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

Report of the Sixth Committee

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I. INTRODUCTION

1. At its 5th plenary meeting, on 23 September 1977, the General Assembly decided to include in the agenda of its thirty-second session the item entitled "Report of the International Law Commission on the work of its twenty-ninth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered this item at its 25th, 30th to 32nd, 35th to 46th and 68th meetings, held on 21 and from 26 to 28 October, from 1 to 15 November and on 9 December 1977.

3. At the 25th meeting, Sir Francis Vallat, Chairman of the International Law Commission at its twenty-ninth session, introduced the Commission's report on the work of that session. 1/ The Committee also had before it a note by the Secretary-General (A/32/183), prepared pursuant to a decision of the Commission, 2/ containing the text of the draft articles provisionally adopted by the Commission on topics considered at its twenty-ninth session. At the 31st meeting, the Chairman of the Commission commented on observations which had been made at the beginning of the debate on the report. The members of the Sixth Committee expressed their appreciation to the Chairman of the Commission for his statements.

4. The report was divided into five chapters entitled: I. Organization of the session; II. State responsibility; III. Succession of States in respect of matters other than treaties; IV. Question of treaties concluded between States and international organizations or between two or more international organizations; and V. Other decisions and conclusions of the Commission. Chapters II, III and IV contained draft articles provisionally adopted by the Commission on State responsibility, succession of States in respect of matters other than treaties and treaties concluded between States and international organizations or between international organizations, respectively. Chapter V concerned the topics "The most-favoured-nation clause", "the law of the non-navigational uses of international watercourses" and "the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", the second part of the topic "relations between States and international organizations", the conclusions of the Commission on its programme and methods of work on the basis of recommendations made by a planning group of the Enlarged Bureau established by the Commission and a number of administrative and other matters.

5. At the 68th meeting, the Rapporteur of the Sixth Committee raised the question whether the Committee, in accordance with established practice, wished to include in its report to the General Assembly a summary of the main trends which emerged in the course of the debate on the item. After referring to General Assembly resolution 2292 (XXII) of 8 December 1967, the Rapporteur informed the Committee of the financial implications of the question. At the same meeting the Sixth Committee decided that, in view of the subject-matter, the report should include an analytical summary of the Committee's debate on the item.

1/ Official Records of the General Assembly, Thirty-second Session, Supplement No. 10 (A/32/10).

2/ Ibid., para. 130.

II. PROPOSAL

6. At the same meeting, the representative of Lesotho introduced a draft resolution (A/C.6/32/L.19) sponsored by Algeria, Austria, Bolivia, Brazil, Bulgaria, Colombia, Finland, India, Jamaica, Jordan, Kenya, Lesotho, Liberia, Mali, Mexico, Morocco, the Netherlands, New Zealand, the Niger, Singapore, Spain, the Sudan, Thailand, Turkey and Yugoslavia (see para. 251 below).

III. DEBATE

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

7. Representatives generally acknowledged that, at its twenty-ninth session, the International Law Commission had accomplished a substantial and impressive amount of work, as could be seen from its report. Satisfaction was expressed with the important results achieved at that session. The Commission had not submitted any complete set of draft articles to the Sixth Committee for consideration, although it had elaborated a total of 31 draft articles, some of which were extremely complex, on subjects which the Commission had not finished considering - State responsibility, succession of States in respect of matters other than treaties, and the question of treaties concluded between States and international organizations or between two or more international organizations. The report was in fact an interim report. Nevertheless the topics which the Commission had considered following closely the recommendations made by the General Assembly in resolution 31/97 of 15 December 1976 and were of the utmost importance for the practical conduct of international relations; Governments could not approach or consider them from a purely academic point of view. The Commission's achievements at the twenty-ninth session were especially laudable since in its first year following the change in its composition, the Commission had maintained the level of scientific quality and political realism which had traditionally characterized its work, its new nine members having apparently adapted quickly to their work.

8. The International Law Commission was said to be a focus of the aspirations of all peoples for peace, security, prosperity, justice and equity. No effort should be spared in the elaboration of rules of international law which could respond to the aspirations and concerns of the peoples represented in the United Nations and of all the world's peoples. As a result of the changes that had taken place in the international community after the Second World War, all countries, developed and developing alike, must now join in a co-operative effort to replace the outmoded concept of legislating that confirms the partition of the world by a more humane concept of working together to enhance life in a shared world. Only equitable rules in all areas of international law could bring about the realization of the hopes of mankind in the present confused and turbulent times. It was stressed that all the draft articles prepared by the Commission should ultimately be based on principles of justice and equity and not merely on practice and precedent, since there was no permanent point of reference for developing international law other than justice and equity. It was also said that, taking as its starting-point the present state of international positive law, the Commission should respect the

interests of the entire international community, paying special attention to the decisions and recommendations of the General Assembly and the other organs of the United Nations. The elaboration of viable and equitable texts of international law would strengthen the world Organization and give substance to the idea of world peace.

9. On the whole, the Commission was praised for the way in which it performed its functions. It was thanks to the studies made by the Commission that the principal sectors of contemporary international law had been codified and that codification was based on the principles contained in the United Nations Charter. It was emphasized that the Commission had become the central organ for the progressive development of international law and its annual reports were essential for the subject. The Commission was making a genuine contribution to the codification and progressive development of contemporary international law, as well as to the establishment of lasting peace and fruitful co-operation between nations through respect for law and order. It was also said that by the quantity and quality of its work, the Commission contributed to the establishment of a legal structure which would provide the basis for peaceful coexistence and for the achievement of the purposes of the United Nations Charter in the definite interest of all States. The opinion was further expressed that in its task of establishing a juridical basis for international relations, the Commission should establish a legal framework for all areas of activity, which should be strengthened by sanctions against States that breached international law. On the other hand, the view was held that the Commission tended to concern itself with the codification rather than the progressive development of international law, and it was influenced primarily by the philosophies and doctrines of classical international law.

10. It was stressed that the progressive development and codification of international law had become one of the major tasks of the United Nations, since the international community now comprised more than 150 independent States all seeking to play an active role in it and relations among States were much more extensive than they had been in the past. It was said that the harmonious and progressive development of international law was more important to the development of peaceful and constructive international relations than some of the more publicized items dealt with at the General Assembly.

11. The view was also expressed that the inclusion in legal instruments of mandatory norms for the conduct of States exercised a direct and positive influence on world peace and security. Such norms promoted the elimination of force and the threat of force from international life, and consolidated the practice of the settlement of disputes among States by peaceful means, in harmony with the current requirements of international law and the demands of the new world order. The process of codification was a means of adapting the law to the major changes which had taken place in inter-State relations, thus fulfilling the ever-increasing need for co-operation at many levels among States, and promoting the general acceptance of legal norms.

12. It was stated that the role of international law in creating peace and co-operation among States was increasing. Its main task was to regulate international relations among sovereign States with different social systems.

The many changes in the world in recent decades had helped to transform international law into a real instrument for achieving peace and developing friendly relations among States. In conditions of peaceful coexistence, the main characteristics of international legal rules were their broad scope and duration.

13. The view was expressed that the codification work carried out by the United Nations under Article 13 of the Charter might be becoming alienated from the principal concerns of the international community. It was no accident that the international community, which only 20 years previously had hailed the achievements of the first codification conference convened to complete the work undertaken by the Commission, should currently make use of other techniques to bring that work up to date. In considering the recent reports of the Commission on the one hand, and the needs of the international community in the field of law on the other, the question must arise whether the codification and progressive development of international law were not suffering the same fate as that being experienced, at least temporarily, by the legal settlement of disputes in a great institution established for that purpose.

14. It was further stated that certain suggestions made in the past few years during the general debate on the report of the Commission revealed a disturbing tendency to underplay the significance of the progressive development and codification of international law as undertaken thus far, i.e. in accordance with the third paragraph of the Preamble and Article 1 of the Charter, and to divert the attention of the Commission from that priority task by urging it to dissipate its efforts on questions of less importance. The principles of international law, elaborated in an earlier time in vastly different circumstances, no longer corresponded to current needs. International political, social and economic patterns had been radically changed by the break-up of colonial empires, the emergence on the international scene of many small newly independent States, and break-throughs in science and technology. The relationships based on power and domination which had existed in the past had been replaced by interdependence among nations, which must co-operate in solving the major problems facing mankind within the framework of an international legal order which guaranteed genuine peace and security. The Commission must make an effective contribution in that regard, and there was an urgent need for the General Assembly, through the Sixth Committee, to guide its work so as to satisfy the demands of a constantly evolving world. But care should be taken, at any rate, not to jeopardize the proved effectiveness of a mechanism for the sake of narrow political expediency.

15. With reference to the work undertaken by the Commission, some representatives made general observations on the relationship between the Commission and the Sixth Committee. It was stated that the Commission had the daunting task of promoting the progressive development and codification of international law. To that end, it had to survey the whole field of international law with a view to selecting topics for codification, having in mind the existing drafts. It had developed its own methods of work and enjoyed a considerable degree of autonomy in carrying out its task. The Sixth Committee had its own responsibilities, which were complementary to those of the Commission. It could exercise a degree of supervision over the Commission's current work programme and propose new topics to it. It was also for the Sixth Committee to determine, on the basis of draft articles prepared by the

Commission, the final form to be given to the codification of certain questions of international law, and the forums in which the corresponding instruments should be elaborated. The Sixth Committee should not interfere too much with the work of the Commission, but the latter should also take account of comments made in the Sixth Committee which signalled difficulties ahead. The common goal of both organs was the progressive development and codification of international law. The preparatory work of the Commission was an essential first step, but the active co-operation of Governments was required in order to convene conferences of plenipotentiaries, to adopt codification conventions and to sign and ratify them. A constructive dialogue between the Commission and Governments was therefore necessary at all stages of the consideration of a particular topic, whether that dialogue took the form of written comments by Governments or statements by their representatives in the Sixth Committee. It was further stated that whereas the Commission was composed of a small number of eminent experts on international law, the Sixth Committee included representatives of all Member States, a fact which enabled experts from nearly every country in the world to comment on texts which might become rules of positive law for all countries. In that regard the respective roles of the Commission and the Sixth Committee were therefore complementary.

16. With reference in particular to the annual consideration in the Sixth Committee of the Commission's report, the view was expressed that discussion in the Committee would be more meaningful if a general debate on the Commission's work was followed by detailed discussions on the individual topics. That arrangement would lead to a more lively debate and a more substantial exchange of views. It was further said that the members of the Sixth Committee should not limit themselves to expressing general approval or disapproval of the Commission's work, but should also express views that would indicate the position which their respective Governments would take when the final draft articles were before them. In order that their remarks should serve as a guideline for the Commission, it was also necessary that they dealt more with the Commission's future work than with its past achievements.

17. The view was also expressed that every statement on the report of the Commission was necessarily a compromise between a mere statement of approval or disapproval of the Commission's work and a detailed consideration of the substantive matters which the Commission had itself already debated. If the views expressed in the Committee were too summary, the danger was that the Commission might receive an impression of the approval or disapproval of the Governments represented in the Committee which might not be entirely in accord with their intentions. If the examination of the Commission's report was too detailed, the Committee would be straying across the boundary between two important sets of divisions, namely the division between the Sixth Committee and the Commission itself and the division between what was appropriate for oral comment and what was appropriate for written comment. There was need for caution in seeking to extract from the summary record of the debate a more exact reflection of the Committee's approval or disapproval of the Commission's approaches or plans than the debate could properly furnish.

18. In this connexion the opinion was expressed that, at a time of great financial stringency, the question of the necessity of an analytical report by the Sixth Committee at a high cost should be given further consideration during the year ahead, taking into account the views of the Commission on the matter. The

opinion was also expressed that the Committee should dispense with the analytical presentation of the observations made in the debate which was customarily included in the Rapporteur's report on the item concerning the Commission's own report. It was suggested that instead of such an analysis, the Sixth Committee should agree to have verbatim rather than summary records of the statements made on the Commission's report.

19. Certain representatives addressed themselves to certain aspects of the implementation of Article 13, paragraph 1 (a), of the Charter. In this respect, the opinion was expressed that the General Assembly should once again consider the most appropriate way of using to the best advantage the wealth of talent and experience represented by the Commission and its members. Although in the case of strictly legal questions the entire task of preparing draft texts in all their detail, could quite appropriately be left to the Commission, it was said that other methods might be advisable in the case of areas where the preparation of international texts was likewise required but where the political implications of the underlying problems were much greater. With reference especially to the successful co-operation, between the Commission and the Sixth Committee in the preparation of international instruments, it was stated that a closer collaboration, indeed, a sharing of responsibilities between the two bodies, could only be beneficial to the progressive development of international law and would help to elevate the tone of debate in the Sixth Committee.

20. It was also said that on the elaboration of rules of positive law, in addition to the Commission, the Sixth Committee was also involved, and other bodies, such as conferences of plenipotentiaries played a part when binding legal instruments were adopted. The view was further expressed that it would be advisable to take up certain suggestions which had been advanced both in the Sixth Committee and in the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. The report of the latter Committee contained specific proposals for a general reassessment of the theory of sources of international law and for the establishment of working groups or ad hoc committees responsible to the Sixth Committee to codify international law in such specific areas as economic development or the environment, in collaboration with the International Law Commission. Those committees would discuss urgent codification problems which the Commission, due to its heavy programme of work, would not be in a position to address in the near future and would meet only during sessions of the General Assembly so as to avoid the proliferation of new organs and the costs and overlapping which that involved. It was stated that ad hoc groups of experts might be used for the work preparatory to the final consideration of the topic by a diplomatic conference. The opinion was also expressed that after entrusting the study of specific questions to expert groups, as was done in the International Labour Organisation, the conclusions of those groups would then be submitted to the Sixth Committee as a whole.

21. It was also stated that thought should be given to strengthening the role of the Sixth Committee by making it a kind of plenipotentiary conference which would be entrusted with codifying certain international rules concerning the law of economic development, taking into account new facts of current international relations. The Committee should contribute to the establishment of a new world

order in both the economic and legal spheres. It was also said that greater use of the Sixth Committee as a conference of plenipotentiaries was justified for the following important reasons: (a) the resources of both rich and poor countries were limited; (b) 149 States were represented in the Committee, on an equal footing, and their representatives were in principle experts on international law; (c) the general desire not to entrust one task to various bodies, which could lead to duplication; (d) the fact that Article 13 of the Charter provided the political and legal basis for the progressive development and codification of international law; (e) the fact that considerably fewer States than were represented in the Sixth Committee took part in plenipotentiary conferences; (f) the fact that the States which generally did not participate in conferences were those which had the most limited resources and which did not have representatives in the specialized legal codification organs; and (g) the shared concern to spend only what was strictly necessary for the realization of the ideals which would lead to a better world.

22. Some representatives touched upon certain aspects of the final stage of the codification process. It was said that there was ample opportunity for States to influence the process of the codification of international law at various stages of the Commission's work. One such opportunity was that afforded to plenipotentiary conferences. At that stage, however, it was usually too late to try to introduce substantial changes in the basic texts proposed by the Commission, owing to limitations of time. Experience had shown that texts adopted at codification conferences followed almost word for word those proposed by the Commission. At such conferences, participating members of the Commission were in the best position to suggest what was the proper course to follow, because of their greater familiarity with the subject-matter. However, there should be no feeling of rivalry between the members of the Commission and other participants. Any contribution the members of the Commission might wish to make at any stage in the codification and progressive development of international law was certainly welcome.

23. The opinion was also expressed that it would be timely for the Commission to discuss how the results of its work could best be translated into such rules regulating the conduct of States as States would abide by. When they had been submitted to plenipotentiary conferences, some of the Commission's drafts had been subjected to considerable changes, and one might wonder whether such modifications were a continuation of the codification process or were an infringement upon it. Inasmuch as the Commission was trying to codify existing law, it did not seem that a majority decision of a plenipotentiary conference could alter existing norms; that was, moreover, the reason why each State considered itself free to ratify or accede to the resulting conventions. Since the topics currently being studied by the Commission were particularly delicate, the Commission should certainly consider whether to continue applying the same methods or whether to endeavour to devise new formulae which would strengthen the rule of law. Multilateral conventions on those topics, particularly on State responsibility, did not seem the only possible solution. It was also said that what was essential, in the final analysis, was that the products of the Commission's work should not remain a dead letter, as was true of so many resolutions adopted by the United Nations.

24. Several representatives expressed their condolences on the death of Mr. Edvar Hambro, a distinguished lawyer and a member of the International Law Commission, and associated themselves with the tribute paid to his memory by the Commission.

25. Some representatives indicated that in commenting on the report, they had to adopt a selective approach because of the wealth of material discussed at the twenty-ninth session of the Commission, the organic link between the topics dealt with at that session and those considered at the preceding sessions, and the need for detailed study of all the draft articles currently in preparation.

B. State responsibility

26. Several representatives emphasized the importance and the urgency of the codification and progressive development of the rules of international law governing State responsibility, a key topic of international law, of undeniable contemporary significance. The rules applicable in that field had an effect on international relations as a whole; they were instrumental in the implementation and observance of rules on a wide range of other fields of international law. State responsibility was closely linked with the maintenance of peace, and because of the crucial role of international law in that area, work on codification should be speeded up. (See also, below, section E, 5 (a) of the present chapter.) State responsibility arose from a failure to discharge legal obligations and it was evident that, by failing to discharge their international obligations, States undermined the foundations of international order. In this connexion it was recalled that the arbitrator in the Spanish Zone of Morocco claims had ruled that responsibility was the necessary corollary of a legal right, that all rights of an international character involved international responsibility, and that, if the obligations were not met, responsibility entailed the duty to make reparation. Similarly, the Permanent Court had ruled in the Chorzow Factory (Jurisdiction) case that the breach of an engagement involved an obligation to make adequate reparation. Nevertheless, the legal basis of State responsibility in international law had always remained incomplete and hence inconclusive. It was also said that, as the Commission had rightly emphasized, State responsibility was one of the topics in which the progressive development of law could play a particularly important role. The Commission had also shown prudence in stating that the roles to be assigned to progressive development and to codification of already accepted principles could not be planned in advance, but would depend on the specific solutions adopted for the various problems.

27. Some representatives stressed that State responsibility, as viewed by the Commission, was no longer limited to the classical concept which had related only to the treatment of aliens or to international demands for compensation following the nationalization of property belonging to aliens but included all spheres of State responsibility. The Commission had not underestimated the difficulties of the topic but had avoided the trap of out-moded controversies by concentrating rightly on the rules relating to State responsibility for internationally wrongful acts, namely, rules governing the whole range of new legal relationships which might arise from an internationally wrongful act committed by a State, leaving for later consideration the question of State

responsibility arising from the performance of certain acts not forbidden by international law. As the Commission had said, it was one thing to state a rule and the content of the obligations it imposed and another to determine whether there had been a breach of an obligation and what the consequences of that breach should be. Only that second aspect came within the sphere of responsibility proper and to encourage any confusion on that point might once again frustrate the hope of successful codification.

28. The opinion was expressed that the codification of "secondary" rules, in which the Commission was currently engaged, would contribute to the effectiveness of international law and also, it was to be hoped, to an increase in morality in international life. It was noted that after having made the distinction between "primary" and "secondary" rules, the Commission had gone on to observe, quite rightly, that the content, nature and scope of the obligations imposed on the State by the "primary" rules of international law were not without significance in determining the rules governing responsibility. It had thus established an essentially ethical hierarchy between the various categories of international obligations and in so doing had established a classification of internationally wrongful acts into crimes and delicts, depending on the seriousness of their consequences for the international community as a whole. On the other hand, the view was expressed that the distinction between primary and secondary sources of obligations could not be maintained if progressive development and codification of international law were to go hand in hand.

29. Some representatives emphasized the great care needed in dealing with the topic. The rules governing State responsibility, as secondary rules of international law, had an impact that was felt on all the primary rules which defined the rights and obligations of States in the most diverse areas. They, it was added, needed to be codified in the clearest terms so as to remove all ambiguity about the circumstances which rendered States responsible for the violation of an international obligation. That was deemed to be of special importance for developing countries because of the absence of efficient administrative infrastructure. The imputability of State responsibility should be precisely defined and illustrated, with objective formulae being found to safeguard the interest of the State which suffered the injury and the interest of the State against which a claim was pressed.

1. Comments on the draft articles as a whole

30. Several representatives referred to the structuring of the draft proposed by the Commission, which was generally supported. It was pointed out that in order to study the topic of State responsibility, the Commission had envisaged in 1975 that it would divide its draft articles into three parts, devoted respectively to the origin of international responsibility, to its content, forms and degrees, and to the implementation of international responsibility and settlement of disputes.

31. In this regard, some representatives noted with approval that the Commission had indicated that, after completing work on parts I and II of the draft articles, it might decide to add to the draft a part III concerning the implementation or "mise en oeuvre" of international responsibility and settlement of disputes. In their view, that was the key element of any regulation of the régime of international responsibility. The rules relating to the origin, content, forms and degrees of responsibility, however clear they might be, would be of little use unless they were coupled with sufficiently effective provisions for their implementation or mise en oeuvre. By "effective provisions" it was meant the establishment of compulsory arrangements for the settlement of disputes arising from the interpretation and application of the draft articles. Such a mechanism should be flexible and should include a wide choice of methods of settlement, in accordance with Article 33 of the United Nations Charter. If the parties did not agree on a particular method of settlement, each party would be entitled to refer the dispute to compulsory settlement. Provision should therefore be made in the text of the draft itself for procedures and machinery which, when set in motion at the request of a party to a dispute, would result in a decision based on law that was binding on all parties. On a topic as important as State responsibility, a State should not be the sole interpreter of the rules codifying international law. Failure to apply and interpret the rules uniformly might lead to the disintegration of delicate compromises which provided balanced protection of competing rights and interests. In that way alone could the evisceration of the draft articles be prevented and their full effectiveness be ensured.

32. Also with regard to the future work on the topic, the opinion was expressed that one of the most important tasks of the Commission would be the consolidation and development of the most positive result it had achieved thus far, namely the division of breaches of international obligations into international crimes and international delicts in draft article 19, which was one of the leading provisions of the draft articles on State responsibility. Attention should first be given to regulations aiming at preventing and, above all, at repressing international crimes, which were the most dangerous acts gravely endangering international peace and security. International delicts could be dealt with in the second place. In that regard the Commission should proceed bearing in mind the formulation of draft article 19.

33. One representative, referring in general to part I, considered that, subject to his delegation's previous remarks on the question, chapter I, on general principles, and chapter II, on the act of the State under international law, were generally acceptable and the 15 articles they contained were properly included in an

intergovernmental codification project. He felt somewhat uneasy, however, about chapter III, on the breach of an international obligation, which was not yet completed.

2. Comments on the various draft articles

34. Referring to the work done on State responsibility at the twenty-ninth session, representatives noted that at that session the Commission had discussed the sixth report of the Special Rapporteur for the topic, Professor Roberto Ago, whose invaluable contribution was generally recognized. On that basis it had prepared articles 20, 21 and 22, included in chapter III of part I of the draft. Article 20 dealt with the breach of an international obligation requiring the adoption of a particular course of conduct and article 21 dealt with the breach of an international obligation requiring the achievement of a specified result. Those articles took into account the nature (obligations of conduct; obligations of result). The international obligation for determining the conditions of its breach, conditions which varied with that nature. Article 22, on the exhaustion of local remedies, was based on the distinction between obligations of conduct and obligations of result, since it applied only to obligations of result concerning the treatment to be accorded to aliens.

35. Some representatives stressed that the three articles were closely interconnected and, in their opinion, they constituted a logical and harmonious whole. It was also stated that, article 20 affirmed the primacy of international legal obligations, while articles 21 and 22 recognized the right of States to safeguard their legitimate interests. That balance illustrated the growing interdependence between the domestic law of States and international law.

36. Several representatives expressed general agreement with the texts of articles 20, 21 and 22 prepared by the Commission as to the content as well as to their wording. Those three articles were particularly significant from both a theoretical and a practical point of view. The Commission had achieved commendable results in their adoption, which constituted an important step forward in the codification of one of the most complex fields in international law, one in which the practice of States was widely divergent. Their elaboration represented a considerable amount of work and was supported by a mass of precedent drawn from State practice and court decisions. They were also consistent with the principles of sovereign equality of States and of non-interference in the internal affairs of other States.

37. On the other hand, the opinion was expressed that as regards articles 20, 21 and 22, the question which had to be asked first was not whether they correctly stated the lex lata or the lex ferenda, but whether such provisions were really necessary or viable in an international convention. There were, it was said, important reservations in that regard. Articles 16 and 17 seemed to include virtually all that was needed in a draft which was not supposed to deal with the so-called "primary" rules of international law, but only with what the Commission had termed the "secondary" rules. Those rules alone, as the Commission had stated, fell within the sphere of responsibility proper, and a strict distinction in that

sphere was essential if the topic of international responsibility was to be placed in its proper perspective and viewed as a whole. It was further stated that during the codification of the law of treaties, the Commission had at one time found itself facing the danger of becoming too closely involved in matters of contractual jurisprudence. If it had not changed direction, it would have taken a doctrinal instead of a conduct-regulating approach, and would never have arrived at a generally acceptable formulation of Part V of the Vienna Convention of 1969. The effort to codify rules concerning State responsibility, as formulated in draft articles 18 to 22, seemed to be facing a similar danger, through its concentration on jurisprudential details.

38. Some representatives stressed that in dealing with the topic, continuity with the work thus far done was essential in order to avoid taking premature stands on so delicate and complex a question. Consequently, it was felt that the three articles should be studied in the light of other articles already adopted and with due regard for those which would follow so that the draft would form a coherent whole. In this connexion, certain representatives considered that it would be premature to make a final assessment of articles 20, 21 and 22, because the Commission had yet to consider such important problems as the breach of an international obligation made under the impact of an external event, the time and duration of the breach of an international obligation (tempus commissi delicti), questions relating to participation by other States in the internationally wrongful act of a State and matters relating to attenuating or aggravating circumstances, including force majeure and fortuitous event. For those representatives, in the absence of such provisions, which the Commission had the intention to study, it was difficult to express a view on the three articles before the Sixth Committee, it was said.

39. Several representatives, referring with approval to the relevant resolutions of the General Assembly and in particular resolution 31/97, stressed that the Commission should continue on a high priority basis its work on State responsibility with the aim to complete the preparation of at least the first set of draft articles on responsibility of States for internationally wrongful acts within the present term of office of its members. The Commission should adhere to the recommendations contained in resolution 31/97 in order to complete the study of the matters covered in part I, chapter III, of the draft articles, namely the objective element of the internationally wrongful act, and especially the delicate question of the tempus commissi delicti, which was closely linked to the rule regarding the exhaustion of local remedies. It should also complete the study of the questions covered in chapters IV and V, namely participation by other States in the internationally wrongful act and circumstances precluding wrongfulness and attenuating or aggravating circumstances. To that effect, the Commission should give particular attention to State responsibility at its next sessions (see also, below, sect. E, 5 (a) of the present chapter).

40. With respect to terminology, one representative was of the view that the wording of the articles at least in the Spanish version was in need of improvement for purposes of greater clarity and precision. The opinion was also expressed that the term "non-performance" was more appropriate than the term "breach" since the question was one of civil liability. It was also said that the Commission should

use the words "the conduct of the State" to express two different concepts, as it had done in articles 20 and 21, as well as in other provisions. In article 20 those words meant a particular course of conduct which the State was required to adopt by virtue of an international obligation. In article 21, they signified only the means by which the State achieved a specified result which was the only requirement of the international obligation. On the other hand, a number of representatives expressed support for the actual wording of articles 20 to 22.

41. A number of representatives made specific comments on the three articles adopted at the twenty-ninth session, as well as on some of the articles adopted at previous sessions.

Article 18

42. One representative considered that the requirement that the international obligation should be in force for the State was of course an essential element of any obligation, the breach of which would give rise to an instance of responsibility for the State involved. Consequently, that aspect of the question could be dealt with in article 16, article 18 being complicated and redundant. The Commission could consider such a change when returning to the delicate problem of the tempus commissi delicti.

Article 19

43. One representative was of the view that article 19, dealing with international crimes and international delicts, gave an incomplete answer to the very hypothesis with which it purported to deal. If the examples mentioned in paragraph 3 (c) of that significant and controversial article were to be retained, they must be completed by the addition of an appropriate reference to the perpetrators and aiders and abettors of acts of indiscriminate terror, the seizing of hostages, and the like, that is to say, to the States in which such people trained and which gave them asylum. Furthermore, it seemed that in a legal text, an expression such as "essential importance" must be clarified and given a more objective turn, since those two words could easily become overcharged with subjective emotions. Another representative noted the distinction between responsibility for international crime and international delict - not in the sense of their private law analogies but in the sense of a grave violation of international law. In his view, breaches of the peace, war crimes and crimes against humanity would be international crimes, while a refusal to grant independence to a colony, or racial discrimination, would be considered cases of international delict. Some representatives, on the other hand, reiterated the support they had expressed the previous year for the distinction embodied in article 19 between international crimes and international delicts.

Articles 20 and 21

44. Several representatives commented on the distinction embodied in articles 20 and 21 between obligations "of conduct" or "of means" and obligations "of result".

It was noted that, as the Commission had explained, obligations of the first kind, to which article 20 refers, are those which require the State to perform or to refrain from a specifically determined action. Obligations of the second kind, which are envisaged in article 21, are those which only require the State to bring about a certain situation or result, leaving it free to do so by whatever means it chooses. Different views were expressed on the matter.

45. Some representatives agreed with the distinction, which they characterized, in general, as being necessary, useful, justified, relevant, appropriate, reasonable or sound, etc. The distinction was fundamental for determining whether a breach of an international obligation had taken place, as well as the time and duration of such a breach. It was essential for distinguishing two situations which were different in practice and which could have qualitatively different effects. It was well founded in the practice of States and facilitated the understanding of the draft articles. The distinction was one which was traditionally known in private law. Further, it should be seen in the light of the distinction between international crime and international delict embodied in article 19. It was the logical corollary of the preceding articles and clarified article 22 which, in dealing with the exhaustion of local remedies, cannot but refer to obligations of result. Although the distinction might sometimes give rise to difficulties, especially in classifying an obligation into one category rather than the other these could be overcome through effective procedures for the settlement of disputes. In this connexion, the view was expressed that the distinction should not be deemed to be so subtle as to necessarily require the matter to be referred, in the event of difficulties of interpretation, to international tribunals.

46. It was stressed that international obligations were not all identical but differed in some substantive points, which had varying consequences as to the determination of what constituted breach and the legal definition of the actions of a State committed in breach of those obligations. International obligations not only expressed duties pertaining to different sectors of inter-State relations and to matters of varying importance for the international community; they were also differently structured with regard to the determination of the ways and means by which the State was supposed to discharge them. Thus, there were international obligations of means or of conduct whose performance required the use of particular means and there were obligations of result which left the State free to choose among various means. It was therefore essential to establish at the outset the nature of an international obligation in order to determine whether a course of conduct adopted by a State would constitute non-performance of that obligation. It was further stated that although there was a permanent causal interaction between conduct and its effects, the distinction was aimed at determining whether there was a breach at the time a course of conduct was adopted or when its effects occurred.

47. It was also said that the distinction was not merely academic, since cases increasingly arose in contemporary international practice where a State could be held internationally responsible solely by reason of its conduct, even where no results contrary to international law had yet emerged. That situation was the consequence of the increasing development of rules contained primarily in treaties which, in the interests of closer co-operation among States, required them to conduct themselves at the legislative level according to the detailed model provided

in the international rule. For example, some international institutions exercised considerable control over the national legislative process: article 93 of the Treaty of Rome, for instance, empowered the Commission of the European Economic Community to intervene in the phase preceding the issue of any national or regional law or ordinance relating to the grant of financial aids to economic sectors or regions of member States of the Community, and to refer the matter to the Court of Justice of the Community if it did not approve them. There were also many international rules of universal scope, for example those requiring States to adopt preventive measures through legislative means, as in the case of air transport. To ensure effective prevention, as required by the international rule, it was often necessary for legislative measures to be promulgated before the occasion to apply the international rule arose. If such measures were not promulgated in time and in accordance with the model provided in the international rule, the resulting uncertainty itself gave rise to the risk of non-implementation which the international rule sought to prevent. Such obligations were therefore obligations "of conduct". In addition, although the obligation "of result" was the classic model of an international obligation, based on the idea of complete separation between the international legal order and the internal legal order, as that separation diminished and international law advanced in areas previously within the exclusive competence of States the number and scope of international rules establishing obligations "of conduct" tended to increase. That tendency was further intensified by the need for clarity in legal rules. Moreover, to an increasing extent, action to ensure that the conduct of a State conformed to an international rule was being taken before that rule was applied in a specific case, by means of the establishment by each State of a system of national rules and procedures that would inspire confidence in other States that the State concerned would apply strictly the international rule in question.

48. The opinion was further expressed that the distinction became clear with respect to the treatment of aliens and their property. For example, in treaties where an alien was given the right to practice or engage in a certain profession, refusal to register him did not in itself amount to a breach by the State of its obligation until the alien had availed himself of the appeal mechanism without success. Similarly, the fact that the State had nationalized the property of an alien did not by itself constitute a breach of its international obligation to respect foreigners' property. The State would not be in breach so long as it agreed to compensate the alien for his property.

49. One representative considered that the usefulness of the distinction was demonstrated, besides the examples given in the report, by certain arbitral awards concerning State responsibility towards foreign companies whose sometimes reprehensible conduct had led a State to break its agreements with them. In one such award, the arbitrator had considered whether the State, before resorting to unilateral breach, had nevertheless used the specific means required of it, such as the granting of administrative authorizations, tax exemptions and parliamentary ratification of an establishment agreement, while its foreign partner had failed to provide the quid pro quo required of it, since the objective of certain neo-colonialist companies was to set up as many obstacles as possible in order to exploit an advantageous, not to say monopolistic, position for as long as possible without providing anything in return. The provisions of article 20, as they had

been drafted, could apply to such cases, since the State had adopted the conduct specifically required by an international obligation.

50. Other representatives expressed doubts regarding the distinction reflected in articles 20 and 21 even though they acknowledged that that distinction, said to be based on terminology used in countries with a traditionally Roman system of law, was not only attractive but was also possible and often made, as the Commission had indicated with numerous examples given in the commentaries. Some representatives, while admitting that in many instances an obligation could be characterized as being of one kind or the other, nevertheless considered that the distinction incurred the risk of creating uncertainty or confusion in international practice since there were many examples of obligations which might be regarded as falling in one or other of the two categories established, and this either simultaneously or subsequently. It was doubtful whether a distinction based on rather artificial criteria could really be used as a guide by States in the conduct of their international relations. In this connexion, it was said that the problems which would certainly arise from the practical application of the distinction between international obligations must be taken into account when devising machinery for the settlement of disputes in the context of part III of the draft, concerning the "implementation" ("mise en oeuvre") of international responsibility. It was also considered that efforts to codify and progressively develop international law should at the same time endeavour to simplify it, even by using categories from private law whenever possible. However, to attempt to squeeze international law into private law categories required great caution. The distinction between the obligations in question might have been useful for crystallizing the doctrine of State responsibility, but whether it should have been retained beyond that point was doubtful.

51. Certain representatives wondered whether such a fine distinction was really one which could and ought to be formulated in terms of draft articles intended for inclusion in a possible international convention on State responsibility. Was it not really a theoretical and recondite or a jurisprudential qualification which, even if acceptable as a generality, would always give rise to differences in the concrete case? The question was also raised whether the distinction would not represent a step backward, tending rather to confuse a situation which, it was felt, had been made perfectly clear in article 16 of the draft.

52. It was also stated that, as suggested by the Commission, the distinction hinged on the amount of choice that a party was given in fulfilling its obligations. However, it was not clear how little choice the obligation must allow a party before the obligation would be considered one of "means". The view was further expressed that although in private law a distinction was made between obligations of conduct and obligations of result, in international law an obligation of conduct, viewed from a different angle, could also be regarded as an obligation of result. Supposedly typical examples of instruments establishing obligations of conduct might just as easily be categorized as establishing an obligation of result, namely the promulgation of uniform legislation in all States parties. In practice and in logic, it was said, it was impossible for a means not to produce some result or for a result not to be achieved by resort to certain means. In law, freedom of choice as to means was not always total and it was sometimes

the case that the desired result could be achieved by only one means. If a provision of law required achieving a particular result and was indifferent as to the means employed, only the result mattered; failure to achieve that result gave rise to various legal consequences, usually reparation or sanctions. It was never sufficient to employ the proper means if they did not lead to the desired result. Reference was made to the commentary, where the Commission stated that a conventional obligation might be interpreted as either one of means or one of result. However, it was said, the question could be asked whether all obligations were not ultimately obligations "of result", since, once it was determined by a normal process of interpretation that a party was required to adopt a certain course of action, the party was required to produce that result.

53. It was also said that further confusion with regard to the distinction was caused by the use of the words "course of conduct" in article 20 which gave the impression that a single act or omission was not sufficient to constitute non-fulfilment of an obligation of means and by the use of the word "conduct" twice in article 21, paragraph 2 which related to failure to achieve a result. The use of the term "conduct" in two provisions as closely connected as article 20 and article 21 paragraph 2, as well as in other provisions could create a very unsatisfactory situation.

54. The opinion was expressed that the cases in which it might be difficult, if not impossible, to place a particular obligation in one or the other category were not simply "marginal" cases. There was a growing tendency in some international institutions to seek to characterize as obligations of conduct what were prima facie obligations of result, with a view to achieving uniform application of international conventions. That might be laudable, but it did obscure the distinction between the two types of obligations. Reference was made to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the directives of the European Economic Community. The Commission had stated that those directives contained obligations of result, in view of the wording of article 189 of the Treaty instituting the European Economic Community. However, recent jurisprudence of the European Court of Justice had shown that certain provisions of the directives might be regarded as directly applicable within the Community's legal order, notwithstanding the absence of implementing domestic legislation. Thus, an international instrument which appeared at first sight to contain obligations of result could be subsequently determined to contain obligations of conduct. Of course, it might be pointed out that those two treaties conferred rights directly upon, or applied directly to, individuals. There were, however, a growing number of treaties of that nature, and any generalized rule or distinction must take account of them. Furthermore, it was said that taken to its logical conclusion, the reasoning offered by the Commission would mean that a State which, in accordance with a treaty, adopted given legislation but did not implement it had satisfied its international obligations, whereas another State which had, in effect, already implemented the rules in question in its internal law but not promulgated legislation for the implementation of the treaty would have committed a breach of its obligations.

55. Certain representatives, by way of example, referred to the possible categorization of the obligation arising from the principle of the peaceful

settlement of disputes. On the basis of that principle, it was said, States were obliged to arrive at a specific result, the peaceful settlement of a dispute, but they might attain that result by means of their own choice, provided they were peaceful. Thus the obligation defined the means to be used for its implementation, while leaving States the freedom of choice. It was further said that the Commission had indicated that an obligation to resolve disputes by peaceful means was an obligation "of result" because a State could choose between several types of peaceful settlement devices; yet, it later stated that an obligation to adopt legislative measures was an obligation "of means" even though the State had the option of proceeding by enacting a law in the proper sense or some other normative means peculiar to it.

56. Certain representatives assumed that the main function of the distinction drawn in articles 20 and 21 was to lay the foundation for the rule enunciated in article 22 by identifying those obligations to which the rule of exhaustion of local remedies applied. It was stated that if such was indeed the purpose, then the distinction, which was based on the nature of a particular obligation, appeared to be broadly equivalent to the distinction between direct injury and indirect injury in the more traditional terminology of the law of State responsibility. It was generally accepted that the local-remedies rule was not applicable to cases based on a direct breach of international law causing immediate injury by one State to another. Such injury would normally result from breach of an obligation of conduct, whereas indirect injury (i.e. injury caused to a national of another State) would normally result from breach of an obligation of result. It remained unclear, however, whether the parameters of the distinction between direct and indirect injury coincided with those of the distinction between breach of an obligation of conduct and breach of an obligation of result. The Commission, it was said, seemed to have a doctrinal attachment to the distinction between obligations of conduct and obligations of result, making it difficult to appreciate precisely how the rule of exhaustion of local remedies would operate under the scheme it proposed.

57. With reference also to the Commission's commentary on the matter, certain representatives were of the view that although differences of interpretation could be referred to a competent international law tribunal, the fact remained that the distinction was so important in current practice that it would be desirable to establish a more precise formulation in the matter, so that it would not be necessary to rely on an international tribunal to solve the problem. It was also said that having in mind that where an international dispute arose as to whether an obligation was of one type or the other, it would be for a competent international tribunal to decide the matter, the commentary did not deal with the question of whether a claim made under the wrong rubric would fail for that reason, as had formerly been the case with forms of action at common law. Clarification of that point would therefore be welcome.

58. The opinion was also expressed that although their wording was acceptable, the three draft articles adopted and, in particular, articles 20 and 21, could, given their place, diminish the impact of article 19. The criteria set forth in articles 20 and 21 could, without doubt, make it possible to ascertain under certain circumstances whether a breach of an international obligation had taken

place, but they had no place, but they had no practical meaning if the obligation was so many-sided that it was difficult to decide whether it should be considered an obligation "of conduct" or an obligation "of result". As the distinction could give rise to misunderstandings, articles 20 and 21 were favoured only on condition that their provisions were considered to be auxiliary and complementary. Article 16 could be used to establish the existence of a breach of international law and the auxiliary and complementary character of articles 20 and 21 could be stressed by inserting into them a stipulation that would link the whole draft to generally recognized international legal documents, such as the 1970 Declaration on Principles of International Law or the Final Act of the Conference on Security and Co-operation in Europe. It should not be forgotten that, as the Commission had decided in preparing the draft articles, State responsibility did not arise from the breach of certain specific international obligations only but from the breach of any international obligation.

59. One representative emphasized that articles 20 and 21 constituted a unit. Indeed, article 20 and article 21, paragraph 1, contained definitions of the notion of breach by a State of an international obligation. In his opinion, those two provisions should therefore be combined in a single article, the first paragraph of which would reproduce article 20 while the second would reproduce article 21, paragraph 1. If a legal régime based on article 20 and article 21, paragraph 1, which related respectively only to conduct, i.e. means, and to result, was to be applicable, the future convention would have to provide concrete, practical, reliable criteria for determining when it was only the means and when it was only the result that had to be taken into account, something that was not apparent in the articles in question. In seeking a criterion for distinguishing between the ideas embodied in articles 20 and 21, attention should be concentrated on the word "particular" in article 20 and on the words "means of its own choice" in article 21. Since the latter expression implied the possibility of resorting to various means, it might be thought a contrario that the word "particular" meant that only one means could be employed. As it was, however, doubtful that that was in fact the meaning to be given to that expression, it was not therefore possible to arrive at a satisfactory criterion for the two articles as they now stood. If the police in a certain State failed to protect an alien who was attacked even though they were in a position to do so, that omission on their part gave rise to international responsibility of the State in question since it was contrary to international law. Did the alien acquire a right to damages immediately after the omission on the part of the State in accordance with article 20, or must the person concerned first exhaust all local remedies as provided by article 21? Was the claim for damages a new claim under article 21, i.e. a claim other than the one arising from the obligations of conduct? It could not be argued that there were two different claims.

60. Certain representatives, while questioning whether there was a real need for the distinction embodied in articles 20 and 21, nevertheless expressed their readiness to await the drafting of future articles since the Commission had stated in its commentary that that distinction would be of normative and practical importance when it came to determining the time and duration of the breach of an international obligation (tempus commissi delicti), a question it intended to study at a later stage. It was to be hoped that the following draft articles would shed further light on the practical consequences of the distinction.

61. The view was expressed that the difficulties created by the distinction could be avoided if the Commission took account of the concept of damage as a condition of responsibility, either independently or as a constituent element of an internationally wrongful act, and based the distinction on the beneficiary of the right in question, namely a foreign State or the nationals of such a State.

62. In the opinion of one representative, in view of the provisions of articles 20 and 21, it would be advisable to insert in article 3, relating to the elements of an internationally wrongful act, an additional paragraph providing that those elements could be simply a course of conduct, or a given result. It was important to make a clear distinction between an obligation and the result it required. According to article 16 of the draft, there was a breach of an international obligation by a State when an act of that State failed to conform, not with the obligation itself, but with the result expected, which could be a given course of conduct or a specific event. In other words, the distinction between international obligations "of conduct" or "of means" and those "of result" affected the question of State responsibility only in so far as one took into account the various ways in which a State might fail to fulfil its obligations. The focus should not be on the obligation itself but on the form which the breach of the obligation might take.

Article 20

63. Several representatives specifically referred to and supported article 20 which was regarded as an improvement on the original formulation proposed by the Special Rapporteur making it more flexible and appropriate to the reality of international practice. The article was well founded and the commentaries appended to it cited a considerable number of practical examples to clarify the different situations envisaged therein.

64. It was pointed out that the article dealt with the breach of an international obligation requiring the adoption of a particular course of conduct by a State and the responsibility which would thus arise. Such an obligation might require the enactment or the abolition of domestic legislation. The draft articles gave the State the freedom to choose the means of carrying out its obligation. However, where the means of conduct were stipulated, failure to follow them would constitute a breach. Failure to fulfil legal undertakings would be tantamount to a breach whether harmful consequences ensued or not. In the case of article 20, both the existence of a certain course of conduct and that of an obligation had to be demonstrated.

65. Article 20 was said to be a logical conclusion to the doctrine developed in the draft articles. It was in conformity with article 16 but differed from the latter in that it laid down a specific course of conduct from which a State could not depart without engaging its international responsibility. In other words, to the extent that the relevant international obligation was directed to the pursuit of a particular end, it also specified the means by which that end must be achieved. But important though it was that that end should be achieved, the fundamental

consideration that the end must be seen as inseparable from the means was of equal importance. The achievement of specified results was involved in the case of an obligation of conduct, but in that case there was a specific requirement regarding the type of action or non-action required by the State to achieve the result sought by the international obligation.

66. It was also pointed out that the type of international obligation dealt with in article 20 might relate to the conduct of the executive, legislative or judicial organs of the State and might entail an act or commission, if the course of conduct was positive or active, or an omission or inaction if it was negative or passive. Had the provision been restricted to active conduct, a whole series of situations requiring passive conduct would have been neglected. In this connexion it was emphasized that States were bound to abstain from the threat or the use of force against the territorial integrity or political independence of another State and to adopt laws prohibiting racial discrimination.

67. In the opinion of certain representatives further efforts should be made to define the concept of a "course of conduct", which was ambiguous and could give rise to future difficulties with regard to interpretation. The Commission had expressed its preference for this comprehensive term rather than the twofold expression "action or omission". There were indeed cases where certain obligations required the State to refrain from a specifically determined practice, and situations could arise in which the course of conduct adopted by the State in breach of the obligation consisted of a series of actions of the same kind rather than of one separate action. On the other hand, the view was expressed that the expression "specific course of conduct" used by the Commission was preferable to the words "action or omission", which might be difficult to interpret. It was also suggested that consideration be given to the possibility of including the prohibitive aspect of State conduct in the structure of article 20; that could be done by inserting the words "or to refrain from adopting" into the text. If that should prove undesirable, the article on definitions could be used to indicate clearly that the conduct of the State also include "a specific conduct of forbearance", a phrase used in the report.

68. The view was also expressed that there was a need to define the concept of an international obligation, in order to prevent a confusion between the political and legal interpretations. It should be made clear that the obligations referred to were those flowing from the norms of international law in force at the time when the wrongful act was committed. A technical definition could likewise be given to the concept of "obligation in force".

69. With regard to the expression "not in conformity", which served to determine the existence of a breach of an international obligation, it was said that it should be understood in the light of the commentary on article 20. An act of a State over and above what was required of it by a given obligation did not indicate absence of conformity.

Article 21

70. Several representatives also specifically referred to and supported article 21

whose text was likewise considered to be an improvement over the formulation originally submitted by the Special Rapporteur in that it avoided the distinction between complete and incomplete breach. Article 21 offered a solution which was both flexible and feasible; it had been substantiated in treaty and judicial practice and was in line with international justice and the maintenance of the rule of law. It represented an established measure of international equitable consideration designed to afford a State the opportunity to fulfil its international obligation so as to avoid incurring international responsibility. To give a party in breach an opportunity to make amends could only lead to the strengthening of the principle of pacta sunt servanda, which was the corner-stone of international law. The article, moreover, reflected the trend towards the co-ordination of domestic legislation with international obligations, which also strengthened the international legal order. In the commentary to the article the Commission had listed the various cases in which it applied and had set forth in detail the various problems to which it might give rise.

71. It was pointed out that article 21, which dealt with the breach of an international obligation requiring the achievement of a specified result, was based on the principle that an international obligation of result did not require a particular course of conduct: in other words, the State had a range of options by which to achieve a specified result. The Commission had appropriately proceeded to confirm that States could, in general, choose the means to perform their international obligations and enjoyed the freedom in such cases to modify their conduct at a later time in order to ensure the required result. The general application of the article allowed the State absolute discretion in its choice of means. However, there was a limited category of cases which afforded the State only an initial choice in the application of means needed to achieve the specified result. In the other category of cases, provided the initial choice of means had not rendered impossible the achievement of the required result or an allowed equivalent result, the State could discharge its obligations by its subsequent conduct or choice of means. It was also indicated that in the case of article 21, a breach arose from the fact that the State had not performed its obligation to achieve a specified result. Paragraph 1 of the article stated the general criterion, and paragraph 2 provided for an exception: a State could acquit itself of its obligation by securing the specified result through its subsequent conduct, but it should be emphasized that the result had to be achieved in any case. There was a breach of an international obligation of result only if the State was found to have failed to achieve in concreto the result required by the obligation. However, when it was clear from the obligation that that result or an equivalent result could be achieved by the State's subsequent conduct, there was no breach unless the State also failed by its subsequent conduct to achieve the result in question. It was said that the liberal approach adopted by the Commission as to the course of conduct to be followed by the State was justified by the priority accorded to the attainment of a certain result or its equivalent. In this connexion it was stated that States were bound to settle their disputes by peaceful means of their choice, including those provided for under Article 33 of the Charter. Like the obligation to bring about a peaceful settlement of disputes, most international obligations relating to human rights were obligations "of result".

72. The view was expressed that the specified result could be positive or active in substance and negative or passive in form, or vice versa. In any case, the time

factor played a decisive role in ascertaining the occurrence of a breach. The provisions of article 21 had therefore introduced into the concept of a breach a novel element, that of time: the State concerned was allowed a time-limit to achieve the result. In order to establish that responsibility had arisen, it was necessary to determine the tempus commissi delicti, i.e. the time and duration of the breach of an international obligation of result.

73. Some representatives referred to a difficulty that might arise in determining if the promulgation of a law contrary to international law or its application constituted a breach of an international obligation. It was said in this regard that the two types of obligation should not be confused, since the breach of an obligation of result could not occur unless the required result had not been attained. The simple enactment of legislation calculated to be applied in breach of an international obligation would not generally in itself constitute a breach of the obligation unless the legislation was in fact so applied. However, the opinion was held that, without further qualification, it was not possible to accept the assertion contained in the commentary to the effect that the fact that a State bound by an obligation of result had adopted a measure or, in particular, enacted a law constituting in abstracto an obstacle to the achievement of the required result, was not yet a breach or even the beginning of a breach of the obligation in question. That idea seemed to follow the same lines as that which had led to the insertion of the article relating to the exhaustion of local remedies in chapter III. It meant that no internationally wrongful act could be deemed to have taken place as long as the State had a chance of rectifying its own error or of not taking any specific action on it, which was apparently in contradiction with the refusal of the Commission to introduce the concept of damage. Moreover, the mere adoption of a measure, even in the absence of implementation, must in certain cases be considered as constituting a breach of an international obligation to another State. The view was further expressed that a State which promulgated a law contrary to international law, particularly if such a law could cause physical damage to alien individuals, was committing an internationally wrongful act. In order to engage responsibility on the part of the State in question, it was not necessary for the promulgated law to have actually caused injury to the individuals to whom it applied. The most that might be admitted was the possibility of applying a different role where the promulgated law dealt only with the property and not with the persons of aliens.

74. It was further stated that a useful clarification was provided by the Commission in its commentary, where it was noted that in some cases the international obligation gave no indication whatsoever of the means the State might use to achieve the required result, but that in others the obligation, although not expressly requiring recourse to a particular means, indicated a preference for a certain means as the most likely to achieve the result required of the State. The view was, however, expressed that a sovereign State had complete freedom of choice where no indication was given of the means to be used. It could freely opt for one means or another, having regard to the possibilities available to it in a specific historical situation, and the progressive character sometimes assumed by the fulfilment of certain internationally assumed obligations. For example, article 2, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination stated that States parties undertook to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its

forms. It was to be expected that the concept of "appropriate means" would be reflected differently in the practice of each State party, depending on national particularities and the nature of the existing regulations and legislative machinery.

75. Several representatives referred specifically to paragraph 2 of the article dealing with the situation in which, even if the State had initially adopted a conduct not in conformity with the obligation, it might be given another opportunity to correct the said conduct so as to bring about the desired result. It was said that besides the situation in which a remedy was applied to the internationally unacceptable initial conduct of the State, there was another more radical one by which initial conduct not in conformity with the obligation was completely obliterated by the subsequent conduct of the State, such as in the case of reparation for damage. The important point to bear in mind was that the State's choice of the means to be employed could in no instance constitute a breach of the obligation. A breach of an obligation of result should not be deemed to have taken place while the possibility of a remedy still existed, in other words, as long as the result in question or an equivalent result might be achieved by subsequent conduct of the State. There was a breach of the obligation only if the State also failed by its subsequent conduct to achieve the result required of it by that obligation. The good faith of the party thus remedied the original breach whether the first course of conduct had been deliberate or not. If, for example, a country agreed to exempt from customs duties goods from another country, and those customs duties were nevertheless levied on such goods upon their entry into its territory, there would be breach of the former country's obligation only if the competent authorities did not reimburse the customs duties unlawfully collected. It was further stated that by defining breach as a process occurring in stages, the rule provided an important incentive for States to redress their initial conduct so as to produce effects equivalent to those required by the international obligation, with a view to making reparation for injury suffered. That provision reflected the efforts of the Commission to solve the problem in a fair and equitable manner, drawing upon the guiding principles of international law.

76. Certain representatives expressed some doubts concerning the expression "equivalent result" in paragraph 2 of article 21. It was said that this expression, by its flexibility, would facilitate international relations, but at the same time it opened the door to various interpretations of the meaning and scope of the concept of required result and, moreover, allowed the State to claim the realization of one aspect of the required result rather than the other. The State might claim, for example, that the realization of a certain degree of economic and social development was tantamount to the realization of the objectives of human rights and for that reason reject any accusation of a serious breach of an international obligation of essential importance for safeguarding human rights. The view was also expressed that the term "equivalent result" remained rather ambiguous, and should therefore be given a more precise and concrete meaning. For example, in the case of obligations in respect of the treatment of aliens, which, according to the Commission were obligations "of result", a case might arise where an individual died following an attack on his person in a foreign State, as a result of negligence on the part of the competent authorities of that State in fulfilling their obligations

to prevent such an attack. That was the case envisaged in paragraph 2 of article 21; yet it was doubtful whether it could definitely be concluded in such a case that there had been no breach of the obligation from the outset, even if the State, for example by paying compensation to the victim's family, tended through its subsequent conduct to produce an "equivalent result" to that required by the obligation.

Article 22

77. Representatives who commented on article 22, dealing with the question of exhaustion of local remedies, generally agreed that it was by far the most significant of the three articles on State responsibility adopted by the Commission at its last session. The article embodied a universally recognized principle of general international law whereby State responsibility did not occur before all the remedies available for obtaining satisfaction at the internal level were exhausted. During the current critical period in the formation of a genuine international community, the principle of the exhaustion of local remedies was of fundamental importance, since it reconciled the principle of State sovereignty and the needs of international co-operation. The view was also expressed that the exhaustion of local remedies was an established principle concerning the diplomatic protection of nationals abroad and, as such, constituted a basic norm of international law to which Governments must give consideration when diplomatic problems developed concerning the treatment of their own nationals abroad. It was an important safeguard for States when confronted by a claim advanced by another State on behalf of one of its nationals who claimed to have suffered injury.

78. Several representatives supported the inclusion in the draft of the rule embodied in article 22. It was considered that the relevance of the provision in the text could not be questioned; its exclusion would represent a deliberate attempt to leave the current uncertain situation intact. It was essential that it should be included if the future convention on State responsibility was to be endorsed by a large number of States. It was also said that the formulation in article 22 had been arrived at after a full examination of the doctrine and of the views and practice of States on the topic, including the practice of the League of Nations. Besides, the rule contained in the article was engendered by political and practical considerations. It was an essential confirmation of the priority to be given to local remedies and was consistent with Article 2 of the United Nations Charter. The rule was a means to prevent issues that might arise between States in connexion with the treatment accorded to aliens from immediately being raised in the international arena, especially at present times, when so many countries, on the pretext of protecting their nationals, interfered in the internal affairs of other States. It also reaffirmed the principle of the sovereign equality of States, which ensured that no one was outside the competent local jurisdiction. The rule took national jurisdiction into account in view of the fact that parties might have associated themselves with local jurisdictions. It was also stated that the structure of the rule as formulated by the Commission fulfilled the contemporary requirement of a balance between the requirements of the suppliers of capital and those of the countries where the capital was invested. The latter States wanted confidence to be placed in their legal structures, especially since a minimum standard of legal protection could now be considered to exist in every country in the world. At the very least, it was said, the rule was an expression of hope that weaker States would no longer be forced to give special treatment to aliens and foreign companies without having a fair opportunity to remedy an alleged breach. From a practical point of view, the rule should also prevent the multiplication of claims at the diplomatic level.

79. Several representatives, endorsing the Commission's view to the effect that the text adopted should be confined to a general statement on the principle as provided for by general international law, which should be flexible enough to be able to be adapted to the various situations that arose in practice, expressed their approval of the text of article 22 as it stands. Certain representatives considered that the final version of the text could be improved, provided that the basic concepts which it contained were not changed. Other representatives expressed disagreement with the article as a whole or with some of its elements, as well as with points dealt with in the commentary attached to it.

80. One representative considered that the rule embodied in article 22 belonged to the category of primary rules, relating only to the establishment of the breach of the obligation, and was not in itself a general rule of international responsibility, even less a rule of jus cogens from which no derogation was possible. If it was retained its existing formulation was too narrow.

81. Another representative expressed the opinion that the rule was inequitable, particularly where the State not only breached an international obligation of "result" but was guilty of denying justice by systematically preventing an injured alien from making use of local remedies. In his view, the Commission should reconsider the article from that perspective.

82. It was also said by one representative that, for a matter which occupied so large a place in international practice and jurisprudence, the substantive rule relating to the need to exhaust local remedies was stated at too abstract a level of generality. In his opinion, the detailed discussion in the commentary only highlighted the lack of detail in the stated rule. Although the Commission had indicated that it had taken the view that the text adopted should be confined to a general statement on the exhaustion of local remedies, it had given no reasons for that conclusion, which was far from being one of self-evident validity. In view of the Commission's statement that the draft articles under study were cast in such a form that they could be used as the basis for concluding a convention if so decided, it would seem that the work of expressing in the form of articles the solutions to the manifold problems of exhaustion of local remedies could be taken further.

83. Several representatives agreed that the rule of exhaustion of local remedies applied only where the international obligation which the State was alleged to have breached was an obligation of result and not an obligation of conduct. As drafted, article 22 and particularly its paragraph 2, made the exhaustion of local remedies a constituent element of the notion of breach of an international obligation of result. It laid down an additional condition of the violation of obligations of result for a special category of obligations, those designed to protect aliens, natural or juridical persons, and their property. It was in the light of that obligation that it would be possible to determine whether a State had breached its obligation. A large proportion of international obligations concerning the treatment to be accorded to private individuals allowed the State to achieve by stages the result required of it or to achieve it by subsequent conduct.

The breach of an international obligation of result would occur in cases where it was established that the natural or juridical persons who considered that they had been placed in a situation incompatible with the internationally required result had not succeeded, even after exhausting all remedies, in rectifying the situation. No such breach of obligation could exist in law until all available local remedies had been resorted to in vain. In that regard, article 22 completed the definition of breach of an international obligation of result contained in article 21 and was closely linked to the latter article. On this basis, one representative considered it advisable to combine the two provisions by adding several lines to article 21.

84. On the other hand, one representative considered that article 22, concerning the exhaustion of local remedies, did not apply to the situations referred to in article 21 on the obligation of result and should not be combined with the latter article, as had been proposed. In his view, the situation governed by article 21 concerned only the treatment of aliens pursuant to bilateral or multilateral establishment agreements and the like. In those cases, the exhaustion of local remedies constituted a well-established rule of general international law. In this connexion, it was said that a diversity of legal concepts currently existed in the world as to when local remedies could be considered to have been exhausted. State practice varied on that point, and it was extremely difficult to formulate a uniform attitude to the status, rights and duties of aliens in a foreign country, whether they were natural or juridical persons, unless the host country and the country of which those persons were nationals concluded a specific agreement or convention. That was the procedure followed by many Governments, in accordance with internationally accepted principles.

85. Also with reference to article 22, one representative noted that the Commission, while itself at times recognizing in its commentary the distinction according to the beneficiary of the right, whether States or natural or juridical persons, had retained in the text another concept, namely that of the result achieved. In his view, that procedure was particularly regrettable since, if the solutions chosen by the Commission were accepted, it appeared that a single obligation could not be considered as both an obligation of means and an obligation of result. On the other hand, the distinction based on the beneficiary of the right took account of the principle, which was well established in contemporary international law, whereby a State invoking the responsibility of another State would be bound by the rule of exhaustion of local remedies only when exercising diplomatic protection and not when asserting a right of its own.

86. Also in connexion with the scope of article 22, it was noted that it was further limited to international obligations concerning the treatment to be accorded to aliens, whether natural or juridical persons. That limitation was the most fundamental, inasmuch as it justified the condition of the exhaustion of local remedies. It was considered that that justification of the rule was of primary importance to the determination of its exact scope, particularly in cases which the Commission had qualified as "more or less special or marginal". The

view was expressed that all international obligations to which the articles prepared by the Commission referred were obligations from State to State; the result to be achieved was therefore required in the direct interest of another State or States, or indeed of the international community as a whole. However, that did not prevent the singling out of a category of international obligations whose results depended upon the "collaboration" of the "beneficiaries" of such obligations and the victims of their breach. The absence of such collaboration could to a certain extent be compared with contributory negligence on the part of the victim. It was further said that it was normal that the private individual concerned should take the initiative of resorting to all the local guarantees offered by a State. The exhaustion of local remedies therefore seemed to be a necessary precondition in order to determine whether a State had breached an international obligation. That was the logical consequence of the nature of international obligations whose purpose and specific object was the protection of individuals.

87. Several representatives addressed themselves to the question to what extent the rule of exhaustion of local remedies enunciated in article 22 was a rule of substance or of procedure. It was pointed out in this regard that the Commission had unequivocally concluded that it was a substantive rule, although conceding that it had procedural aspects. The opinion was expressed that the question whether exhaustion of local remedies was a rule of substance or of procedure was far from academic, since it was partly the nature of that rule that determined the point at which the international responsibility of a State could be said to be engaged. If the rule was considered substantive, or primarily substantive, the international responsibility of the respondent State was generated only when local remedies had been exhausted. On the other hand, if the rule was considered procedural, it operated solely as a bar to the admissibility of a claim by the injured State before an international tribunal but had no effect on the point in time at which the international responsibility of the infringing State was engaged.

88. Some representatives endorsed the Commission's opinion that the exhaustion of local remedies was not just a simple procedural device related to the implementation of international responsibility, but rather a rule of substance which generated the responsibility in question. It was said that, as was proved by most conventions on the protection of individuals, by the decisions of the International Court of Justice and by State practice, that it was a substantive rule which might also have international diplomatic or legal effects on the implementation (mise en oeuvre) of international responsibility, which was the subject of the third part of the draft. The Commission's position, it was added, was in keeping with the solution adopted in the countries of continental Europe. Besides, it seemed contradictory that an internationally wrongful act, concerning the relations between States, could cease to exist because the individual involved failed to take the necessary initiative. It was more logical that, where the interests of an individual were involved, the internationally wrongful act should possess a complex structure, resulting from a whole series of acts on the part of the State concerned, from the original act to the stage at which the internal legal order, whose administrative or judicial remedies had been scrupulously invoked by the individual concerned, revealed themselves to be incapable of ensuring that international law was respected.

89. Certain representatives who supported the Commission's position emphasized that the fact that the rule had been included in part I of the draft should not prevent the Commission when it turned to part III devoted to implementation (mise en oeuvre) of international responsibility from studying in detail its technical and procedural aspects and its effects on diplomatic and judicial procedures which were not negligible. The view was expressed that since the Commission's position did not exclude cases of initial breaches of international law when such breaches did not prevent domestic laws from construing the rule as procedural it was gratifying to know that the Special Repporteur would submit articles dealing with the procedural aspects of the rule to the Commission.

90. On the other hand, some representatives entertained serious doubts about the substance of article 22 and believed that the local-remedies rule was first and foremost a procedural rule whose proper place was within the framework of the part of the draft which would be devoted to the implementation of international responsibility. The exhaustion of local remedies, it was said, was simply a condition of diplomatic protection. It was also stated that the rationale for the Commission's position found in paragraphs (13) to (35) of the commentary to article 22 was unconvincing. In particular, the cause-and-effect relationship between the two parts of the proposition in paragraph (14) of the commentary to the article was by no means evident. Further, it was stated that the apparently impeccable logic of the argumentation found in paragraph (15) of the commentary was in fact very questionable. The example was given that if State A asserted that State B was in breach of its obligations towards State A because a national of State A had been denied the benefit of most-favoured-nation treatment provided for by a treaty in force between States A and B, no claim for reparation of the injury suffered by State A in the person of its national would be admitted by an international instance of a jurisdictional nature unless local remedies had been exhausted. However, it was said, the conclusion was not, as the Commission had suggested, that the breach of the obligation imposed by the treaty had not yet occurred; it was simply that there had not yet been an opportunity for the infringing State to implement its responsibility. The situation was different when the breach of State B's international obligations to State A resulted from the action of judicial organs of State B which had failed to perform their duty to afford a national of State A the internationally required judicial protection against injury suffered owing to a violation of domestic law alone. In that case, it could be argued that State B's international responsibility was not generated until local remedies had been exhausted; however, that exception stemmed not from the principle that a State's international responsibility was not generated until local remedies had been exhausted but from the specific nature of the claim made by State A.

91. One representative indicated that he would have no objection to the rule of the exhaustion of local remedies, which was generally regarded as a procedural rule, being considered as a substantive rule, if that helped to strengthen the sovereign equality of States. In cases where the conduct of the State constituted in itself a breach of an international obligation concerning the treatment to be accorded to aliens, there could be no question of waiting until the aliens concerned had exhausted local remedies before recognizing that a breach had occurred. In his view, article 22 should, therefore, be redrafted.

92. The view was also expressed that any rigid distinction between a "procedural" and a "substantive" definition of the exhaustion of local remedies should be approached with caution. From a practical point of view it was important to determine the time from which the damage must be taken into consideration in order to calculate the amount of the reparation. According to the "substantive" approach, damages would be calculated not as of the time of the injury but as of the time of the exhaustion of local remedies, interest accruing only from the time of exhaustion. Yet, under customary international law, when a State expropriated the property of an alien it was obliged to pay just compensation as of the time of the taking, and if it failed to pay such compensation even on the exhaustion of local remedies, an international wrong would arise concerning which the Government of the alien's State could make an international claim. It seemed that the Commission's draft did not satisfactorily deal with the problem of the time of the injury to the alien as from which the obligation to compensate him ran. According to this view, a solution lay in recognizing that there was a wrong for which reparation was due at the time of the injury but that the right of the alien's Government to espouse a claim for that wrong arose only upon the unsuccessful exhaustion of local remedies. On the other hand, it was considered that as the Commission had rightly noted, the choice between those two solutions whether substantive or procedural, was quite unrelated to the question of the criteria for establishing the amount of compensation. There was no reason why the calculation of compensation should not be related to the first stage of a complex act.

93. Certain representatives considered that it was not necessary, for the purpose of international codification, to adopt a position on the highly controversial question of whether the exhaustion of local remedies rule was one of substance or one of procedure. It was said that perhaps it was not very important whether the rule was of one or the other kind since the sole purpose of article 22 was to make it possible to determine whether a breach of an international obligation existed. The opinion was also expressed that the answer to that question depended on the circumstances of each case. The United Nations Conference on the Law of the Sea had not yet succeeded in determining where the rule was to be placed, but its classification as a matter of substance or of procedure was quite irrelevant. It was further stated that, at any rate, the rule must be defined in a neutral manner without specifying whether it was one of substance or of procedure. In practice, the alien who had suffered injury or the State which presented a claim on his behalf was concerned only with obtaining satisfaction of the claim. If no satisfaction was possible because the local remedies had not been exhausted, it did not matter to the party that that circumstance had prevented the claim from arising or the action from being brought. Furthermore, whatever the fundamental nature of the rule, whether substantive or procedural, the local remedies open to individuals must lead to results which conformed to international law.

94. Finally, certain representatives indicated that, in any case, they could not express any final view on article 22 until it was known how the Commission intended to deal with the more significant aspects of the local-remedies rule, namely the procedural aspects.

95. Referring to the nature of the rule, certain representatives considered that the rule of the exhaustion of legal remedies was not a rule of jus cogens, and could therefore be set aside by a treaty provision allowing for swifter protection of the interests involved. However, other representatives took the view that that rule allowed of no exceptions and that any agreement attempting to exclude it should be considered without legal effect.

96. One representative, who regarded the rule on exhaustion of local remedies as a rule of general application, at least in the treatment of aliens, but from which there could be derogation by express agreement, cited as an example the Convention on the Establishment of a Centre for Settlement of Investment Disputes, in which the parties had agreed to submit disputes for conciliation or arbitration without their nationals having to exhaust the local remedies. In this connexion another representative stated that as far as the exception to the rule of the exhaustion of local remedies in the case of investment guarantee agreements, which involved, for example, the binding jurisdiction of the International Centre for Settlement of Investment Disputes, it was simply the counterpart of the official guarantee provided by the State of which the investor was a national. In that case, diplomatic protection could not be invoked until it was established, after the exhaustion of local remedies, that the act of which the State receiving the investment had been accused was fundamentally incompatible with the provisions of the guarantee agreement. Furthermore, the system of official investment guarantees was currently coming to resemble an insurance system and in any case it seemed that the guarantee system had been applied in very few cases. Therefore it could not be concluded that there had been any sort of change in the machinery of international responsibility.

97. Certain representatives referred to other aspects of the relationship between the principle and the determination of the existence of a breach of an international obligation relating to the treatment of private individuals. Thus, the view was expressed that there was no logical connexion between the exhaustion of local remedies and denial of justice, since even the least discriminatory legal treatment of aliens could be incapable of redressing an internationally wrongful act if that act arose from a legislative measure, and the judicial authority was not empowered to abrogate or waive the application of a national law which was contrary to international law. Furthermore, the structure of internal procedural rules could render a local remedy inaccessible to an individual who had suffered injury as a result of a specific internationally wrongful act.

98. Another aspect for consideration was said to be the question as to when local remedies would be deemed to have been exhausted. Consideration of that aspect of the rule might be necessary for the progressive development of international law in respect of State responsibility. In this regard the opinion was expressed that in order to decide whether responsibility was generated only when local remedies had been exhausted or whether it existed prior to that time, it was necessary to know whether a wrongful act was already involved or whether the first

wrongful act derived from the exhaustion of local remedies. If the relationship between those quite distinct situations could lead to confusion, it was because local remedies were at the same time a means of redress and, in the case of failure, the point of departure of international responsibility.

99. With regard to the sphere of application of the rule of exhaustion of local remedies, certain representatives commented on the meaning of the term "alien". The opinion was expressed that this term was questionable since it seemed to indicate either that the State was automatically responsible with regard to individuals who were its own nationals, i.e. that it was not necessary for the latter to exhaust local remedies for it to be recognized that the State had breached an international obligation "of result" in their regard by failing to treat them as it should, or else, which was unfortunately more probable, that the field of application of the principle of the exhaustion of local remedies was limited to the treatment to be accorded to "aliens", i.e. that it did not encompass the treatment which a State undertook to accord to "national" individuals. It was also said that as regards the term "alien" it would seem at first glance to be a simple matter: the exhaustion of local remedies should in principle be restricted to individuals and bodies corporate. But, it was asked, what about stateless persons? Had not the time come to adopt an international convention on State responsibility giving the State in which a stateless person was permanently resident the right to present a claim for damages on his behalf? Questions also arose in connexion with persons having multiple nationality and bodies corporate The future convention could not be silent in that regard. In this connexion, it was noted that the condition of the exhaustion of local remedies did apply in cases of injury caused to foreign public entities - including States - provided that, in the cases in question, they had acted jure negotii or jure gestionis. It was also pointed out that the exhaustion of local remedies was inapplicable in cases of injuries suffered by persons acting as State organs such as diplomats, representatives and other agents of the State. Finally, the view was held that an international claim arising out of State responsibility should also be subject to the rule of nationality of claims. There should be a bond of nationality between the claimant State and the person injured. Possible exceptions to that rule might be the cases of inhabitants of a protected State or aliens serving on the merchant ships or in the armed forces of a claimant State.

100. Several representatives agreed with the Commission's differing from the report of the Special Rapporteur in not extending the scope of the rule of exhaustion of local remedies to a State's treatment of its own nationals. It was said that the wording adopted by the Commission was preferable to the text proposed by the Special Rapporteur since it came closer to the traditional concept of responsibility, which related only to the treatment of aliens. To retain the Special Rapporteur's proposal regarding recognition of the international responsibility of a State in respect of its own nationals would be, at the current stage, too bold a step in the field of the progressive development of international law. Before such a principle was incorporated into an international legal text, a more detailed study should be undertaken with a view to avoiding any provision which might result in interference in the internal affairs of other States, especially the weaker ones.

101. On the other hand, the opinion was expressed that during the second reading of the articles under consideration, particularly article 22, some thought should be given to extending the application of the principle of exhaustion of local remedies to the treatment accorded by the State to its own nationals. The international community was gradually assuming responsibility for the protection of certain fundamental rights, and most of the existing conventions on the subject, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and the Optional Protocol thereto, expressly imposed the requirement of exhaustion of local remedies. Furthermore, it should be kept in mind that the provisions of article 19, concerning the distinction between two separate categories of internationally wrongful acts, inevitably inspired the substance of the following articles - including article 22. For instance, the express reference made by the Commission to some of the most characteristic violations of international obligations of essential importance for safeguarding the human being, such as those concerning genocide and apartheid, had a special bearing on the possible extension of the rule of exhaustion of local remedies to all private individuals, including nationals of the State directly involved.

102. Several representatives commented on the Commission's decision not to limit the scope of the principle of exhaustion of local remedies explicitly to cases concerning the conduct adopted by the State "within its jurisdiction". It was said that there was a clear link between the condition of the exhaustion of local remedies and the jurisdiction of the State whose initial act ran counter to an international obligation of result. In the opinion of some representatives, it would be advisable to so limit the scope of the principle. It was said, as an example, that if a fishing vessel was damaged on the high seas by a foreign warship it would be unreasonable not to be able to determine the existence of the breach of an international obligation and not to allow the victims to file an international claim unless it was established that judicial and other local remedies available to the victims in that State had been exhausted. It was generally admitted that the rule of exhaustion of local remedies was based, among other things, on respect for the sovereignty and jurisdiction of States, and it would be unreasonable to require a private individual having no link to the sovereign jurisdiction of the offending State to abide by that jurisdiction and to exhaust local remedies available in that State. Consequently, the scope of the application of that principle should be limited to cases where a person was placed under the sovereign jurisdiction of another State and maintained certain links with that State. Such a limitation might in practice raise problems in respect of the exact limits of national jurisdiction under international law, but national jurisdiction undeniably had limits. In this connexion, the view was expressed that the applicability of the principle to cases of injury caused by a State to an alien outside its territory and similar cases should be resolved by State practice.

103. One representative was of the view that the local remedy rule might be ineffective where the action complained of had occurred outside the State's jurisdiction or had been perpetrated against an alien who was only temporarily

within the State's jurisdiction. That was a practical matter to which the Commission should address itself. Cases of injury suffered by a sailor in a harbour of a foreign country or by persons in transit at an airport were examples of such a situation.

104. Another representative felt that the term "jurisdiction" was ambiguous, because it did not correspond to the same concept in French and in English; it therefore suggested that the words "in the exercise of its State authority", which might better reflect the justified concerns of the Commission, should be inserted in article 22.

105. Several representatives stressed that the exhaustion of local remedies was only applicable where such remedies were effective and available and not merely theoretical. The Commission had made that point explaining that a remedy which would be a mere formality should not be required as a prerequisite to the State's action for reparation. It was said that in stressing the effectiveness rather than the availability of local remedies, the Commission showed that it was quite aware of the reasonable limits of the rule in cases when, on the one hand, the wrongful act entailing responsibility was directly prejudicial to another State and when, on the other hand, foreign private individuals were injured at the same time and by the same conduct as the State of which they were nationals. The question had caused difficulties for the Commission and great emphasis had been placed on the concept of local remedies "open" to individuals and "effective" local remedies. It was felt that if differences of opinion arose concerning the interpretation of availability and efficacy, they could be settled peacefully. In this connexion, it was said that to speak of remedies that were effective and truly accessible, was to say that they should, among other things, not be too onerous.

106. On the other hand, some representatives expressed doubts about the adequacy of the criteria of "effectiveness" and "availability". In this regard the view was expressed that the application of the rule of the exhaustion of local remedies was bound to raise problems of interpretation, if only in respect of the rather vague terms "effective", "available" and "equivalent". It should be remembered that local remedies by their very nature often made it impossible to obtain the results called for by international obligations. For instance, national courts in many countries were not even allowed to discuss the international obligations. Although that did not necessarily mean that a local remedy was not "effective" in such cases, since "equivalent" results might be obtained, the difficulties raised by the application of that condition were such that it would be preferable to avoid giving it too broad a scope.

107. It was further said that the Commission seemed, however, to give a rather wide meaning to those two qualifications. It alluded in the commentary to cases where the State of which the injured persons were nationals intervened without waiting until the victims had had recourse to the remedies provided by internal law, which it considered incapable of correcting the situation in which its nationals had been placed. That example was deemed not quite convincing. The fact that the State whose nationals had been injured doubted the effectiveness

of the internal remedies could not constitute a decisive criterion for determining whether an international obligation had been breached. The real reason for the non-application of the condition of the exhaustion of local remedies in the case of "a general atmosphere of hostility towards the nationals of some foreign country" was rather the actual character of the international obligation contracted towards another State whose legitimate interests prevailed over the individual interests of the individuals concerned. After all, as the Permanent Court of International Justice had rightly stated in the Chorzow Factory Case, "rights or interests of an individual the violation of which rights causes damage, are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act". Similarly, it would be a somewhat strained interpretation to consider that local remedies were not available in cases where it was simply "difficult" for an injured alien to have recourse to them, even if the damage to his property was inflicted outside the territory of the State which committed the injurious act, to use the example cited by the Commission. There again, the real reason for not applying the principle of the exhaustion of local remedies seemed to be a different one. If, as the Commission stated, it would be unreasonable to require the State whose national had been injured to initiate actions at the level of the internal legal order of the State responsible for the injury, it was because the other State was in principle not subject to the jurisdiction of the latter State.

108. The view was also expressed that another aspect which was left unresolved by the general wording of the formula in article 22 was whether a remedy was "effective" if its operation was affected by unreasonable delay in the dispensation of justice. In this regard, it was felt that the traditional principle of exhaustion of local remedies was too limited in scope. The exhaustion of local remedies might be a cumbersome process in any country, involving the individual in delays that might render the application of the local remedies more or less useless. For that reason, it was said, article 22 should be amended in such a way that it provided for a breach of an international obligation of a State not only if the aliens concerned had exhausted the local remedies available to them without obtaining satisfaction, but also if the application of the local remedies was unreasonably delayed. A precedent had been set in article 5 of the Optional Protocol to the International Covenant on Civil and Political Rights. It was further stated that an indication of a possible answer to the question might also be found in article 41 (1) (C) of the International Covenant on Civil and Political Rights and in article 14 (7) (A) of the International Covention on the Elimination of All Forms of Racial Discrimination.

109. One representative thought that the commentaries had left unprobed at least one of the more delicate and difficult problems which called for solution. The omission which particularly came to his mind related to one aspect of the identification of situations where the rule was that remedies need not be exhausted because there were no remedies to exhaust. The problem was approached in paragraphs (47-51) of the commentary on article 22, but the question not expressly covered was whether a remedy could be deemed unreal (and therefore not

requiring exhaustion) solely on the basis of an opinion of a local lawyer. Although it would not be reasonable to expect the commentary to cover every single problem that might arise, the problem provided a test of the adequacy of the wording of article 22. The only relevant words in it were "... if the aliens concerned have exhausted the effective local remedies available ...".

110. Another representative stressed that in stating that the principle of the exhaustion of local remedies must be interpreted in the light of the general criterion of good faith, the Commission seemed to have recognized that that criterion, which was a moral one par excellence, was at the heart of the problems relating to the international responsibility of States, in view of the prominence which all States must grant that criterion in fulfilling all of their obligations. It was considered, therefore, highly desirable for the Commission to draw the necessary conclusions and codify in the draft articles the fundamental rule of obligation of good faith, as embodied in Article 2, paragraph 2, of the Charter.

111. Certain representatives welcomed the Commission's conclusion that the requirement that the individual considering himself injured must exhaust local remedies in no way implied that the State of which he was a national might not make diplomatic representations to the State alleged to have committed the wrongful act until the individual had exhausted the local remedies available in the latter State. In their view, that principle was clearly right and fully in accordance with State practice. On the other hand, the opinion was expressed that such action could be taken only as a truly exceptional step, since it could take on the appearance of interference in the internal affairs of another State, not to mention the fact that it could create friction between the organs of that State, especially in countries where there was a clear-cut separation of powers. When an action for avoidance or an action for redress had been brought, diplomatic representations should be directed to the executive power, which had competence in foreign affairs.

112. One representative noted that the Commission had affirmed that the State of which the alien was a national could make diplomatic representations to the State alleged to have committed the wrongful act before that alien had exhausted the local remedies available in the latter State, but immediately afterwards it had stated that the State of which the individual concerned was a national could not "take over" the wrong done to that individual before the latter had had recourse to the domestic courts open to him. In his view, the Commission should reconsider that question in the light of State practice over the past 10 years.

113. Certain representatives made some observations of a terminological character concerning article 22. One view was held to the effect that the article was complicated and difficult to understand. Another representative expressed the hope that the Commission would, when it returned to the second reading of the article on local remedies, be able to grapple in greater detail with the expression in codified form, as opposed to elaboration in the commentary, of some of the detailed aspects of its application.

114. As to specific terms, certain representatives considered it important to give a definition of the term "local remedies" in the draft. It was noted that the commentary on the article indicated that the Commission intended to decide on the insertion of such a definition later. With respect to the word "remedies", it was asked whether the term referred only to judicial remedies and what were the criteria for determining whether a State organ was to be regarded as judicial. Were arbitration and administrative remedies among the remedies which must be exhausted? The term "remedy", it was said, had different meanings in different States, but in an international convention it must have an independent meaning since otherwise there would be little hope of obtaining uniform interpretation and application of the convention. With regard to the word "local", it was observed that in some States there were concurrent jurisdictions and that it might be advisable to deal with that problem in the draft. In connexion with the term "local remedies", the view was also expressed that the word "effective" was apt to create problems of interpretation. In ordinary language and in legal practice, a remedy was effective if it had a positive result, but in the present instance it must of necessity have a negative result. Article 22 should specify that the remedy must be possible both in law and in fact.

115. It was also said that the words "the obligation allows" should be replaced by a reference to the nature of the obligation, since the treatment in question did not derive from an obligation but rather from law or from a contract. Finally, as regards the wording of the French version of article 22, in fine, which read "les recours internes efficaces leur étant disponibles", it was felt that wording "efficaces et disponibles" would be preferable.

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

116. In general, representatives noted with satisfaction that the Commission had made considerable progress on the topic of succession of States in respect of matters other than treaties. The significant contribution of the Special Rapporteur, M. M. Bedjaoui, through his scholarly and wide-ranging ninth report (A/CN.4/301 and Add.1) was stressed. It was noted that that report had underlined the difficulties and complexities of the subject-matter, illustrating varied State practice and divergent opinions of writers. Hope was expressed by certain representatives that given the progress achieved at its twenty-ninth session, the Commission could, at its next session, complete the first reading of the draft articles on succession of States to State property and State debts.

1. Comments on the draft articles as a whole

(a) General comments

117. Several of the representatives who spoke on the subject expressed satisfaction with, or general approval of, the draft articles adopted by the Commission at its twenty-ninth session on succession of States to State debts. Stress was placed on the importance and relevance of the formulation of international rules concerning succession to State debts; it was viewed as the most controversial and intricate aspect of State succession. The study of the question of succession to State debts was described as essential for a better understanding of the work already done in the field of succession of States to State property (part I of the draft). It was said by some representatives that the new draft articles revealed a concern for relating the topic to current realities and that in taking that approach the Commission had made a remarkable effort to fulfil the need for the progressive development of the rules of international law in the field. The view was further expressed that the application of out-dated principles could lead to de facto injustices. Other representatives recalled that all international relations, particularly legal relations between States, were governed by the principle of good faith which should be the starting point for any codification efforts on the topic. Furthermore, in view of the scarcity of precedents in the field, it was said that the Commission's work should be limited to the formulation of a basic legal framework on succession to State debts, leaving room for the countries involved to find flexible solutions on a case-by-case basis, with due regard for the circumstances prevailing at the time of the occurence of succession of States. Another view expressed was that it seemed questionable whether a meaningful international consensus could be achieved within the foreseeable future on an item which was always complex and politically difficult. Reservations were expressed by certain representatives with regard to specific draft articles adopted at the Commission's twenty-ninth session.

118. Finally, several representatives said that it was difficult to take a position on the new articles adopted on the topic pending further study and the final outcome of the Commission's work on the subject.

(b) Form of the draft

119. Support was expressed for the Commission's view that the form to be given to the codification of rules on the topic could not in fact be definitely established until the topic had been fully studied. Practical considerations, it was said, should prevail even at the initial stage and the decision to work, as in similar cases, on the basis of draft articles was seen as the best way of defining or developing rules of international law intended to regulate the subject. The draft articles, as conceived, were consistent with the form of an eventual convention, if the General Assembly decided to refer the matter to a codification conference. One representative said that if the draft articles were to become a convention, it would be advantageous for newly independent States to implement its provisions retroactively.

(c) Scope of the draft

120. The Commission was congratulated on having decided to confine its treatment of the topic to State property and State debts for the time being. The view was also expressed, however, that before the expiration of its current five-year term of office, the Commission could begin the consideration of a series of articles concerning State succession to other public property and public debts.

121. Furthermore, it was said that the decision taken by the Commission in 1968 to give priority in its consideration of the topic to economic and financial matters was entirely justified. The question of succession to non-financial obligations would have to be considered separately in another part and at a later date. On the other hand, the opinion was expressed that the Commission should conduct a detailed study of all aspects of State succession in respect of matters other than treaties, without restricting itself to economic or financial considerations.

122. In that connexion, one representative stressed that the time had come to deal with the question of the status of the populations of the territories which had been the subject of a succession of States. That question was invested with a sense of urgency because of the human considerations involved. He said there were currently hundreds of thousands of former inhabitants of such territories dispersed over various areas of the globe, particularly in the former administering Powers of their original territories. More often than not, those persons enjoyed only precarious rights in their new surroundings and had to cope with serious difficulties, since they had had to leave behind all their property and because even their nationality was sometimes in doubt or undefined. It was important, he stressed, to study and define the interests of those individuals within the context of the succession of States.

(d) Structure of the draft

123. A number of representatives commented favourably upon the Commission's approach of maintaining to the extent possible a parallel between the articles forming part II of the draft (Succession to State debts) and those included in part I

(Succession to State property). That approach was viewed as commendable and of utmost importance. Certain other representatives, however, believed that the parallel between the two parts had not been respected. A certain lack of parallelism was mentioned as between article 18 and article 5, as well as between article 22 and article 13.

124. As to the types of succession of States dealt with in section 2 of both parts I and II, the view was expressed that it was only justifiable to distinguish between different types of State succession on the basis of objective criteria, and that, from a legal point of view, there were only three types of succession: separation, transfer and unification. It was said that the distinction between a "newly independent State" and the "separation of part of a State" did not seem justified as it was based on considerations of a political or psychological rather than a legal nature and as it appeared to give rise to a number of uncertainties and difficulties. However, it was stressed that a very clear distinction must be made between State succession as the direct consequence of the decolonization process - where much could be said for a broad tabula rasa approach - and all other cases of State succession, especially those arising out of dissolution or dismemberment of a State, a case which the Commission intended to examine in the near future. Succession of the latter category should, it was said, follow the principle that the duty of the new sovereign to bear a portion of the predecessor's debt should be dependent upon the benefits accruing to the territory transferred; the emphasis should be placed on territory and on its population as the debtor element.

125. A number of representatives spoke in favour of including in the draft procedures relating to the peaceful settlement of disputes. It was said that such procedures should lead to a binding decision based on law and should be flexible, including a wide choice of methods of settlement, in accordance with Article 33 of the Charter. If the parties did not agree on a particular method of settlement, each party would be entitled to refer the dispute to compulsory settlement. Certain representatives referred to the need to establish effective machinery for dispute settlement in the light of the inclusion in certain articles of the draft of such expressions as "equitable proportion".

2. Comments on the various draft articles

Articles 1, 3, 4, 12, 13, 15 and 16

126. One representative believed articles 1 and 4 could be deleted as they merely stated the obvious. He also asked why the types of succession dealt with in articles 12 and 13 (as well as in articles 21 and 22) were not mentioned in article 3 on "Use of terms". Another representative expressed regret concerning what he deemed to be the abusive use made of such vague concepts as "equitable proportion" in articles 15 and 16 (as well as article 21) and "equitably compensated" in article 16.

Articles 17 and 18

127. Many representatives who spoke on the question of succession of States to State debts referred to the scope of the articles in part II (article 17) and to the definition of the term "State debt" (article 18). As to article 17, while certain representatives believed that it was not drafted with sufficient clarity or that it should be deleted as stating the obvious, other representatives stressed that articles 17 and 18 were intrinsically linked and opposed the deletion of article 17.

128. Several representatives considered article 18 to be the key element of part II of the draft articles and considered it to be acceptable and sufficiently broad to cover all financial obligations which might be considered as belonging to the category of "State debts". The definition in article 18 was said to be a masterly achievement of clarity, flexibility and political realism. The value of the comprehensive commentaries was also mentioned. It was noted, however, that the definition of "State debt" was the essential problem with regard to the draft articles on succession to State debts and had presented difficulties. Other representatives were of the view that the article was too vague and lacking in precision. It was said that the article did not clarify sufficiently the legal nature of the rights and obligations which they regulated and that it should specifically indicate what were the financial obligations in question. Reference was made to a lack of parallelism between article 18, defining "State debt" and article 5, defining "State property". Also, it was suggested that the Commission should consider whether it might not be preferable to transfer the definition of the term to article 3 on "Use of terms".

129. With regard to the different categories of debts to which reference was made in the commentary, certain representatives agreed with the Commission's approach of excluding from the definition of "State debt", the debts of the successor State. For clarity, it was suggested that the word "predecessor" could be inserted in the last phrase of article 18 so it would read "chargeable to the predecessor State". Some representatives supported the Commission's approach of not including debts of local authorities within the definition of "State debt". That seemed logical and just, it was said, since local authorities would continue to be responsible for their own debts, notwithstanding the succession of States. However, another view was expressed that in State practice, a very substantial part of the debts involved in succession were considered to be proper to the territory and to be "colonial" debts contracted within the context of the territory's financial autonomy. Therefore, article 22, dealing with newly independent States, should in particular take into account all debts contracted by the administering Power in the name and on behalf of the dependent territory, because the financial autonomy of that territory had been purely formal. As to the exclusion from the definition of debts of public enterprises or establishments, it was stressed that that approach should be clarified by the Commission as it was acceptable only if it was clearly understood that the debts of any public institution situated in the territory of the successor State should pass to that State. Furthermore, it was said, if a public institution had its headquarters in the predecessor State and carried on certain activities in the territory passing

to the successor State, debts relating to those activities should pass to the successor State in a proportion and according to criteria to be established. Regarding the category of delictual or semi-delictual debt, it was emphasized that a fundamental question was not answered in the draft articles so far presented: the distinction between debts having a contractual origin and those arising from illegal acts of the State, even if the victims were its own nationals or, a fortiori, if they were stateless persons or foreign nationals. It was said that such debts were frequently unliquidated at the date of the succession and stressed that the dominant factors in such cases should be the territory and the population. Finally, certain representatives agreed with the Commission's view that so-called "régime debts" should not be considered as a category distinct from State debts.

130. The Commission's decision that it would not be useful or timely to draft at this stage provisions on the question of "odious debts" was supported by several representatives. It was stressed that the Commission was correct in deferring the question of including provisions on the matter until each particular type of succession of States had been examined, as the rules to be formulated for each type might well settle the issues raised by the question and thus dispose of the need to include general provisions thereon in the draft. The principle of good faith as the starting point for codification efforts on the topic was stressed as regards this question. It was further stated that the question was too controversial to admit of constructive codification. On the other hand, other representatives favoured the inclusion in the draft of specific articles dealing with the question of "odious debts". Provision against the inheritance of "subjugation" or "war" debts was deemed vital in discouraging such grave breaches of international law as subjugation of peoples, denial of their right to self-determination, or waging war. According to that view, it was conceivable that notwithstanding the provisions of article 22, pressure might be exerted on a newly independent State to accept some of the "odious debts" as the price of independence. Therefore, it was in the interests of newly independent States to have a specific rule of international law on the matter, under which they could denounce such obligations.

131. Representatives who spoke on article 18 referred to the word "international", which had been included by the Commission in square brackets in order to draw the attention of Governments to the difference of opinion among its members regarding the scope to be given to the provision in so far as creditors are concerned. Several representatives favoured the retention of the word "international". It was stressed that no attempt should be made to define the financial relations of the State with private individuals or corporations, such relations being governed solely by the State's internal legal order; it should be made clear that only State debts of an international character and arising at the international level could be included in the definition of "State debt". Mention was made of a tendency to apply rules of private law to questions of international law, although in international law there could be an extreme inequality between parties with rights and obligations. To place persons, natural or juridical, on the same level as States was viewed as inappropriate and inconceivable. Even if it were recognized that certain debts owed to private persons were of a magnitude

corresponding to inter-State debts, substantial difficulties would arise, it was said, if the two types of debts were regarded as identical and regulated by the same rule of international law. The view was expressed that debts owed to individuals had no relevance to State succession and that foreign investors should have no more rights than nationals in the same situation. International responsibility vis-à-vis foreign investors could only arise, it was said, within the context of the exhaustion of local remedies and the denial of justice; to hold otherwise would constitute a serious breach of State sovereignty and a flagrant interference in the internal affairs of States. It was stressed that in formulating and codifying a new system of international law, the Commission must be careful to avoid establishing or confirming new forms of dependency between weak States and powerful corporations. One representative stated his country had been subjected to intervention by foreign Powers on the pretext of recovering debts owed to their nations. Such intervention had given rise to the Drago Doctrine opposing the compulsory recovery of debts, which had been reiterated by inter-American bodies many times. That Doctrine should be, in his view, reflected in article 18 and in any other article pertaining to the same issue. Moreover, it was said, article 20 stipulated that a succession of States does not as such affect the rights and obligations of creditors, thus affording a general safeguard to foreign private creditors. Another argument adduced for retaining the word "international" was that the scope of article 18 should be reduced as far as possible since it was impossible to determine exactly the trend of contemporary practice in the light of the fluidity which currently prevailed in State practice as a result of the process of decolonization. The scope of the customary rule on succession may well have been radically changed, giving rise to a new rule applying only to newly independent States; whereas the old rule, in modernized form, may still be valid for cases of succession not related to the attachment of independence by new States. One representative suggested that the question of the financial obligations of a State vis-à-vis individuals could be studied later in a more appropriate context, for example in connexion with the study of the problem of public debts. Finally, note was taken of the fact that the meaning of the word "international" was broad in scope, referring not only to financial obligations contracted between States, but also to financial obligations between a State and an international organization or another subject of international law.

132. Other representatives, however, favoured the deletion of the word "international". They believed there was no basis for excluding State debt to private persons from the scope of the draft and favoured a broad definition in view of the varying forms which State indebtedness could take. It was urged that it was clearly a well-established fact that international law had been concerned with the interests of aliens as well as of States, and that that practice did not constitute a flagrant interference in the internal affairs of States. International law was not confined to the rights of States but also concerned the rights of individuals, an elementary truth demonstrated in case-law and in numerous treaties. It was said that a preoccupation with notions as elusive and abstract as sovereignty or international personality could lend to an excessively theoretical codification of the law, which in turn could produce great injustice; emphasis should be placed on territory and on its population as the debtor element. Both classes of debts owed by States (those to other subjects of international law and

those to natural or juridical persons) were affected equally by State succession, it was stressed. While the satisfaction of a debt to a national or juridical person might be governed solely by internal law, State succession was itself governed by international law. The Commission's work on the topic had showed there was no point in distinguishing between classes of creditors. It was quite reasonable that rules of international law should deal with aspects of the factual situation involved in succession whereby the same territory and the same population came under the jurisdiction of different States before and after succession - a situation which third parties had neither provoked nor accepted, but which was nevertheless of great importance to them. Thus rules on the passing of State property had been recognized, including the acquisition by the successor State of fiscal jurisdiction previously exercised by the predecessor State. Having dealt with the passing of such "assets" from one State to another, international law could not, it was felt, keep silent on the question of the effect of State succession on the "liabilities" of the predecessor State. It was noted that article 5 defining State property did not contain any limitation and even mentioned the internal law of the predecessor State, thus implying that State property included debt-claims of the predecessor State vis-à-vis individuals. Reference was also made to article 11 by which debts owed to the predecessor State should pass to the successor State; similarly, debts owed by the predecessor State should be dealt with, whoever the creditor was. Also mentioned were articles 21 and 22 which mentioned the link between the State debts which passed to the successor State and the "property, rights and interests" which passed to that State, a link clearly independent of the status of the creditor. Furthermore, inclusion of the word "international" would, it was stated, no doubt be contrary to the practice of States, which contained thousands of cases of succession of States to debts which were not debts on an inter-State or international level, but were State debts whose creditors were alien individuals or corporations. In a codification of the topic, State practice could not be ignored in order to meet the ideological outlook of a minority of the world community which was antisympathetic to some forms of economic activity and which wished to deprecate the rights of individuals under international law. Another factor mentioned by certain representatives opposing inclusion of the word "international" was that an important part of credit currently extended to States derived from foreign private sources. The inclusion of the word might lead to a limitation of the sources of credit to States and international organizations, which would be detrimental to the interests of the international community as a whole and, in particular, to those of the developing countries. The argument that the position of foreign private creditors was adequately safeguarded by the provisions of draft article 20, paragraph 1, seemed doubtful to certain representatives in the light of the commentary which, in their view, gave a rather vague interpretation of the paragraph and left too much uncertainty as to the rights of the creditor. It was suggested that it would be worthwhile to confirm the protection envisaged in article 20 by omitting the word "international" in article 18. Finally, it was stressed that to recognize as a fact all the practical sources from which State debts derived neither admitted nor suggested that the existence of such debts created obligations for the successor State.

Article 19

133. Article 19 concerning obligations of the successor State in respect of State debts passing to it was commented upon favourably by some representatives. They expressed satisfaction with the contents of the article and believed it to be fully consistent with and parallel to article 6 of the draft relating to rights of the successor State to State property passing to it. Other representatives, however, raised questions concerning the article. It was said that the Commission should reconsider articles 19 and 20 which seemed to contain contradictory principles. If the succession of States entailed the extinction of the obligations of the predecessor State, in accordance with article 19, it was hard to see how it could not affect the rights and obligations of third-party creditors; yet article 20 seemed to deny any such effect. It was urged that the rules governing the relationships between predecessor States, successor States and creditors be clearly defined to avoid all possible confusion. One view expressed was that article 19 was acceptable only if the draft articles provided for all cases where there was a State succession to debts, otherwise problems would arise with regard to debts which did not pass to the successor State but which could not be considered as remaining the responsibility of the predecessor State. Another view was stated that the article should be extended to debts, while another view was stated that the article should be extended to comprise cases where an agreement had been completed between predecessor and successor States in accordance with the draft articles and had been accepted by the creditor. Finally, one representative said it would be preferable to provide a definition of the expression "passing of debts", which would basically constitute what is now the text of the article.

Article 20

134. A number of representatives supported the basic, extremely important rule contained in article 20 which was seen as reflecting the universally recognized legal principle whereby an agreement between the predecessor and successor States could not affect, in and of itself, the rights of creditors. The Commission was congratulated on having simplified and clarified the texts of proposals originally submitted by the Special Rapporteur, discarding any allusion to "devolution agreements" which, according to the draft on succession of States in respect of treaties, could be considered merely as statements of intention. Other representatives, however, urged further precision and clarity. It was said that the meaning of the article should be explained further. The agreement concerning the passing of debts of the predecessor State to the successor State could not in itself be invoked against a creditor third State; on the other hand, the rule of succession to certain debts, as a rule of international law provided in the draft, could be invoked against the third State in question. Moreover, it was stated, as soon as the successor State had contractually accepted the succession, the debt involved was its own and was obliged to discharge it. Attention was also drawn to the seeming contradiction between articles 19 and 20 (see para. 133 above).

135. With regard to paragraph 1, a number of representatives stressed its importance, particularly the fact that the term "creditors" was given a broad interpretation so as to embrace not only third States but also their nationals. Thus the provision constituted an essential and important general safeguard to foreign private creditors. The suggestion was made, however, that to make it clearer that the paragraph applied to foreign private creditors, the term "creditor" might be defined. Other representatives expressed certain doubts whether the interests of such creditors were adequately protected particularly if the word "international" was to be included in article 18 (see para. 131 above). The formula was interpreted to mean that the set of draft articles did not affect the application of other international rules in force concerning relations between States and foreign creditors (not nationals of the predecessor State) where such relations were called into question by a case of succession.

136. Paragraph 2 elicited favourable comments from certain representatives, while other representatives questioned whether its provisions might be too rigidly worded and did not answer the question posed. It was necessary to reword the paragraph, it was stressed, so as to allow the predecessor and successor States, or the successor States, the necessary latitude to conclude any agreement regarding the passing of State debts. As to the text contained in square brackets, which was directly related to the definition of State debt contained in article 18, certain representatives considered the retention of the text necessary, on the basis of views reflected in paragraph 131 above, while other representatives favoured the deletion of the text on the basis of views reflected in paragraph 132 above. Another element considered to be important was the fact that the paragraph also referred to creditor international organizations and that it was clear from the commentary that there was no intention to exclude as creditors other subjects of international law from the scope of the paragraph. On the other hand, the view was expressed that while such an approach might be prima facie technically accurate, it would be useful to ascertain the practice of States on that specific point in order to determine whether there were any precedents of international organizations or other subjects of international law in that situation.

137. References to subparagraph 2 (a) were on the whole supportive, although it was considered advisable by one representative that the acceptance of the agreement between the predecessor and successor States, or between successor States, by a third State or international organization might be "express or tacit". On the other hand, certain representatives reserved their position on subparagraph 2 (b) or expressed doubts thereon. Paragraph 2 (b) was described as obscure and as being clearly inconsistent with the purpose and intent of the preceding portion of the article and the commentary. It was further stressed that the subparagraph seemed to suggest that a creditor third State or international organization could find themselves being made subject to an agreement they had not accepted and to which they were not parties. It was necessary to determine when the consequences of the agreement were "in accordance with the other applicable rules of the articles in the present Part". According to one view expressed, if the reference to "other applicable rules" included the provisions of article 21, paragraph 2 and article 22, it was doubtful whether those rules were sufficiently clear to determine whether the agreement had legal effects in respect of third parties.

For example, an agreement between the predecessor and successor States following the rules of paragraph 2 of article 21 did not justify the automatic substitution of the successor State for the predecessor State in relation to a third party; what was reasonable and equitable in the predecessor-successor State relationship was not necessarily reasonable and equitable in the relationship between either of them and a third party. Furthermore, it was urged that notwithstanding the indications in the commentary that the subparagraph dealt only with the consequences of the agreement and not the agreement itself, to the extent that it ought to bind a creditor third State, without its consent, by an agreement between the predecessor and successor States, it violated the spirit of articles 34 to 36 of the Vienna Convention on the Law of Treaties, a situation which should be avoided.

138. Lastly, one representative urged the Commission to consider a rule to the effect that if the predecessor and successor States had concluded a valid agreement which was not binding on third parties, the predecessor State could claim from the successor State any sum which the former had paid to a third-party creditor.

Article 21

139. Some representatives considered article 21, which dealt with the case of the transfer of part of the territory of a State, to be acceptable and correct on the whole, while another view was expressed that in its present form the article was not sufficiently balanced. Paragraph 1 which provided for the conclusion of an agreement between the predecessor and successor States on the passing of State debts in this type of succession was the subject of favourable comment by some representatives.

140. Paragraph 2 was the subject of most of the comments made on article 21. The passing of State debt on the basis of equitable proportionality, in the absence of agreement and taking into account the property rights and interests which passed to the successor State in relation to State debt, was supported by several representatives. Certain of those representatives believed that solution to be wise, just, and easily applicable. The view was expressed that the principle of equitable proportion, based on actual benefit, would be fairer than simply ruling that the successor State should assume the debts connected with the transferred territory, namely localized State debts. It was stressed that equity had a special place in the system of international law which had been highlighted by United Nations practice and an increasing number of inter-State instruments. Reference was also made to paragraph 2 of Article 38 of the Statute of the International Court of Justice. The suggestion was made that the principle of equitable proportion should be adopted by the Commission for all types of State succession. Certain other representatives supported the rule as set out in paragraph 2, but recognized that the ambiguity of expressions used might lead to difficulties in their interpretation and application. Even so, it was pointed out that equity was only a guide to achieving a satisfactory apportionment of debt and that it might be assumed that some sort of third-party mechanism would or should be used to ensure a fair settlement. Moreover, it was said, the paragraph included a

clarification that helped to determine what was meant by "equitable proportion" in a given context. Stress was placed on the fact that paragraph 2 referred to the case of the absence of an agreement, i.e. the existence of a dispute and that, in that case, it was on the basis of equity that the judge or arbitrator must decide. The view was expressed that paragraph 2 of article 21 made it necessary to establish effective machinery for the settlement of disputes in any future convention on the topic. Furthermore, it was urged that the question was not whether the rule established in paragraph 2 was ideal but whether it was possible to find a better alternative likely to command wider support, which did not seem possible. Nevertheless, the Commission should try, in its second reading, to avoid possible ambiguities.

141. Several other representatives expressed doubts or opposition to the reference in paragraph 2 to "equitable proportion" and urged the Commission to study the matter further. The terms "equitable proportion" and "equity" were said to be vague, amorphous and ill-defined, as well as being controversial. Equity was viewed as the absence of law, representing natural justice as opposed to legal justice. It was stressed that while it was true that principles of equity had on occasion been applied in deciding international legal disputes, the problem had always been whether equity was distinct from law. Such a concept, it was urged, could introduce political elements which would undermine the foundations of law. Paragraph 2 of Article 38 of the Statute of the International Court of Justice had never been used by the Court; the difference between equity and decisions ex aequo et bono was not clear in the present state of international law. The vagueness of the concept was further aggravated, it was felt, by the fact that the paragraph provided that account should be taken of the property, rights and interests which passed to the successor State in relation to the State debt. The opinion was stated that the nature of the debt might be much more important in determining the passing than the amount of property transferred.

142. The view was, however, expressed that while the practice of using such expressions as "equity" and "equitable proportion" was not reprehensible in itself, and might be of value as a formula of last resort, it was necessary to recognize that what the international community was doing was identifying an area in the law in which it did not wish, or was unable, to prescribe objective rules with a specific and predictable content. It was left to the parties to agree as to what was equitable in a particular case. If they could not agree, no rule of law was applicable and all that could be hoped for was that they would accept third-party settlement. It was suggested that the factors which a third party should take into account when exercising the subjective discretion conferred upon him should be identified more precisely. Thus, the Commission should probe more deeply the range of factors which might affect an equitable decision in such circumstances and specify that some were more relevant than others. Only after such an exercise, and a full accounting of the difficulties and divergencies involved therein, could States be aware of the full implications of signifying their willingness to accept the application of equity.

143. The use of the word "interests" was referred to by certain representatives. It was felt that it would be helpful if the Commission were to specify more clearly what it had in mind by that word, the imprecision of which had been demonstrated in the Barcelona Traction Case. Another view put forward favoured the elaboration of the word "interests", so as to emphasize the source of the financial obligation, which might be contractual or delictual, and to take into account such factors as the size of the population of the territory and the gross national product.

Article 22

144. Several representatives fully approved and unreservedly endorsed the rule enunciated in article 22 relating to newly independent States. Support was expressed moreover for the inclusion of an article on newly independent States since the problems of succession to State debts might persist for many years after the attainment of independence and because there still was a number of Non-Self-Governing Territories which the whole world hoped would attain independence as soon as possible. It was stressed by several representatives that the rule embodied in article 22 constituted a significant contribution and an historical step towards the progressive development of international law. The opinion was expressed that international law should cease expressing the ethic of only part of its subjects and seek rather to reflect the new requirements of international public order, including the right to development. Favourable comments were made on the Commission's thesis that international law could not be codified or progressively developed in isolation from the political and economic context in which the world was living and that the proposed rules must reflect the concerns and needs of the international community. Thus it was impossible to evolve a set of rules concerning State debts for which newly independent States were liable without to some extent taking into account the situation in which a number of newly independent States found themselves. The Commission had found, it was stated, that in formulating rules governing succession to State debts, it could not ignore the legal consequences of the fundamental right of peoples to self-determination and the principle of the permanent sovereignty of every people over their wealth and natural resources. Article 22 was described as a successful blend of justice, scholarship and realism that would enable developing countries to meet their financial obligations without dislocating their economies, thus making international law more meaningful and relevant. State succession in the case of newly independent States was considered a special case, deserving preferential treatment. The view was in particular stressed that there was a good rationale for distinguishing between the case of newly independent States and other types of State succession, such as the case of separation of part of the territory of a State. While in the latter case, both the predecessor State and the territory transferred had been responsible for and had consented to, the incurring of the debt, thus allowing for some apportionment thereof, such was not the case in the newly independent State situation. Reference was made to instances mentioned in the Special Rapporteur's report in which colonial Powers had been only too willing to incur debts without consulting the territory which became a newly independent State.

145. A number of representatives fully supported the general clean-slate rule contained in paragraph 1 providing for the non-passing of State debt of the predecessor State to the newly independent State. It was stressed that the clean-slate principle was fundamental to the preservation of the sovereignty of newly independent States. Furthermore, it was stated, the clean-slate rule, while not uncontroversial, had warrant in United Nations doctrine and was already contained in the draft convention on succession of States in respect of treaties. The rule was viewed as perfectly fair bearing in mind the financial situation of a number of newly independent States. Support for article 22 as representing a compromise was also expressed, although a more simple and precise version was considered

preferable. One representative supported in particular the alternative formulation of the article as proposed in foot-note 404 of the Commission's report. Another representative who supported the provisions of article 22 believed, however, that its drafting could be improved. He suggested that the article could be brought more into line with article 13 by including the situations referred to in paragraphs 4 and 5 of the latter article. Finally, the Commission's commentaries in the decolonization process were praised as very meticulous and erudite.

146. A number of representatives who supported article 22 drew particular attention to paragraphs (39) to (50) of the commentary dealing with the financial situation of newly independent States. Those paragraphs provided, it was said, an up-to-date picture of the situation of developing countries being asphyxiated by the growing burden of their external debt and provided an extremely useful background for the formulation of article 22. The article was viewed as being of considerable practical importance in the light of the monumental problems faced by newly independent States of servicing their debts, part of which derived from succession to debts of the predecessor State. It was pointed out that the repayment of debts, some inherited with independence and others incurred of necessity to overcome under-development, had imposed severe and crushing financial burdens on most developing countries, which had to incur new debts, in some cases, to pay off old ones. Consequently, it was stressed, the rules applicable in the case of newly independent States should be just and equitable not only in theory but also in their application to the actual situation of the States concerned. It was viewed as significant that the Commission had established a link between the topic and the legal problems relating to the establishment of the new international economic order and that its commentary had reproduced the provisions of the Programme of Action on the Establishment of a New International Economic Order (General Assembly resolution 3202 (S-VI) of 1 May 1974) relative to the alleviation of the debt burden of the developing countries. The concern of the non-aligned countries with regard to the debt problems of developing countries and the question of debt cancellation was underlined. In that connexion reference was made to the final communiqué of the ministerial meeting of the Bureau of Non-Aligned Countries held in April 1977 (A/32/74, annex I) and to the Declaration adopted on 29 September 1977 by the Ministers for Foreign Affairs of the States members of the Group of 77 (A/32/244, annex).

147. Other representatives expressed opposition or reservations concerning article 22 and the general clean-slate rule embodied therein. One view expressed was that since it was only justifiable to distinguish between different types of succession on the basis of objective criteria, the distinction between a "newly independent State" and the "separation of part of a State" was unjustified and gave rise to uncertainties and difficulties. That distinction, it was said, was based on considerations of a political or psychological rather than a legal nature. According to that view it seemed impossible to advance the principle that no State debt should pass to the successor State in the absence of an agreement between the predecessor and successor States. Thus the article was considered unacceptable as it stood and a compromise solution was urged. Another view expressed was that article 22 was perhaps the most difficult and controversial

of the articles on the topic adopted at the twenty-ninth session. It was recognized that the Commission had had to do some creative work because, as it had itself stated, State practice and the writings of jurists did not provide clear and consistent answers to the question of the fate of State debts of the former metropolitan Power. If State practice and writings suggested a rule at all in this field, it was stressed, it would be based on the criterion of the extent to which a loan may have been of benefit to the formerly dependent territory. The rule proposed in article 22 was seen as being based on the financial situation of newly independent States and could not have been extrapolated from State practice. Although readily admitting that a certain number of newly independent States suffered from a severe burden of debt that inhibited their development, it was felt that that consideration alone was not sufficient to justify adopting the non-passing of State debts as a principle generally applicable to all newly independent States.

148. Certain representatives drew attention to the distinction, which was said to be difficult to appreciate, made by the Commission in relation to the passing of State debts between the case of transfer of part of the territory of a State (article 21) and the case of decolonization (article 22). In the former case, it was provided that an equitable proportion of the State debt of the predecessor State passed to the successor State, whereas in the latter case nothing passed from the predecessor State to the newly independent State in the absence of an agreement between them. It appeared that newly independent States were to have something that might be called "better than equitable" treatment. The Commission's argument that it was necessary to avoid such general language as "equitable proportion", which had proved appropriate in other types of succession but which would raise serious questions of interpretation and possible abuse in the context of decolonization, was considered not convincing at all. It was stressed that while the special situation and needs of newly independent States could not be denied, it was necessary to ask what were the serious questions in interpretation and possible abuse which could affect the application of the concept of equity. If, as was assumed, settlements involving equity were to be reached only by agreement or a third-party decision, it was asked what questions of interpretation and abuse could affect newly independent States which would not also operate in other situations. The view was expressed that it was not merely the rule established for newly independent States which raised questions but, even more important, the impact of that rule upon the value and application of equity elsewhere. The alternative text of article 22 as formulated in foot-note 403 of the Commission's report was viewed as more in line with the proper approach and was supported by certain representatives.

149. Concerning the commentary on article 22, certain representatives believed that it had occasionally overstepped the framework of State succession and indeed that of a legal study. It was considered inappropriate for the Commission to include passages on international economic analysis in its report, as was done in paragraphs (39) to (50) of the commentary; that was not the sphere of the Commission's competence. Reference was made by certain representatives to the fact that a number of texts or portions thereof quoted in the commentary, including resolutions of the sixth special session of the General Assembly, had given rise to reservations, or had been vigorously opposed, by Governments.

150. Some representatives referred to the proviso in paragraph 1 that the clean-slate rule would apply unless an agreement between the predecessor and newly independent States provided otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State. While the view was expressed that the requirement for an express agreement for the passing of State debts sought to protect the newly independent State from being burdened by investments made for the benefit of the metropolitan country or to favour settlement by the colonizers, other representatives expressed doubts concerning such agreements which sounded very much like the leonine and rejected category of devolution agreements. It was stressed that account should be taken of the pressures which could be exerted during the negotiation of an agreement between the newly independent State and the predecessor State which had been the former colonial Power. The new State might, it was said, be pressured into accepting "odious debts" as the price of independence which had in fact often occurred. The suggestion was made that if the agreement had been obtained from the newly independent State involuntarily, that State might have the right to repudiate it. One view was that the paragraph should retain only the principal rule and not enter into the details of the agreement, while other representatives urged that, notwithstanding the requirements found in paragraph 2, the nature of the agreement should be elaborated. It was noted that the misgivings concerning the paragraph were attenuated by the connexion established between State debt and the activity of the predecessor State in the territory concerned. It was suggested that in addition to the criterion just mentioned, another related criterion which should be satisfied was that the debt incurred should actually benefit the newly independent State. The alleged advantage to the colonial territory of certain activities which had most often been designed by the predecessor State to create conditions favourable to colonization was questioned. With regard to the further criterion of paragraph 1 concerning the link between the State debt of the predecessor State connected with its activity in the territory concerned and the property, rights and interests which pass to the successor State, one representative said that succession to State debts or obligations should be in equitable proportion to State properties and rights. He stated that while an exact parallel might be ideal, more lenient conditions should be allowed to the least developed countries whose attainment to independence might be more or less recent. Another representative, however, expressed doubts concerning the criterion of the equitable relation between the debts and property, rights and interests passing to the newly independent State.

151. Several representatives expressed in particular their full support and endorsement of paragraph 2 of article 22 which was viewed as being of great importance for the defence of newly independent States. It was described as an essential safeguard concerning the criteria governing the agreement between the predecessor State and the newly independent State, envisaged in paragraph 1 of the article. The agreement must not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor endanger the fundamental economic equilibrium of the newly independent State. Paragraph 2, it was stressed, gave legal effect to a number of important General Assembly resolutions adopted in recent years, was in full harmony with the proposed new international economic order and reaffirmed principles set forth in the Charter

of Economic Rights and Duties of States and in the Charter of the United Nations. The Commission had rightly referred in its commentaries to various resolutions and to the relevant work of United Nations bodies, it was said. The opinion was stated that given the severe indebtedness of newly independent States, which could make political independence a mockery, it was of fundamental importance that economic realities should be taken into account, especially when the debts had been incurred without the consent of the people of the newly independent State. Moreover, as the Commission had well realized, article 22 must take into account the payment capacity of the newly independent State, in view of the burden it had to bear in its efforts to develop an often backward economy.

152. Certain representatives raised the question whether the paragraph went far enough. According to one view, it would be necessary to include in paragraph 2 other criteria that took into account the disparity in levels of development of the territories concerned. It was not sufficient, it was stressed, to include a proviso to the effect that the fundamental economic equilibria of the newly independent State should not be endangered, since that referred only to the implementation of the agreement with the predecessor State; it was essential that the agreement itself should not be disproportionate to the real economic circumstances of the newly independent State and should have due regard for the new State's capacity to pay. Another comment made was that it would seem preferable to delete the word "fundamental". Finally, it was suggested that the word "should" be replaced by the word "shall", in the English version, which had already been used in paragraph 6 of article 13.

153. However, the opinion was stressed that it should be recalled that States which took measures in the exercise of their sovereignty over their wealth or natural resources or in the interest of their fundamental economic equilibria should, in so doing, fulfil their international obligations in good faith. In addition, it was said that the Commission had treated the law loosely in its commentary to article 22 in discussing the principle of permanent sovereignty over natural resources. Certain representatives recalled in connexion with passages quoting from certain General Assembly resolutions relating to that principle, including the Charter of Economic Rights and Duties of States, that a number of Governments had expressed reservations or registered strong opposition to some of the resolutions and passages quoted. Thus one representative drew attention to what was viewed as the startling statement in the commentary that by those resolutions, the General Assembly had reiterated and "developed" the principle of the permanent sovereignty over natural resources. That statement was open to the interpretation, it was said, that the Assembly, by its adoption of controversial resolutions, "developed" principles which were arguably of a legal character. It was stressed that such an interpretation of the powers and practice of the Assembly was not accepted and did not conform to the United Nations Charter or to international law; the Assembly was not a law-making body, and its resolutions only contributed to the development of international law where they obtained virtually universal support, where the members of the Assembly had a law-making intention, and where the content of the resolution was reflected in general State practice.

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

154. Many representatives who spoke on the question of treaties concluded between States and international organizations or between two or more international organizations noted and welcomed the substantial progress achieved by the Commission at its twenty-ninth session on this topic. It was on this question, it was said, that the Commission had achieved the greatest results at that session. Significance was seen in the fact that the Commission had been able to adopt 22 additional draft articles on the topic, which indicated that efforts to codify the vast area of treaty law had entered a new phase. The Commission, it was stressed, had made a commendable effort to regulate the growing interaction between the numerous and different subjects of international law; the many international organizations now in existence had given a new dimension to international law. It was nevertheless said that difficulties had arisen and a number of problems had still to be resolved. It was recalled that the Commission in its report had indicated that international practice was still very limited in that field, and practically non-existent with regard to such aspects as reservations. The Special Rapporteur on the topic, Mr. Paul Reuter, had given evidence of his ability and ingenuity through his reports and by his efforts to ensure as much progress as possible on the topic.

155. The Commission was encouraged to continue its consideration of the question and the hope was expressed that its future work would proceed expeditiously and would not be unduly hampered by dogmatic controversies. It was also stressed that work on the question of treaties concluded between States and international organizations or between two or more international organizations was now a matter of priority.

1. The general approach and method followed by the Commission

156. Most representatives who spoke on the matter supported the method adopted by the Commission in its formulation of draft articles on treaties concluded between States and international organizations or between international organizations, by which it endeavoured to follow the provisions of the Vienna Convention on the Law of Treaties 3/ as closely as possible. That practical approach had led to significant progress, it was said, and confirmed the particular usefulness and value of the Vienna Convention. Hope was expressed that the remaining articles on the subject would be drafted in the same manner. It was stressed, however, that in using the Vienna Convention as its guide, it was important for the Commission to avoid allowing the present codification effort to become an exercise in interpretation of that Convention or to result in the formulation of contractory provisions. Attention was drawn by one representative to the various types of

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3/ For the text of the Convention, see Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (United Nations publication, Sales No. E.70.V.5), p. 289. The Convention is hereinafter referred to as "the Vienna Convention".

relationships which the draft articles under consideration must maintain with the Vienna Convention. If they were given the form of a convention, it was said, then on the issues regulated, the convention would take its place as a companion instrument of parallel authority to the Vienna Convention. But to the extent that the draft articles were based on adaptations on that Convention, reference could be made to State practice in the application of the latter Convention when faced with difficulties of interpretation of the new instrument, but only in so far as it dealt with relations between States and international organizations or between such organizations. So far as the relationship between States under the new instrument was concerned, he stated that the text of the Vienna Convention could be used to correct deficiencies in the new instrument, and to that extent that Convention would prevail. On the other hand, one representative was of the view that the Vienna Convention should be looked upon with a critical mind, as it was very recent and as yet untested. In his view, work on the present question afforded a golden opportunity to correct any inadequacies or defects of the Vienna Convention.

157. While approving of the Commission's method which recognized the intrinsic link between the Vienna Convention and the rules pertaining to treaties concluded between States and international organizations or between such organizations, it was stressed by some representatives that the close relationship should not be transformed into a mere analogy and that the Commission should exercise caution in its approach to the topic. Because of the special character of the legal personality of international organizations, they could never be assimilated to States, it was stated. It was therefore indispensable, according to those representatives, that the parallelism should not extend too far and that the basic differences between States and international organizations be duly taken into account. Unlike States, the rights of international organizations were determined and limited by their rules, it was said. In addition, it was recalled that the legal status, functions and structure of international organizations differed from one organization to another and that there were differences between treaties concluded between international organizations and States and treaties concluded only between international organizations.

158. One representative doubted whether the latter category of treaties really came within the scope of the law of international treaties, since they were really no more than interdepartmental understandings, such as were common in every national administration. Thus, he said, it seemed simpler for the Commission to concentrate on those treaties to which States had given their consent. Furthermore, the appearance of international organizations on the world scene, particularly as contracting parties, was, according to another representative, a relatively recent phenomenon so that practice was still limited and far from uniform. Concern was expressed about the danger that the Commission might over-simplify intricate aspects of international organizations when drawing up draft articles strictly parallel with the Vienna Convention.

159. A close investigation was urged by one representative of the various articles of the Vienna Convention in order to be certain that they applied mutatis mutandis to treaties to which an intergovernmental organization was a party. The Vienna Convention was largely concerned with the consent of a State to be bound by a

treaty, that consent being basically a matter for the internal law of that State, international law governing the modalities of its expression on the international plane. On the other hand, he said, an intergovernmental organization was a creation of international law, and its internal law was a matter of international law; the whole process by which it decided to be party to a treaty also derived from international law, although there was a process in the background by which States agreed that an international organ should decide to be bound by a treaty.

160. On the other hand, certain other representatives questioned the need for the distinctions which the Commission had made between States and international organizations, such distinctions being described as multiple and convoluted. The view was expressed that inasmuch as international organizations were subjects of international law and could enter into treaty relationships with States, they should be considered as being equal with States for the purpose of participating in the same treaty. It was said by one representative that Governments derived legitimacy from the consent of the governed, and international organizations acted on the basis of the consent of their members. Both had international legal personality and the capacity to enter into treaties, and nothing in the law of treaties made it obligatory to investigate how either States or international organizations received authority to act. He said the internal law of international organizations was not relevant to the law of treaties. Special rules for international organizations in the law of treaties were required only in limited circumstances and should not, he stressed, be expanded because of an inability to accept the legal personality of such organizations.

161. Finally, some other representatives urged a practical approach to the matter. While not ignoring that there were differences between States and international organizations, such an approach, it was suggested, would avoid dogmatic controversies concerning the legal nature of international organizations and the allegedly "fundamental" differences between States and such organizations in respect of treaty relations, which could unduly hamper the future work on the topic. It was remarked that there was a need to find solutions which were generally acceptable so that the draft articles might be a non-controversial contribution to the progressive development of international law. One representative stressed that it was the practical and pragmatic approach followed by the Commission which had led to significant progress at its twenty-ninth session.

162. The form of the Commission's work on the topic was questioned by certain representatives. One opinion expressed was that a proper format for the work of the Commission on the topic might be a simple article applying the Vienna Convetnion except as provided for in the articles that would follow, of which few would then be needed. Similarly, the view was stated that the Commission should first have sought to establish how far the rules set out in the Vienna Convention could be applied to the treaties under consideration. Thus it was urged that before going on to the second reading of the draft articles the Commission should make a radical reappraisal of its work and recast them in the form of the necessary modifications to the Vienna Convention. The fear was expressed that the draft articles being prepared would be both too complex and too numerous, which would seriously delay the later stages of codification. It was further questioned whether it was feasible

to draft an international convention on the topic. Once it had received the observations of the Governments and international organizations concerned, the Commission should, it was suggested, confine itself to producing a comprehensive report indicating the modifications needed to apply the Vienna Convention to the treaties under consideration, leaving the future evolution of the law to subsequent practice. It was perhaps superfluous, one representative said, to draft a complete set of articles on the question; it would be tragic if, in so doing, the Commission undermined the work accomplished in the Vienna Convention.

2. Comments on the draft articles as a whole

163. Some representatives voiced their general agreement with the basic legal principles embodied in the draft articles on treaties concluded between States and international organizations or between international organizations adopted by the Commission at its twenty-ninth session. These draft articles were said to require little comment since they closely followed the Vienna Convention and reflected the current state of the law. Certain representatives who made specific comments on certain draft articles, such as those relating to reservations and article 27, said that the other articles adopted were acceptable.

164. Other representatives, however, expressed doubts concerning various aspects of the new draft articles. One representative stressed that they were far from acceptable, as it was revealed in the draft articles relating to reservations that the essential fact that international organizations were not full-fledged subjects of international law had been neglected. Another representative had no objection to the provisions formulated by the Commission but felt bound to question their practical value, since in its commentary the Commission cited only a few relevant treaties and not a single case of a reservation formulated in the circumstances. Certain representatives noted that in an endeavour to achieve symmetry, repetitions and recurrences of long and difficult expressions had been retained. In addition, to make the draft articles complete, a series of combinations and permutations of terms had been adopted. While it was recognized that such technical difficulties had been encountered and that the Commission had succeeded in finding compromise solutions, it was stressed that it would be desirable for the Commission to render the text simpler and less cumbersome. It was suggested that article 2 on use of terms might include certain terms used throughout the draft in order to shorten it without detriment to its clarity. Finally, one representative felt that some of the commentaries on draft articles that reproduced textually the corresponding articles of the Vienna Convention should have been broader, more detailed and more explicit.

165. One representative referred to the repeated reference in the draft articles to "the object and purpose of the treaty". He said that when only States were parties to a treaty, one could always refer to the object and purpose of the treaty, but when one or more international organizations were parties to a treaty, a reference to its object and purpose could have certain repercussions on the object and purpose of the treaty establishing the relevant international organization or organizations. He urged that the Commission should give some thought to that problem.

166. Certain representatives reserved their position on the draft articles under consideration pending further study and the Commission's future work on the topic.

3. Comments on the various draft articles

Article 2, subparagraph 1 (i)

167. One representative considered the definition of "international organization" contained in subparagraph 1 (i) of article 2 to be unsuitable because it was too vague. In his view, the term should mean only those organizations which had been

established by treaty and themselves possessed the treaty-making capacity. He stressed that if any other kind of intergovernmental organization became a party to agreements or treaties, there would be a problem in determining whether those agreements or treaties should be governed by international law or by internal law.

Article 2, subparagraph 1 (j)

168. With regard to the definition of "rules of the organization" in subparagraph 1 (j) of article 2, one representative found that definition useful and acceptable, since it was as precise and complete as possible. He noted that it reproduced in full the definition of that expression given in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. On the other hand, another representative believed that transposition was incorrect since the two contexts were very different. Consequently, he welcomed the fact that the Commission had recognized the need to re-examine that point and stressed the importance of the definition in connexion with article 27 (see para. 179 below).

Articles 19, 19 bis, 19 ter, 20, 20 bis, 21, 22, 23 and 23 bis

/Part II: Section 2. Reservations/

169. Many of the representatives who spoke on the topic made general comments on the draft articles included in section 2 of Part II of the draft, relating to the question of reservations, as well as more specific comments relating to certain articles included in that section. The draft articles relating to reservations dealt with an extremely complex problem on which little light was shed by existing international law, it was said. The view was however expressed that although some complications seemed inevitable in achieving a consensus because of the fundamental differences of approach as far as international organizations were concerned, simpler and less elaborate solutions to the problem of reservations were preferred.

170. Some representatives found reasonable and practical the rules concerning reservations adopted by the Commission. Support was expressed in particular for articles 19, 19 bis and 19 ter. The rules concerning reservations, it was said, were based on the "liberal" régime of the Vienna Convention allowing, in general, the formulation of reservations in all cases for States (article 19 bis, para. 1), and in cases for international organizations when the treaty was solely between organizations (article 19) or when the participation of an organization was not essential to the object and purpose of a treaty between States and international organization (article 19 bis, para. 3). Thus when an organization's participation in the latter type of treaty was essential to its object and purpose, the Commission had adopted a more "strict" approach, allowing reservations only if expressly authorized or otherwise agreed that reservations were authorized (article 19 bis, para. 2). Similarly, for the question of objections to reservations, which had not been the subject of a separate provision in the Vienna Convention, a "liberal" régime allowing objections was applied for States (article 19 ter, para. 2) and for international organizations in the case of treaties between organizations (article 19 ter, para. 1). In the case of treaties between States and international organizations, organizations were afforded a "liberal" régime if their participation in the treaty was not essential to its object and purpose or if the possibility of

objecting was expressly granted by the treaty or was a necessary consequence of the tasks assigned to the organizations by the treaty (article 19 ter, para. 3); otherwise, a "strict" régime would be applicable for international organizations. It was indicated that by adopting such a balanced, pragmatic and flexible dual régime, the Commission had succeeded in reaching a successful compromise on the delicate question of reservations, taking into account the differences between States and international organizations. It was stressed that the general application of the "liberal" régime of the Vienna Convention with respect to reservations could lead to a chaotic situation; nor could the solution be to deny international organizations the right to formulate or accept reservations, or to object to them. Thus, it was emphasized, the Commission had been correct in considering the matter from the viewpoint of determining what limitations should be imposed on that right. In that connexion, the system proposed by the Commission in article 19 bis and 19 ter seemed quite acceptable. If the participation of the international organization was essential in view of the specific responsibilities given to it by the treaty, everything would point to the fact that the organization would have participated fully in the adoption of the text of the treaty and in the related negotiations. Furthermore, it was said, if the organization's own field of competence was such that it could not fulfil the object and purpose of the treaty, it would not have become a party to the treaty and thus it was far from certain that certain problems raised were real ones. It was noted with gratification that the Commission had recognized in connexion with article 19 bis, paragraphs 2 and 3, the distinction between different types of international organizations, by taking into account the situation of non-universal organizations admitted to participation in a multilateral convention in cases where, because of the powers delegated to them by States, they were at least partly substituted for their members. For organizations of that kind, it was said that the more open régime provided for in article 19 bis, paragraph 3, and article 19 ter, paragraph 3, was particularly suitable.

171. Other representatives, however, could not accept the solutions offered in the draft articles on reservations, as it was maintained that the basic differences existing between States and international organizations were not sufficiently brought out. Those differences implied, it was stressed, distinctions with respect to their importance, their nature and the conditions under which they might formulate reservations, which in the case of international organizations should be allowed only as an exception to the general rule, in other words only when expressly authorized by the treaty in question. It was thus stressed by some representatives that the Commission should accordingly reconsider the draft articles adopted on reservations and revise its position. Support was expressed by certain of those representatives for the alternative text to articles 19 and 19 bis reproduced in foot-note 435 of the Commission's report which was based on a more restricted but homogeneous régime. To provide, as was done in the present text of draft articles 19 and 19 bis, for a régime allowing reservations by international organizations, even subject to certain conditions, conformed to neither the doctrine nor the practice followed by international organizations, it was said. The statement was made that the condition based upon the concept of participation that was essential to the object and purpose of the treaty was vague and would lead to uncertainty. One view expressed was that in formulating reservations States were seeking to protect their vital interests, but, in view of the restricted competence of international organizations, it was difficult to know what interests

it might be vital for them to protect. Furthermore, objections to reservations on the part of certain States or organizations could give rise to situations where the organization could have different relationships, possibly on important matters, with different member States. It was emphasized that the formulation of reservations and the acceptance or rejection of reservations by an international organization clearly had to be decided by its competent organ. According to another view, intergovernmental organizations should not be authorized to formulate reservations under residual rules, since it was clear from the proposed texts, especially article 20 bis, that such a possibility could undermine the delicate balance maintained by the relevant provisions of the Vienna Convention. The fact that one or more international organizations might be entitled to become party to a multilateral convention should not, it was stressed, prejudice the right of the State to formulate reservations in accordance with the provisions of the Vienna Convention.

172. Still other representatives viewed the draft articles on reservations as being more restrictive than necessary. It was questioned by certain representatives whether a special rule was required in the situation envisaged in article 19 bis, whereby international organizations were given less flexibility than a State in making a reservation to a treaty in which its participation was essential to the object and purpose of the treaty. According to that view, the residual rule reflected in article 19 of the Vienna Convention that a reservation was permissible where it was not incompatible with the object and purpose of the treaty should simply be applied to international organizations in their treaties with States and international organizations. It was stressed that the essential principles of the "liberal" régime of the Vienna Convention should be extended to treaties concluded by international organizations. According to one view expressed, international organizations should be fully authorized to enter reservations and to object to reservations made by States. It was possible that reservations made by States might run counter to some decisions taken by a competent organ of an international organization whose participation was essential to the object and purpose of the treaty. Alternatively, such reservations might, it was said, be inconsistent with the principles and purposes of the organization. In such cases, it was stressed, the right of the organization to enter an objection should not be restricted nor linked to any necessary consequences of the tasks assigned to it by the treaty. Restrictions should not be imposed on international organizations on the assumption that such organizations were institutions created by the States participating in the treaty since that was not necessarily so, as in the case of a regional organization concluding a treaty with non-member States.

173. In that regard, certain representatives urged the Commission to study and clarify the relationship between an international organization and its member States, when both the organization and its member States were parties to the same treaty. A solution should be found, one representative said, to the problems currently being encountered when an international organization, which carried out its activities within the territory of a State, was a party, together with that State, to a treaty to which only one of them had made reservations.

174. In connexion with the use in article 19 of the phrase "treaty between several international organizations" one representative considered it premature to foreclose the possibility of reservations in a bilateral sense. In his view, while an

understandably cautious approach on the matter had been taken by the Commission, it should not be forgotten that excessive caution would inhibit the progressive development in that important area of treaty law.

175. Concerning article 19 bis, the view was expressed by one representative that the phrase "treaties between States and one or more international organizations or between international organizations and one or more States" was too long, even though good reasons had been given for its use. He suggested that a shorter term be adopted which could be defined in article 2 on the use of terms.

176. As to article 20 bis, one representative wondered whether the elaborate scheme of situations contained in paragraph 3 was necessary, or whether it might be preferable to leave that question to the interpretation of the treaty.

177. One representative considered that the Commission should redraft articles 23 and 23 bis to take into account both the obligation of good faith provided for in article 18 and the provisions of articles 25 and 25 bis. In his view, if a signatory State or international organization formulated a reservation, that reservation should remain valid until such time as the State or international organization in question had notified its intention not to become a party to the treaty or had ratified the treaty but confirmed its reservation.

Articles 24, 24 bis, 25 and 25 bis

/Part II: Section 3. Entry into force and provisional application of treaties/

178. One representative suggested that a rule should be established providing that the failure of any international organization to become a party to the treaty should not be regarded as an obstacle to the entry into force or provisional application of the treaty unless the participation of that organization was essential to the object and purpose of the treaty.

Article 27

179. A number of representatives expressed doubts concerning paragraph 2 of article 27, which provided that an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization. It was pointed out that the Commission itself viewed the text as a compromise for the purposes of the first reading, and that its members had expressed widely divergent opinions on the text. Thus the Commission was urged to re-examine the question in greater depth.

180. It was stressed by some of those representatives that the internal law of the State could not be assimilated to the rules of an international organization. Certain representatives stressed that the principle that the rules of an international organization could not be invoked as a justification for its failure

to perform a treaty was not correct, as there were cases where they had to be invoked, as when reference was made to the actual competence to conclude treaties, or in the case of treaties concluded to execute decisions or resolutions of an organization, which treaties were logically subordinate to such decisions or resolutions or to the action taken by the organization which gave rise to them. It was said that the Commission had overlooked the difference between States and international organizations. Rules of an international organization, unlike the internal law of a State, belonged to the sphere of international law, it was stressed. Also emphasized was that international organizations, unlike States, could not amend the rules which governed them in order to be able to perform the treaties to which they were a party, as those rules took precedence over the treaties. It was deemed advisable, therefore, to amend paragraph 2 to bring it into line with Article 103 of the Charter. The difference between States and international organizations was mentioned by another representative who said that while article 27 of the Vienna Convention was fully justified since the capacity of States to conclude treaties was derived from international law, the same situation did not obtain in the case of international organizations. Such organizations derived their capacity to conclude a treaty from its own rules (draft article 6), and the conclusion of a treaty in contravention of those rules would thus be a case of conclusion ultra vires, and in that case the invocation of the rules might be justified. In that connexion, one representative suggested that the rules of the United Nations, so defined, might in fact be determinative of the legality or illegality of a failure to perform a treaty obligation. Necessity was seen, according to another view, for distinguishing between the constituent instrument of an international organization and its other rules, including the decisions and resolutions of organs. As matters now stood, the constituent instrument of an international organization was considered, according to article 2, 1 (j), to be part of the rules of the organization, in spite of the fact that its characteristic as a multilateral treaty clearly distinguished it from the internal law of a State.

181. Certain representatives considered that the rule reflected in article 27 raised the question of the link between the treaty to which an international organization was a party and the international legal instrument governing the organization in question, i.e. the problem of the legal relationships between the organization and its member States and between the member States as such. One representative noted that the question was also related to articles 29 and 34. It was seen as obvious by that representative that a treaty between an international organization and one or more of its member States was in a different position from a treaty between an international organization and one or more third States. He said that strictly speaking an international organization could not be a party to its constituent instrument, although it was certainly bound by that instrument in the same way as its member States were bound by it. The legal relationship between an international organization and its member States could not therefore be dealt with on the same footing as the legal relationship between an international organization and a third State or another international organization. In regard to the relationship between an international organization and its member States, he stressed that the "rules of the organization" were not comparable to the "internal law" of a foreign State. It seemed to him that the problems dealt with in article 27, and the yet-to-be-discussed article 46, were in reality only problems in respect of third parties. Another representative referred to the question in

connexion with the link between article 27 and the question of international responsibility. He believed it necessary to ask whether it was the responsibility of the international organization as such or that of its member States which was involved when a change in the internal rules of the organization occurred which could be invoked vis-à-vis other contracting parties to a treaty. It was well known, he said, that any change in the rules governing an international organization, especially amendments to its constituent instrument, was, in the final analysis, attributable to the will of its member States. The question arose, in that regard, whether it might not be preferable to adopt different solutions for organizations with a universal basis and for those more limited in scope.

182. Other doubts were expressed whether, in view of the complexity of the subject, the rule proposed in paragraph 2 could cover all the problems that were likely to arise in practice. It was far from certain, it was said, that the rule to be retained should be of the same kind for all international organizations. The Commission was urged to proceed with caution and to review the article in the light of the new phenomenon of international organizations whose rules enabled them to exercise part of the treaty-making competence previously exercised by the individual member States. Another point made was that paragraph 2 did not achieve its purpose, since all activities of an international organization, and therefore also the performance of a treaty, must be subject to the "exercise of the functions and powers of the organization". Thus, under that paragraph, an international organization could always invoke its own rules as a justification for failure to perform a treaty.

183. Certain other representatives opposed the rule stated in paragraph 2 as they viewed it as unacceptable that an exception should be admitted to the principle of observance of treaties by an international organization. They stressed that the obligations of international organizations to perform the treaties they concluded should be no less than those of States. It was seen as unwarranted and pernicious to draw a radical distinction between the internal law of a State party and the rules of an international organization party with regard to the observance of treaties. The provision of paragraph 2 could be read, it was emphasized, as meaning that the parties intended, even without expressly so indicating, that the international organization could unilaterally absolve itself of its treaty obligations by a plea of later exercise of its functions and powers. These representatives considered that the existing form of the paragraph could clearly endanger the fundamental principle pacta sunt servanda. One representative stressed in particular that the existing wording gave the impression that the international organization had done something which it should not have done and that its act was tainted by flaws rendering it null and void. In addition, the exception provided for by that paragraph also implied, he stressed, the existence of treaties contrary to the functions and powers of an international organization. But questions relating to the competence and purposes of international organizations and those relating to the particular mandates of the organs of such organizations had nothing to do with the problem of observance of treaties. Just as, in the case of States, it was held that it was incumbent upon the State to resolve questions pertaining to the internal imputation of acts performed by one of its organs, he believed it should be decided, when international organizations were involved, that it would be for the organizations themselves to settle analogous questions.

Article 30

184. Some representatives commented on the decision by the Commission to place in a separate paragraph 6, the initial phrase of paragraph 1 of article 30 of the Vienna Convention, concerning the primacy of the United Nations Charter over all successive treaties. This was done, it was noted, to take into account divergent views on whether Article 103 of the Charter could be extended to international organizations. Placing the phrase in a separate paragraph 6 was viewed by one representative as intentionally ambiguous, but as also preserving the primacy of the Charter. Another representative viewed the solution to be an improvement over the text of article 30 of the Vienna Convention.

185. Certain other representatives, however, expressed doubts on the matter. In their view, the ambiguous wording of paragraph 6 was regrettable and should be dispersed; the primacy of the Charter should be confirmed in clear terms. It was viewed as inconceivable and illogical to give States the opportunity of ridding themselves collectively of obligations to which they were subject individually and which they had freely assumed by becoming parties to the United Nations Charter.

Articles 31, 32 and 33

/Part III: Section 3. Interpretation of treaties/

186. One representative drew attention to paragraph (2) of the general commentary on section 3 dealing with the interpretation of treaties as an illustration of the need for the commentaries on articles reproducing textually the corresponding articles of the Vienna Convention to have been broader, more detailed and more explicit. The example given in paragraph (2) of the commentary to support the position indicated therein was not, he said, convincing. It was not, he stressed, the public character of preparatory work that constituted the specific factor which would allow useful conclusions to be drawn in the matter of interpretation. In fact, he said, for parties which had themselves negotiated a treaty, whether bilateral or multilateral, the public nature of the preparatory work posed no problems, inasmuch as each of the parties possessed all the documents leading up to the final conclusion of the instrument. A more attentive and detailed review of the practice of international organizations in that regard was called for, given the specific nature of the subject-matter and the exploratory character of the draft articles.

Article 34

187. While considering the substance of article 34 to be acceptable, one representative felt that it would be preferable, in paragraph 1, to refer only to one State, without qualifying it as a "third" State, since all States had the status of third States under treaties concluded exclusively between international organizations. Similarly, in paragraph 2 of that article, he believed it would have been appropriate to substitute the expression "State not party to the treaty" for the words "third State", a corresponding change also being made in the title.

E. Other decisions and conclusions of the International Law Commission

1. The most-favoured-nation clause

188. Representatives widely supported the Commission's intention, in accordance with General Assembly resolution 31/97 of 15 December 1976, to complete at its next session in 1978, the second reading of the draft articles on the most-favoured-nation clause. This topic had not been considered at the twenty-ninth session, the draft articles adopted in first reading having been transmitted to Member States, organs of the United Nations with competence on the subject-matter and interested intergovernmental organizations for their observations. The Commission was awaiting those observations, which would be taken into account in the report to be submitted by Mr. N. Ushakov, whose appointment as the new Special Rapporteur on the topic was generally welcomed.

189. The most-favoured-nation clause was a field in which considerable work had already been done. It was said that the draft provisionally adopted was well conceived and that it was to be hoped that it could take the form of an international instrument. This, it was added, would not fail to have significant effects on international co-operation not only in trade relations but also in economic relations in general, by giving full effect to the principle of non-discrimination which derived from the principle of the sovereign equality of States and would contribute greatly to the development of international law.

190. It was emphasized that the concept of the most-favoured-nation clause went beyond purely legal considerations; its scope had outgrown the limits of international trade to include broader economic sectors. The principle it embodied was gradually changing as States moved towards more advanced forms of co-operation and closer interdependence. The most-favoured-nation clause should, therefore, take account of differing degrees of development in the countries to which it was applied; its application to all countries, regardless of their level of development, would constitute equality in form but would involve, in reality, an implicit discrimination against the weakest members of the international community. In the field of trade, it was said, although the purpose of the clause was to enable countries to compete on an equal footing, it should not function in a discriminatory manner against the weaker economies or depend on reciprocity; the industrialized countries should implement a generalized system of preferences and grant preferences to all the developing countries without requiring other preferences in return; this latter practice affected the very principle of equal treatment underlying the most-favoured-nation clause and ran counter to world-wide efforts to ensure equitable economic relations. It was added that preferences without reciprocity should apply to all the developing countries and not only to some of them, as occurred with the so-called special or vertical preferences, which ensured a market for commodities from certain developing countries and, in turn, ensured a preferential market in those countries for products from industrialized countries, thus fundamentally altering the conditions of equality of access to consumer and supplier markets in the countries concerned to the obvious detriment of other countries whose products did not receive similar treatment. The growth of systems of that kind furthered the development of some countries but

obstructed that of others and embodied discrimination contrary to the very essence of the most-favoured-nation clause. Accordingly, it was stressed that in its second reading of article 21, the Commission should make provision for safeguarding the interests of developing countries according to their degree of development and should codify the differential treatment referred to in the GATT Tokyo Declaration of 1973 not only with regard to tariffs but also in broader areas of co-operation between industrialized and developing countries. In any case, the articles prepared thus far by the Commission on the topic should be understood not to prejudice the establishment of new rules of international law in favour of the developing countries.

191. It was further stated that the Commission should also keep in mind emerging situations involving new and more extensive modes of co-operation between countries with like interests. Any integration process, whether regional, subregional or between neighbouring States, should automatically be considered an exception to the application of the most-favoured-nation clause. Thus, for example, the Latin American Free Trade Association and the Cartagena subregional integration scheme, that had been created specifically to accelerate the economic development of their members by means of internal benefits ranging from tariff reductions to joint development programmes for specific industries. As GATT had recognized, such benefits could not be automatically claimed by third States under the most-favoured-nation clause without irrevocably undermining systems of integration. Also in this connexion, a general reference was made, with approval, to the arguments put forward by the spokesman for the Commission of the European Community, as well as by the spokesman for the Presidency of the European Community during the discussions in the Sixth Committee the previous year.

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

192. A number of representatives expressed support for the Commission's decision to continue its study of the law of the non-navigational uses of international watercourses on the basis of comprehensive reports to be submitted by Mr. S. Schwebel, whose appointment as the new Special Rapporteur on the topic was generally welcomed. Nevertheless, certain representatives considered it unfortunate that the Commission had lacked the time to deal thoroughly with this topic although they were hopeful that now it might be taken up with some degree of priority so that the work would finally be embodied into an international convention.

193. It was said that the appointment of the Special Rapporteur came at a particularly opportune moment with the gathering momentum of concern over the need for the progressive development and codification of the rules of international law regulating the development and use of international water resources. It was recalled that the General Assembly had referred that topic to the Commission as early as 1969. Given the absence of treaties in the cases of a large number of international drainage basins and the inadequacy of the legal and institutional arrangements made in others, and given the advances of science and technology with respect to water-related fields, the finite character of water resources and the competition among water users, the potential for dispute was obvious. Therefore, it was added, forthright action to meet the situation was all the more necessary.

It was pointed out that the United Nations Water Conference, held in 1977, had emphasized the importance and urgency of that question and the Economic and Social Council, in resolution 2121 (LXIII), had requested the Commission to give it higher priority.

194. One representative, explaining that his country was a lower riparian country and that its resources were heavily dependent on the use of international watercourses, submitted the following principles for consideration by the Commission with a view to improving friendly relations among States: (i) the waters of an international river should be equitably apportioned among the riparian States, having due regard to the heavy dependence of particular riparian States on water and traditional uses of such water; (ii) exercise of rights by a riparian State within its territory should not result in reducing the normal flow of water or in ecological changes liable to cause damage in the territory of another riparian State; (iii) each riparian State should exercise the utmost care within its territory to prevent the pollution of water; (iv) where the utilization of water by a riparian State was likely to cause damage to another riparian State, prior agreement of the latter State should be required; (v) any right of a riparian State that could be exercised in more than one way should be exercised in such a way as not to cause damage to another riparian State; (vi) an aggrieved riparian State should be adequately compensated for any loss suffered by reason of the violation of its rights by the other riparian State; (vii) riparian States should be under legal obligation to settle their disputes peacefully. If a friendly settlement could not be reached, they should be required to approach international forums available for that purpose.

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

195. Several representatives expressed satisfaction that the Commission, in response to the recommendation of the General Assembly in resolution 31/76, had started its work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier by setting up a working group to study the ways and means of dealing with that topic and expressed their agreement with the recommendations submitted by the working group and adopted by the Commission, regarding the future work thereon. A number of those representatives expressed the hope that the Commission would give careful consideration to the possibility of drafting a protocol on the topic which would supplement the Vienna Convention on Diplomatic Relations. This, it was said, would fill some gaps in diplomatic law, would eliminate the concerns expressed at Vienna in 1975 at the Conference on the Representation of States in Their Relations with International Organizations and would contribute to the strengthening of friendly relations among States. The view was expressed that among the questions that should be considered were the communications by diplomatic couriers, the exemption of diplomatic couriers and their baggage from customs inspection or control, including distant inspection or control with the use of technical means, and the inviolability of diplomatic mail in cases of rupture of diplomatic relations.

196. On the other hand, it was questioned whether the Commission should pursue work on a protocol on the problems of the diplomatic pouch and courier. The view was expressed that if it did so, the Commission should deal with the problem of abuse of the diplomatic pouch, as in the smuggling of arms and drugs.

4. Second part of the topic "Relations between States and international organizations"

197. Several representatives expressed satisfaction that the Commission had taken up the study of the second part of the topic concerning relations between States and international organizations on the basis of a preliminary report submitted by the Special Rapporteur, Mr. A. El-Erian. It was noted that the Commission's discussion of the report seemed to indicate that it could now consider that part of the topic, as it was ripe for codification, thereby completing its work of codifying diplomatic law. The view was expressed that in undertaking such a task, the Commission should base its approach on the principle of functionalism; the privileges and immunities of officials of international organizations were indispensable to carry out the tasks entrusted to them. So far such privileges and immunities had been established in a piecemeal fashion, and the Commission's task was to formulate general rules susceptible of being embodied in an instrument which, although it might be residual in character, could help in unifying present practices and be applied by international organizations in cases of lacunae in the existing special conventions.

198. On the other hand, some representatives doubted the desirability of giving a high degree of priority to work on the matter. Further still, some representatives questioned the usefulness of the work the Commission intended to do in the sphere of relations between States and international organizations. The view was expressed that that work would not prove useful so long as the 1975 Vienna Convention had not been generally accepted. It was also said that those relations were already adequately regulated by special conventions, practice and Article 105 of the United Nations Charter, and that the Sixth Committee should avoid encouraging another codification effort which might well prove abortive.

5. Programme of work of the Commission

(a) Implementation of the current programme of work

199. Representatives generally agreed with the broad goals set forth by the Commission regarding work on the topics under active consideration within the Commission's five-year term of office ending in 1981 and, in that context, with the programme of work adopted by the Commission for its thirtieth session. That programme consisted in concluding the second reading of the draft articles on the most-favoured-nation clause, continuing the preparation of draft articles on the high priority topic of State responsibility and on the two priority topics of succession of States in respect of matters other than treaties and treaties concluded between States and international organizations and studying the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

200. Several representatives, stressing the importance of the codification and progressive development of the rules of international law governing State responsibility, urged the Commission to give the highest priority to its work on that topic so as to speed up the elaboration of its draft on State responsibility for

internationally wrongful acts. It was said that at its twenty-ninth session the Commission had adopted only three articles and that at that pace and given the complexity of the questions which it still had to examine, such as participation by other States in the internationally wrongful act of a State and circumstances precluding wrongfulness and attenuating or aggravating circumstances, the Commission would not be able to complete the first reading of part I of the draft articles, relating to the origin of responsibility, in 1979 as planned.

201. It was noted that the Commission had divided its draft into three parts, the first of which was subdivided into five chapters, but had thus far considered only the first two chapters and a part of the third. In this regard, the view was expressed that it was hard to understand why the Commission wished to complete the second reading of part I of the draft articles before the conclusion of its five-year term of office. It would in fact be more logical for it to examine first the articles of part II of the draft (content, forms and degrees of international responsibility), which was in certain respects closely linked to part I. On the other hand, the opinion was held that it was important for the Commission to concentrate on finishing the first and second readings of part I of the draft articles and not to permit that work to be retarded by the consideration of articles in parts II and III. In particular, it was said, it would be an error for the Commission to devote any time at all to the question of settlement of disputes unless and until the rest of the work in parts I and II had been completed.

202. With regard to State succession in respect of matters other than treaties, it was said that the articles submitted by the Commission dealt with almost all questions relating to State debts, which gave grounds for hope that the Commission would complete the first reading of the draft articles on succession to State property and State debts in 1978 and could possibly begin considering a series of articles concerning State succession to other public property and public debts before the expiration of its current five-year term of office.

203. Opinions were also expressed by some representatives in favour of giving as high a priority as that to be given to State responsibility to the question of treaties concluded between States and international organizations or between two or more international organizations and to the law of the non-navigational uses of international watercourses.

204. It was also noted that under the item in the agenda of the General Assembly "Review of the multilateral treaty-making process", the International Law Commission was given an opportunity to submit observations. The hope was, therefore, expressed that the Commission would be able to find time in its two sessions between the current and the thirty-fourth sessions of the Assembly to prepare for the Assembly an exposition of its views on the multilateral treaty-making process and of its own role therein. That potential additional burden was one which the Commission should bear in mind in planning the use of its time.

(b) Possible additional topics for study following the implementation of the current programme of work

205. Representatives generally welcomed the review made by the Commission of possible additional topics for future study. It was pointed out that since its inception the

Commission had prepared a number of draft conventions which, after having been adopted, had become pillars of modern international law. Yet international relations continued to evolve, with the result that it was always necessary to study new topics in the field of the codification and progressive development of international law. In this regard, the opinion was expressed that it was timely for the Commission to proceed to a more thorough exchange of views on its future work programme. The Commission, it was said, should review the current state of international law as a whole and, after consulting the Sixth Committee and the regional legal committees, should draw up a new general programme reflecting the needs of the international community and the general trends in international law. Reference was made in this connexion to the survey of international law prepared by the Secretariat in 1971 as a basis for drawing up such programme.

206. In this sphere, it was deemed essential that the Commission, a body of limited membership composed of experts acting in their personal capacity, and the Sixth Committee, in which all States Members of the Organization were represented, should pursue a productive dialogue. As a matter of fact, it was said, the Commission was caught in a dilemma: on the one hand, the General Assembly continued referring questions to it, while, on the other, it had not yet been able to complete certain drafts which it had been discussing for some time.

207. In the opinion of some representatives, the Sixth Committee should ensure that the quality of the Commission's output did not suffer as a result of its pursuing its activities on too wide a front. It was, therefore, necessary for the General Assembly to show restraint in the assignment of new topics to the Commission. There was no doubt, it was said, that during the recent sessions the Assembly had been too hasty in recommending that the Commission should give priority to different topics, without any discrimination or real regard for the over-all picture. The Sixth Committee should distinguish codification assignments which required no more than preliminary investigations by the Commission, such as completely new topics whose scope was yet not clear, from other assignments for which the preliminary research had already been done and which the Commission could be authorized to continue. On this basis, certain new topics could be added to the programme of work, limiting their study to preliminary investigation by the Secretariat, a duly appointed Special Rapporteur and by the Commission, without taking any decision on the future course of that work. If the volume of work of the Commission was reduced, the work could progress at a more leisurely pace, in an atmosphere of intellectual concentration which was an essential condition of success in the difficult task of codification. Discussion in the Commission would be more concentrated and its reports would be less discursive.

208. It was also stated that while the order of priority of the work to be undertaken was laid down by General Assembly resolutions, it was also desirable that the Commission itself should take appropriate initiatives to speed up the work on a limited number of topics. In the opinion of certain representatives, the Commission's work programme had now become severely overburdened so that it was making only piecemeal progress on all its topics. That situation was certainly distracting to Governments, and created difficulties for many members of the Commission. The Commission had sometimes been criticized for dissipating its efforts and it was desirable in their view that it should concentrate on present

topics which were urgent and would contribute to enhance the role entrusted to the United Nations by Article 13 of the Charter like those closely connected with international peace and security, before proceeding to take up new ones. At least, it was said, new topics should not be taken up until about the third year of the Commission's current term of membership. In this connexion it was recalled that for a long time the Commission had insisted on having its agenda no more than one major topic and one minor topic, i.e. one topic requiring a great deal of research by both the Special Rapporteur and the individual members of the Commission both during and between its sessions, and another topic requiring less research. It was also suggested that the Commission might give thought to the possibility of dealing with some smaller and more specific topics which, because of their restricted ambit, could be fully dealt with in two or three sessions. The Commission should attempt to deal succinctly and rapidly with such topics giving them priority over larger and possibly more theoretical questions.

209. Several representatives agreed in general with the tentative conclusions reached by the Commission regarding the selection from its general programme of work of additional topics for future active consideration. In this connexion, the opinion was expressed that, in any event, whatever the reference in the draft resolution to be recommended by the Sixth Committee to specific topics for inclusion in the Commission's active programme of work, it should be understood as not precluding the Commission's freedom of action to take up other topics or to give to those to be mentioned a lower priority in the light of the circumstances prevailing at the time of commencement of work thereon. Other representatives addressed themselves in detail to all or some of the topics singled out by the Commission.

(i) Juridical régime of historic waters, including historic bays and rights of asylum

210. Certain representatives endorsed the Commission's conclusion that in the present circumstances it was preferable not to keep on its agenda the question relating to historic waters including historic bays and to the right of asylum, which were already being dealt with by other bodies. It was deemed appropriate to relieve the Commission of the obligation to keep those topics on its agenda.

(ii) International liability for injurious consequences arising out of acts not prohibited by international law

211. Representatives generally favoured consideration by the Commission of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the so-called "liability for risk", which had been placed on the programme of work pursuant to a recommendation of the General Assembly. Some representatives considered that the Commission should begin work on the topic at its next session and it was suggested that for that purpose the Commission should appoint a Special Rapporteur. It was recalled that the Assembly had emphasized the need to take up the topic as early as possible and it was stated that it had become indispensable to ascertain at what point acts which were formally lawful could become intrinsically wrongful. Reference was made in this regard to the relevance of the topic for the new law of the sea.

212. Other representatives, stressing the relationship between this topic and that of State responsibility favoured its being taken up in the light of the progress made on the draft articles on State responsibility for internationally wrongful acts currently under preparation. It was stated that since final completion of the articles of Part I of that draft was not to be achieved until the end of 1981, it would not be realistic to expect the Commission to undertake, before that date, a discussion of the topic of liability for risk. For some representatives, this topic should only be put on the active work programme upon completion of work on the present draft as a whole. It was said, in this regard that in setting aside the topic of liability for risk, and in deciding to treat the problems in sequence, the Commission would enhance its chances of bringing the work on State responsibility to a successful conclusion. The violation of future rules on liability for risk would entail responsibility for internationally wrongful acts, a responsibility in respect of which those rules would be "primary" rules of international law, in the terminology of the Commission.

213. The view was also expressed that in dealing with the topic of liability for risk the Commission could not leave aside the "primary" rules and deal exclusively with the "secondary" rules, as it had rightly done in respect of the topic of State responsibility. In addition, it was said, the different aspects of the question should be studied together, as they could not be separated; those aspects were: the determination of the acts involved; general rules concerning the origin of liability; contents of that liability; and implementation of liability and settlement of disputes.

(iii) Jurisdictional immunities of States and their property

214. Several representatives favoured consideration by the Commission of the topic of jurisdictional immunities of States and their property. It was a topic limited in scope, of considerable practical importance in the ordinary course of relations between States since the growing tendency of States to engage in commercial activities presented particular problems and one on which there was a great deal of material in the way of State practice and jurisprudence, making it thus suitable for codification and progressive development. Reference was made in this connexion to the recent entry into force of the European Convention on State Immunity of 1972 and the Foreign Sovereign Immunities Act of the United States of 1976 as well as to the fact that at the Commonwealth Law Ministers Conference recently held in Canada, it had been decided to request the Commonwealth secretariat to examine whether there were any general principles of law that could be adhered to by all Commonwealth countries in that field, taking into account the recent developments in international organizations, including the Council of Europe and the United Nations.

215. The opinion was expressed that the topic of jurisdictional immunities of States and their property was a complicated one, in that those immunities were dependent upon the peculiarities of each legal system, and experience had shown that the elaboration of an international instrument on the topic was made difficult by the need to find language translatable into the terms of the various national legal systems. In addition, a definition of foreign State had to be found which

would take account of the peculiarities of the internal legal system of that foreign State. Those difficulties were, however, not deemed insurmountable for codifying the topic. On the other hand, it was considered that the topic, which touched on both domestic law and international law, presented such particular difficulties with regard to codification that it was made unsuitable for active consideration by the Commission.

(iv) Draft Code of Offences against the Peace and Security of Mankind

216. Several representatives supported the review by the Commission of the Draft Code of Offences against the Peace and Security of Mankind which it had submitted in 1954 to the General Assembly. At that time, the Assembly had decided to defer consideration of the Draft Code until it took up again the question of defining aggression. The Assembly had not only taken up that question but it had also adopted a definition of aggression in 1974. The time had therefore come to bring the Draft Code up to date, so as to take into account the developments which had occurred in international relations and international law since its elaboration.

217. In the opinion of some representatives, the Draft Code which was closely related to the question of international criminal jurisdiction had not lost its timeliness in the context of international relations. In this connexion, the view was expressed that much work had been done on the development of international humanitarian law, but the question of definition of war crimes and responsibility for them had not attracted adequate attention. Nor had any discussion taken place at the governmental level - as distinguished from the non-governmental level where the discussion had been lively - of the idea of an international criminal tribunal. It was further stated that it was imperative to complete the codification of the rules of law on a subject which was all the more important for international peace and security because aggression, military intervention and the use of force were increasingly threatening the sovereignty and territorial integrity of countries and undermining the very foundations of the United Nations. Once completed, the Draft Code would considerably facilitate the Commission's work in the field of State responsibility, especially with regard to the consideration of the objective element of the internationally wrongful act, since it would provide a criterion for determining the degree of gravity of the wrongful act and the consequences attributable to it. It was essential to settle those questions so as to ensure the political viability of the Commission's final draft on that topic.

218. Other representatives, however, saw no advantage in the Commission's reviewing the Draft Code. It would be not only difficult to achieve consensus among States, but much of the content of the Draft Code had been taken over into the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter, adopted by the General Assembly in 1970, and into the definition of aggression, adopted by the General Assembly in 1974. It was also said that the Commission's suggestion on the matter did not seem to fall within its mandate as laid down in its Statute and in Article 13 of the Charter and referred to tasks which the General Assembly should not have sought to impose on the Commission, and which the Commission was not equipped to carry out. If those tasks were to be carried out, they should be assigned to properly constituted special committees which would be empowered to negotiate the political compromises that would undoubtedly be required.

219. Representatives agreed not to make reference to the Draft Code of Offences against the Peace and Security of Mankind in the draft resolution to be recommended this year by the Sixth Committee in view of the fact that a separate item concerning the Code had been inscribed by the General Assembly in its agenda for the present session and allocated also to the Sixth Committee.

(v) Other topics

220. Some representatives stressed the need for the Commission to concentrate on the codification of rules relating to the peaceful settlement of international disputes. In this regard, the view was expressed that the Sixth Committee should examine this field, which was one of the least developed in international law and one which would require the greatest efforts for the formulation of a treaty or of rules permitting a better application of the specific measures laid down for that purpose in Article 33 of the Charter. But before the question was considered by the Committee from a political point of view, the Commission might provide the Committee with a draft or with guidelines on the subject, taking into account the provisions of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter as well as the precedents in the matter established by the regional agreements in force.

221. The view was also expressed that the Commission might envisage examining the impact of the work of post-war international organizations on the traditional sources of international law. Other topics to which attention was called as worthy of consideration by the Commission were the law relating to international economic relations, recognition of States and Governments and treatment of aliens. In addition, the opinion was expressed that in so far as the subject of nationality of claims did not fall within the scope of the present studies on State responsibility, that subject was ripe for study, particularly in the light of the effect on the protection of corporations and shareholders of the decision of the International Court of Justice in the Barcelona Traction Case. It was further said that another topic might be that concerned with the resolution of the problems associated with the use of ships by international organizations, which was at least as urgent and practical as consideration of the problems of treaties concluded by international organizations.

6. Methods of work

222. Representatives supported in general the Commission's conclusions regarding its methods of work. It was considered that those methods were judicious, appropriate and effective and that together with the current procedures and organization of work were on the whole satisfactory. It was observed that the excellence of the methods of work of the Commission was reflected in the important results obtained with respect to codification; those results stood out when compared to the work of similar bodies such as the League of Nations Committee of Experts for the Progressive Codification of International Law or The Hague Conference for the Codification of International Law. A diplomatic conference soundly based on the proposals of the Commission was bound to succeed from the very outset, unlike those conferences which had not benefited from similar preparatory work. The methods of

work of the Commission had passed the test of suitability and there was, therefore, no need to amend the Commission's Statute. The Commission should, nevertheless, continuously keep under review its methods of work in an effort to find appropriate ways to improve them. In this respect, the opinion was expressed that the possibility of review should not be disregarded as concerns the distinction embodied in the Statute between methodologies depending on whether projects for codification or for the purpose of development of international law were concerned.

223. Several representatives welcomed the setting up by the Commission of the Planning Group on a virtually continuous basis. This would permit the Commission to adapt itself in the simplest and most flexible way to the requirements expressed yearly by the General Assembly and in particular to take up new matters which the Assembly considered urgent.

224. Several representatives stressed that as far as methods of work were concerned, they were purely a matter for the Commission's internal organization, in regard to which it should enjoy autonomy. It was said that the Commission should adopt whatever working methods it found best, provided that it never sacrificed quality to speed, and that all its members were able to participate fully in the major phases of its work. In this respect the opinion was expressed that the Commission's work should not be assessed in terms of the number of articles provisionally adopted at one session. The inherent difficulty of certain topics, particularly State responsibility, necessarily slowed the Commission's work. In the codification and progressive development of international law, patience and determination were required, together with a painstaking attention to detail, in order to elaborate draft rules capable of being applied in the many diverse situations arising in international relations. Legislation was a laborious and difficult task which required time. It was better to have before the Sixth Committee a small number of well-drafted articles, as in the present case, than a large provisions which were of mediocre quality. The Commission should avoid hastily adopting drafts for submission to the General Assembly. Besides, by preparing documents of good quality rather than a multiplicity of documents, the Commission gave valuable assistance to the members of the Sixth Committee and the Members of the United Nations generally, which, in view of the considerable volume of ongoing legal activities, often had difficulty in keeping abreast of the most recent work done in that field. In any event, as the Commission had rightly stated in paragraph 119 of its report, to submit to the General Assembly every two or three years a final set of draft articles of a high technical value and a high degree of acceptability to the whole international community on essential areas of international law could not be considered a slow pace at all.

225. With respect to the Commission's composition and attendance, it was emphasized, that the role assigned to the Commission in its Statute should be preserved: the Commission should continue to be an organ composed of specialists in international law, representing the principal legal systems of the world and the main forms of civilization and responsible for the codification and progressive development of international law. Because of its composition, the Commission was the organ best suited to draw the right conclusions from the general evolution of State practice and theory and to formulate rules which met the current needs of the international community, in the light of the new political, economic, and social trends. However,

the view was expressed that a composition not based on the principle of equitable geographical representation led rather to the adoption of conservative solutions by the Commission. It was further said that many members of the Commission found it impossible to be present during the whole session, especially when the duration of sessions was now of 12 weeks. That was a matter which Governments and the Commission itself should look into. Members of the Commission were chosen with a view to ensuring representation of the main forms of civilization and of the principal legal systems of the world, and the international community was therefore entitled to expect that the Commissions's draft articles would be the product of collective wisdom. Accordingly, Governments and other bodies must make every effort to enable individual members of the Commission to participate fully in its work. The recent efforts to avoid overlapping between the next session of the Conference on the Law of the Sea and the thirtieth session of the Commission were deemed an encouraging sign in this regard. It was also stated that the working conditions of the Commission members should be improved by providing them constantly with information on United Nations activities concerning legal matters.

226. As far as the manner of adoption of the Commission's texts, the view was expressed that the principle of consensus which guided the Commission in its work had great merit since that was the only way to ensure results acceptable to the greatest possible majority of Member States in a world of diverse interests and varying legal opinions. On the other hand, it was said that the conservatism of the solutions arrived at by the Commission resulted also from the fact that it had always sought, at least until its most recent session, to apply the consensus principle. Unanimity was of course desirable but if the Commission could not submit a unified text it should submit more than one text among which the Sixth Committee could choose and which would reflect the division between those who wished to maintain the status quo and those who wished to establish a new, just and equitable legal order.

227. Also on the subject of the Commission's methods of work, one representative, while recognizing that the Commission had done detailed research on theory, decisions of tribunals, practices of States, and fully and partly accepted international practices, found it striking that the Commission not only prepared its drafts in bits and pieces but did not always disclose in advance the scheme adopted by it for the study of various topics. In his view, the Commission itself often seemed not to be quite clear in its own mind as to what the whole architectural plan of its drafts was going to be. For example, it had so far avoided a decision on whether the draft articles on State responsibility were to begin with an article giving definitions or an article enumerating the matters excluded from the scope of the draft. The reasons could not be that the draft articles were only tentative, since the same might apply to the definitions and the preliminary clauses. It appeared, in his view, as if the Commission had not yet studied, even tentatively, the whole of the subject of one of its series of draft articles. It was surely desirable that the Commission should first survey a topic in its entirety and tentatively prepare a structure of codification before beginning its detailed work. That method would increase the speed of work and enable those who were called upon to give their views on draft articles to bear in mind the final end of the work.

228. In connexion with the methods of work of the Commission some representatives addressed themselves to the question of governmental involvement, by way of oral or written comments, in the evolution of the Commission's texts. It was considered that in the process of keeping to methods under review, the Commission should give to that aspect of its relationship with Governments further thought. It was stated that under the present system, when a set of articles appeared in instalments over an extended period, the only opportunity which Governments had to comment in writing was at the conclusion of the first reading of the draft. The result was that Governments tended to resort to the debates in the Sixth Committee as a vehicle for the communication of the substance of their ideas to the Commission. It was not certain, however, whether it would be advisable for Governments to comment orally on each and every one of the provisions adopted by the Commission each year or whether it would be preferable for them to wait for the finished draft in first reading before going into details. The procedure of oral comments had the disadvantages of allowing little time for the careful weighing of the report, unduly extending consideration of the report and deflecting the Committee's attention from current procedural aspects of the Commission's work. Although it was true that at the second reading of its drafts, the Commission took into account the relevant observations made in the Sixth Committee, it then had at its disposal the written or oral comments of Governments on the "ensemble" of the texts adopted in first reading. The affirmation was made that it would be simpler and more effective if Governments confined themselves to submitting comments on the complete set of draft articles after the first reading by the Commission.

229. Also with regard to working relations between the Commission and Governments, the view was expressed that Governments should be invited to submit written observations on several occasions in the course of the preparation of a set of draft articles, particularly since Governments were often unable to present their views in the Sixth Committee because they had not had an opportunity to study the Commission's reports in detail. The opinion was also expressed that the possibility of requesting preliminary written comments from Governments at interim stages in its work should be brought to the attention of the Commission. It was always useful to give Governments an additional opportunity to describe their views in detail and with the precision that was possible only in written form. In recent years the Sixth Committee had adopted a somewhat inefficient method of handling the report of the Commission. There was an increasing tendency to read extremely detailed statements which, although interesting and worth while, were too detailed to enable other delegations to respond and thus give rise to the lively exchange of ideas which the presence of Committee members in New York should make possible. It would be preferable for such detailed statements to take the form of written comments, which would in turn permit statements to focus on particular features. That approach would be in the long-term interests of the Commission and make more efficient use of the presence of representatives at the General Assembly. It was also stressed that Governments could submit comments to the Commission in writing in response to the Commission's appeals. Comments received in due time could be taken into account when the Commission drafted the final version of the draft articles. Governments should therefore endeavour to submit their comments as soon as possible when so requested.

230. Representatives generally supported the Commission's recommendations regarding the pressing need to increase the staff of the Codification Division of the Office of Legal Affairs. It was said that despite a lack of manpower, the staff of the Codification Division did magnificent work for the Commission in addition to servicing the Sixth Committee, other special or ad hoc committees and legal plenipotentiary conferences. In view of the number and importance of the items in the Commission's programme of work, the increase in the staff of the Division was entirely justified. The Codification Division must be able to undertake a greater number of research projects and studies than was currently permitted by its very full schedule. The additional staff should be chosen in such a manner as to maintain the high standards of integrity and competence which characterized the present few members of the Division. In this connexion, one representative expressed the view that the proposed action concerning the strengthening of the Codification Division should draw upon ordinary allocations so as not to require an increase in the budget of the Organization.

231. Representatives also endorsed the reference in paragraph 123 of the report concerning the manner in which regulations for the control and limitation of documentation should be applied with respect to research projects and studies requested from the Codification Division. In this connexion, the Secretariat was congratulated on its important study on force majeure and "fortuitous event" (ST/LEG/13), which should be made as widely available as possible in all the languages of the Commission.

7. Form and presentation of the report of the Commission to the General Assembly

232. Several representatives supported in general the conclusions reached by the Commission regarding the form and presentation of its report to the General Assembly. With regard to the form of the report and particularly to its length and that of the commentaries it was said that as in the case of any legal text, it was difficult to pass judgement on draft articles in isolation. Attention was drawn to the fact that the Commission's mandate required it to make well-reasoned reports and to give adequate background information in its commentaries. Thus the Commission's practice of referring in them to doctrine was entirely consonant with its Statute. The Commission acted rightly in providing the full background of arguments for the proposals it submitted to the General Assembly, given the need for the clearest possible picture of specific aspects of the progressive development of law and the ever-growing requirements of the international community. In this manner, delegations and Governments, especially those without extensive research facilities, were enabled to follow the Commission's work and to make constructive contributions to the discussion. Besides, it was said, while the primary role of the commentaries was not the dissemination of scientific or theoretical material, the Commission's report should nevertheless be a self-contained document. The summary records of the Commission's proceedings were distributed only to its members and often were not available in final form until about one year after the close of each session. In practice, therefore, the commentaries were the only source of information readily accessible to Governments on the background and rationale of individual draft articles. It was also stated that the practical character of the structure of the Commission's report had been confirmed over the years and deserved to be maintained in the future. The logical division of the report and the inclusion of an analytical table of contents made it easy to consult. The summaries given in the various chapters, especially those providing the full background of debates concerning the topic dealt with in the chapter, were particularly useful. Foot-notes were also an invaluable research tool.

233. Several representatives agreed with the view expressed by the Commission that its commentaries were an essential element of the codification process, and an important part of the travaux préparatoires of the resulting conventions. It would be a mistake to sacrifice the authority of a document which, in the course of 30 years, had become an indispensable mirror reflecting the latest developments in the field of the codification and progressive development of international law, solely to satisfy the wishes of those who had no time to read it. As the Commission itself had concluded, the report should be short or long according to the Commission's perception of the need for explaining and justifying the draft articles contained therein to the General Assembly and Member States. The Commission should enjoy complete freedom of action in the preparation of its reports.

234. Certain representatives, while agreeing that the substantive value of the commentaries should take priority over brevity, stressed the need for the report to be manageable and easy to consult and study. The report was not only a briefing for decisions but also a source of practical information. Its fullness had thus far enabled delegates to check the conclusions adopted by the Commission and point

out any short-comings they might find. There could be no doubt that a manageable report was necessary if the Commission was to benefit from comments of the Committee and of member Governments; otherwise, comments would always be "preliminary views" subject to further consideration. No doubt there was room for improvement, and the Commission had expressed its readiness to review its method of presentation. It was said that the suggestion that summaries should be provided remained to be explored. Also, an index would probably add to its usefulness.

235. Certain representatives questioned some aspects of the practice of adding commentaries to the draft articles. This practice, it was said, sometimes caused the drafters to think, perhaps unconsciously, that what was vague or had been omitted in the article could be made specific or introduced in the commentary. However, the text of the articles must be as self-sufficient as possible; the notions contained in it must be expressed as accurately, clearly and unambiguously as possible. It followed, according to this view, that some elements in the commentaries were worthy of being incorporated into the text of the relevant articles.

236. Also, certain representatives expressed misgivings on the value of the commentaries as part of the travaux préparatoires of codification conventions adopted on the basis of drafts to which they were attached. In this regard it was said that although they were part of the preparatory work for the articles, they would as such have very limited value under article 32 of the Vienna Convention on the Law of Treaties. Among the various sources of international law, the commentaries stood only slightly above the level of legal literature and at the lowest level of preparatory work, since they derived from lawyers who, although prominent in their field, had been invited by the General Assembly to express their personal views on the subject in question. The situation would be very different if the Commission was composed of States represented by experts. If the Commission's commentaries were really to have the character of travaux préparatoires, the members of the Commission would have to be representatives of States, which they were not, and certain paragraphs of the report could not reflect the more or less unilateral viewpoint of a given rapporteur. It was also stated that to consider the commentaries as an important part of the travaux préparatoires was diametrically opposed to what had been said by the Commission in 1966 concerning the position of its proceedings in relation to the preparations for the Convention on the Law of Treaties.

237. The view was further expressed that for several years the Commission had been too free in giving its interpretations to various international treaties. Certainly, such treaties could usefully be invoked to support a given proposition, but the greatest caution must be exercised in formulating observations upon them. Above all, the Commission must refrain from giving interpretations to the Charter of the United Nations, and should bear in mind the declaration adopted in San Francisco on that subject.

238. The opinion was expressed that, having in mind the limited value of commentaries as travaux préparatoires, the Commission was not required to submit detailed monographs to the General Assembly and to governmental services already

overburdened with work; it would be quite sufficient to submit the shortest possible explanatory statements, such as many Governments customarily submitted to their legislatures. It was further stated that the Commission should try to set out in a few sentences the positive ideas it was seeking to embody in each article. According to this opinion, that purpose was not served by the learned commentaries in the report which, while they justified the language of a proposed article, sometimes lost sight of the original intention. Moreover, in order to make the interpretation of individual articles easier, the authors of the report might sometimes have found it useful to replace long explanations by specific examples. In this connexion, the view was expressed that the numerous examples given were illustrative rather than exhaustive. It would be preferable in the commentaries to refer in certain cases to the experience of specific countries.

239. Also with respect to the form of the report, the view was expressed that the multiplicity of foot-notes made the report excessively heavy and difficult to read, so that it did not meet the practical needs of the body or bodies to which it was addressed. Many of the foot-notes contained quotations drawn from a great number of works without any attempt at evaluation. The Commission had decided in 1966 to drop all quotations from its commentaries, realizing that it was better to leave the Secretariat to compile the bibliographical material needed for diplomatic conferences, and the Secretariat had most adequately fulfilled that task. Other foot-notes consisted of proposals for which certain members of the Commission, not identified by name, had expressed a preference. At one time, members dissenting from the Commission's conclusions had been entitled to register their dissent in the annual report. That practice did not seem to have been abolished, although it was no longer necessary since dissenting opinions, together with the identity of their authors, were duly published in the Commission's Yearbook.

240. It was also suggested that the Commission should give consideration to readjusting the pattern of its adoption of commentaries to its draft articles, since there had been a tendency for the Commission to adopt those commentaries in haste without giving its members sufficient time to read and digest them in draft form. The greatest care should be exercised in drafting the commentaries and, it was said, much would be gained if they were written in a spirit of détente, compromise and mutual understanding.

241. As far as the time of submission of the Commission's annual report to the General Assembly, several representatives stressed the importance for Governments to be allowed sufficient time to study the Commission's report. It was said that the purpose of the debate in the Sixth Committee was not merely to provide an opportunity for delegations to express their views on the subject; it should above all give national authorities the chance to express their initial reaction, as had previously been the case. The Commission was composed of legal experts of high standing and competence, but in the final analysis it was States which were represented at conferences of plenipotentiaries and which became parties to the treaties adopted at them. To ensure fruitful consideration of the Commission's report in the Sixth Committee, Governments must be able to make their views known, and for that purpose they must have time to study the report in depth. The report differed greatly in its nature and contents from the other

reports submitted to the Assembly. It was regrettable that Governments had not time to study it with the attention it deserved and to take appropriate positions on the draft articles contained in it. In particular, the developing countries had too few legal experts, and it was difficult for them to study and comment on a report which was received late.

242. It was recalled that in the past, it had been the practice of the Sixth Committee to begin its work with the consideration of the Commission's report, in view of the importance Governments attached to it. Unfortunately, that was no longer possible, given the date on which the Commission concluded its yearly sessions and the time needed for processing the document before it could be distributed. In these circumstances, the Commission had suggested that the Sixth Committee should postpone its consideration of the Commission's report until later in the Assembly's session. For the Commission, that solution was practical and preferable to distributing its reports in several parts. The latter solution did not seem feasible, since the Commission approved its report at the end of its session. The suggestion to postpone consideration of the Commission's report until the end of the General Assembly session was generally supported as a practical way of helping solve the situation. Nevertheless, some representatives stressed the need for paying continuous attention to the matter of ensuring the timely distribution of the report to Governments prior to the commencement of the annual review of the General Assembly.

243. In this regard, the opinion was reiterated that an earlier distribution of the report might be achieved if it were to be reduced in size and submitted in instalments. It was also stated that in order to do justice to the report, it would have to be circulated at least four weeks before the opening of the General Assembly. The Commission would then have to meet earlier, and that might cause difficulties for some of its members. Nevertheless, consideration should be given to such a course in view of the wish of the members of the Sixth Committee to give the reports of the Commission all the attention they deserved.

244. Also in connexion with the consideration of the Commission's report in the General Assembly the view was expressed that it should be possible to arrange the programme of work of the Sixth Committee in such a way as to ensure the uninterrupted consideration of the Commission's report. Some representatives came to New York specifically to attend meetings at which the report was considered and it was, moreover, highly desirable for those meetings to be attended by the Chairman of the Commission. It was to be deplored that the Commission's report was not considered while the Chairman of the Commission was in New York. The Chairman could then have listened to the criticisms of the report and replied to them, which would have been of great interest.

245. Some representatives pointed out that the fact that the Commission's report was not issued in time in some languages caused additional difficulties for all delegations which used those languages. The hope was expressed, therefore, that steps would be taken to ensure that the Commission's reports were in future translated simultaneously into all the official languages.

8. Co-operation with other bodies

246. Representatives welcomed the Commission's continued practice of co-operating with regional juridical bodies such as the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the European Committee on Legal Co-operation.

9. Gilberto Amado Memorial Lecture

247. Satisfaction was expressed at the future organization of the Gilberto Amado Memorial Lecture, to be delivered by Judge T. O. Elias.

10. International Law Seminar

248. Several representatives expressed gratification at the success of the International Law Seminar organized by the United Nations Office at Geneva, which had held its thirteenth session during the Commission's session, with several Commission members volunteering their services as lecturers. The hope was expressed that such seminars would continue to be organized during future sessions of the Commission, so as to promote the dissemination and teaching of international law.

249. A number of representatives announced that, as in previous years, their Governments would make available scholarships enabling students from developing countries to attend the seminar which would be held simultaneously with the next session of the Commission. Representatives thanked those Governments which had made financial contributions to enable participants from developing countries to attend the seminar. Hope was expressed that other Governments would follow suit to ensure a satisfactory geographical distribution among participants. However, in the opinion of some representatives, the long-term solution was to finance the seminars, which were of particular importance to developing countries, from the regular budget of the United Nations.

IV. DECISION

250. At its 68th meeting, the Committee adopted draft resolution A/C.6/32/L.19 by consensus (see para. 251 below).

V. RECOMMENDATION OF THE SIXTH COMMITTEE

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

Report of the International Law Commission

The General Assembly,

Having considered the report of the International Law Commission on the work of its twenty-ninth session, 4/

Emphasizing the need for the progressive development of international law and its codification in order to make it a more effective means of implementing the purposes and principles set forth in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 5/ and to give increased importance to its role in relations among States,

Noting with appreciation the work done by the International Law Commission on State responsibility, succession of States in respect of matters other than treaties and treaties concluded between States and international organizations or between international organizations,

Noting with satisfaction the conclusions reached by the International Law Commission regarding the study of other topics under current consideration,

Welcoming the review made by the International Law Commission of possible additional topics for future study and the continued attention paid by it to the question of rationalizing further its organization and methods of work,

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

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

3. Approves the programme of work planned by the International Law Commission for 1978;

4. Recommends that the International Law Commission should:

(a) Complete at its thirtieth session the second reading of the draft articles on the most-favoured-nation clause adopted at its twenty-eighth session, as recommended by the General Assembly in resolution 31/97 of 15 December 1976;

(b) Continue on a high priority basis its work on State responsibility, taking into account resolutions of the General Assembly adopted at previous

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4/ Official Records of the General Assembly, Thirty-second Session, Supplement No. 10 (A/32/10).

5/ General Assembly resolution 2625 (XXV), annex.

sessions, with the aim of completing at least the first reading of the set of articles constituting part I of the draft on responsibility of States for internationally wrongful acts, within the present term of office of the members of the International Law Commission;

(c) Proceed with the preparation, on a priority basis, of draft articles on:

(i) Succession of States in respect of matters other than treaties, in an endeavour to complete the first reading of the set of articles concerning State property and State debts;

(ii) Treaties concluded between States and international organizations or between international organizations;

(d) Continue its work on the law of the non-navigational uses of international watercourses;

5. Endorses the conclusions reached by the International Law Commission to study the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, as requested by the General Assembly in resolution 31/76 of 13 December 1976;

6. Endorses the conclusions reached by the International Law Commission regarding the second part of the topic of relations between States and international organizations;

7. Invites the International Law Commissinn, at an appropriate time and in the light of progress made on the draft articles on State responsibility for internationally wrongful acts and on other topics in its current programme of work, to commence work on the topics of international liability for injurious consequences arising out of acts not prohibited by international law and jurisdictional immunities of States and their property;

8. Expresses confidence that the International Law Commission will continue to keep the progress of its work under review and to adopt the methods of work best suited to the speedy completion of the tasks entrusted to it;

9. Endorses the recommendation of the International Law Commission for the strengthening of the Codification Division of the Office of Legal Affairs of the Secretariat;

10. Endorses the conclusion reached by the International Law Commission, in paragraph 123 of its report, concerning research projects and studies required by the work of the Commission;

11. Expresses the wish that seminars continue to be held in conjunction with sessions of the International Law Commission and that an increasing number of participants from developing countries be given the opportunity to attend these seminars;

12. Requests the Secretary-General to forward to the International Law Commission for its attention the records of the discussion on the report of the Commission at the thirty-second session of the General Assembly.