on its relationship to other articles. Thus, one representative observed that the use of the terms "appreciable harm" in draft article 9, "adversely affect" in draft article 4, paragraph 2, and "affected to an appreciable extent" in draft article 5, paragraph 2, unfortunately created uncertainty about the magnitude of the damage or harm which gave rise to the obligation to consult or notify the affected States or indeed the nature of the types of use prohibited by draft article 9. Another representative agreed that the terminology used gave rise to some confusion and added that, since causing appreciable harm could not always be wrongful, the draft articles should reflect the Special Rapporteur's view that, in the case of conflict of uses, the doctrine of equitable utilization could only minimize the harm to each State and not eliminate it entirely and that the harm would thus be wrongful only if it was not consistent with the equitable utilization of the watercourse by the watercourse States concerned.

164. The remark was furthermore made that within the terms of draft article 9, there seemed to be a tension between prohibited use that might cause appreciable harm and the inclusion of such use in a watercourse agreement, and that one did not see clearly how, within the standards to be established by the draft articles, a type of use that might cause appreciable harm became none the less legal by reason of its incorporation in a watercourse agreement. The view was expressed that such a likelihood rendered ineffectual any attempt to establish mimimum standards of use, as outlined in draft article 6 on equitable and reasonable utilization and developed in draft article 7, and that one therefore had to conclude that, for the

minimum standards to have legal force, the application and adjustment by watercourse States of the residual general principles (as provided for in draft article 4, para. 1) should not do violence to the minimum standard of reasonable and equitable utilization.

Draft article 10. General obligation to co-operate

165. Attention was drawn to the interdependence of States in the contemporary world and to the fact that international co-operation in solving international problems was one of the purposes of the Charter. Emphasis was placed on the importance of co-operation as a fundamental principle of watercourse management and on the interrelated nature of all aspects of such management and control, as evidenced by the Sandoz incident involving the chemical pollution of the Rhine. That principle was viewed as essential, on the one hand, for preventing an activity from having negative consequences for the other riparian States and, on the other hand, for ensuring optimum utilization of the watercourse in the interest of all.

166. A number of representatives shared the view that the principle of co-operation had a firm basis in international law. Reference was made in this connection to Article 1, paragraph 3, of the Charter and to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The Charter of Economic Rights and Duties of States and various articles of the Convention on the Law of the Sea were also mentioned in this context. It was furthermore recalled that a number of riparian or littoral African States had constructed legal régimes based on the principle of co-operation. Reference was made in particular to article 4 of the Niamey Act, under which the riparian States undertook to establish close co-operation in any project likely to have an appreciable effect on certain features of the régime of the Niger River, to article 6 of the Statute relating to the development of the Chad Basin, and to other river agreements between African States, for example the African Convention on the Conservation of Nature and Natural Resources of 1968.

167. As regards the question whether a general obligation to co-operate should be enunciated in the draft articles, several delegations felt that the obligation in question was an essential foundation for a draft setting out a régime for the relations of States that shared an international watercourse. The view was expressed that this obligation had its legal basis in the Charter of the United Nations and in the Friendly Relations Declaration and could be viewed as no less important at present than the principle of the sovereign equality of States. It was also said that obligations of co-operation and consultation, as corollaries of such general principles as that of the equitable and reasonable utilization of an international watercourse, were already crystallized in customary law or were in the process of becoming so. The remark was furthermore made that there was no point in discussing whether or not there was a general obligation in international law for States to co-operate since the Commission's mandate was not restricted to codifying existing law but extended to its progressive development.

168. Other representatives, while recognizing the existence of a general obligation

of States to co-operate not only pursuant to various international instruments and State practice, but also stemming from the fact that such an obligation was essential to peaceful coexistence among States, held the view that the obligation had not yet been formulated in positive law. It was also said that there was no general obligation under international law to co-operate under all circumstances and that co-operation must have a precise goal - in the present instance establishing the best way of using and protecting the waters or, as one representative put it, achieving equitable utilization, avoiding or minimizing pollution and preventing environmental degradation. Reference was made in this connection to certain existing watercourse agreements, and in particular that concerning the development of the Kagera River basin concluded between the riparian States of Burundi, Rwanda and the United Republic of Tanzania in 1977 and that for the development of the Senegal River concluded between Mali, Mauritania and Senegal in 1972. The view was expressed that those arrangements had on the whole been successful, not because of the obligation to co-operate, but rather because of the recognition of the necessity of co-operation among riparian States to their mutual advantage. Those examples, he said, showed that as a result of shared common objectives, good-neighbourly relations and common development problems the principle of co-operation had been significantly advanced in Africa, on the basis of equality and full respect for the territorial sovereignty of all riparian States.

169. Still other representatives, while not wishing to question the desirability of co-operation between States in connection with international watercourses as with all other aspects of international relations, indicated that they failed to see the practical purpose of stating that proposition in the form of a general obligation, or the real meaning of such an obligation and how it could be enforced. It was suggested to omit draft article 10, taking into account the problems to which it gave rise and its lack of practical value, or at least to examine attentively, while attempting to make the present formulation more specific, the question of the practical operation of any provisions on the subject.

170. One representative observed in this connection that the duty to co-operate, even if expressed in general terms in one part of the draft articles, should in other articles be given content and made to operate within a well-defined juridical framework with fairly precise requirements. The remark was made that articles 10, 12, 6 and 7 provided for a general obligation to co-operate in the utilization of an international watercourse or a duty to co-operate in specific aspects of that utilization, and that it would presumably be necessary in other articles to specify a duty to co-operate in relation to other aspects of the utilization of an international watercourse. He added that failure to specify such a duty in relation to certain articles should not be interpreted as meaning that the duty did not apply to those articles, since the general duty to co-operate provided for in article 10 ought to be seen as applicable to all the provisions in the draft articles and that he accordingly preferred the formulation in article 10 to the one suggested in paragraph 98 of the Commission's report.

171. Some representatives insisted on the need to preserve a fair balance between the principle of co-operation and all the other principles of international law relating to the topic. Several of them singled out among such principles that of

the permanent sovereignty of States over their natural resources, which, it was stated, was not adequately reflected in the draft articles proposed thus far. Mention was also made of the principle of equality of rights, the principle of sovereignty and territorial integrity of watercourse States and the principles of good-neighbourliness. Reference was made in this connection to the report of the Sub-Committee on Good-Neighbourliness (A/C.6/41/L.14), which listed the rights and duties of States concerning good-neighbourliness and co-operation between neighbouring States - particularly the principle of the taking of measures by States to eliminate or minimize the effects of some domestic activities on neighbouring States or on States of the same area and the refraining by States from domestic activities that clearly might have harmful effects on the territory of neighbouring States - and stressed the need for consultation and co-operation in activities and events that clearly might affect neighbouring States.

Draft articles 11 to 15

172. Several representatives supported those draft articles which they viewed as essential in order to give full effect to the substantive provisions of the draft articles. Agreement was expressed with the view of the Special Rapporteur that the notification-and-consultation obligations existed in general international law and were vital to the operation of the draft articles, and the remark was made that the texts proposed were balanced and did not detract from the requirement that the procedural protection for a potentially affected State should not be permitted to be used to frustrate legitimate uses by another State.

173. Other representatives, while agreeing that the philosophy behind the draft articles was a sound one and reflected the need for harmonious relations among States sharing international watercourses, felt that their present formulation was not entirely satisfactory and therefore welcomed the Special Rapporteur's intention to redraft them, taking into account the discussion in the Commission and the Committee.

174. Still other representatives felt it premature and unrealistic to impose rigid procedures of the type envisaged by the Special Rapporteur. The view was expressed that the draft articles under consideration would hamper the sovereign right of States to utilize their resources and that they unduly benefited the notified State and imposed excessively heavy burdens on the State contemplating new uses. The remark was also made that the draft articles were unbalanced in favour of the downstream States and were not suppported by State practice.

175. One representative proposed that to cure the defects the draft articles should be recast as procedural rules in the form of recommendations, so as to bind the watercourse States concerned only when incorporated in specific watercourse agreements.

Draft article 11. Notification concerning proposed uses

176. Draft article 11 was found by some representatives to be both necessary and appropriate. The view was expressed that when a State contemplated such new use of an international watercourse there had to be a duty to notify other watercourse States and provide them with sufficient information to enable them to assess any potential harm. Emphasis was placed on the need for the notices contemplated (a) to contain enough information to enable the other States to evaluate the potential for harm as accurately as possible and (b) to be issued prior to any activity.

177. On the other hand, serious doubts were expressed as to the advisability of endorsing the principle formulated in draft article 11. It was said that the principle was virtually impossible to enforce and that the proposed obligation might be exploited by certain States for purposes that were alien to the objectives of the draft articles and might result in each watercourse State being given the possibility to exercise veto power by withholding its consent to a new use contemplated by another State.

178. Concrete comments on the draft article included: (a) the observation that, in order to avoid problems of interpretation concerning the draft articles on notification, draft article 11, which dealt with the duty to notify, should be adapted to draft article 9, which prohibited activities causing appreciable harm to other watercourse States; (b) the remark that the word "contemplate" did not really define the situation in which the duty to notify existed and should be replaced by another wording which would indicate more exactly that the intention had already taken form in a concrete project; and (c) the observation that a watercourse State which contemplated a new use of an international watercourse that might cause appreciable harm to other watercourse States was obliged to obtain the necessary data even if they were not available, in order to permit itself and the watercourse State to be notified so as properly to determine the potentially adverse effects of the new use, and that the word "available" should accordingly be deleted.

179. Several representatives commented on the phrase "cause an appreciable harm". While some of them expressed preference for the substitute formula proposed by the Special Rapporteur, namely "have an appreciable adverse effect", others wondered whether such a change would help to dispel the doubts referred to in paragraph 103 of the report concerning the triggering mechanism of the notification obligation provided for in the article. It was pointed out that, although some members of the Commission had remarked that obliging a State to notify other watercourse States when it contemplated a new use of an international watercourse which might cause appreciable harm to other States was tantamount to obliging that State to admit in advance that it was planning to commit an internationally wrongful act, the Special Rapporteur's substitute formula would imply that a State would be obliged to give notification about a new use which, if implemented, would not be in breach of article 9 since it would only have an appreciable adverse effect upon, and not cause appreciable harm to, other watercourse States. The question was asked why a State should be obliged to set in motion the time-consuming notification procedure envisaged in the draft article when its proposed activity would not be in breach of article 9. Preference was therefore expressed for retaining article 11 as

presently worded, accepting the Special Rapporteur's explanation that the particular provision in article 11 was intended as a factual, not legal, criterion. In order to highlight the factual nature of the criterion, it was suggested to indicate that all new uses called for notification and to insert a definition of new uses into the draft, taking into account the definition in footnote 50. It was furthermore suggested to add a provision to the effect that no adverse inference as to whether the notifying State intended to commit an internationally wrongful act was to be drawn from the mere fact of notification.

Draft article 12. Period for reply to notification

180. With reference to the draft article as a whole, satisfaction was expressed that provision was made for a reasonable period of time between notification and reply, and that the text allowed for negotiations between the States concerned with regard to the length of the period. The remark was made in this connection that since the draft articles gave a sort of right of veto to the notified State its suspensive effect should be of a maximum duration that could be extended at the request of that State.

181. As regards paragraph 1, some representatives expressed preference for alternative B, which was viewed as more in conformity with the procedure laid down in previous articles. One representative suggested that the period for reply to notification should be limited to not more than nine months, so as to preclude the possibility of the notified State subjecting the notifying State to unnecessary delays.

182. With regard to paragraphs 2 and 3, the view was expressed that the applicable principles should ensure that throughout the standstill period the notified State neither suffered appreciable harm nor had the veto. It was also remarked that the Special Rapporteur's proposal to provide for a suspensive effect would be acceptable only if it required co-watercourse States which felt threatened to establish by objective evidence that the proposed use would truly impair their uses of the watercourse and that it would cause them irreparable harm.

183. With reference to paragraph 2, the question was asked under what condition the notifying State might proceed with the proposed new use after the period of time for study and evaluation had elapsed and after the notified State had raised objections against the new use, and the subsequent consultations or negotiations envisaged in paragraphs 2 and 3 of draft article 13 had failed to lead to an equitable resolution of the situation. Also in relation to paragraph 2, it was suggested to delete the word "co-operate" and to retain merely the reference to the provision of data and information by the notifying State.

184. As regards paragraph 3, it was remarked that the duty to negotiate, also embodied in articles 13, 14 and 15, was sufficiently well defined and called for the fulfilment of certain precise requirements which, if not fulfilled, would engage the responsibility of the delinquent States. Reference was made in this connection to the arbitral award in a case between Kuwait and the American Independent Oil Company, according to which the failure of the negotiations might

be attributable to the conduct of one of the parties, in which case the matter became transposed onto the plane of responsibility. The view was on the other hand expressed that the text called for clarification. It was remarked that, while the concept that the negotiations should not unduly delay the initiation of the contemplated use was unobjectionable, the question arose as to how and by whom such a possible undue delay would be established and what the consequences thereof would be. It was suggested to provide for a minimum period, such as that proposed in alternative B for paragraph 1, or a maximum period for study and evaluation of the potential harm, it being understood that, since the fixing of such a maximum period naturally carried with it the danger that in certain cases too little time would be left to the notified States for study and evaluation, a possibility should be created for the notified State to ask under certain conditions for an extension of the period.

Draft article 13. Reply to notification: consultation and negotiation concerning proposed uses

185. The draft article as a whole gave rise to reservations on the part of some representatives. It was described as coming close to granting a power of veto to the notified State and therefore difficult to accept for many States. Emphasis was placed on the need to formulate the text in such a way as to prevent consultations and negotiations from being used to upset the necessary balance between the rights and interests of States. The view was also expressed that the notified State should be required to indicate in detail why it believed that the notifying State was likely to exceed its equitable share of the resources in question as a result of the new use contemplated.

186. With regard to the procedures to be followed in case of contestation, the view was expressed that it would be worth considering laying down a time-limit for the proposed consultations and negotiations so that if they failed to reach a satisfactory conclusion the States involved could resort to the other means of settlement laid down in the draft. In this connection, the view was expressed that it would be preferable to delete from article 13, paragraph 5 - as well as from article 14, paragraph 1 - the references to the "dispute settlement provisions of these draft articles" and to list the other peaceful means of settling disputes provided for in Article 33 of the Charter and the good offices provided for in the Manila Declaration on the Peaceful Settlement of International Disputes. The point was on the other hand made that some form of binding third-party settlement procedure was greatly preferable in order to settle disputes which might arise out of the application of the draft articles. The fear was expressed that a simple reference to the methods of peaceful settlement mentioned in the Charter would not lead to a final and fair settlement of disputes, and it was suggested that a provision patterned on those included in the 1976 Convention for the Protection of the Rhine against Chemical Pollution and in the 1976 Convention for the Protection of the Rhine against Chlorides should be included either in the main text or in an annex to the draft articles.

187. As regards the wording of the article, it was suggested that in paragraph 3 the words "unable to adjust" should be replaced by "unable to confirm or adjust".

Draft article 14. Effect of failure to comply with articles 11 to 13

188. The general observation was made that care should be taken to strike an appropriate balance between the interests of the notifying State and those of the notified States.

189. As regards paragraph 1, the point was made that the phrase "any of those other States believing that the contemplated use may cause them appreciable harm may invoke the obligations ... under article 11" was unclear, inasmuch as it could mean either that the State planning the new use would be required to give the notification or that it would be assumed that the notification had been given. The view was expressed that while the latter seemed to be the correct interpretation from the wording of the article the text ought to be clarified in this respect.

190. As regards paragraph 3, one representative expressed agreement with the members of the Commission who had proposed its deletion. Although sharing the opinion that the paragraph could be eliminated without loss to the system of procedural rules as a whole, another representative observed that the liability imposed in that paragraph on a watercourse State which failed to comply with the notification duties laid down in draft articles 11 to 13 was not necessarily identical to the liability provided for under general international law in the case of non-compliance with those articles. In his view, the liability envisaged in paragraph 3 for "any harm caused to other States by the new use, whether or not such harm is in violation of article 9" appeared to be much more stringent than the harm which might be deemed to have been caused because of the non-observance of the obligations laid down in draft articles 11 to 13. Still another representative held the view that, notwithstanding the prevailing opinion in the Commission, the paragraph, like paragraph 3 of article 15, should be set aside until such time as problems relating to liability under the draft articles were clarified. However, he agreed that a case could be made for the deletion of article 14, paragraph 3, inasmuch as the situation envisaged was that of a wrongful act, to which general rules on responsibility would apply, even though the proposed provision linked responsibility for the violation of the procedural rules to harm that might be independent of such a violation.

Draft article 15. Proposed uses of utmost urgency

191. Some representatives shared the view that the text required careful consideration because it could provide a convenient way to evade the obligations set out in the preceding draft articles. While deletion of the draft article was advocated in view of the difficulties caused by its interpretation and application, another suggestion was that the text should be drafted with extreme caution in order to ensure that States could not use it as a means of shirking their basic responsibilities under the draft. In this connection, disagreement was expressed with the suggestion in paragraph 116 of the report that the task of clarifying what kind of situation amounted to utmost urgency under article 15 should be left to the Drafting Committee; the issue was, it was stated, a substantive one and should be considered by the Commission as a whole.

192. Commenting on the relationship between paragraphs 1 and 2, one representative said that it was not clear how the duty under paragraph 2 to engage in consultations and negotiations with the notified State in accordance with article 13 was consistent with paragraph 1, which provided that in cases of the utmost urgency the notifying State under article 11 could, notwithstanding affirmative determinations by the notified State that the proposed new use could cause it appreciable harm, proceed with the initiation of the contemplated use. He observed that, since the requirement to consult and negotiate under article 13 appeared based on the assumption that the notifying State had not proceeded with initiation of the new use, it was difficult to see how it could apply in the context of article 15 under which the notifying State did not need to wait for a reply from the notified State.

193. As for paragraph 3, the remark was made that it provided for liability in cases where harm was the consequence of an activity that was lawful under paragraphs 1 and 2 of the same article, so that its deletion would result in the elimination of all liability in the cases in question. The issue was viewed as calling for further discussion in order to clarify, in particular, whether the "utmost urgency" dealt with in article 15, paragraph 1, amounted to the causes (force majeure or necessity) excluding wrongfulness. The view was expressed that if the answer were to be in the affirmative, the whole article would be superfluous unless paragraph 3 was retained, and that in the opposite case article 15 would serve a useful purpose and the issue of the retention or deletion of paragraph 3 would be a substantive matter, inasmuch as that paragraph laid down a principle that had a result that was opposite to that ensuing from the general principles on responsibility.

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

1. General observations

194. The legal regulation of activities not prohibited by international law which might have transboundary consequences affecting persons or things was generally recognized as increasingly relevant to the present-day world, as a result of scientific progress and the interdependence of States. Emphasis was placed on the need for the international community to protect itself against some of the less than beneficial effects of technological advances and to face the global problems of ecological security. Reference was made in this connection to the ecological catastrophes of 1986 which, it was stated, illustrated the necessity to speed up the work of the United Nations in this field. It was at the same time stressed that the formulation of international rules on the topic should not become an obstacle to scientific and technical progress, which was essential for the progress and prosperity of peoples. The task at hand was considered to be particularly important in view of the recent development in collective thinking attested by three international instruments dealing with co-operation and prevention in the technological field: the two 1986 Vienna Conventions on the advanced warning system and on assistance in the event of nuclear or radiation accidents and the 1987 Montreal Protocol on the ozone layer.

195. Due note was taken of the further satisfactory progress made in the study of the topic. The question was however asked whether the Commission had devoted to the issue all the time that it deserved. Regret was also expressed at what was viewed as an attempt on the part of some members of the Commission to frustrate progress on a topic that was clearly of importance to the peoples of all nations.

196. Some representatives felt it difficult to comment on chapter IV of the report and on the subject as a whole. The remark was made that the Commission had held a very wide-ranging debate on a great number of issues and that while knowledge of its views on the fundamentals of the topic and on the more or less accepted approach was useful the Sixth Committee could not reasonably deal with the 15 issues carefully presented in paragraphs 134 to 152 of the report. Regret was expressed that no clear indication should have been provided of the subjects on which the opinions of Governments would be of particular interest. The view was furthermore expressed that one did not yet perceive a convincing architecture of possible rules emerging from the Commission's work and that the level of generality of the discussion held was indicative of a division of opinion on the substance. Regret was expressed in this connection that after 10 years of discussion the scope and substance of the subject-matter should still be undefined, that there should be contradictions with respect to fundamental definitions and concepts and that, as had become apparent from the discussion in the Sixth Committee, agreement should not yet have been reached on the approach to be taken to the topic.

197. The remark was made that part of the difficulty in coming to grips with the topic might be caused by its title, which focused on the fact that the acts causing injury were not contrary to international law. It was stated in this connection that the essence of the topic lay not in the wrongfulness or otherwise of an activity but in the danger it represented and the risks it entailed. New approaches to the topic were therefore suggested. Thus it was said that liability was the counterpart of the exclusive sovereignty of a State over its own territory and that the draft should be centered on the question of providing sanctions for indirect violations of territorial sovereignty. Another view was that, taking into account Principles 21 and 22 of the Declaration of the United Nations Conference on the Environment and the warnings contained in the report of the World Commission on the Environment, a focus on environmental concerns would provide a clearer idea of the objective: the result of the Commission's work, it was stated, would be a framework convention on international environmental law. It was also suggested to approach the question from the angle of co-operation among States, and reference was made to Principle 22 of the Stockholm Declaration and to the work of the International Atomic Energy Agency (IAEA) in strengthening international co-operation for safer use of nuclear energy.

198. A further source of difficulty in tackling the topic was, it was stated, its relationship to the topic of State responsibility, which had tended to stunt its development. Some representatives maintained that the former topic could not move forward independently of the latter and suggested that the Commission should not undertake any drafting until it had fully dealt with State responsibility. Others stressed that the present topic was urgent and considered as unacceptable the argument that work on that topic must await the outcome of work on State responsibility.

199. With reference to the distinction between State responsibility and liability, the view was expressed that State responsibility imposed duties or standards in performing an act whereas liability for acts which were not prohibited designated the consequences of failure to perform those duties or meet the general standards, and that liability for injurious consequences arising out of acts not prohibited by international law flowed from the fact that the norms of that liability were the consequences of failure to perform a duty or meet a general standard. Another view was that the difference between the two concepts lay in the fact that in the case of State responsibility cause for action stemmed from breach of an obligation whereas in the case of liability the essential factor was a harmful event unforeseen by and unknown to the State concerned - in other words, an injurious act not resulting from the breach of an obligation.

200. As regards the method to be followed in regulating international liability for injurious consequences arising out of acts not prohibited by international law, some representatives advocated a case-by-case approach and favoured the conclusion of agreements on particular kinds of activities with possible harmful effects, such as treaties concerning liability for damage caused by outer-space activities. Reference was also made in this context to the proposal for the establishment of a general régime of liability and a system for preventing nuclear disasters, which provided for State liability for material damage. The representatives in question held the view that obligations of prevention and reparation in relation to dangerous activities arose exclusively from formal agreements between States and that it was agreements of that type that should serve as a point of departure for the codification of the law of liability. Some of them added that they had no objection to the Commission elaborating basic principles for future treaties on liability.

201. Other representatives insisted on the urgency of the issues at stake and stressed that it would be improper to wait for more accidents to occur before customary norms were developed in this area of international law. Attention was drawn to the duty of the Commission under its mandate to promote the progressive development of international law. Disagreement was expressed with the claim that there was not a sufficient basis on which to begin building norms on the topic. Mention was made in this connection of the conventions concluded with regard to the peaceful uses of outer space and under the auspices of IAEA. Attention was also drawn to Principle 21 of the Stockholm Declaration, which provided for the responsibility of States to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

2. Suggested approaches to the topic

202. Some representatives favoured the concept of strict liability as an appropriate basis for the Commission's work. The remark was made that this concept, which was described as an attempt to prevent harm coupled with an obligation to pay compensation if harm did occur, had found expression in many modern civil codes in the form of responsibility for acts that harmed one's neighbour and was not restricted to common-law systems. It was pointed out that

strict liability, i.e. liability arising from a causal relationship between activity and injury, was not the same as absolute liability, that strict liability would only apply, in the area under consideration, in the absence of agreement between the States concerned on hazardous activities and that its application would be settled through negotiations that would take account of factors modifying the strictness of liability. While agreeing that exceptions such as force majeure, fortuitous event and contributory negligence could be introduced as moderating factors, one representative favoured a presumption of strict liability which was strong enough not to be tempered by negotiations and the concept of shared expectations. Also in favour of strict liability it was adduced that, although much more stringent standards had been adopted in many legal systems, there was no convincing evidence that it had discouraged the development of science and technology. Emphasis on strict liability, it was furthermore observed, would not diminish the responsibility of a State, corporation or individual under other legal rules in respect of damage arising out of actions which were attributable to that party.

203. Other representatives, while acknowledging that decisions of international courts and provisions of international agreements could serve as evidence of the existence of strict international liability and agreeing that given the increasing hazards it was important not to leave unregulated injurious consequences in respect of which State responsibility in the traditional sense could not be incurred, held the view that although liability was accepted in principle it was proving difficult to derive a system of precise rules from existing customary law. It was also remarked that in the field in question there were so far only special conventions dealing with specific activities, the purpose of which was above all to harmonize domestic law in the area of civil liability, and that the only multilateral legal instrument dealing with the objective responsibility of States was the 1971 Convention on International Liability for Damage Caused by Space Objects. It was suggested to take existing international agreements on civil liability and national rules on strict liability and to examine to what extent general principles of international law or at least some principles could be derived from them. The Commission, it was added, should consider whether strict liability should be founded not only on actual damage but also on the nature of the activity that caused it. Categories of damage which were singled out included damage originating in nuclear facilities, air and water pollution caused by chemical works and injurious consequences of genetic research.

204. Still other representatives objected to what was termed the inadmissible generalization of strict liability. It was observed in this connection that the lack of practice and normative material should necessitate caution lest abuses occur in practice under the pretext of countering the injurious consequences of a lawful activity. International law, it was stated, offered no general or customary norm imposing the obligation of compensation for damage; the principle of "strict liability" could only be applicable within a restricted and precisely defined scope, and a formal agreement between States remained the only source substantiating such an obligation.

205. The remark was made that if the introduction of strict liability posed problems for many States the topic could be approached in terms of prevention and

reparation, as proposed by the Special Rapporteur, in order not only to make it acceptable but also to preserve its unity and enhance its effectiveness. A number of representatives agreed that a pragmatic approach combining the rules of prevention and reparation was most likely to gain acceptance and should be used as a working hypothesis. This approach was described as a subtle one which sought to apply a régime of reparation for harm caused by a State to the persons and property of another State when the harm could not be linked to the violation of a norm of conduct or a primary rule, and, to that end, to insert an obligation of prevention between the dangerous activity, or the harm, and the reparation. The work on the question was viewed as useful inasmuch as a legal framework must be established for doubtful cases in which there was no clear line of demarcation between the lawful and the unlawful.

206. Several of the representatives endorsing this approach insisted on the need to strike an appropriate balance between the rules dealing with the duty of care and prevention and the rules on liability, pointing out that to provide for reparation alone would be unfair and illogical and that a rule of prevention without sanction for its breach would be ineffective. The remark was however made that the element of prevention should not be overemphasized, as reparation was the essence of liability. It was also said that the principles on reparation should be combined with assurances of non-repetition and that there should be an effective linkage between prevention and reparation.

207. In this connection the view was expressed that prevention of injurious consequences should involve the obligation for the person carrying out the activity, with the guarantee of the State of origin, to take suitable precaution - failing which the person carrying out the activity would have to make reparation - and that the affected State might be entitled to oblige the State of origin or the potential author of the injurious consequences to take the necessary precautions. It was added that non-prevention might be considered as an aggravating circumstance which would increase the amount of damages payable. Reference was furthermore made to the linkage which already existed in terms of rules of evidence, as was seen in the Corfu Channel case. It was said in this connection that rules of prevention enabled responsibility for violations to be established without further proof of failure to exercise due care, either by virtue of an irrefutable presumption of lack of due diligence or by virtue of a rebuttable presumption which would in effect reverse the burden of proof.

208. Some representatives however observed that including prevention as a component element of the topic gave rise to a number of questions. It was first remarked that while the current trend towards the formulation of rules of conduct for specific dangerous activities was a positive one since such rules made the harmful consequences of such activities less likely and provided a solid basis for establishing responsibility in case of violation, it was doubtful whether the Commission would succeed in laying down such primary rules in a way that would render them applicable to the entire range of possible activities. It was also pointed out that, once rules of international law requiring States to act in a certain way or to refrain from a certain activity were established, non-compliance with the rules would amount to an internationally wrongful act with the result that the question would be transferred to the field of international responsibility.

The question was further asked whether when damage occurred despite full compliance with the rules there was an obligation to indemnify - a question which, in the view of some delegations, called for a negative answer inasmuch as a State could not incur liability once it had fulfilled its obligations. Other questions which were raised in this context were whether violation of rules of prevention not resulting in damage would give rise to international claims and whether, in the event that damage occurred as a result of a violation of the rules, responsibility would stem from the violation or from the dangerous activity.

3. Principles relevant to the topic

209. The three principles identified by the Special Rapporteur as applicable in this area and listed in paragragh 194 (d) of the report generally met with approval. They were however viewed as extremely abstract in their formulation.

210. With reference to the principle of sovereignty, it was observed that while a certain measure of caution should be exercised with regard to the regulation of lawful State acts sovereignty was not only the right of a State to act in its own territory but also the right not to have harmful interference on its territory from outside. Mention was made in this context of the concept of sic utere tuo ut alienum non laedas, which reconciled the right of every State to engage in lawful activities, particularly in its own territory, without being answerable to another State and the right of every State to enjoy the benefit of its own facilities and assets without interference from the activities of another State. In order to reconcile those two rights, neither of which, it was observed, could be absolute if for no other reason than they would conflict, it was suggested to rely on the principles of good-neighbourliness, co-operation and good faith, which should afford the basis for agreed procedures entailing the obligation to give notification of activities and of their possible consequences and, when consequences occurred, to negotiate in good faith. It was suggested that the principle as formulated in paragraph 194 (d) (i) of the report should also refer to the need to minimize the potential transboundary injury resulting from any activity undertaken within the State's territory or control.

211. As regards the principle that the innocent victim of injurious transboundary effects should not be left to bear loss, the view was expressed that where nationals of one State were injured or when property was damaged as a result of activity occurring in another State the loss should be borne by the State in which the loss-causing activity occurred, since it was in a better position than anyone else to prevent damage. This approach, it was stated, would ensure that the State harmed was not left with a loss and would provide an incentive for States to take particular precautions where activity within their territories could have transboundary consequences. Emphasis was however placed on the need to establish a reasonable and equitable régime which should protect the affected State without imposing an unbearable burden on the State of origin. Attention was drawn in this connection to the fact that developing countries lacked the expertise for appreciating the exent of the risks posed by the work of foreign corporations operating in their territory.

212. As to the forms of compensation, some representatives held the view that private law remedies were ineffective. It was stated in this connection that the civil law approach, although it had its merits, was fully applicable only among States with comparable legal systems and furthermore was inadequate in cases of large-scale accidents causing damage not only to a great number of individuals but also to the environment. Reference was made in this connection to the proposal for the elaboration of an international convention on State liability for damage caused by accidents at nuclear power installations, which aimed at establishing a duty of compensation at the State level and would thereby provide an important incentive for Governments to promote nuclear safety at the national level. It was also said that to enable the interests of the victims to be dealt with quickly the State should agree to accept liability for such activity provided that the obligations of the said entities vis-à-vis the State were laid down under the national regulations.

4. Scope of the topic

213. Some representatives held the view that the draft should cover only the most dangerous activities rather than encompass all acts not prohibited by international law that might give rise to injurious consequences. The definition of the term "dangerous activities", it was added, should be based on existing international instruments and State practice. Also in relation to the notion of "dangerous activity", some delegations expressed preference for a conceptual definition and others for a list of the activities concerned which, one representative observed, would have to be renewed periodically. It was also suggested to elaborate a general definition and to identify a non-exhaustive list of dangerous activities in the commentary. This approach gave rise to reservations on the ground that technological progress would quickly render any list obsolete.

214. Some representatives held the view that the draft should only cover activities with physical consequences and that going beyond that area to include economic and social activities would lead to insurmountable difficulties. The view was on the other hand expressed that, while the criteria of "physical consequences" adequately covered the danger posed by transboundary effects of certain activities, the important factor in the establishment of liability under the topic was proof of the cause-and-effect relationship between the activity and the injury and that the Commission might need to reflect further on the argument that economic and social consequences should not be excluded from the scope of the topic since such consequences were by no means infrequent. The decision to exclude economic activities, it was stated, raised certain moral questions which the international community should not overlook.

215. As regards the scope of the draft in terms of the entity conducting the dangerous activity, doubts were expressed concerning the inclusion in the definition of the activities not only of the State but also of physical and legal persons within its territory causing damage within the territory of another State to such other State and to its physical and legal persons. This, it was observed, was tantamount to making the State liable for all activities within its territory or under its control about which it knew or had means of knowing and disregarded

the fact that damage caused by the activities of individuals to other individuals was governed primarily by private international law.

216. As to the pre-conditions for liability listed in draft article 4, they were viewed as reflecting a concept of liability which presupposed fault, and which numerous international conventions had rejected. Doubts were furthermore expressed regarding the requirement that the injury should be foreseeable, and the remark was made that the magnitude or seriousness of the injury was not affected by the fact that it was not foreseen. The concept of "appreciable risk" was on the other hand viewed as useful in describing the foreseeability of a risk of a certain magnitude that should trigger the obligation of the State of origin to take measures of prevention. The remark was made that the concept of appreciable risk was appropriate in a general convention but should be supplemented in specialized instruments with objective criteria that would help the State of origin to identify the risk in time. Mention was made in this connection of the possible role of a third party, for example a fact-finding commission.

217. The requirement that the State of origin should have known or should have had means of knowing that a dangerous activity took place within its territory or control was viewed by some representatives as having a sound basis in justice and equity. Its importance for developing countries was stressed, and support was expressed for the proposal that the question of liability should be subject to special review in the case of developing countries lacking the means for effective monitoring of the areas under their jurisdiction. Referring to the formulation contained in draft article 4, one representative remarked that it was not clear whether the requirement that the State of origin should know that the activity in question created an appreciable risk was part of the knowledge which that State should have regarding the activity or whether it constituted a separate requirement. In his view and taking into account the understanding reflected in paragraph 129 of the Commission's report, it ought to be treated as a separate requirement, and the words "provided further" should accordingly be added in the penultimate line of draft article 4 after the word "and" and before the word "that".

218. As to the terms "territory", "control" and "jurisdiction", they were considered as useful, if somewhat ambiguous. The view was expressed that a State should clearly be liable for extraterritorial consequences emanating from territory under its control when it did not have recognized sovereignty. The addition of the word "jurisdiction" was viewed as justified in order to cover areas such as exclusive economic zones.

219. Other comments concerning specific draft articles included (a) the observation that draft article 1 should expressly limit the scope of the draft to "activities that are not prohibited by international law", (b) the remark that paragraph 4 of draft article 2 lent itself to an interpretation endorsing the "protection of nationals" concept, a concept which some countries rejected in the absence of specific agreements, and (c) the observation that the phrase "any matter in respect of which a right is exercised or an interest is asserted" in draft article 2, paragraph 2 (c), was dangerously ambiguous.

5. Form and nature of the draft to be prepared by the Commission

220. As regards the end-product of the Commission's work in this field, the view was expressed that the Commission should consider whether it wished to propose a multilateral agreement or whether it should confine itself to establishing principles or guidelines which States should apply when concluding agreements on liability for hazardous activities or settling claims for damage caused.

221. Some representatives favoured the first course of action and others the second. Still others advocated a framework convention stating basic principles which would allow for the conclusion of more specific agreements in fields too different in nature from each other to be included with any reasonable success in a single general convention - an approach which, it was stated, would resolve the question of liability without committing the States to choosing a procedure that would not be adequate for the particular circumstances. With regard to the relationship between the framework agreement and agreements concluded by States in specific areas, it was suggested that the framework agreement should provide for an obligation to take account of its provisions in drawing up special agreements and should clearly stipulate that in case of conflict its rules would prevail. The criticisms of the framework-agreement approach expressed in relation to the topic of the law of non-navigational uses of international watercourses (see para. 113 above) were reiterated in the context of the present topic.

222. The view was expressed that the Commission need not worry about the nature of the draft articles inasmuch as reasonable texts would obtain the necessary support regardless of their form.

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

223. Several representatives, stressing the role of international organizations in present-day international relations, emphasized the relevance and importance of the topic. They welcomed the work of the Commission thereon and approved of the Commission's request that the Special Rapporteur should continue his study of the topic in accordance with the guidelines laid out in the schematic outline contained in his third report and in the light of the exchange of views in the Commission. These representatives generally found the Special Rapporteur's outline to be a good beginning and an adequate basis for further work.

224. Comments focused on the structure of the outline, on the general approach to the topic, on the scope of the future draft in terms of the organizations to be covered, on the concept of international organizations and on the next phase of the work.

225. On the first point, it was said that the outline, by dealing successively with the non-fiscal and the financial and fiscal privileges and immunities of the organization and of officials and experts on mission for, and persons having official business with, the organization provided a useful framework for the further development of the topic. Doubts were on the other hand expressed

regarding the advisability of drawing a distinction between the privileges and immunities of international organizations and those of their officials on the basis of whether or not such privileges and immunities fell within the financial sphere.

226. As regards the general approach to the topic, the remark was made that the future draft, instead of being confined to the existing legal régime, should endeavour to remedy the shortcomings of that régime, thus providing a better basis for the privileges and immunities of international organizations and the guarantees given to their officials, and that the outline provided by the Special Rapporteur should be expanded so as to include the capacity of and means at the disposal of international organizations for defending their officials' immunities, in accordance with the relevant jurisprudence of the International Court of Justice. It was pointed out in this connection that the draft under consideration should include the duty of the host country to ensure legal protection and respect for the status, privileges and immunities of the organizations and their officials so as to make it impossible for the host country to take restrictive measures of a discriminatory nature against officials of an international organization, as had been the case in certain States.

227. A piecemeal approach was on the other hand advocated whereby a few problems should be selected for consideration during the first stage, such as those concerning international organizations, and much more delicate problems, such as those relating to international officials, should be left for a later stage.

228. Support was expressed for the methodology adopted by the Commission, which combined the codification of existing rules and practice with the identification of lacunae. Both were viewed as useful undertakings which should be seen as complementary rather than mutually exclusive.

229. As regards the scope of the topic in terms of the organizations to be covered, the view was expressed that only international organizations of a universal character should come within the framework of the topic. Another opinion was that the topic should for the moment be restricted to universal organizations which could be the subject of a general convention on privileges and immunities, and that regional organizations should not be dealt with until a later stage.

230. The view was on the other hand expressed that, although it was appropriate for the Commission to concentrate on universal organizations, that should not be to the exclusion of regional organizations, in particular those which attempted to implement the objectives of universal organizations at a regional level and whose officials therefore needed privileges and immunities. The objective should be to protect and defend organizations of all kinds and their officials so that they were able to function without let or hindrance. Although the immunities they enjoyed might vary, a comparative study on the subject would be very useful.

231. On the concept of international organization, it was stated that, while no useful purpose would be served by embarking on a new definition, since the definition contained in the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character was still adequate, the Commission should consider the question of the international/

personality of organizations. In this connection, the view was expressed that draft article 1, presented by the Special Rapporteur in 1985, 7/ was somewhat narrowly conceived: it was said in particular that the words "to the extent compatible with the instrument establishing them" appeared to be restrictive and that the attributes mentioned in subparagraphs (a), (b) and (c) of paragraph 1 gave the impression that international organizations could have no other attributes. The words "under the internal law of their member States" were queried on the ground that such internal law was hardly relevant. On the other hand, support was voiced for the Special Rapporteur's proposal to make paragraph 2 a separate article, subject to the addition of the words "and international law" at the end of the paragraph.

232. As regards the next phase of the work, one view was that the Commission should begin the preparation of draft articles, and the hope was expressed that the proposed methodology would make it possible to complete a draft during the current term of office.

233. Another view was that the Commission should tackle the topic only after completing the consideration of other priority topics, in particular that of State responsibility and that of jurisdictional immunities of States and their property. Emphasis was placed on the need to conduct with great prudence the study of the legal status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities, with full attention being paid to the relevant international agreements.

234. Some representatives expressed serious doubts as to the advisability for the Commission to devote serious efforts or to assign any priority to this item, particularly in view of the presence in the Commission's work programme for the next five years of many other important topics and taking into account the Commission's intentions in relation to those topics.

235. In support of this position it was said that a network of treaties already existed in that field, e.g. the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies, with its many annexes adapting it to various agencies and many other international agreements including various headquarters agreements between organizations and the States concerned, and that there was therefore no need for another multilateral convention on the subject. The remark was furthermore made that the Commission's work on the topic could only either call into question the status or validity of those existing agreements - a result which would be unacceptable - or have a negligible practical impact, inasmuch as each international organization had its separate requirements. It was for the member States of each organization to decide for themselves, perhaps in the light of the experience of existing organizations, what privileges and immunities were necessary for the organization in question. Thus, it was concluded, the Commission should confine itself to providing guidelines and recommendations to be adopted by States and international organizations as they saw fit.

236. It was also pointed out that in regulating the status, privileges and immunities of international organizations one had to strike a satisfactory balance

between the interests of organizations and those of host States, and that it was by no means certain that a search for generally applicable solutions, particularly if the topic were to be broadened so as to encompass regional organizations, would succeed in striking such a balance.

237. Attention was finally drawn to the very limited progress made by the Commission on this topic in the last 10 years. It was remarked in this connection that the outline presented in 1987 was no different from the one suggested by the previous Special Rapporteur in his preliminary report in 1977 and that, in practical terms, all that the Commission had done at its latest session had been to confirm a decision taken 10 years previously. The consideration of the topic at the Commission's last session, it was stated, had produced no tangible results and the Commission would soon have to examine the fundamental problems in order to make recommendations to the Committee about its further work on the subject.

F. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

1. State responsibility

238. Several representatives insisted on the importance of this topic. The remark was made in this connection that it was essential for international law to be particularly clear on the consequences of the violation of its primary rules, as only then could it represent a body of rules by which States could peacefully reconcile their divergent interests. Some representatives felt that work on such a fundamental question had been unjustifiably protracted. Others held that the lapse was unavoidable and remarked that the new Special Rapporteur should be given an opportunity to make his views known.

239. One representative urged that the coverage of the draft articles on State responsibility should be sufficiently broad to include illegal narcotics trafficking, which was a matter of grave concern and a heavy burden for the law enforcement agencies of countries being used as transit points for such trafficking.

2. Jurisdictional immunities of States and their property

240. Emphasis was placed on the importance for subsequent work in this area of the deadline of 1 January 1988 set for the submission by Governments of comments and observations on the draft articles provisionally adopted by the Commission. One representative, however, suggested that this deadline should be extended by one year in view of the Commission's intention, reflected in paragraph 232 of the report, to take up the second reading of the draft articles in 1989.

241. On the substance of the topic, objections were raised to what was termed an artificial reversal of the current rules and practices of international law, which attempted to transform the minimal hitherto generally accepted exceptions or limitations to the enjoyment of sovereign immunity into a general norm, and to present acknowledgement and recognition of sovereign immunity as exceptions/to the

norm. The view was expressed that the Commission had based its work on the minority practice of certain common-law States which had legislated on the subject and that failure to recognize the widespread practice of States would result in infringement of international law. Reference was made to a particular country which, in order to tackle the problem actively and put itself in a better position to defend the multiplicity of cases being brought against it in the courts of the minority of States, was going to begin an intense legislative process on the subject, so as to gather together majority practice on the generally recognized aspects of the sovereign immunities of States.

242. Another view was that a number of developed countries had begun around the middle of the twentieth century to make a distinction between the actions of a State in its sovereign capacity and its capacity as an economic agent, restricting immunity in the latter case. The opinion was expressed that the draft articles adopted in first reading, although they went a long way towards recognizing that trend, continued, in certain important respects, to reflect the outmoded "absolute theory" of immunity. As a way of fostering consensus, it was suggested that the Commission should consider diverting its focus temporarily away from the details of the articles and towards a thorough analysis of the practice of States - not just recording their statutes or agreements in this area - and of the impact that the practices had had on the relations among the affected States.

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

243. Several representatives described this topic as a very important one and welcomed the adoption by the Commission, on first reading, of draft articles which they viewed as constituting a good basis for the preparation of a convention on the subject. Support was expressed for the establishment of a single convention on the status of the diplomatic courier and the diplomatic bag, which lent itself to the sytematization and consolidation of currently dispersed norms.

244. Doubts were on the other hand expressed on the need for, and the desirability of, draft articles on the topic. The remark was made that, while it was true that the existing régime laid down in article 27 of the 1961 Vienna Convention on Diplomatic Relations and incorporated in subsequent conventions did not address some of the details of the subject, the draft articles might raise more problems than they purported to solve. It was added that the existing régime, which reflected a practice extending back for centuries, had been adopted as the circumstances had required and that attempting to deal with features of the different adaptations complicated the law and diminished the flexibility inherent in separate but parallel approaches. It was also remarked that in the light of past experience problems in this area would be relatively few and could perhaps best be solved bilaterally by the States concerned within the current general framework.

245. The view was expressed that the three basic criteria to be taken into consideration - namely (a) that each State could be a sending State, a transit State and a receiving State; (b) that the bag was meant to be used for official

communications; and (c) that the inviolability of the bag was intended primarily to maintain the confidentiality of official communications - were reflected in the draft and that balance had in general been maintained between the interests of the sending State, the transit State and the receiving State.

246. Some representatives observed that article 28 still contained bracketed language and commented on it in some detail. Thus the view was expressed that the unbracketed part of paragraph 1 which read "the diplomatic bag shall not be opened or detained" and was based on the corresponding provisions in existing multilateral conventions was not sufficient. Support was voiced for the two bracketed phrases, namely "shall be inviolable wherever it may be" and "shall be exempt from examination directly or through electronic or other technical devices". In connection with the latter phrase, it was stressed that the diplomatic bag should not be subject to any kind of examination, either direct or indirect, for that would infringe upon the principle of inviolability. It was also remarked that the receiving State and the transit State had sufficient means at their disposal to prevent abuses, including, in case of violation, resort to retaliatory measures, and that the use of electronic or mechanical devices would be likely to result in clear discrimination against developing countries which were not technologically as well equipped as the developed countries. As regards paragraph 2 of article 28, the remark was made that seeking to extend to the diplomatic bag the régime of the Vienna Convention on Consular Relations - which provided that the bag could be opened and returned to its place of origin - was unacceptable as it would result in changing the status of the diplomatic bag as defined in the relevant conventions.

247. Another view was that, in the event of serious doubt or suspicion, the diplomatic bag might be opened by the competent authority of the receiving State in the presence of an authorized representative of the sending State, a procedure which, it was stated, was fully in keeping with the Vienna Convention on Diplomatic Relations and would ensure the bag's inviolability while safeguarding the sending State's legitimate rights and interests.

248. Another provision which gave rise to criticism is article 33. It was remarked in this connection that any State party to the Vienna Convention on Diplomatic Relations and to the Vienna Convention on Consular Relations that entered a reservation under article 33 for the purpose of applying to the diplomatic bag the régime applicable to the consular bag would be violating the provisions of the Vienna Convention on Diplomatic Relations. A flexible régime, based on the Convention on Diplomatic Relations, the Convention on Special Missions and the Convention on the Representation of States in their Relations with International Organizations of a Universal Character was advocated as one that would gain the widest acceptance among States.

249. As regards article 18, the remark was made that the need for the diplomatic courier to enjoy immunity from the criminal jurisdiction of the receiving State or the transit State derived from the fact that the courier must be able to perform his functions without hindrance and was based on his status as an official used to maintain official relations with the representational entities. It was added that only the sending State could waive the immunity of the diplomatic courier, that the immunities accorded to the diplomatic courier should not be inferior to those

accorded to administrative and technical personnel and that the Commission had provided legal guarantees against abuse of the privileges and immunities of the diplomatic courier.

250. A number of representatives stressed the importance for subsequent work on the topic of the deadline of 1 January 1988 set for the submission by Governments of comments and observations on the draft articles provisionally adopted by the Commission.

4. Programme, procedures and working methods of the Commission, and its documentation

251. A number of representatives emphasized the importance of the above-mentioned issues and their relevance to the effectiveness of the Commission's constribution to the progressive development and codification of international law. Some urged the Commission to devote serious attention to the way in which it operated and to the wealth of useful ideas and suggestions which had been put forward in this area, so as to speed up and improve its work. Reference was made in this connection to section H of document A/CN.4/L.410.

252. As regards the planning of future activities, a number of representatives expressed satisfaction with the intentions of the Commission as described in paragraph 232 of its report. One representative, however, found them overly optimistic, while another noted with regret that the Commission had only undertaken to "endeavour" to reach the goals described in that paragraph. It was also said that the proposed plan had a number of shortcomings and that the Commission should reconsider the questions whether final reports on some topics on its agenda could be submitted sooner and whether special rapporteurs could work more efficiently. The table annexed to the report, which recorded the intentions of special rapporteurs in relation to their respective topics, was considered by several representatives as a useful addition to the report.

253. Among the topics on the current programme of work, some representatives singled out as priority topics those on which complete sets of draft articles had been adopted on first reading, namely the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and the topic of jurisdictional immunities of States and their property. Several felt that the work on the draft Code of Crimes against the Peace and Security of Mankind should proceed expeditiously and some urged that greater priority should be given to the issue of State responsibility. In this connection, the view was expressed that it would be more suitable to continue work on the second and third parts of the draft articles and only after their completion to start the second reading of the first part of the draft, in order to permit consideration of the document in its entirety.

254. Some delegations, while viewing the guidelines for the present five-year period as realistic, suggested to shift priorities in one case, pointing out that, since the nuclear accident at Chernobyl, countries were increasingly expecting the United Nations and other international bodies to respond to the environmental

threats posed by the industrial era and that the question of international liability for injurious consequences arising out of acts not prohibited by international law had therefore acquired added importance.

255. The possibility of staggering the consideration of some topics was referred to by a number of representatives. The remark was made that such staggering, while it would be most unlikely to prevent completion of a first reading of two topics within the five-year term as planned, or to hold such progress in other fields, would make it easier for the special rapporteurs to prepare their reports, would allow members to study the reports in advance and would enhance the quality of the corresponding debate. While some representatives took note with satisfaction of the views expressed by the Commission in paragraph 234 of its report, others regretted that the Commission had not been able to respond to the General Assembly's invitation in paragraph 5 (a) (ii) of resolution 41/181 of 8 December 1986 to make specific proposals in this respect, particularly as its workload was already heavy and a decision on the question would immediately increase the efficiency of its work. One representative expresssed the wish that the question of staggering should be considered by the Commission at each session and another one that it should be re-examined at the end as well as at the beginning of each session, it being understood that the staggering of the substantial consideration of topics should not entail a corresponding staggering of the work of the Drafting Committee.

256. A number of representatives noted with satisfaction that the Commission had given serious attention to the General Assembly's request that it should thoroughly consider its methods of work in all their aspects. Some welcomed the establishment of the Working Group on Methods of Work referred to in paragraph 235 of the report. While due note was taken of the Commission's opinion that its present working methods and organization were appropriate and remained the most effective ones for the performance of the tasks entrusted to it by the General Assembly under Article 13 of the Charter, a number of representatives welcomed the ideas reflected in paragraphs 237 to 240 of the report. Thus, the Commission's awareness that the principal legal systems and the various languages should be equitably represented in the Drafting Committee was noted with satisfaction and the hope was expressed that the possibility of flexible composition according to topic would be re-examined. The suggestion put forward in paragraph 239 with a view to strengthening the co-ordination of the work carried out in plenary meetings and the work of the Drafting Committee gave rise to favourable comments, as did also the reference in that paragraph to the counter-productive effects of premature referral of draft articles to the Drafting Committee and the Commission's conclusion reflected in paragraph 244 of the report that reports circulated less than two weeks before the opening of a session should not be discussed at that session unless special circumstances dictated otherwise.

257. The question was however asked whether all avenues had been exhausted in the search for improved working methods. The remark was made for example that the Planning Group's concern that the Drafting Committee should be able to work in optimum conditions ought to have resulted in a clearer indication of how that was to be achieved. Attention was drawn in this connection to such matters as the length and efficiency of debates within the Committee on each item and measures to

improve the work of the Drafting Committee, e.g. by setting up sub-committees or separate drafting committees with a continuing core group for different topics. The view was expressed that the Commission should give serious thought to such alternative working methods and consider, for example, the approaches of other law-making bodies as set out in the 1980 Secretariat study of multilateral treaty-making. Misgivings were furthermore expressed as to what was termed "the disposition of the Commission to reopen discussion of issues that had been fully covered at earlier sessions" and the remark was made that, while such a disposition might be due to changes in the Commission's composition, inasmuch as it enabled new members to familiarize themselves with the work, the persons elected to the Commission by the General Assembly hardly needed "orientation debates", so that the backtracking was due more to the fact that previously reached solutions were unsatisfactory to some members. The hope was expressed that the Commission could find working methods that enabled it to respond with the necessary speed to the demands made upon it, failing which States would be increasingly reluctant to turn to it, and the trend to adopt texts on urgent and vital issues without the benefit of the preparatory work of the Commission would become more prevalent.

258. With respect to the Commission's reporting methods, satisfaction was expressed by some representatives at the fact that the Commission had followed the General Assembly's recommendation and indicated in its report, at least in relation to two topics, issues on which it wished to have the views of Governments, a practice which allowed the indispensable dialogue between the Commission and the General Assembly and could not be too strongly encouraged.

259. Some representatives expressed the wish that the annual report to the General Assembly should be circulated to Governments as soon as possible, if necessary, according to one of them, in provisional form. It was furthermore suggested that the background introduction to the various topics as contained in the report should be considerably abridged, and that after the adoption on first reading of a complete set of draft articles a comprehensive document covering not only the texts adopted but also the explanatory comments thereon should be compiled. Also in order to help Member States in the preparation of their interventions, it was suggested that, as envisaged in paragraph 246 (b) of the report, the Chairman of the Commission should circulate to Governments immediately following the conclusion of the session an introduction to the report along the lines of his own presentation to the Sixth Committee.

260. Some representatives commented on the method of consideration of the Commission's report by the Sixth Committee. In this connection, it was stated that, although the Sixth Committee should not attempt to replace the Commission by engaging, for example, in drafting, it was essential that States should provide sufficiently clear guidance to the Commission for its work. Emphasis was placed on the usefulness of drawing up a detailed timetable for the consideration by the Sixth Committee of the various chapters of the report.

261. As regards documentation matters, it was suggested that, as a follow-up to General Assembly resolution 39/90 of 13 December 1984, the Secretariat should prepare in advance of each session a summary of important international law-making activities which had taken place within and outside the United Nations during the

preceding year, so as to provide all members with equal information about those activities and enable them to take such information into account in their own work. The possibility of updating the 1971 Survey of International Law was mentioned as an alternative to this suggestion. It was recalled in this connection that there were several topics that had been identified but not taken up by the Commission following the 1948 and 1971 Surveys, namely recognition of States and Governments, recognition of acts of foreign States, extraterritorial questions involved in the exercise of jurisdiction by States, extradition and the right of asylum, domestic jurisdiction and the treatment of aliens. Also in the area of documentation, several representatives expressed the hope that an updated edition of the publication The Work of the International Law Commission would be available in the near future. Support was also expressed for the continuation of summary records and for arrangements ensuring the prompt and regular publication of the Commission's Yearbook.

262. A number of representatives, while acknowledging the Organization's present financial difficulties, stressed that the progressive development and codification of international law was too important a task to be relegated to the background. Several endorsed the view of the Commission as reflected in paragraph 243 of its report that its annual sessions should run for a full 12 weeks. Some shared the concern expressed by the Commission in paragraph 248 of its report about the staffing difficulties being experienced by the Codification Division.

5. Co-operation with other bodies

263. Emphasis was placed by several representatives on the need for co-operation between the Commission and other legal bodies engaged in similar work. Satisfaction was expressed at the fact that the Commission maintained a constructive working relationship with such bodies, since that helped it to keep abreast of legal developments in various regions. One representative paid special tribute to the contribution made by AALCC to the progressive development of international law. The same representative also referred to the desirability of appropriately taking into account the legal work of the Commonwealth and the Movement of Non-Aligned Countries.

6. International Law Seminar

264. Representatives welcomed the convening of the twenty-third session of the International Law Seminar and thanked both the Governments which had made fellowships available to participants and the members of the Commission who had delivered lectures. The remark was made that it was important to keep alive the interest of young people - particularly those in developing countries - in the codification and progressive development of international law through the Seminar and the sending of information to universities and training and research institutions. It was noted with satisfaction that the Commission was fully cognizant of the need to provide fellowships to bring participants from far-flung geographical regions.

265. Appeals were addressed to Member States for more voluntary contributions to enable the Seminar to continue.

7. Gilberto Amado Memorial Lecture

266. Several representatives noted that the Commission had observed the centenary of the eminent Brazilian jurist. They welcomed the holding of the 1987 Gilberto Amado Memorial Lecture and thanked the Brazilian Government for making it possible.

Notes

1/ Official Records of the General Assembly, Forty-second Session, Supplement No. 10 (A/42/10).

2/ Ibid., Sixth Committee, 35th to 49th and 58th meetings.

3/ By paragraph 1 of its resolution 42/151, the General Assembly agreed with the recommendation in paragraph 65 of the Commission's report to amend the title of the topic in English in order to achieve greater uniformity and equivalence between different language versions.

4/ Official Records of the General Assembly, Forty-first Session, Supplement No. 10 (A/41/10), note 84.

5/ Ibid., Thirty-eighth Session, Supplement No. 10 (A/38/10).

6/ Ibid., Forty-second Session, Supplement No. 10 (A/42/10), para. 39.

7/ Ibid., Fortieth Session, Supplement No. 10 (A/40/10), note 213.
