UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/31/370
10 December 1976

ORIGINAL: ENGLISH

Thirty-first session
Agenda item 106

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

Report of the Sixth Committee

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I. INTRODUCTION

1. At its 4th plenary meeting, on 24 September 1976, the General Assembly decided to include in the agenda of its thirty-first session the item entitled "Report of the International Law Commission on the work of its twenty-eighth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered this item at its 13th, 14th, 16th to 34th and 60th meetings, held on 7, 12 and from 13 October to 2 November and on 1 December 1976.

3. At its 13th meeting, on 7 October, Mr. Abdullah El-Erian, Chairman of the International Law Commission at its twenty-eighth session, introduced the Commission's report on the work of that session. 1/ At the 26th meeting, on 25 October, he commented on the observations which had been made during 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 six chapters entitled: I. Organization of the session; II. The most-favoured-nation clause; III. State responsibility; IV. Succession of States in respect of matters other than treaties; V. The law of the non-navigational uses of international watercourses; and VI. Other decisions and conclusions of the Commission. Chapter II contained a set of 27 draft articles provisionally adopted by the Commission in first reading on the most-favoured-nation clause. Chapters III and IV contained draft articles provisionally adopted by the Commission on State responsibility and on succession of States in respect of matters other than treaties, respectively. Chapter V contained a description of the Commission's work on the law of the non-navigational uses of international watercourses. Chapter VI concerned the question of treaties concluded between States and international organizations or between two or more international organizations, the conclusions of the Commission on the programme and organization of its work on the basis of recommendations made by a planning group established by the Commission and a number of administrative and other matters.

5. At the 60th meeting, on 1 December, 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-first Session, Supplement No. 10 (A/31/10).

II. PROPOSAL

6. At the same meeting, the representative of the Netherlands introduced a draft resolution (A/C.6/31/L.9) sponsored by Algeria, Bolivia, Bulgaria, Egypt, Germany, Federal Republic of, Ghana, Greece, Indonesia, Iran, Ireland, Kenya, Mexico, the Netherlands, New Zealand, Nigeria, Norway, Paraguay, Peru, the Philippines, Poland, Romania, Spain, Thailand, Tunisia, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Yugoslavia (see para. 251 below).

III. DEBATE

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

7. The representatives who participated in the debate congratulated the Commission for the substantial and constructive work done at its twenty-eighth session which had enabled it to complete the first reading of the draft articles on the most-favoured-nation clause, to achieve considerable progress in the preparation of draft articles on State responsibility and succession of States in respect of matters other than treaties and to examine the first report by the Special Rapporteur on the law of the non-navigational uses of international watercourses (A/CN.4/295). The report of the Commission had great intrinsic merit and constituted a valuable source of information for the interpretation and application of international law and for future studies in that field. Both in format and content, it provided further evidence of the valuable role of the Commission in the codification and progressive development of international law.

8. The Commission was praised for its continued efforts to contribute to the fulfilment of the Assembly's responsibilities under Article 13, paragraph 1 (a), of the Charter of the United Nations. The progressive development and codification of international law was not an easy task in the United Nations, which was constantly confronted by changes in international relations and profound political and ideological divisions among its Members. Against this background, in the Commission, the over-all standard during the past five years had been in the high tradition established by and expected from it. While some might complain about a certain lack of speed, the work of codification which had been entrusted to it called for extensive research in the fields of State practice, jurisprudence and doctrine. Moreover, States were often over-hesitant in replying to the questionnaires drawn up by the Commission. But there was no questioning that the draft articles resulting from the work of the Commission, together with the commentaries, had always constituted the basic device in the treaty-making process. The advantages of that method could be appreciated even more in some other instances, such as the United Nations Conference on the Law of the Sea which, at its series of sessions, had not succeeded in drawing up a convention for want of an advanced draft.

9. The practical achievements of the Commission in the field of international law derived from the interaction between the scholarly studies, the commentaries and the draft articles it submitted, the deliberations of the Sixth Committee and the written observations formulated by Governments. The functioning of that triangle - International Law Commission, Sixth Committee and legal departments of Member States - was one of the most important prerequisites for the United Nations contribution to the codification and progressive development of international law.

10. Several representatives indicated that their Governments attached the greatest importance to the Commission's work in the fields of progressive development and codification of international law. This was the more so since it was now to the Commission that the international community had to look to see reflected in new and generally acceptable legal norms the vast changes that were taking place in many spheres, especially that of international co-operation. The Commission's reports provided increasing evidence of the importance which the Commission's members attached to contemporary developments which had a bearing on the subjects discussed. In this connexion, the particular significance that the International Law Commission had for the developing countries was stressed. It was only unfailing respect for the absolute inviolability of national sovereignty and territorial integrity which could secure to the poor and the militarily weak a climate of peace and stability, and there could not and must not be any erosion of that principle. It was gratifying, therefore, to note that the principle had found expression in the Commission's work. The Commission had also shown its awareness of the fact that all efforts directed towards the progressive development and codification of international law might remain sterile unless they led to economic hope and betterment and ultimately to true economic independence for all peoples throughout the world.

11. Some representatives stressed that the codification of international law had become an increasingly complex and sensitive task. The birth of a large number of States had created a new international climate in the legal sphere. The codification of international law should, therefore, take account of new demands and aspirations, as well as the ideas and legitimate interests of all States. The rules of international law which the International Law Commission was endeavouring to develop and codify should contribute to the solution of current problems between States in the interest of all States. Those rules should clearly define relations between States in accordance with the need to maintain peace and security, to build a new international economic order and to ensure the free and independent development of all peoples. By striving to achieve those objectives, the Commission would be contributing to the reshaping of contemporary international relations. The legal solutions formulated by the International Law Commission required the courage to look beyond traditional international law and take into account the opinions and practice of all States, as could be seen in the commentaries on the draft articles. The Commission was to be congratulated on the fact that some of the draft articles contained in its latest report, including article 21 of the draft articles on the most-favoured-nation clause and article 19 of the draft articles on State responsibility, showed political and social sensitivity to a new world order. The Commission should not be deterred from making further efforts in that direction by the fact that States might reproach it for its daring.

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12. Some representatives stressed the importance of international law as the basis of relations between States and, in conformity with the current trend towards the relaxation of international tension, as a major factor in the solution of contemporary problems, including the prevention of a new world war. A period of lessened tension afforded favourable conditions for the progressive development of international law. The present era was marked by such trends as the irresistible advance of the forces of peace and progress, the liquidation of colonialism and the emergence of new States pursuing a policy of peace; those trends in themselves afforded yet further scope for the development of new principles and provisions of international law. Thus, the codification and progressive development of that law could be seen as one aspect of a complex of efforts directed towards the relaxation of international tension and the establishment of a new system of international relations. The embodiment, as norms of international law, of the progressive principles of international life would lead to a strengthening of the international legal system.

13. Some representatives, referring to the election of the members of the Commission scheduled to take place at the current session of the General Assembly, stressed the great importance they attached to the election and, in particular, to the application of the principles laid down in article 8 of the statute of the Commission. It was extremely important for the international community and for the development of international law that the members of the Commission should not only fulfil the required conditions, but that the major civilizations and the main legal systems in the world should be represented. The aim of the codification and the progressive development of international law was to establish a law for the existing international community so that all States, large and small, old and new, might participate in the task and so that all nations would feel responsible for that law and feel confident that it expressed the needs of the world community.

B. The most-favoured-nation clause

14. Representatives who spoke on the chapter of the Commission's report devoted to the most-favoured-nation clause 2/ expressed in general their satisfaction at the completion, in first reading, of the draft articles on the topic, as had been recommended by the General Assembly in resolution 3495 (XXX). Tribute was paid to the Special Rapporteur, Mr. Endre Ustor, and to the members of the Commission on their achievement, which represented one of the most important steps forward taken by the Commission at its twenty-eighth session.

15. In the opinion of some representatives, there could be no doubt of the timeliness of the Commission's work on the topic, for the principle of most-favored-nation treatment was of the greatest importance for co-operation among States in the sphere of economic relations in general and in the development of international trade in particular. This was shown by numerous international documents such as the Final Act of the Conference on Security and Co-operation in Europe and the Charter of Economic Rights and Duties of States. The view was also expressed that the most-favoured-nation clause was an important instrument for the promotion of equitable and mutually advantageous economic relations among all States regardless of existing differences in social systems and levels of development. It should be stressed, however, that the application of the clause was not limited to trade or economic relations but also applied to the most diverse inter-State relations. The fact that its application was no longer limited to commercial treaties but extended to such diverse fields as transport, the establishment of aliens, diplomatic and consular immunity, the administration of justice and intellectual property made it particularly necessary to regulate the clause on the legal level.

16. Many representatives commented on the set of draft articles adopted in first reading by the Commission, either as a whole or with reference to specific provisions. Some observations were also made on related aspects not covered by the draft.

1. Comments on the draft articles as a whole

17. Several representatives considered the set of 27 draft articles to be generally acceptable and a good basis for further work. The opinion was expressed that the set of articles on the most-favoured-nation clause met in general the requirements in respect of such articles, for it included all the questions the codification of which might be useful for the practical application of the clause. There would, of course, be further debate on many related questions which could not be fully settled at a first reading. But the draft represented an acceptable beginning of a solution on a subject that was in itself controversial owing to the conflicting interests at play; it contained several valuable provisions on the legal effects of the clause *inter partes* as well as for third States.

2/ *Ibid.*, chap. II.

18. A number of representatives considered that the draft articles were simple, clear and concise. However, the view was expressed that the text of some of them was almost too condensed, so that it was necessary to refer to the commentary in order to find the answers to a number of important questions.

19. There was general agreement that the draft articles should be passed on to Governments for their comments in the form in which they had been submitted to the General Assembly. In this connexion, some representatives, noting the Commission's desire to base its study on the broadest possible foundations and in order that the draft articles would fully reflect the modern developments in the field of international trade, felt that it would be highly beneficial to submit them, prior to their adoption in second reading, also to the competent United Nations bodies which dealt with meta-legal issues that might impinge on the operation of the clause, such as the United Nations Conference on Trade and Development (UNCTAD). Those organs could make invaluable comments on the draft articles. It was also suggested that the draft articles should be transmitted to the various regional economic groups for their comments.

(a) The most-favoured-nation clause and the principle of non-discrimination

20. Some representatives quoted with approval from passages contained in paragraphs 37 to 40 of the Commission's report on the relationship between the clause and the principle of non-discrimination. It was said in this connexion that the definition of most-favoured-nation treatment given in draft article 5 covered the ideal case, in which the treatment which the granting State accorded to the beneficiary State was no less favourable than that it extended to any third State. There were, however, in practice cases in which States conducted their trade and other economic relations with specific countries on other bases and the Commission had included recognition of their sovereignty in that respect in draft article 26.

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

21. Some representatives considered that the draft rested on a firm foundation, for the Commission, in formulating the articles, had proceeded from the generally recognized principles and rules of international law and from an evaluation of State practice, judicial decisions and legal writings. The articles took into account the fundamental changes that had taken place in international economic relations, and especially in international trade, during recent years, and also the need to abolish unjustified trade barriers and promote international co-operation on the basis of mutual respect and equity. In particular, they had the merit of taking into consideration United Nations resolutions on the new international economic order. Taken as a whole, they represented progress towards the establishment of development law in keeping with the requirements of that new order. At a time when efforts were being made to institute a new international economic order, the clause could obviously not be viewed in the same light as in the past, and due account must be taken of its negative impact on economically

disadvantaged partners. There should therefore be some restrictions regarding its application. In this connexion, satisfaction was expressed at the elaboration by the Commission of new rules relating to exceptions to certain commitments in the most-favoured-nation clause which could go far to change the law relating to international trade. The Commission, whose size and composition were particularly conducive to disciplined and objective consideration of the issue, was to be commended on its courage in considering the question of the most-favoured-nation clause in the context of reality.

22. Certain representatives, nevertheless, wondered whether the Commission had given sufficient study to the interrelationship between the application of the clause and the position of the developing countries. That aspect of the draft should be given further study at the second reading, taking into account the specific measures that could be adopted in order to institute a new international economic order. Since this was the first time that the Commission was dealing with economic relations and international law, its efforts should extend to other aspects of economic international law and development law if it was to be responsive to the needs of the present-day world. The opinion was also expressed that the draft articles should take full account of new developments in international relations, particularly in the economic field. Given the fundamental changes which had occurred since the most-favoured-nation system had first become part of the practice of States, a complete reconsideration of the system might be necessary. For example, while the classical, non-conditional most-favoured-nation clause was non-discriminatory, abstract and automatic in its application, it was doubtful that a modern most-favoured-nation system, as adapted to current needs, could retain those characteristics. The draft would have better reflected modern-day reality if the traditional and outdated elements prejudicial to developing countries had been removed from the clause.

23. In the view of a number of representatives, due to the Commission's wish not to be drawn into discussion of economic policy matters, the draft did not effectively reflect the spirit of new economic principles generated by recent international events and approved by various international legislative forums. Some of the articles formulated by the Commission did not adequately take account of the declarations and resolutions which had been adopted in the past years to preserve the interests of the developing countries. In that connexion, specific mention was made of the Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S-VI)), the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX)), the resolutions of the General Assembly concerning the permanent sovereignty of all peoples in relation to their wealth and their natural resources, and various resolutions of UNCTAD.

24. It was also added that the history of the most-favoured-nation clause was revealing in itself: the clause had been inserted especially in treaties of friendship, trade and navigation of the earliest type in order to ensure the enjoyment of the greatest benefits or of equality in the advantages accorded by the granting State to any other State. But in the past it had generally been the developing countries which could be identified as the granting States as opposed

to the beneficiary States, although there was in principle reciprocity of treatment. The weaker members of the international community had often been asked to give equal maximum concessions to the stronger Powers. That practice had changed quite radically, as recognized by the Commission. Since the advent of UNCTAD it had become customary to refer to the different levels of economic development with a view to ensuring greater benefits for the developing countries.

25. The view was also expressed that most-favoured-nation treatment had evolved in response to the needs of the main trading nations and of international trade. The Commission's comments on the abandonment of the conditional clause revealed that instead of coherent development, there had been a series of oscillations in the positions of the main trading partners as a result of fluctuations in international trade and in the commercial strength of the States concerned. Thus the evolution of the clause had been a response to considerations other than strictly legal ones. The Commission had recognized that reality but had emphasized the legal character of the clause and the legal conditions governing its application. The Commission had stated on several occasions in its commentary that it was unwilling to bridge the gap between law and economics. Although it referred to developments in the General Agreement on Tariffs and Trade (GATT), UNCTAD and elsewhere, its draft articles did not reflect the progressive development of rules in international trade which would be beneficial to developing countries. Nevertheless, meta-legal realities did exist and, to a large extent, determined the shape and content of any legal principles which were the subject of efforts at codification, since neither the evolution nor the progressive development of international law could take place in isolation from the international, social, economic and political realities governing the relations between States.

26. The opinion was further expressed that the Commission, whose aim was to clarify the scope and practical effect of the clause as a legal institution, had elaborated a legal régime of the clause which affirmed most-favoured-nation treatment as the norm of international trade relations, from which only certain derogations were permitted. In so doing, the draft articles did not take account of the development of international trade relations since the Second World War. What the Commission regarded as exceptions to the clause were actually a modification of the clause resulting from the changes which had occurred in international trade relations. That was true of the promotion of concessional trade advantages between developing countries, of the preferential treatment to be accorded the products of developing countries in the markets of the developed countries, and of the role of free-trade areas and customs unions and the question of the preferential or national treatment accorded to one another by members of such associations. It was, therefore, felt that the legal régime of the most-favoured-nation clause could not be elaborated by reaffirming the supremacy of the clause in trade relations between States, since, as far as the developing countries were concerned, UNCTAD had categorically stated that that would satisfy the demands of formal equality but would create grave inequality in its application. The Commission should review those provisions of its draft which did not take due account of different levels of economic development and should promote the development of contemporary international trade relations in conformity

with the decisions of UNCTAD and other forums. It should take into account the pivotal role of regional economic integration movements in the development of the agricultural and industrial sectors of developing countries participating in such movements, the right of developing countries to accord advantages to one another without according them to developed third States, and their right to receive non-reciprocal and non-discriminatory preferential treatment for their products from the developed countries.

(c) The general character of the draft articles

27. Several representatives noted with satisfaction that the Commission had followed the Vienna Convention on the Law of Treaties closely in drafting the articles and that it considered that they should be interpreted in the light of that Convention. They agreed with the Commission that the draft articles should be an autonomous set and not an annex to the Vienna Convention.

(i) Scope of the draft

28. The opinion was expressed, with reference to paragraph 45 of the Commission's report, that the Commission had appropriately focused on the legal character of the clause and the effect of the clause as a legal institution in the context of all aspects of its practical application. It had therefore rightly studied the clause as a special aspect of the general law of treaties without considering the clause's different fields of application, since the question of when and to what degree the clause could and should be applied was not within its competence. It was said that, on the other hand, the Commission had studied, in accordance with its functions, the legal consequences of the application of the most-favoured-nation clause in the different fields of inter-State relations and in the different international treaties as well as the rules of interpretation to be adopted and, more generally, the legal problems involved in the application of the clause. That approach was to be welcomed since it had led the Commission to submit draft articles in which the clause was considered in a general manner and not in relation to the field in which it was applied. The Commission could not examine all aspects of the matter nor all individual cases; it must limit itself to the task of codifying general rules relating to the needs and aspirations of the international community. The comment was also made that, in view of the important role the clause played in the field of international trade and of the difficulty in completely dissociating its legal and economic aspects, the Commission had had to solve interdisciplinary problems taking account not only of the legal aspects but also of the economic conditions in which the clause was applied, a fact that was welcomed. Although the clause was closely linked with international trade, the Commission had been particularly wise in declining to be drawn into a discussion of economic policy matters, which were best dealt with in other contexts and by other bodies of the United Nations.

29. Reference was made to the fact that the Commission had indicated it was aware that the provisions of the draft articles would not give an automatic solution to all questions which might arise in connexion with the interpretation and application

of most-favoured-nation clauses. Some representatives, therefore, considered that the draft should contain an article on the settlement of disputes. Among the reasons in support of this position it was said that in the absence of legal precedents, the implementation and interpretation of a future convention creating new rights and duties would inevitably give rise to disputes. It was asserted that, for example, the question of how to determine the conditions in which a State might claim benefit under a generalized system of preferences was likely to remain controversial for a long time. A State should not be the sole interpreter of the rules concerning the most-favoured-nation clause; without a uniform interpretation and the establishment of settlement procedures, the application of the rules might lead to the disintegration of carefully negotiated compromises designed to give balanced protection to competing rights and interests. The view was expressed that the settlement machinery should include a wide range of choices of settlement methods, including those specified in Article 33 of the Charter. If the parties failed to agree on a particular method of settlement, they should be entitled to refer the dispute to compulsory arbitration, a procedure which would be of great advantage in preventing States from being subjected, for example, to political or economic pressures from other States. Reference was made in this connexion to existing precedents such as the Protocol to the Montevideo Treaty which established the Latin American Free Trade Association. Emphasis was also placed on the right of a party to a dispute arising out of the application of a most-favoured-nation clause and involving the interpretation or application of the draft articles to refer the matter for judicial settlement to the International Court of Justice.

30. The view was also expressed with regard to the settlement of disputes that such arrangements could concern only disputes arising from the application of the future convention, for which measures provided by international law could be applied, and not disputes which might arise between parties to an agreement containing the most-favoured-nation clause.

31. Other representatives agreed with the Commission that it was not useful, at the present stage, to include a provision on the settlement of disputes and with its decision to refer the question to the General Assembly and Member States and, eventually, to the body entrusted with the task of finalizing the draft articles. It was said in this connexion that, despite the special character of the clause, it should not be forgotten that treaties of that nature were treaties like others. Any problems which arose and the machinery for their settlement should be subject to the same régime applicable to other treaties, and there was no justification for departure from the approach adopted in the Vienna Convention on the Law of Treaties on that subject.

32. A number of representatives, addressing themselves to the specific case of the European Economic Community, considered that, as a whole, the draft articles did not take account of the reality of the Community, its requirements and concerns. The opinions expressed on this point by reference to some concrete aspects of the draft are reflected below under articles 15 and 21. In addition, it was suggested that the Commission should include in the draft a provision for the application of

the clause to commercial relations between States or groups of States with different economic systems; the provision could be based on the Final Act of the Conference on Security and Co-operation in Europe.

(ii) Form of the draft

33. With respect to the final form of the codification of the topic, some representatives found the draft articles generally acceptable as a basis for the elaboration of a convention at a future date, which would be an effective instrument for promoting international trade on a non-discriminatory basis. Other representatives, however, reserved their position as to what the final form should be.

2. Comments on the various draft articles

Article 1

34. It was suggested that the words "in written form" be added after the word "treaties".

Article 2

Paragraph (a)

35. Some representatives favoured the elimination of paragraph (a) since the definition of the term "treaty", already laid down in the Vienna Convention on the Law of Treaties, was a broad definition the purpose of which was to restrict the meaning to treaties in written form between States.

Paragraph (e)

36. Some representatives supported the inclusion of paragraph (e), as a definition of the term "material reciprocity" was essential to a proper understanding and interpretation of the articles, making it possible, in particular, to distinguish that term from "formal reciprocity". Other representatives considered that the meaning of the terms "material reciprocity" and "equivalent treatment" was not completely clear, even though the commentary to articles 8 to 10 shed some light on the point. It was said that neither paragraph (e) nor articles 9, 10, 18, paragraph 2, and 19, paragraph 2, clarified the relationship between the most-favoured-nation clause and material reciprocity, a question which should be given further attention by the Commission. It was also said that paragraph (e) was more of a substantive provision than a definition. On the other hand, doubts were expressed about its usefulness.

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Article 3

37. It was said that this article could be retained although its object was covered by article 1 and by the norms of general international law.

Article 4

38. The view was expressed that article 4 should state more explicitly that it was a question basically of a relationship between States deriving from the valid terms of a treaty in force because there were many treaties concluded in historical circumstances which no longer prevailed. The opinions were also expressed that articles 4 and 5 should be combined in a single article and that the provisions of those two articles should be incorporated in article 2 so as not to detract from the traditional importance of definitions.

Articles 5 and 7

39. The view was expressed that articles 5 and 7 should be reviewed to take into account that a beneficiary State should not automatically be entitled, under a most-favoured-nation clause, to all the privileges enjoyed by the third State when, due to the existence of a special relationship between the granting and third States, the extension of those privileges to the third State in a particular field was something more than an act of commerce.

Article 6

40. The view was expressed in support of the article that its provisions recognized the principle of the sovereignty and liberty of action of States.

Articles 8, 9 and 10

41. It was stated that articles 8, 9 and 10, by specifying that the clause was the exclusive source of the rights of the beneficiary State, were in accordance with State and judicial practice. Doubts were, however, expressed as to the reservation in article 8 whereby the parties could agree on conditions since it was said that a clause combined with material reciprocity was not conducive to the unification and simplification of international relations. The view was also expressed, with reference to paragraph (24) of the commentary to articles 8, 9 and 10, that the draft articles, by acknowledging the necessity of establishing equivalence, would offer the most disadvantaged countries an invaluable asset in their negotiations with their more developed counterparts.

Articles 11 and 12

42. The view was expressed that the threefold condition of similarity of subject-matter, category and relationship which, under articles 11 and 12, would apply to the granting of rights deriving under a most-favoured-nation clause, was in keeping with the free will of the parties and with judicial practice.

Articles 13 and 14

43. Some representatives supported articles 13 and 14 in general. With respect to article 13, it was said that the rule stated in that article was in conformity with modern thinking on the operation of the clause. One suggestion was made to add to article 13 a statement to the effect that the most-favoured-nation clause should either not mention any condition at all or should explicitly formulate such condition as a conditional clause. It was also suggested that article 13 should be linked with article 8 so as to be subject to the exception contained in this latter article regarding the principle of the independence of the contracting parties.

Article 15

44. In relation to article 15, representatives addressed themselves to the question whether or not the most-favoured-nation clause attracts benefits granted within customs unions and similar associations of States. In this respect, it was stressed that, as the Commission pointed out in paragraph (26) of its commentary on the article, that question was of special importance in cases where the granting State entered into a customs union or other association after the conclusion of an agreement containing a most-favoured-nation clause which was not coupled with an appropriate exception. The matter took on added importance in view of the growing trend towards regional economic integration in all areas of the world regardless of the level of economic development of the States in those areas. In the view of some representatives, as the decision whether or not to incorporate in the draft an exception referring to customs unions and similar associations had enormous political implications, the ultimate decision would have to be taken by the States to which the draft was submitted.

45. Many representatives agreed that the International Law Commission had been right not to attempt to formulate a rule establishing a general exception to the principle of application of the most-favoured-nation clause in the case of customs unions and other associations of States. It was said that although the right of Member States to conclude whatever agreements they wished was an inalienable element of their sovereignty, the most-favoured-nation clause should not, in principle, be subject to exception lest it lose its value. Broad exceptions to the clause were incompatible with its definition as set forth in article 4 and with the definition of "third State" set forth in article 2, subparagraph (d). There could, of course, be certain positive exceptions, such as those in favour of developing countries, as set forth in articles 21 and 22, or in favour of land-

locked countries, as set forth in article 23, or in favour of neighbouring regions for the purpose of developing regional trade, but there should be no other exceptions.

46. In the opinion of several representatives, the Commission was right in assuming that the beneficiary of the most-favoured-nation clause was entitled to its benefits irrespective of whether the granting State extended the favoured treatment to a third State by a mere fact or a bilateral or multilateral agreement. Customs, political, economic and other associations were governed by the basic principle of the continuation of treaty obligations. A State should not be permitted to evade its contractual responsibilities to certain States by entering into treaties with other States inconsistent with such obligations. The fact that customs unions and other such associations were important in the development of international trade and regional integration should not be taken as a justification for violating treaty commitments.

47. It was stated that there was no legal basis for the attempts by representatives of some exclusive economic groups to justify their discriminatory trading policies on the grounds that the rights and privileges accorded to the members of such groups could not be claimed by States which were the beneficiaries of a most-favoured-nation clause. In the opinion of some representatives, there was no general rule of contemporary international law providing for the implied exclusion of the benefits granted within a customs union from the scope of application of the most-favoured-nation clause. The fact that particular agreements contained provisions making specific exceptions to the operation of the clause confirmed the absence of a rule to that effect. Furthermore, the value of the draft would be considerably diminished were it to include a provision tending to exempt the benefits granted within a customs union from the scope of application of the clause, for such a provision would not be in keeping with the prevailing trend towards promotion of economic co-operation among all States, and particularly States with different economic and social systems and States at a different level of development. The principle of most-favoured-nation treatment was essentially general in character and presupposed an opportunity for all States to claim its benefits, while the aim of exclusive economic groups was to safeguard privileges for the most powerful countries at the expense of the international community and of their weaker partners. The policy and practice of such groups was incompatible with the Charter of Economic Rights and Duties of States, and particularly with article 12 thereof.

48. With reference in particular to the position of the European Economic Community (see paras. 56 and 57 below), it was said that the purpose of the articles on the most-favoured-nation clause was to codify the general rules concerning the clause and that the scope of the clause went far beyond the context of trade agreements. Besides, as stated in article 3, the scope of the draft articles was limited to clauses contained in treaties concluded between States and did not apply to clauses contained in treaties concluded by international organizations, of which EEC was an example. It was pointed out that article 234 of the Treaty establishing EEC showed that the founding States had been fully conscious of the fact that the establishment of the Community did not exempt them from their

obligations under most-favoured-nation clauses contained in trade agreements concluded previously with third countries. Furthermore, during the 20 years of EEC's existence, its members had frequently had recourse to the traditional practice of including exceptions in treaties.

49. In the opinion of some representatives, the question was one which should be solved through agreements between the States concerned, for practice had shown that in that way solutions could be found to all complicated problems arising when the obligations assumed by a State on the basis of the most-favoured-nation clause were to be harmonized with its obligations deriving from its membership in a customs union or an economic community. Attention was drawn in this respect to the provisions of articles 25 and 26 of the draft, which were deemed to furnish adequate guarantees. By virtue of article 25, which dealt with non-retroactivity, it was evident that the provisions of the draft articles did not directly affect the present positions and interests of States with regard to customs unions. Article 26, which dealt with the freedom of the parties to agree to provisions other than those in the draft, clearly expressed the residual character of the provisions of the draft.

50. Certain representatives stressed that the question whether a most-favoured-nation clause entitled a contracting State to certain benefits which another contracting State granted to its partners in a customs union or a free-trade area was basically one of treaty interpretation, and the conclusion to be drawn could differ from case to case. The view was expressed that to cater for instances where such interpretation was open to doubt, it would be advisable to include a new article stating a presumption based on the most probable case. If it were accepted that a new member of a customs union did not generally extend to a State benefiting from a most-favoured-nation clause the treatment it granted to other members of that union, then such a presumption would operate to exclude the application of the most-favoured-nation clause. It was felt that that approach was in keeping with the special nature of customs unions.

51. Many other representatives were of the view that the draft should allow for an exception from the operation of the most-favoured-nation clause in the cases of customs unions, free-trade areas and other similar associations of States. In the absence of such an exception article 15, as drafted, might be interpreted to mean that the most-favoured-nation clause would imply the extension to third countries of the advantages enjoyed by the member States of a customs union or other similar association, or in other words that the members of any such groupings should grant to States outside it the same treatment they accorded to those within it. Such an interpretation would not take account of the existence of customs unions and other similar associations of States and of their characteristic features. Regional integration was an increasingly important reality reflecting a special relationship of an objective character which did not lend itself to generalization through the application of a most-favoured-nation clause. It was not in conformity with customary law to equate, for the purpose of the most-favoured-nation clause, bilateral agreements with multilateral agreements establishing a customs union or other regional association of an economic nature.

52. It was stated that the so-called customs union issue could not be solved simply on the basis of the rule of pacta sunt servanda and the principle of res inter alios acta. The right of States to join together in any way they wished was a prerogative of their sovereignty. For some representatives the fact that there was no rule of customary international law which would relieve States upon their entering into a customs union or other association from their obligations under a most-favoured-nation clause was not an insurmountable obstacle. The Commission did not merely codify existing law; although that role was very important, it should not be forgotten that it also innovated and in fact made law. The provisions of article 22 were of relevance in that regard. The view was also expressed that even though, according to article 25, the draft articles would not be retroactive and even though, according to article 26, derogations from them were permissible, it was clear that article 15, if retained in its present form, could make it difficult to complete the codification work.

53. It was emphasized that the question did not concern only EEC or other such associations of developed States, but affected all regional groupings. It was by no means an academic question since the promotion of the development and well-being of countries was at issue: the economically more advanced countries - and, with added reason, the weaker and smaller countries - were seeking to strengthen their economies by means of regional and subregional agreements. For that reason, third States should not as a general rule be able automatically to claim the benefits conferred upon the members of an integrated economic system. Although States participating in a process of integration could not simply ignore the legitimate interests of non-participating States, the automatic treatment of outsiders on an equal footing with participants would defeat the purpose of such integration. Application of the most-favoured-nation clause to customs unions or other such groups could harm States which were members of them and which had at the same time granted most-favoured-nation treatment to non-member States, for it would compel them to forgo the protection of the measures which the members of the groups had evolved to safeguard their foreign trade and industry. In the special case of developing countries, application of the most-favoured-nation clause could thus eliminate an important source of income in the form of customs duties. Furthermore, the other States in a customs union or similar association affected by the operation of a most-favoured-nation clause would suffer from the entry of the beneficiary State into the market of the granting State, for the concessions they enjoyed within the framework of the group would in effect be cancelled.

54. It was also stated that an additional reason for not applying the most-favoured-nation clause to customs unions and similar associations was the difference in the degree of freedom which States enjoyed according to whether or not they were members of such groups. Outside those groups, the only restriction on the right of a State to grant or refuse preferential treatment to any country was the restriction arising from the most-favoured-nation clause itself, whereas the mere fact of entering such a group limited a State to dealing only with the other members and compelled it to grant them what were often substantial concessions. Furthermore, a customs union or free-trade association in effect constituted an entity distinct from its members, in which the organized group of States to some extent succeeded to the individual member States so that, in the final analysis,

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it was not the member States but the group itself which benefited from the concessions, which could not be withdrawn without its consent. In such circumstances, the individual member States could hardly be regarded as "most-favoured-nations" in respect of each other. Finally, even if a State which was the beneficiary of a most-favoured-nation clause could not claim the advantages which members of a customs union or similar association granted to each other, it could claim the benefits which such States granted to third States outside the group.

55. Several representatives supported the inclusion of an exception to the operation of the most-favoured-nation clause for customs unions or other similar associations when their members were developing States. It was said in this respect that exceptions for customs union agreements among developed countries were contrary to the principles of preferential and differentiated treatment of developing countries. Developing countries had increasingly used the device of establishing economic unions and other similar associations to accelerate their economic development. In order to integrate the market area of the members, internal benefits had been granted according to the level of development. The role these groupings had played in international trade relations during the past two decades showed that it was no mere practice of convenience that treaties provided for exceptions in their favour. While it was true that State practice and doctrine did not do much to facilitate codification, the extensive use of such exemptions in commercial treaties indicated that the parties to those treaties had not overlooked the possible effect of customs unions or other associations on any most-favoured-nation treatment previously granted. States wishing to establish a customs or similar union often resorted to the "customs union" exception with respect to the normal application of the most-favoured-nation clause. The most obvious example in current practice was article XXIV of the General Agreement on Tariffs and Trade. A number of other customs union agreements, many of them among developing countries, had been drawn up so as to make an exception with respect to the clause. References were made in this respect to the experiences of the Latin American Free Trade Association, the Andean Pact and the Central African Customs and Economic Union which proved the need for incorporating an express exception in the draft. (For a related comment, see para. 69 below.)

56. A number of representatives supported the inclusion of a customs-union exception with particular reference to EEC. It was recalled that the European Communities formed a customs union with a common customs tariff. Within the Community, not only had customs duties and other obstacles to trade been reduced or eliminated, but an active process of integration was taking place within the framework of community institutions, with a view to harmonizing economic and social conditions. The objective of the special treatment accorded by the member States of the Communities to each other within the framework of the Community treaties was not only the elimination of barriers to trade between the member States but also the equal treatment of the nationals of member States and the adoption of common policies and rules in relation to economic activities. It was impossible to separate the treatment which the member States accorded to each other from the general organization and institutional activity of the European Communities as such. Accordingly, only States which were or became members of those Communities could benefit from such treatment. The Community and its member States had always

considered that it was under a customary rule of international law that those States which formed customs unions or free-trade zones could ensure that the most-favoured-nation clause would not grant to third countries the concessions inherent in membership of such customs unions or zones. Membership in the Community was the result of a process of negotiations in which the States which acquired the advantages of membership agreed to accept the corresponding obligations, which were wider in scope than the obligations usually pertaining to a customs union. One such obligation was acceptance of the Community legal system which was applicable to member States, under the supervision of the Court of Justice of the European Communities.

57. In the view of some representatives, article 15 as drafted failed to take into consideration the fact that the members of the Community had vested in the Community all their powers relating to trade policy and retained, individually, only the necessary means to implement bilateral agreements in that field. Having neither a customs tariff nor customs regulations of their own, they could not grant customs or trade facilities not accorded under the common system. Consequently, there was a basic incompatibility between relations within the Community on the one hand, and the application of the most-favoured-nation clause to commercial transactions on the other. It was felt, therefore, that that particular situation must be recognized in any set of provisions relating to the most-favoured-nation clause, which purported to represent a codification and progressive development of international law on the topic.

Article 16

58. Some representatives supported in general the provisions of article 16. Other representatives, however, expressed certain reservations on the article. It was said that its title and text did not seem to be completely in harmony and that the article was unclear as the term "national treatment" had not been defined in the draft; also, that article 16 did not appear to be in accord with State practice since it would entitle a beneficiary State to claim national treatment if such treatment had been extended to a third State. In order to caution the granting State in this respect it was suggested that the words "unless the parties otherwise agree" should be inserted at the beginning of the article. It was stated that article 16 gave much too broad a scope to the most-favoured-nation clause and would not, in its present form, be in the interest of the vast majority of developing countries. The article assimilated the standards of national and most-favoured-nation treatment, but the national treatment standard was invariably the highest order of treatment granted by a State and invariably incorporated not only the standard of most-favoured-nation treatment but that of preferential treatment as well. It seemed paradoxical that, contrary to the intention of both parties, the most-favoured-nation standard, which was the low standard, should be interpreted to encompass national treatment, which carried the maximum number of rights.

Articles 17, 18 and 19

59. Some representatives considered in general acceptable the provisions of articles 17, 18 and 19. With reference to article 17, the view was expressed that the article was based on the assumption that national and most-favoured-nation treatment went beyond the beneficiary's State entitlement under the international minimum standard; since human rights were also involved a reference might be added to the commentary to article 17 to the effect that neither of those two forms of treatment could be invoked by a State as an excuse for behaviour that fell short of the international minimum standard. With regard to article 19, it was suggested that the world "to a third State" be inserted after the word "State" in the third line of paragraph 1 for reasons of clarity and to bring it into line with article 18, paragraph 1.

Article 20

60. Article 20 was supported in general by some representatives. It was said that the article protected the beneficiary State against any abuses on the part of the granting State and that its provisions constituted a prerequisite for the proper development of economic relations as a whole.

Article 21

61. Many representatives welcomed the fact that the Commission, taking into account the debate that had been held at the thirtieth session of the General Assembly, had retained article 21 in the draft. In so doing, it was said, the Commission had kept to its stated intention not to exceed its competence when considering the question of relationship between the most-favoured-nation clause and the different levels of economic development. The Commission had not used its work on the clause as a pretext for formulating a rule, under article 21, designed to make the generalized system of preferences a binding commitment on the part of developed countries, which matter was rightly being considered elsewhere. The value of article 21 for developing countries lay in the fact that it helped guarantee the implementation of the generalized system of preferences. Developed countries were thus assured that the preferential treatment which they extended to developing countries under the scheme would not benefit other developed countries in their capacity as beneficiaries of a most-favoured-nation clause.

62. A number of representatives supported the article in its present form as being in conformity with the efforts made by the international community to relieve the flagrant imbalance between developed and developing countries. As drafted, article 21 seemed to be based on a criterion of equity and to take due account of the disadvantaged situation of the developing countries, especially of the relatively least developed countries. The rule enunciated in that article was consistent with the resolutions on preferences adopted by most regional and interregional organizations and with those of the General Assembly and its competent organs. In particular, it faithfully reflected the practice of States regarding the generalized system of preferences applied within the framework of UNCTAD. It was also in agreement with article 12 of the Charter of Economic Rights and Duties of States.

63. Some representatives were of the opinion that it was not possible to include in the draft, at the present time, any rules other than those contained in article 21, in favour of the developing countries. It was said in this connexion that although there was a trend to promote trade between developing countries, it was not yet sufficiently crystallized to warrant the adoption of legal rules which generated obligations. For that reason, the view was expressed against the adoption of provisions additional to those of article 21 excepting from the operation of the most-favoured-nation caluse any concessions which developing countries granted each other for the promotion of their international trade. Nevertheless, it was considered that there should be a general reservation concerning the possible establishment of new rules open to international law in favour of developing countires, for there were very few rules that were subject to such changes as the principles governing international economic relations. This, it was noted with approval, article 27 attempted to do. For some, therefore, the provisions of articles 21 and 27 should be combined in a single article.

64. A number of considerations were made which, it was felt, reduced the advantages of article 21. With particular reference to the present wording of the article, the view was expressed that it required further study since it was not quite clear how generalized the system of preferences should be in order to qualify for the exception. It was also said that, as drafted, the Commission's text would permit a developed State, under the most-favoured-nation clause, to extend to another developed State the preferential treatment granted to a developing country, but in a more restructed form than the generalized system of preferences. Besides, the belief was expressed that the article provided no secure exception in favour of the developing countries because of the residual character of the draft, which was confirmed in article 26. It would be desirable, therefore, to exempt article 21 from the effects of article 26 by adding at the beginning of article 26 the words "with the exception of article 21".

65. Many of the representatives who supported article 21 did so because the objective of the system of generalized non-reciprocal, non-discriminatory preferences was to give developing countries access to markets of developed countries for their manufactured and semi-manufactured products, thus helping developing countries to improve their trade capabilities and, hence, to promote their economic development. Nevertheless, they pointed out that the system suffered from a number of serious drawbacks, Mention was made, *inter alia*, of the following: first, it depended on the principle of selection of the beneficiaries by the donor country and consequently was inherently discriminatory against some developing countries. It allowed the developed State, on the basis of subjective criteria, to deny to one developing country the same treatment it granted to another developing country at a similar level of development, a practice which was common but should on no account be sanctified by law. Second, it was of limited duration; the Special Committee on Preferences established at the second session of UNCTAD had provided in its agreed conclusions that the initial duration of the generalized system of preferences would be 10 years, subject to a review, which in fact had resulted in a further extension. The problem was, however, far from transitory and such solutions were at best palliatives. Third, the grant of preferences did not constitute a binding agreement and they were consequently subject to unilateral withdrawal. Fourth, the preferences were only

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of limited value to the majority of developing countries, since they applied only to manufactured and semi-manufactured goods, which the developing countries, especially the least developed countries, did not produce.

66. Several representatives pointed out that developing countries also received preferential treatment outside the generalized system of preferences, both from developed countries and from other developing countries, which in many cases was intended to benefit the least developed among the developing countries. Since the saving clause under article 27 was lacking in legal force and would therefore have little effect in that connexion, it was considered that an explicit reference should be made in article 21 to the advantages other than those under the generalized system of preferences which were granted to developing countries. The inclusion of provisions additional to article 21 was indicated to reflect, in more effective terms, the exception it sought to establish in favour of developing countries by ensuring that no developed country could claim such preferential treatment as the beneficiary of a most-favoured-nation clause. In this connexion, it was stated that the principle of duality of standards, which was increasingly being invoked in international law to redress the imbalance between developed and developing countries, was a healthy sign, for the most-favoured-nation clause should not operate automatically to extend to third States the advantages granted reciprocally by developing countries or received by those countries from developed States.

67. With regard to the preferential treatment given to developing countries by developed countries other than within the generalized system of preferences, it was recalled that the Tokyo Declaration adopted by the Ministerial Meeting of GATT on 14 September 1973 had set forth the basis for the current multilateral trade negotiations consecreting a new principle to secure additional advantages for the developing countries, the principle of differentiated or more favourable treatment. The concept of differentiated treatment was broader than that of preferential treatment, which had been limited to tariffs, Unlike preferential treatment, differentiated treatment should be applicable to a vast range of areas of economic co-operation between developed and developing countries and should, therefore, in the opinion of many representatives, be reflected in the draft. A concrete suggestion was made in this respect to amend article 21 to read:

> "A beneficiary State is not entitled under a most-favoured-nation clause to any treatment of a preferential or differentiated nature extended by a developed granting State to a developing third State."

68. With respect to preferential treatment granted by developing countries as among themselves, it was said that the promotion of trade among such countries, involving the supply of primary materials and semi-processed agricultural commodities, which were currently excluded from the system of preferences, would be the only realistic way of helping the majority of developing countries, particularly the least developed. It was for that reason that developing countries had insisted on numerous occasions that other ways be found to increase and encourage trade and economic co-operation among themselves as a more realistic tool for development. Intensification of economic co-operation among developing countries was now the order of the day, as was reflected in article 21 of the

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Charter of Economic Rights and Duties of States and in the deliberations and documents adopted at all the recent conferences which had concerned themselves with economic issues, the Group of 77 meeting at Manila, the fourth session of UNCTAD at Nairobi, the Fifth Conference of Heads of State or Government of Non-Aligned Countries at Colombo and the Conference on Economic Co-operation among Developing Countries held at Mexico City. Reference was also made to developments which were already taking place in several regions such as the adoption of the Bangkok Agreement under which the developing countries of the Economic and Social Commission for Asia and the Pacific (ESCAP) region had negotiated trade preferences as a first step towards liberalization and expansion of trade. It was, therefore, felt that the Commission, in view of its role to promote the progressive development of international law, could not afford to ignore the broad consensus on the development of trade among developing countries. Many representatives agreed that article 21 should be expanded or a supplementary article should be formulated to except from the operation of the most-favoured-nation clause any preferences or favours which developing countries granted to one another. Otherwise, that preferential treatment would be meaningless it if was extended to developed States which were beneficiaries of the clause.

69. Also in the framework of preferences granted by developing countries to one another, the view was expressed that the necessary additional provision should deal in particular with preferences granted by developing countries to each other as members of a customs union, free-trade area or other similar association, since economic or customs unions as such would not justify the inclusion of such an exception in the draft. Although that exception might not be recognized as implied under customary international law, it ought to be acknowledged in cases where the paramount objective was the economic development of developing countries through trade expansion, economic co-operation and regional integration. In that connexion, it was pointed out that on 26 November 1971, the Contracting Parties to GATT had agreed to a waiver to article 1, paragraph 1, of the General Agreement, which would operate to the extent necessary to allow each developing Contracting Party participating in the arrangements set out in the relevant Protocol to accord preferential treatment as provided in the Protocol with respect to products originating in other developing countries parties to the Protocol. It was recalled that a similar waiver had been at the basis of the adoption by the Commission of the present text of article 21.

70. Specific reference was also made in the context of preferences to the case of EEC. It was explained that its member States had transferred to the Community various powers which they had previously exercised and in particular, their powers relating to common trade policy. Consequently, the Community was the sole competent authority for matters concerning the application of the most-favoured-nation clause. The Community concluded preferential and non-preferential trade agreements with many States or groups of States and, since 1971, had applied a system of generalized preferences for the benefit of developing countries. With regard to preferences for those countries, the Community granted them most-favoured-nation status as well as preferences. In that connexion, the Community shared the concern of the International Law Commission regarding the particular interests of developing countries in their relations with the industrialized nations. Preferential treatment was granted by the Community mainly by means of

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agreements based on article 238 of the Treaty establishing the European Economic Community. In such agreements the Community generally granted conditions more favourable than those applied under a most-favoured-nation clause, while in return, the partner States applied the clause to the Community. As an example of the application of the clause to special preferences, reference was made to the Lomé Convention of 28 February 1975. It was also indicated that within the framework of UNCTAD the Community applied a system of tariff concessions on exports of finished and semi-finished goods from a large group of developing countries, the Group of 77. The system did not constitute a legal obligation for the Community and was theoretically of a temporary nature, but it did meet a concern which had been felt since the Second World War in the United Nations, and particularly in UNCTAD. The opinion was, therefore, expressed that in view of the Community's role in applying generalized preferences and in view also of the advantages which they conferred, it would be as well if the draft took account of the realities of the Community.

Article 22

71. Many representatives supported the exceptions embodied in article 22 which took account of the special situation of States having a common frontier and which was based on State practice. Some representatives welcomed in particular the provision that a beneficiary State other than a contiguous State was not entitled under a most-favoured-nation clause to the treatment extended by the granting State to a contiguous third State to facilitate frontier traffic. In this connexion, it was said that the Commission's remarks in paragraphs (22) and (23) of the commentary to articles 11 and 12 relating to the *ejusdem generis* rule did not apply in the cases covered by articles 22 and 23 since objective relationships such as those referred to in them could not be invoked by States which were not in the same objective position. Approval was voiced for the use of the expression "frontier traffic" rather than the more limiting "frontier trade".

Article 23

72. Many representatives agreed with the exception provided for in the article regarding special benefits accorded to land-locked countries on account of their geographical situation. It was said that the article dealt with concerns and needs of which the international community had become increasingly aware so as to ensure greater equity in international relations. It was also said that its principle, which would henceforth be part of international law, had been embodied in instruments such as the 1958 Convention on the High Seas and the 1965 Convention on Transit Trade of Land-locked States. Reference was made in this connexion to the inclusion of the exception in article 110 of the "revised single negotiating text" prepared at the Third United Nations Conference on the Law of the Sea. It was also said that the article was based to some extent on principle VII adopted by UNCTAD at its first session and was in line with the special measures for land-locked countries adopted at the Fifth Conference of Heads of State or Government of Non-Aligned Countries. Nevertheless, it was said, article 23 did not make use of the term "right of access".

73. On the other hand, the view was expressed that neither the special treatment nor the transit facilities granted to land-locked countries by neighbouring States could be considered "rights" in international law, much less a "fundamental right"; those facilities arose out of bilateral agreements, not from any general rule of international law. It was also indicated that one of the basic elements currently under negotiation between land-locked and coastal transit States, particularly at the Third United Nations Conference on the Law of the Sea, was the incorporation of the element of reciprocity in their bilateral or regional arrangements for access to and from the sea. The article should be drafted in a manner which took into account the legitimate interests of the transit State while according access to and from the sea to a land-locked State.

74. Some representatives were of the opinion that since access of a land-locked State to and from the sea was only one aspect of the much broader problem concerning the treatment of land-locked States with regard to the uses of the sea, article 23 was too restrictive; the International Law Commission should give further consideration to a more comprehensive approach with regard to the rights and facilities extended to land-locked States. Reference was made in this connexion to article 58 of the "revised single negotiating text" mentioned above which granted preferential treatment to land-locked States for the purpose of exploiting natural resources situated in the waters of the exclusive economic zone of neighbouring States.

75. Some representatives emphasized the need for paragraph 2 of article 23 to be restricted to neighbouring land-locked States and not to be automatically applied to distant land-locked States. It was said that there was nothing in common between the needs of access to and from the sea of a neighbouring land-locked State and the interests of a distant land-locked State which might even be situated on a different continent but with which the transit State had entered into a trade or other agreement incorporating an unconditional most-favoured-nation clause. Other representatives, however, did not agree that a distant land-locked beneficiary State, not bordering on a coastal transit State, should be treated differently from other beneficiary States with respect to rights and facilities granted to neighbouring land-locked third States.

76. Certain representatives considered that the International Law Commission should examine whether the scope of article 23 should not be widened so as to extend the same advantages in respect of the most-favoured-nation clause as were granted to land-locked States to other categories of States in particular economic situations, for instance the most disadvantaged States, referred to at the Third United Nations Conference on the Law of the Sea, and the 42 developing countries considered by the United Nations as the least developed.

77. With regard to terminology, the opinion was expressed that in order to avoid divergent interpretations of the same legal concept, agreement should be reached on a common formulation for the expressions currently used "right of free access to and from the sea" (in French "_droit de libre accès à la mer et à partir de la mer_") and "right of access to and from the sea" (in French "_droit d'accès à la mer et depuis la mer_").

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Article 24

78. Some representatives agreed with the inclusion of article 24, which reproduced the text of article 73 of the Vienna Convention on the Law of Treaties, since the draft articles were supposed to be autonomous and since States bound by those articles might not necessarily be parties to the 1969 Vienna Convention. Other representatives expressed doubts as to the need for the article but did not oppose its retention.

Article 25

79. Some representatives approved of the adoption of article 25, which was based on article 4 of the Vienna Convention on the Law of Treaties and which, by operating *ex abundante cautela*, was designed to facilitate acceptance of the draft by Governments. Other representatives questioned the usefulness of the article since the rule of non-retroactivity of treaties was embodied in article 28 of the Vienna Convention, but they did not insist on its deletion. (For other comments relating to article 25, see paras. 49 and 52 above.)

Article 26

80. Many representatives expressed support for article 26, which underlined the residual character of the provisions contained in the draft. In this connexion it was said that those provisions would certainly have an interpretative value even in the circumstances provided for in article 26. It was necessary, as article 26 did, to allow in State practice for the requisite freedom of the parties to agree to different provisions. One of the effects of the article was to permit States to reserve the right to grant preferences to any other State, including developing States.

81. It was noted, with reference to paragraph (6) of the commentary on article 2 (d), that a proposal made by one member of the Commission to amend the definition of "third State" had been withdrawn on the understanding that the exclusion provided for in that proposal would be available under article 26. The view was expressed that article 26 should therefore be modified to ensure that it was not used as a pretext for discrimination, particularly in view of the recent attempts by States parties to multilateral conventions to avoid the establishment of treaty relations with other parties to the same conventions. Exclusionary provisions had even been applied under non-political instruments governing narcotics control and the allocation of radio frequencies. Neither the definition of "reservation" in the Vienna Convention on the Law of Treaties, nor the provisions relating to reservations in that Convention, could justify a State in acting in that way. The Commission should ensure that the draft articles did not lend themselves to any such interpretation. (For other comments relating to article 26, see paras. 49, 52 and 64 above.)

Article 27

82. Many representatives expressed satisfaction that article 27 had been added to the draft articles, for it contained a protective clause that left the way open for the evolution of rules of international law intended to benefit the developing countries and which should help to correct any inadequacies of article 21. In this connexion, it was stated that the purpose of article 27 was to assist developing countries by suggesting further exceptions from the operation of the most-favoured-nation clause which would benefit them. It was said that, from the commentary on article 27, it was clear that the Commission had started from the assumption that the only established principles of law benefiting the developing countries were those in article 21, and in order to study the possibility of devising more such principles, the Commission had included in the draft a general provision regarding the possibility of elaborating new principles for the benefit of the developing countries.

83. In the opinion of some representatives, with regard to developing countries, the exception to the application of the most-favoured-nation clause should not necessarily be limited to the case of the generalized system of preferences. The hope was expressed that new rules would soon be formulated to extend the generalized system of preferences to primary commodities and semi-processed agricultural commodities and to exempt from the operation of the most-favoured-nation clause any preferences which developing countries granted each other for the advancement of their international trade.

84. Some representatives considered that it was possible to improve the wording of article 27 and to supplement it by guarantees in favour of developing countries. It was suggested that the article would gain by being redrafted so as to state that the draft articles were without prejudice to the granting of preferential treatment to the developing countries in any other form than within the generalized system of preferences and that the developed countries could not claim the same treatment under the most-favoured-nation clause. In particular, it was stated that since many developing countries regarded regional economic groupings, integration and other forms of economic co-operation as a means of expanding their intraregional and extraregional trade, article 27 should be made more precise in order to take account of such groupings and give legal expression to the principle that developing countries were in no way obliged to extend to industrialized countries the preferential treatment which they granted one another, particularly when they formed part of a free-trade area, a common market, a customs or monetary union or an economic union. The opinion was also expressed that article 27 was excessively terse and should be amplified by the addition of a second paragraph restating General Principle Eight adopted by UNCTAD at its first session. It was also said that the wording of article 27 might be improved since, as it stood, it appeared to close the door to any possible development of the most-favoured-nation clause in international law which was not specifically in favour of the developing countries.

85. Some representatives did not favour the inclusion of article 27 in the draft. It was considered that the article stated an obvious principle and was, therefore, unnecessary.

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C. State responsibility

86. Several representatives who referred to the Commission's work on State responsibility stressed the great importance of the progressive development and codification of the international law rules governing a topic which was at the very core of international law. Rules which applied in that sphere touched upon fundamental interests of States because the breaching by States of international obligations, particularly of especially important international obligations, might affect the very foundations of peaceful relations between States. Thus, in the contemporary world, the entire international community might be affected by certain internationally wrongful acts of States. A clear elaboration of the rules governing State responsibility would serve to enhance the respect of States for their international obligations to meet current needs of the international community, and would, therefore, be a positive factor in the development of peaceful relations and friendly co-operation between States. Some representatives stressed also that the draft articles should reflect the elements of progressive development required by the above-mentioned needs. It was necessary to harmonize lex lata and lex ferenda bearing in mind legal as well as political, economic and technological considerations.

87. Some representatives congratulated the Commission specifically on its approach, as well as on the inductive method it had followed in preparing the draft and, in particular, for reaching its conclusions on individual articles after a thorough analysis of State practice and international judicial decisions. Such an approach was considered essential by those representatives for the successful codification of the topic. Support was also expressed for the Commission's decision not to confine itself to any particular aspect but to define general rules to be applicable to State responsibility for the breach of any international obligation. In this connexion, the view was expressed that the main aim to be achieved by codifying the topic was not to secure special guarantees to foreigners but to create a legal framework capable of strengthening international peace and security and co-operation between States, as well as the sovereignty and independent development of peoples. On the other hand, it was said that although the Commission's aim had presumably been to arrive at clear statements of principle regarding the action open to a State which sought to obtain compensation for a breach of an international obligation, and the measures required of the State found to be guilty, a consensus was not always possible on what constituted an international breach or on the degree of responsibility to be attributed to a given act. The view was, therefore, expressed that the Commission would be better advised to concentrate on matters which lent themselves to agreement and codification, such as the exhaustion of local remedies, force majeure, etc., rather than seeking to define breaches and obligations.

88. It was also said that three principles emerged from the draft articles so far provisionally adopted by the Commission: first, a State was responsible when it had breached its own obligation, by its own behaviour, either by acting or by negligence; second, the unity of the State, thus all organs had to be regarded as part of the State structure, as well as all bodies executing any part of the State power; third, the higher responsibility of the State for the breach of obligations which were particularly dangerous for the international community, namely, the violation of cogent norms of international law.

89. Regarding the commentaries accompanying the articles, some representatives were of the opinion that they constituted a valuable contribution to the development of legal knowledge. But it was also stated, by one representative, that certain concepts might have been clarified if efforts had been made to provide briefer explanations.

90. The International Law Commission was congratulated for the work already done on the topic and several representatives noted with appreciation the learned reports and contributions of the Special Rapporteur on the question, Mr. Roberto Ago. While conceding that the work on the topic involved many political and technical difficulties, certain representatives, however, urged the Commission to pursue its study of the topic more rapidly in order to bring it to a successful conclusion as early as possible. They underlined that, notwithstanding the progress made, much remained to be done. Completion of the first reading was still some years away and an assessment of the draft articles already adopted by the Commission could not be properly made until the entire text had been completed. It was generally agreed that within the next five-year term of office of its members, the Commission should try to complete a first set of draft articles on the topic.

91. Some representatives advanced comments of a preliminary nature either on the draft as a whole or on certain specific articles, particularly on those adopted by the Commission at its twenty-eighth session (articles 16 through 19). Other representatives refrained from expressing comments at the present stage on the draft articles or indicated that their respective Governments would submit observations in due course after a fuller study of the matter.

1. Comments on the draft articles as a whole

92. A number of representatives referred to questions relating to the draft articles as a whole, such as the terminology used and the scope and structure of the draft. Concerning terminology, some representatives stressed that terms having a particular connotation in municipal law should be avoided. A view was expressed that the Commission had reached a series of conclusions as to the method, substance and terminology which were essential for the continuation of its work on the subject. Nevertheless, in an endeavour to conduct a systematic and analytical treatment of the subject of State responsibility, the Commission would have to adopt new terminologies, or rather new definitions of existing terminologies, and undertake further classifications of the responsibility of States, not only in terms of international crimes and international delicts, but also legal classifications in relation to the standard of care, the strictness of absolute or imputed liability for injuries resulting from various acts or operations of States, including reparation as well as preventive, compensative and corrective measures in respect of injurious or harmful consequences of certain activities of States in various fields such as pollution of the ocean and airspace.

93. As to the scope of the draft articles, some representatives referred to the decision by the Commission to limit the draft articles to the responsibility of States for internationally wrongful acts. It was said that that approach should

not prevent the Commission from future consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The decision to exclude from the scope of the present draft articles the so-called question of risk was seen as having been taken out of a concern to place limits on a very broad subject. There was, however, no clear dichotomy between a wrongful act and risk. Those two concepts were related and a rule applicable to one could not be regarded as automatically inapplicable to the other. It might be preferable to suppose that behind all obligations, whether they had their origin in a wrongful act or in risk, there was a common element. A study of the question of risk would thus make a useful contribution to the work on State responsibility as a whole. It was also said that a general understanding had been adopted at the twenty-fifth session of the General Assembly to the effect that the work of the Commission was not limited to State responsibility for wrongful acts but also included responsibility for lawful acts. Although State responsibility in those areas was determined on the basis of special conventions and specific regulations drawn up in technical forums, the formulation of general legal norms would undoubtedly be beneficial. It was suggested that the Commission should, without further delay, nominate a special rapporteur on the question of international liability for injurious consequences arising out of acts not prohibited by international law.

94. On the structure of the draft articles, support was expressed for the International Law Commission's outline of its future work on the topic (paras. 71 and 72 of the Commission's report). Those who spoke with reference to the planned part II of the draft ("The content, forms and degrees of international responsibility") did so mainly in the context of article 19. As to the possible addition of a part III dealing with "the implementation ('*mise en oeuvre*') of international responsibility" and "settlement of disputes", certain representatives favoured the inclusion of such a part and referred in particular to a compulsory settlement of disputes procedure. The inclusion of part III constituted an essential element for the effectiveness of any regulation of the régime of international responsibility. The norms of parts I and II would be of little value if they were not accompanied by sufficiently effective regulations for their application.

2. Comments on the various draft articles

95. Most of the observations on individual draft articles related to those adopted by the International Law Commission at its twenty-eighth session concerning chapter III (The breach of an international obligation), namely articles 16 to 19. A few observations were, however, also made on articles 8, 10, 11, 12 and 13 of chapter II (The act of the State under international law) adopted at previous sessions of the Commission.

Chapter II. The act of the State under international law

Article 8

96. One representative reiterated reservations previously made concerning article 8. The article, it was said, should take into account the real ties between the State and monopolies, since the activities undertaken by monopolies beyond the national frontiers were likely to involve the responsibility of the State which protected and helped them.

Article 10

97. One representative expressed reservations concerning this article. The State should not be held internationally responsible for the acts of a manifestly incompetent organ. In such cases, the injured party could institute procedures in internal law in order to secure recognition of his rights and to obtain reparation. Those questions should be resolved in accordance with the internal law of the State and by its courts. Only damages and losses sustained by foreigners as a result of the violation by the State of treaties in force were attributable to the latter on the international level. Furthermore, the conditions did not always exist to permit the application of a principle such as the one set out in article 10. It should be borne in mind that there were still situations in which certain Powers continued to interfere in the internal affairs of countries which had freed themselves from the colonial yoke.

Article 11

98. Regarding this article, one representative underlined that there were cases where some States hid behind the private activity of commercial or other companies. In such a case the behaviour of the State could consist in an omission or in negligence, failing to prevent an obstruction to the fulfilment of an international obligation, or in a positive act, or even in granting permission to the private person concerned for the commercial, cultural or other activities in question. In these cases, the principle of the unity of the State assumed special importance.

Articles 12 and 13

99. In connexion with article 12, it was noted by one representative that the concept that acts committed by various organs or even by groups in its territory were attributable to the State should not result in attributions to the State of acts committed by other States or in the recognition of the effects of such acts as acts of the territorial State. Those attributions could be made only in accordance with the constitution of the State concerned. Moreover, article 13 should make reference to the case where the territorial State supported or connived in the commission of certain acts by an international organization, thus itself committing a wrongful act.

Chapter III. The breach of an international obligation

100. Several representatives were pleased to note that at its last session the Commission adopted the initial four articles of chapter III (The breach of an international obligation) of part I of the draft. A number of those representatives considered the adoption of those articles as representing significant progress in the definition of the objective element of the internationally wrongful act and approved, in principle, its underlying concepts. Some of those representatives noted with satisfaction that, in drafting those articles, the Commission took duly into account the current level of development of international law as well as basic principles of international law embodied in the Charter of the United Nations.

101. While recognizing that the provisional adoption of the articles referred to above represented an important contribution, certain representatives stated that they could not, at the current stage of development of international law, subscribe to all the principles contained therein and, especially, to some of those included in articles 18 and 19. Some of those representatives also wondered whether the articles adopted by the Commission at its last session were essential for the codification of the rules of international law governing the topic and whether in going into too much detail, there was not a possibility of introducing into the final instrument elements so controversial that the chances of the draft gaining general acceptance might be compromised.

Article 16

102. The majority of representatives who referred to the article expressed general agreement, approval or support for its provision. For instance, it was said that the article expressed a clear statement of an existing principle of law and it excluded all possibility of justifying a breach of an international obligation by casuistry. As drafted, it covered as many potential instances of a breach of an international obligation by a State as was possible. That was so because the article stated that there was a breach of an obligation when the act of a State was "not in conformity" with what the obligation required of it and conformity could not be held to exist even when the act was only partially in contradiction with the obligation. It was likewise underlined that the article covered not only "action" on the part of the State, but also "failure" on the part of the State to act when action was necessary to comply with the obligation in question.

103. Certain representatives were of the view that the provision embodied in the article was a mere statement of the obvious. Some of them, however, considered its inclusion in the draft necessary. Others, however, did not share such a view, although they did not express objections regarding the substance of the rule set forth in the article.

104. It was noted by certain representatives that the Commission in its commentary affirmed that the international obligation whose breach was envisaged in the draft articles must be a legal obligation incumbent upon States under international law, and not a moral or international courtesy obligation.

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Article 17

105. The majority of representatives who specifically referred to article 17 generally endorsed, approved or supported its contents. Certain representatives expressed the view that the rule stated in article 17 was incontrovertible and accurately reflected the state of international law on the point in question. The formal origin of the international obligation breached was irrelevant to establish the corresponding international responsibility of the obligation. It would be absurd to try to introduce in the present draft a distinction based on the differentiation made in other legal systems between "contractual" and "extra-contractual" obligations. The rules embodied in the article were also useful in the sense that they would make it unnecessary for the judge or arbitrator to undertake research in order to determine the degree of responsibility according to the origin of the international obligation breached and would enable the parties to a dispute to gain a better understanding of their rights and obligations. The view was expressed that the wording of article 17 precluded any attempt to justify a breach of an international obligation by relying on purely formal considerations.

106. Certain representatives were of the view that the rule reflected in article 17 was already implicit in the wording of article 3. Therefore, to one of those representatives, it was not clear why it was necessary to repeat the idea. According to another of those representatives, the article dealt with a non-question, since international jurisprudence, as pointed out in the commentary, had not often had occasion to consider the question explicitly. On the other hand, other representatives, while expressing doubts about the need for the article, believed that it should be maintained to avoid any confusion and to provide a better understanding of the general structure of chapter III.

107. As to its wording, the view was expressed by certain representatives that article 17 was less than concise and that its commentary was too lengthy. According to one view, since the origin of a rule of law might be different from the actual source of that rule, it would seem more appropriate to refer to the process by which the obligation arose in accordance with international law. According to another view, the article should be reduced to a single paragraph stating that the origin of the international obligation breached did not affect the international responsibility of the State committing the breach, so as to emphasize, more clearly, the notions of "origin" and "responsibility", which were in fact the essence of the article. Another representative noted that since an international obligation could arise from a customary, conventional or other rule, due reflection should be given to the position of resolutions interpretative of the Charter, and of declarations, adopted by the United Nations. Finally, the suggestion was made that article 17 should contain an express reservation concerning the provision in Article 103 of the Charter.

108. Lastly, certain representatives welcomed the use of the word "origin" in place of the word "source", which, it was said, had a long tradition of controversy in international law. It was also said that although it would be preferable to use the word "source", which was readily understood by lawyers, the word "origin" was acceptable as it was purely a matter of terminology and the sense of the article was clear.

Article 18

109. Some representatives approved in principle the basic underlying concept of article 18. It was said that the article was a reflection of reality and dealt with a principle common to all legal systems, namely that an act could be considered wrongful only if the obligation breached by it was in force at the time when the act was committed. It was also observed that while the form of the article might seem debatable, it was entirely satisfactory as to substance, since it set forth the indisputable principle of the "temporal element" in breaches of international obligations. One representative was, however, of the opinion that the principle posed in the article needed no restatement in the draft.

110. Reservations were expressed, however, by certain representatives concerning paragraphs other than paragraph 1 and, in particular, regarding paragraph 2. Some of them considered that the article should be limited to the present paragraph 1.

111. It was also stated that article 18 would require a thorough and careful examination in the light of parts II and III of the draft. The need to define the concept of "obligation in force" for the purposes of the draft articles was also stressed by one representative. An explicit definition of such an expression could be done either in an article on definitions or in an article in chapter I of part I in order to make it clear that the obligations concerned were obligations deriving from rules of international law in force at the time the wrongful act was committed.

Paragraph 1

112. All representatives who specifically mentioned paragraph 1 of article 18 spoke in favour of the rule reflected therein. The paragraph was viewed as representing the long-established and indisputably basic rule that there was no breach of an international obligation unless the obligation in question was in force for the State at the time when it performed the act not in conformity with what was required by that obligation.

Paragraph 2

113. A number of representatives made comments relating to the rule in this paragraph formulated by the Commission as an exception to the basic rule enunciated in paragraph 1. Some representatives expressed support and approval for paragraph 2. It was said that peremptory norms of general international law, or rules of *jus cogens*, derived from principles which must be respected if peaceful coexistence between nations was to be maintained and which served the fundamental interests of mankind and that paragraph 2 of article 18 took account of that situation. It was stressed that the paragraph was based on the general principle that any international legal norm should have a basis in the legal conscience of the international community which it served at any particular time. It acknowledged the need to provide for the effect on State conduct of the

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emergence of a peremptory norm of general international law, and to offer protection to a State which had acted contrary to what was required of it by an obligation incumbent upon it at the time when the act was committed but whose act had subsequently become compulsory under a rule of _jus cogens_. Paragraph 2 was seen as being essentially based on the moral force inherent in peremptory norms of general international law. It was also said that in accepting the existence of such an exception, the Commission had rightly sought to avoid any undue extension of it which might weaken the general rule laid down in paragraph 1. Indeed, the scope of the exception should be kept within strict limits.

114. Some of those representatives supported paragraph 2 purely because they understood it as strictly limited to cases where the former wrongful act of the State had subsequently become compulsory conduct by virtue of a peremptory norm of general international law. They stressed that the exception provided for in the paragraph was extremely narrow and sufficiently circumscribed to exempt only acts of the State prohibited by a rule of international law in force at the time of their commission but which had since become not only lawful but obligatory as a consequence of the _jus cogens_ rule. Also, the paragraph would not, it was stated, have the retroactive effect of rendering non-compliance with the peremptory rule unlawful _ab initio_; nor would it affect disputes arising from an act that had been settled before the emergence of the _jus cogens_ rule. Moreover, the concern expressed over the fact that a retroactive application of the peremptory rule mentioned in paragraph 2 would in effect deprive the injured State of any remedy, seemed exaggerated. If an internationally prohibited act changed to an obligatory one, that would be due to a fundamental change in the legal conscience of the international community and such a fundamental change must have also affected the behaviour of the injured State.

115. Other representatives who supported in principle the rule in paragraph 2 considered, however, that its scope was too limited. In this connexion, it was stated that before a rule of _jus cogens_ emerged, the conduct later proscribed was normally viewed with moral disapprobation by a large segment of the international community and, while technically not unlawful, was normally considered wrong. It might therefore not be unduly harsh if a State engaging in such activities as _apartheid_, genocide, racial discrimination or slavery, was held accountable for those acts before they became proscribed by a rule of _jus cogens_. It was also said that the question whether an act of a State in an area where _jus cogens_ was in the process of emergence could be regarded as lawful if subsequently, after the _jus cogens_ had evolved, it would be wrongful, should be examined by the Commission, and if necessary the wording of paragraph 2 should be revised.

116. Some representatives stressed that the retroactive application of _jus cogens_ gave rise to extremely delicate problems and must be dealt with very carefully. It was questioned whether the limitation of the exception contained in paragraph 2 might not be narrow enough. Certain representatives doubted whether the subsequent validation of acts wrongful when committed would be justified in all cases by the emergence of a new peremptory norm of general international law. It was possible that in the future, particularly in the law relating to the protection of the environment, there would be new rules made necessary by population expansion and limited food supplies. Such rules, even if they had the character

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of peremptory norms, need not necessarily cast any doubt upon the validity of obligations assumed and broken in the past and did not, of necessity, have a retroactive effect. In its intention to give retroactive effect to some, if not all, peremptory norms of general international law, the Commission, it was said, was on very unsure ground. A State normally suffered injury from a breach by another State of an obligation towards it, and to deprive the first State of a remedy would be to impose a sanction on its behaviour. While it was conceivable that a norm of general international law might be designed to impose such a sanction on the past conduct of a State, even if such conduct was at the time not contrary to a rule of international law then in force, such a purpose could hardly be presupposed, let alone implied in all peremptory norms of general international law.

117. Other representatives expressed serious reservations concerning the inclusion of paragraph 2 in article 18, terming it highly speculative, and as giving rise, if implemented, to more difficulties than it resolved. It was said that the fact that the concept of peremptory norms had received a measure of acceptance in a wholly different context (the Vienna Convention on the Law of Treaties) hardly supported the imparting of the notion into article 18. There was a wide divergence of views among States concerning what rules they considered to be norms of _jus cogens_ and concerning the new norms of _jus cogens_ that they wanted to emerge. Besides, the Vienna Convention on the Law of Treaties provided for procedural, necessary safeguards concerning disputes involving _jus cogens_ rules. Reference was made, in this connexion, to article 66 of that Convention by which, _inter alia_, any dispute as to whether a particular treaty was void on the ground of non-conformity with a new peremptory norm of general international law should be subject to the compulsory jurisdiction of the International Court of Justice. Another provision of the Vienna Convention noted was article 71, paragraph 2 (b), which did not provide for a general retroactive effect for a new norm of _jus cogens_. Those representatives believed that, in general, such provisions were essential in order to safeguard the authority and stability of the existing international order and were even more necessary if a provision such as article 18, paragraph 2, was eventually adopted.

118. Some representatives feared that the adoption of paragraph 2, as presently worded and without such safeguards, would compromise legal stability and tend to undermine the authority of existing law. The present draft might be taken as an incitement to States to perform an internationally wrongful act in the anticipation that such an act might subsequently be validated by the emergence of a rule of _jus cogens_ to the opposite effect. Thus States would be tempted to concoct new exculpatory peremptory norms and a violator of the existing legal order would be given a chance to escape the consequences of his act. Furthermore, paragraph 2 was unlikely to be conducive to an expeditious settlement of disputes. In this connexion it was considered that the rule reflected in the paragraph ignored, _inter alia_, any reliance costs that an injured State might have suffered because of the breach. While an injured State might not be entitled to request specific performance of a contract deemed not in conformity with a new peremptory norm of general international law, it should be entitled to compensatory damages. Such an approach did not impair the new peremptory norm. On the other hand,

imposing the losses on the innocent party undermined the certainty needed in all transactions. It was noted that the Commission had recognized the need for such certainty when it had refused to impose liability on a State for an act that later became unlawful. It had also affirmed in its commentary that "the act of the State is not retroactively considered as lawful ab initio, but only as lawful from the time when the new rule of jus cogens came into force". However, article 1 stated that every internationally wrongful act of a State entailed the international responsibility of that State; thus the complete defence seemed to make the act lawful ab initio or to have the same effect vis-à-vis the injured party. Finally, it was noted that in the case of international crimes, which were dealt with in article 19, the application of the principle of retroactivity could be very dangerous.

119. Certain representatives believed that the solution to the sensitive questions raised by paragraph 2 should be found not by way of an exception to the basic principle of paragraph 1, but rather in the context of the consideration of circumstances precluding wrongfulness and attenuating or aggravating circumstances, to be dealt with in the future chapter V of part I. It was said that it was too early to consider what final form such a provision as paragraph 2 should take and where it should belong in the draft. Another view expressed was that the subject-matter of paragraph 2 did not, as yet, form part of State experience and the prospects of its doing so in the future were slight.

120. As to the drafting of the paragraph, certain representatives said its wording was not absolutely clear. One representative stated that if paragraph 2 merely restated the adage that any later rule abolished an earlier rule in the absence of any special reservation, then the paragraph should preferably be deleted. Another representative stressed that the delicate nature of the question called for the greatest conceptual and terminological clarity. He suggested, therefore, that the words "/and/ if the dispute concerning such an act has still to be settled", taken from the Commission's commentary and reflecting its approach, should be added either at the end of paragraph 2 of the draft article or following the word "subsequently" in that paragraph. It would then be possible to rule out the retroactive application of the norm to all cases in which the wrongful nature of international acts had finally been established.

Paragraphs 3, 4 and 5

121. Certain representatives favourably commented upon paragraphs 3, 4 and 5 of article 18 which dealt with acts of a continuing, composite and complex character, respectively. It was said that those paragraphs, though elaborate, served to clarify the basic rule of paragraph 1. They were based on specific cases which demonstrated the need for adopting a specific legal régime in each case, and they set forth a series of assumptions and solutions. Other representatives, however, questioned whether the detailed and complicated elaboration in paragraphs 3, 4 and 5 of the basic rule enunciated in paragraph 1 was justified, as that approach, while seemingly complete, caused some doubt as to whether there should be exceptions.

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122. As to <u>paragraph 4</u> of article 18, relating to composite acts, a view was expressed placing emphasis on its importance. States were increasingly assuming obligations which involved a pattern of action, such as in the field of human rights. The treaties which existed on that subject required States not to discriminate. The same kind of obligation could arise from bilateral treaties relating to the nationals of the other party. In all those cases, it was important that the pattern of actions constituting a breach of an international obgliation should exist while that obligation was in force. States were entitled to make their acceptance of new obligations dependent on such a condition. It was, however, stressed that in the case of the composite act, it was the nature of the international obligation itself which required that there should be a series of separate acts or omissions before it could be established that there had been a breach of that obligation. It was self-evident that only those acts or omissions which had occurred while the obligation was incumbent on the State should be taken into account. Thus, while the commentary relating to paragraph 4 of draft article 18 was not disputable, the basic rule stated in paragraph 1 of the draft article sufficiently covered the rather rare case envisaged by paragraph 4 and its commentary.

123. With regard to <u>paragraph 5</u> of article 18, dealing with complex acts, certain representatives noted that the rule set out therein appeared closely connected to the concept of the exhaustion of local remedies, a subject still to be dealt with in the context of an article on breach of an obligation of result to be included in chapter III of part I. Thus, it was thought that paragraph 5 introduced unnecessary and undesirable complications into the text and would in any event have to be reviewed when the Commission had formulated provisions on the exhaustion of local remedies. On the other hand, it was believed that the rule set forth in paragraph 5 might not be without utility since, long before the question of the exhaustion of local remedies arose, there might be differences of opinion concerning the consequences of complex acts which were necessary to constitute a breach of an obligation. In the matter of State responsibility, more than in the case of other subjects codified by the International Law Commission, it was possible for lawyers representing different legal systems to apply slightly differing perceptions to certain rules. For that reason, it was welcomed that paragraph 5 did not make it essential, from the point of view of determining an obligation in time, to resolve the question of whether a certain number of actions or omissions were necessary to constitute an offence. It was sufficient that one action or omission had occurred while the obligation was in force. Finally, the view was expressed that paragraph 5 seemed to fall within the purview of <u>tempus commissi delicti</u>, which the Commission was supposed to deal with later in connexion with another article of chapter III of part I. The relationship between that rule and the rule concerning the exhaustion of local remedies should be considered at that time.

<u>Article 19</u>

124. About 60 representatives, namely the great majority of those who spoke during the debate, made comments and observations on the matters dealt with in article 19, the cardinal importance and delicacy of which was emphasized by many

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speakers. Most of those comments and observations related to basic underlying concepts inspiring the article as a whole and, in particular, to the distinction made in the article between "international crimes" and "international delicts". Other comments and observations, more specific in nature, referred either to the merits of the provisions embodied in the various paragraphs of the article or to the wording of such provisions. Several representatives underlined that the comments and observations advanced were preliminary and tentative in character and should not be understood as jeopardizing in any way the final position to be taken on the matter, at a later stage, by their respective Governments.

(a) General comments on the distinction between "international crimes" and "international delicts" as two types of internationally wrongful acts

125. Three main trends of opinion emerged from the debate concerning the conclusion reached by the International Law Commission that contemporary international law distinguished, for normative purpose, between two different categories of internationally wrongful acts according to the importance attached by the international community to the subject-matter of the obligation breached and the seriousness of the breach itself.

126. A first group of representatives agreed with the distinction made by the International Law Commission in that respect between "international crimes" and "international delicts", as reflected in paragraphs 2 to 4 of article 19, and commended the Commission and its Special Rapporteur for the step so taken which was called a milestone in the codification of international law. A second trend of opinion was reflected in statements made by some representatives who were unable to agree with that distinction and asked the Commission to reconsider the approach adopted in article 19 so that the remainder of its work on State responsibility would not suffer. Lastly, the third position was represented by some other representatives who found some bases for or merits in the distinction but refrained from taking a definitive position on article 19 until knowing the Commission's proposals on subsequent provisions of the draft and, in particular, on those concerning the content, forms and degrees of international responsibility (part II) and the implementation (mise en oeuvre) of international responsibility and peaceful settlement of disputes (part III).

127. A series of nuances were also noticeable within each of the above-mentioned trends of opinion. Thus, for instance, some of the representatives who endorsed the distinction in article 19, as made by the Commission, emphasized that it reflected positive international law, while others belonging to the same trend of opinion stressed that article 19 was a turning point in the progressive development of the rules of international law governing State responsibility. The considerations advanced by those who asked the Commission to reconsider article 19 varied also from case to case. Some of them based their criticism of article 19 on arguments related mainly to the nature of State responsibility in international law, including questions of method and approach, others on the scope of the draft articles and still others on both kinds of considerations. A series of differences in emphasis were also observable among those representatives who reserved their final position on article 19. Some, for example, felt that article 19 could become generally

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acceptable in a not too distant future. Others stated that, notwithstanding their reservations, article 19 was an acceptable point of departure. Others regarded article 19 as a working hypothesis. Finally, others refrained from any explicit endorsement. Independently of the position of principle adopted, practically all representatives who referred to article 19 underlined the relationship between the distinction made in the article and the content, forms and degrees of international responsibility and the implementation of international responsibility.

128. Certain representatives stated that the Commission was fully justified in comparing, as it did in its report, the importance of an express recognition of the distinction between "international crimes" and "international delicts" with the explicit recognition of the category of rules of jus cogens in the codification of the law of treaties.

(i) The distinction made in the article in the light of international law

129. Underlining the fundamental importance in international law of the distinction between "international crimes" and "international delicts", several representatives congratulated the International Law Commission for having embodied such a distinction in article 19 of the draft articles on State responsibility under preparation as well as for contemplating, in the course of its future work on the topic, different régimes of international responsibility for the two types of internationally wrongful acts so distinguished, bearing in mind, as appropriate, that those acts may adopt a variety of forms and that the legal consequences entailed by them could also vary. To classify internationally wrongful acts according to their degree of gravity for the international community illustrated, according to those representatives, mankind's developing awareness that breaches of major international obligations - of which those relating to the maintenance of international peace and security were undoubtedly the most important -- could not be treated in the same manner as breaches of other international obligations. It illustrated also, together with the recognition of rules of international law having a "peremptory" character (jus cogens), the increasing legal importance attached by international law to the subject-matter of its obligations. As pointed out by the Commission, the distinction between "international crimes" and "international delicts" had normative consequences inasmuch as it determined different régimes of international responsibility depending on whether an international crime or an international delict was involved. That was today the only reasonable approach to the matter since, under contemporary international law, the legal consequences of an "international crime", which in most of the cases would imply the violation of a norm of jus cogens, could hardly be reduced to a mere question of reparation between the author of the wrongful act and the injured State. The draft articles on State responsibility under preparation could not therefore but codify such a distinction as well as an appropriate régime of international responsibility for "international crimes". All those representatives subscribed to the underlying concepts of the article and approved, subject in some instances to drafting improvements, article 19 as formulated by the Commission. The commentary attached by the Commission to the article was also viewed as particularly valuable by those representatives.

130. For some of those representatives, the distinction between "international crimes" and "international delicts" was fully warranted in positive international

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law. They recalled in this connexion that the Charter of the United Nations itself attached some specific consequences, more grave in nature, to serious breaches of certain international obligations of essential importance for the protection of fundamental interests of the international community, such as those relating to the maintenance of international peace and security; that, as recognized in article 53 and other articles of the Vienna Convention on the Law of Treaties, some norms of international law had the character of _jus cogens_ rules; and that breaches of certain international obligations had been characterized as "international crimes" in various conventions and other international written instruments. The very fact that the International Law Commission had adopted article 19 unanimously was also noted by those representatives as particularly significant in that respect. The concept of a single system of State responsibility was, in the view of those representatives, outdated. Contemporary international law distinguished, on the one hand, between international obligations of fundamental importance for the international community and other obligations and, on the other hand, between serious and less serious breaches of a given international obligation, and such distinctions entailed, under that system of law, different legal consequences in terms of State responsibility. Internationally wrongful acts such as aggression, the maintenance of colonial domination, slavery, genocide and _apartheid_ referred to in paragraph 3 of article 19 constituted, according to those representatives, examples of particularly serious breaches of international obligations of fundamental importance to the international community as a whole which could not but be characterized as "international crimes". By stating it so, it was added, the draft articles on State responsibility would have a preventive and dissuasive effect beneficial for the maintenance of international peace and security and for the development of international co-operation between States on more friendly and just bases.

131. Other representatives, who also supported article 19 and its underlying basic concepts, considered it to be a major contribution to the progressive development of international law in the difficult and complex area of State responsibility. For those representatives the article was an important and necessary innovative advance in the development of the rules of international law governing State responsibility mainly because it broke with the traditional theory which viewed all internationally wrongful acts as belonging to a single and same type. They praised the International Law Commission for having recognized that that traditional theory had evolved so as to encompass two main types of internationally wrongful acts, each of them entailing a different régime of international responsibility. They shared also the view that the basic criteria to characterize a given wrongful act as an "international crime" or an "international delict" should be the vital or fundamental interest of the international community in respect of the international obligation breached as well as the gravity of the act itself. It was also added that the practice of States had shown a tendency since the end of the Second World War to recognize certain breaches of international law obligations as crimes _erga omnes_. All those representatives regarded aggression, colonialism and gross violations of human rights and fundamental freedoms, such as slavery, genocide and _apartheid_, as examples of international crimes that should be accorded more severe treatment than that given to internationally wrongful acts of less importance. Some of them added massive pollution to the enumeration. Broadly speaking, they agreed, therefore, with the examples of international crimes given by the

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International Law Commission in paragraph 3 of article 19 and considered them to be in keeping not only with the United Nations Charter, but also with article 53 of the Vienna Convention on the Law of Treaties, as well as with various resolutions adopted by the United Nations organs concerning maintenance of international peace and security, colonial situations and human rights and with international conventions prohibiting crimes such as genocide, apartheid and other inhuman practices. In this connexion, it was also recalled that the Political Declaration adopted at Colombo in August 1976 (see A/31/197) asserted that apartheid was an international crime and reiterated the collective responsibility of States to extend effective support and assistance to peoples striving for self-determination.

132. Some representatives praised the Commission for having taken duly into account that violations amounting to an "international crime" were a matter of concern not only to the State or States directly affected but also to the international community as a whole. If the international community failed to impose on the perpetrators the sanctions that were called for, the international order would fall prey to anarchy and collapse. It was high time that the notion of collective international responsibility should be firmly established as an unequivocal principle. It had been given recognition by the international community in various ways since the adoption of the Charter of the United Nations. Under Article 24 of the Charter, the Security Council was given broad powers for the maintenance of international peace and security and was recognized as exercising those powers on behalf of the Members of the United Nations. Article 6 of the Charter provided that a Member which persistently violated the principles contained in the Charter could be expelled. The notion of collective international responsibility had also been included in the Geneva Conventions of 1949 which, by virtue of a common provision, obligated the parties not only to respect the provisions of those instruments but also to ensure that they were respected by third parties. Furthermore, that notion was also an integral part of the codification efforts presently being made in connexion with the sea bed, outer space and certain economic areas.

133. As indicated in paragraph 126 above, some representatives were unable to endorse the approach adopted by the International Law Commission regarding article 19 and asked the Commission to reconsider the matter carefully. They found no compelling arguments for the inclusion of the concept of "criminal responsibility" in the draft articles on State responsibility at the present stage of development of international legal institutions. Some of them rejected in that respect arguments by analogy with domestic law and with some aspects of the Vienna Convention on the Law of Treaties. Virtually all domestic law systems separated laws relating to reparation for damage from those relating to criminal responsibility. Moreover, criminal law was set forth in domestic legal systems in great detail and precision. In addition, domestic law systems protected the innocent from false accusations and hasty conviction by a variety of substantive and procedural safeguards. It was also inappropriate to take the articles on jus cogens of the Vienna Convention on the Law of Treaties out of that particular context which, inter alia, included procedural safeguards.

134. It was also stated by some of those representatives that under paragraphs 2 to 4 of article 19, as drafted by the Commission, State responsibility took on a

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penal nature of doubtful interest and value for the international community and contrary to the body of relevant case law, the provisions of Article 36, paragraph 2, of the Statute of the International Court of Justice and the views of most writers. They pointed out that by stating that it was inconceivable to limit its task to establishing in the draft articles a supposedly general régime of responsibility valid for all internationally wrongful acts, leaving it to international custom or particular conventional instruments to lay down the régime or régimes of responsibility applicable to "crimes", the Commission had taken a position which favoured the existence of such crimes in international law and their imputability to States. By doing so, however, the Commission had espoused a trend which was far from constituting an established or generally recognized principle in international law. The text of article 19 submitted by the Commission presumed, therefore, the existence of well-established rules of international law in the fields referred to, while it was clear from the commentary itself that such was not the situation. In this connexion, the view was also expressed that the substance of article 19 would be better situated in a commentary indicating the topics which might be the subject of special studies concerning the establishment of rules of law and the consequences of a breach of those rules in the light of the developments of international law.

135. It was stated that in evaluating article 19 certain preliminary basic questions should be asked and, in particular, what was the purpose of establishing the distinction between "international crimes" and "international delicts" as well as what would be the consequences of identifying a particular act or omission as an international crime rather than as an international delict. In national law it was clear that criminal law protected the fundamental interests of the community and reflected to a large degree the prevailing moral views of the society in which it operated. Moreover, its sanction was markedly different from the sanction of a delict. Crime carried with it the notion of punishment, while delict carried that of reparation. Lastly, the concept of crime covered a wide range of human behaviour. Translating those elements into the sphere of international law was far from easy. The first problem was the difficulty of identifying objectively those acts which most offended the moral sense of international society. Secondly, in the case of individuals, personal sanctions, including corporal punishment, was a familiar concept, but that kind of sanction could not be applied to entities such as States, which were the only entities dealt with in the draft articles as the question of the responsibility of individuals for the commission of crimes under international law had been left aside. Lastly, while in the national sphere criminal law was applied by the judiciary with every guarantee of objectivity, in the scheme envisaged by the Commission criminal sanctions applicable to States would, to a large extent, be in the hands of political organs of the United Nations, where legal considerations often played a secondary role. The Commission could have reserved the possibility of establishing a distinction between the concept of delict and that of crime by adding a few words of reservation to an uncontroversial article and a page or two of commentary.

136. Reservations were made by some representatives about the method of argument developed by the Commission in the commentary accompanying the article. It was stated that the argumentation developed in the voluminous commentary to the article was not persuasive and was more in the nature of advocacy of the extreme than a

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reasoned analysis aimed at clarifying doubts arising from the article. Reference was made in that context to passages of the commentary dealing with how the United Nations collective security system worked and with the legislative history and meaning of the Definition of Aggression and of the Stockholm Declaration on the Human Environment.

137. As also indicated in paragraph 126 above, some representatives expressed reservations concerning article 19, as drafted by the Commission, and stated that they would adopt a final position thereon only when the full legal consequences of the distinction between "international crimes" and "international delicts" were known. Although there was growing evidence of the admission of a distinction between different types of internationally wrongful acts on the basis of the subject-matter of the international obligation breached and the importance attached by the international community as a whole to the respect of certain international obligations of a fundamental nature, there were difficulties in defining such international obligations and assessing the legal consequences of such a distinction. The article raised, therefore, a number of delicate and fundamental questions from the point of view of content as well as institutionally. In the future, the Commission would no doubt have to revert to article 19 and to consider what legal consequences it would attach with respect to "international crimes" and "international delicts" and what scope it would eventually give to the provisions relating to the content and the different forms of responsibility as well as the implementation of responsibility. Those representatives urged the Commission to proceed with caution. In any case, and whatever proposals the Commission might eventually make on such legal consequences, the present terms of article 19, and in particular of its paragraphs 2 and 3, would have to be reviewed very carefully by the Commission at the second reading stage, taking into account the statements made by delegations at the current session and subsequent comments submitted by Governments so as to ensure the broadest possible acceptability for the relevant draft convention.

138. It was noted by some of those representatives that the Commission sought to draw the distinction between different types of internationally wrongful acts by ascribing the term "international crimes" to the wrongful acts of the kind described in paragraph 2 of the article. That description bore some similarity to the description of jus cogens in article 53 of the Vienna Convention on the Law of Treaties, but many different views had been expressed on that concept. Moreover, the acceptance of the distinction would imply differences in the international responsibility régime that must be studied in all its complications before being accepted. It was also recalled, in this connexion, that the rule in paragraph 2 fell into the sphere of the progressive development of international law. There had been no precedent until the judgement given by the International Court of Justice in the Barcelona Traction, Light and Power Company, Ltd. case, that, as the Commission itself admitted in its commentary, had been the subject of different interpretations. With regard to doctrine, writers had not begun to support differentiation of wrongful acts on the basis of the importance of the subject-matter of the obligation breached until the 1960s, and many had done so only in respect of violation of the prohibition of the use of force. The majority still favoured the traditional opinion that only persons who acted as organs of a State, and not the State itself, could be held responsible for international crimes.

Furthermore, the recognition of "international crimes" would inevitably call for a complementary institution which would decide in each case whether a crime erga omnes had been committed. Such wrongful acts, including the examples given by the Commission in paragraph 3 of article 19, were not all of the same kind and gravity and could entail, therefore, different consequences or redress. If in some instances such redress was to come through the provisions of Chapter VII of the United Nations Charter, the essentially political function which the Security Council had to perform under the Charter could not be overlooked. Bearing all those considerations in mind, all those representatives shared the view, broadly speaking, that before adopting a final position on the matter it would be necessary to know the draft articles to be submitted by the Commission in the future, and in particular, those dealing with the implementation of international responsibility and the settlement of international disputes.

139. Some of those representatives considered that the idea of dividing internationally wrongful acts into two categories had gained acceptance at the present time and could become generally recognized in the not too distant future. Others viewed article 19 as an acceptable point of departure for further work by the Commission. It was also stated by others that at the present stage of the work article 19 could not be regarded as more than a simple working hypothesis. While not objecting to certain of the considerations of the distinction sought by the Commission, certain representatives had reservations regarding some of the arguments advanced in the commentary to article 19 and could not, therefore, form a definitive view on the acceptability or otherwise of what was proposed in substance, until they had had an opportunity to consider carefully the consequences of internationally wrongful acts which might be deemed to amount to international crimes.

140. It was stated that article 19 drew a valid distinction, but it still presented difficulties and should be revised in relation not only to the rest of the draft but to international law as a whole. The principle which was receiving growing recognition, that a State could be held responsible according to the degree of gravity of its act, could perhaps be codified. Such a State would then be required by the international community, acting through a tribunal or court, to make compensation, determined on the basis of the damage caused. There was, however, a danger that a codification of the type envisaged under article 19 would cause harm by consolidating the jurisprudence that had developed over the years on a case-by-case basis in its existing form. It would also be unwise to classify certain acts of States as criminal without first agreeing on a definition of such acts and establishing the machinery to deal with them.

141. Lastly, it was also stated that it might be that the main question for the International Law Commission was to decide whether obligations of fundamental importance to the international community could be treated as being on the same footing as ordinary contractual obligations. In that connexion, reference was made to the difficulties that had arisen regarding the principle of the sovereignty of States over their natural resources. Attempts to codify the law of State responsibility had failed because they had reduced themselves to a competition between the sovereignty of States over their own territory and the less compelling

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rights of third States. From the standpoint of régimes of responsibility, a position of principle should be adopted concerning the distinction between obligations that were fundamental to the international community and general obligations. That could be done without waiting for the second stage of the work on State responsibility. For the present, that question should not lead to a decision on the criminal liability of States or on the nature of reparation for serious damages. The work would not be greatly advanced if the Commission made a decision concerning compensation or reparations. The main problem was still the implementation of State responsibility. It was important to recognize the existence of higher fundamental norms at the international level since States might be reluctant to respect the decisions of the international community if they felt that they were expressions of political preference, but they would not be reluctant to do so if they perceived that those decisions were based on funadmental principles of law.

(ii) <u>The distinction made in the article in the light of the scope of the draft articles</u>

142. Certain representatives stated that over half of article 19, and in particular paragraph 3, appeared at variance with the Commission's decision not to deal within the draft articles with the "primary" rules, the violation of which entailed international responsibility. It had been just such an incursion into the area of the "primary" rules that had caused the failure of the 1930 Conference for the Codification of International Law in codifying the topic. The considerations leading the Commission, as set out in the commentary, to include in the article a provision such as paragraph 3 did not really form part, according to those representatives, of the task of codifying the rules of international law governing State responsibility. Any distinction between grave breaches and other internationally wrongful acts could only be made on the basis of the concrete legal consequences they might entail at present under international law, rather than by cross-reference to abstract categories of international obligations or norms as the Commission did in article 19. It was also stated by certain of those representatives that the article should not be regarded as a move towards the progressive development of international law. There was nothing new about the article. The real question was that it included in the draft articles matters falling outside its scope. The characterization of a wrongful act as an international crime and the scale of sanctions to be attached thereto were matters solely for political decision by the competent international bodies. Nothing could be gained by introducing such matters in the draft. Furthermore, the list contained in paragraph 3 of the article was not exhaustive and it was questionable whether States would be satisfied with such vague descriptions of acts which might subsequently have grave consequences. If article 19 was left as it stood, there was a risk that no further progress would be made. The various interpretations advanced in connexion with paragraph 3 of article 19 during the debate in the Sixth Committee were the best illustration of such a risk.

143. Certain other representatives said that the question of whether the Commission could be reproached for making an incursion into the area of "primary" rules could be answered only if the Commission's intentions, as indicated in the commentary,

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were taken into account. It might be felt that it was necessary to have an idea of the "primary" rules before propounding "secondary" rules and that the latter could not be formulated without having some conception of the former. For those representatives it seemed clear that article 19 was descriptive and contained no definition of "primary" rules. The examples in paragraph 3 of the article were not, therefore, an incursion into the determination of the substantive rules of law establishing the international obligations designed to protect the fundamental interests of the international community. Consequently, those representatives considered that by making the distinction between two categories of internationally wrongful acts, embodied in article 19, the Commission had not departed from the basis of its approach to the codification of State responsibility by going beyond the scope of the draft article into the realm of the "primary" rules.

144. Certain representatives pointed out that article 19 established a sort of collective criminal responsibility of the State, which was contrary to the principles of modern penal law. Crimes affecting the international community as a whole engaged not a collective criminal responsibility of the State but solely the personal criminal responsibility of the individuals committing them. It was necessary to avoid approaches which might result in the condemnation of a whole people to economic isolation or ruin. Actually, it was the individual rather than the States who had become subject to "international criminal law" as States increasingly undertook, through international conventions, to use their domestic legal process to punish individuals guilty of infringing that law. The reasons for excluding the State from the scope of criminal responsibility were sound and rested not upon any aura of sanctity vested in States nor upon such maxims as _par in parem non habet jurisdictionem_ but rather on common sense and principles of elementary justice. To introduce the notion of an international crime for which the State would be accountable would be a retrograde step and a breach of the time-honoured maxim _impossible est quod societas delinquat_. That notion had been rejected by many leading authorities on international law who had stated that the sanctions provided for under the United Nations Charter were not criminal law sanctions, and there was no organ of international criminal justice within the United Nations system. Moreover, neither in the documents relating to the surrender of Germany and Japan, nor in the Statutes of the Nuremberg and Tokyo International Military Tribunals, nor in the 1947 Peace Treaties was there any reference to the criminal responsibility of the State. The same obtained with the Convention on the Prevention and Punishment of the Crime of Genocide. Mankind's condemnation of the idea of collective punishment was also reflected in humanitarian law relating to armed conflicts, as attested by certain provisions of the Geneva Conventions relative to the Treatment of Prisoners of War and to the Protection of Civilian Persons in Time of War as well as by the draft Protocols to those Conventions under elaboration.

145. Certain other representatives underlined that even at the current stage of the work it was clear that the Commission was not seeking to extend to the international responsibility of States the principles applicable to responsibility in internal law nor to establish an analogy with the criminal responsibility of persons guilty of crimes under international law. The draft articles on State responsibility in the process of being elaborated related exclusively to the international responsibility of States, as the Commission had plainly explained in

the commentary to article 19. The content of article 19 was not to be confused with matters belonging to the eventual criminal responsibility of individual organs of the State. The reference made in the commentary to the latter question was explained by other reasons. First, because, as in the case of jus cogens, it served to underline the increasing importance attached by contemporary international law to the content of certain international obligations such as those relating to international peace and security; secondly, to point out that the eventual punishment of an individual-organ liable to criminal prosecution did not absolve the State from its own responsibility; and, thirdly, to explain that not every act for which an individual-organ might be criminally liable was necessarily an act attributable to the State under the provisions embodied in chapter II of the draft articles under preparation.

146. Some of those representatives indicated that the use of the term "international crime" in article 19 should not be allowed to obscure the differentiation between the international responsibility of the State and the criminal responsibility of an individual-organ of a State. Those two distinct legal notions of responsibility ran parallel and were intended to act as a needed restraint to the commission of graver forms of wrongful acts affecting the vital interests of the world community as a whole. In this connexion, one representative pointed out that it was apparent from the treaty instruments to which the end of the Second World War had given rise and from the Judgement of the Nuremberg Tribunal that political and material responsibility was to be borne by the aggressor State and criminal responsibility by the individuals who had unleashed the conflict. It was recalled that the Commission had actually concerned itself fully with the responsibility of the individual-organs when it elaborated its draft Code of Offences against the Peace and Security of Mankind, the final text of which had been transmitted to the General Assembly in 1954. Under resolution 897 (IX) of 4 December 1954, the Assembly had postponed further consideration of that draft until a Special Committee set up for the purpose had submitted a definition of aggression. Following the adoption of such a definition in 1974, it was for the General Assembly to proceed to consideration of the draft Code of Offences.

147. Certain representatives regretted that in article 19 the Commission felt obliged to use terms which would appear to emphasize the notion of fault or crime and its inevitable corollary punishment. Thus, it was said that even if the Commission had not had in mind the "criminal responsibility of States" the use of expressions such as "international crime" introduced in the rules of international law governing State responsibility a conceptual ambiguity which it would be desirable to avoid. In so far as such expressions could create confusion and be looked at as a revival of obsolete ideas, nothing would be gained by using them in the draft articles even from the standpoint of the progressive development of international law. Certain representatives remembered, however, that the Commission had justified the use of such expressions by invoking the poverty of legal language, the desire to take account of State practice and United Nations practice, and a concern to limit the scope of the rules it proposed. It was also pointed out that the term "international crime", in reference to acts of aggression by States and other grave internationally wrongful acts, had become common legal usage in international law after the Second World War. Even before that war, that term had been used in a number of legal instruments.

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(iii) The distinction made in the article and the content, forms and degrees of international responsibility

148. Those representatives who opposed article 19, as drafted by the Commission, considered, generally speaking, that to extend in the draft articles the principle of State responsibility beyond reparation or compensation was from a legal as well as a practical point of view of doubtful value. Thus, for instance, it was stated that the perception that certain internationally wrongful acts affected a wider class than others did not compel the conclusion that an "international criminal responsibility of States" must be created. What it supported was the need for an analysis of ways to measure damages to the wider class. Those representatives questioned, therefore, the necessity to leap over the distinction between "civil" and "criminal" responsibility in order to ensure that particularly grave breaches rise to a level of responsibility which exceeded compensation or restitutio ad integrum. In the context of the draft articles under preparation, an approach allowing for exemplary damages in certain cases would constitute already a significant step forward. At least, such a step would be able to build on certain awards, like that concerning the I'm Alone case, 3/ and would provide a measure of progressive development which was not inconsistent with a reasonable expectation that the end-product would be ratified. Recalling the importance attached by his delegation to the concept of "damages" in matters of international responsibility, one of those representatives felt obliged, in the light of the wording of article 19, to adhere wholly to the position which it had stated on the question at previous sessions of the General Assembly.

149. Some of those representatives underlined also that the distinction made in article 19 between "international crimes" and "international delicts" would seem to imply the recognition, at a later stage of the work, of the actio popularis principle, whereby any member of the international community, and not only the injured State or States, would be entitled, when a crime was involved, to take legal proceedings against the wrongdoer. This would be another radical and doubtful innovation in the rules of international law governing State responsibility which could not be accepted without a careful study of all its implications and consequences. When actio popularis was mentioned before the International Court of Justice in the South West Africa case and the Barcelona Traction, Light and Power Company, Ltd. case (second phase), it had been in connexion with a question of procedural locus standi and not with a criminal matter. States not parties to a treaty infringing jus cogens rule might be entitled to have it declared void, but here again the matter was of locus standi and not of criminal responsibility.

150. Other representatives underlined that the legal consequences or forms of responsibility to be inferred from the distinction between "international crimes" and "international delicts" could only be within the range of those which international law recognized as resulting from the commission of an internationally wrongful act. Article 19 was concerned with the international responsibility of States as a legal institution defined by international law and not by reference to notions of civil or penal responsibility belonging to other legal systems. If

3/ Reports of International Arbitral Awards, vol. 3, p. 1609.

those legal consequences were not confined to reparation but might involve also, in certain instances, the application of sanctions, it was because such was the situation in contemporary international law. It was possible to assert, even at the current stage of the work, that the legal consequences, including sanctions which followed in case of an "international crime", were of a distinctive specific nature. State responsibility had traditionally been associated with reparation, and particularly pecuniary reparation, but in contemporary international law such a situation had evolved in order to meet the growing dangers of the time. In the past, the use of force in international relations had been a sovereign and legitimate right of States; there had been no ban on war and the State could not be held accountable for acts of aggression. Consequently, State responsibility had been considered mainly in terms of reparation for minor delicts, but such a situation had been radically changed since the Second World War and the adoption of the Charter of the United Nations. The principles of international law embodied in the United Nations Charter and the needs of an era characterized by the existence of nuclear weapons and rapid advances in science and technology made it imperative that the codification of the rules governing State responsibility took duly into account the progress already achieved by the law on the matter. In the course of its future work on the topic, the Commission should therefore consider the establishment of responsibility régimes bearing in mind the type of internationally wrongful act involved and, in particular, the gravity of its consequences for the international community.

151. Certain representatives said expressly that the Commission should contemplate that a system of effective and appropriate sanctions - economic, political and military - be included in the draft articles on State responsibility in order that the commission of internationally wrongful acts, and in particular of international crimes, might not go unpunished. Such a system should contemplate various kinds of redress. Certain breaches could be redressed through the payment of damages or other reparations. On the other hand, there were other breaches defined as "international crimes", such as aggression, the denial of self-determination, slavery, genocide and apartheid, which affected the entire international community and for which redress should consist of collective punitive action, including the application of sanctions under Chapter VII of the United Nations Charter.

152. Representatives who considered that the distinction made in article 19 between "international crimes" and "international delicts" was a turning point in the progressive development of international law also shared the view, broadly speaking, that the Commission could not but recognize that international responsibility had evolved so as to encompass different régimes according to the type of wrongful act involved. The breach of an international obligation need not always give rise solely to an obligation to make reparation but might entail also in certain serious cases the application of coercive measures, like "sanctions". In this connexion, it was recalled that article 19 dealt with international crimes for which States were responsible, according to Article 2, paragraph 4, of the Charter of the United Nations. Although the draft articles were silent on the different legal consequences of international crimes, it was obvious that the ordinary forms of reparation must be supplemented by such new forms as those provided for in Chapter VII of the United Nations Charter dealing with action with respect to threats to the peace, breaches of the peace and acts of aggression. Furthermore,

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serious crimes of the type referred to in paragraph 3 of article 19, such as those involving the infringement of the right of self-determination and of human rights and fundamental freedoms, would necessarily amount to threats to the peace. The view was also expressed that in some serious cases, it might be justified to apply sanctions even apart from those provided for in Chapter VII of the Charter. Lastly, some of those representatives indicated likewise that the distinction made by the Commission in article 19 could not but have a positive influence in the determination of the subjects having a legal interest in the fulfilment of international obligations, including the question of the recognition and scope of the _actio popularis_ referred to in the judgement of the International Court of Justice in the _Barcelona Traction, Light and Power Company, Ltd._ case.

153. It was emphasized that the progressive development of international law had produced a corresponding expansion in the scope and application of the basic principle of responsibility between States. That widening of responsibility had been demonstrated not only by the greater number of injuries which had come to be regarded as illegal and as giving rise to international claims, but also by the extent of reparation which might now legitimately be demanded. States could now be called upon to pay not only for direct, but also, indirect, damages, and in some cases they had been forced not only to make "_restititio in integrum_", but also to pay an added penalty for having breached international law. According to current juridical thought, it was the duty of society to take joint action against the State which was guilty of an illegal act. Perhaps the most important authority in that regard was the Charter of the United Nations, which spelled out in no uncertain terms the responsibilities and obligations of States. Since the Second World War, the sense of community obligation had found expression in international forums, particularly at the United Nations. The pressures and influences obstructing that irreversible trend could not negate or minimize the importance and validity of those international legal principles. It could justifiably be stated that under international law, a State which was guilty of internationally illegal conduct towards the world community would be held responsible to the community of nations. The trend of current developments was unmistakably towards collective action of a punitive nature on the part of the community of nations as a sanction for the enforcement of the international responsibilities of States in the case of particularly serious breaches of international obligations of fundamental importance for the whole community.

154. Some representatives agreed with the Commission's view that contemporary international law required the application of different régimes of international responsibility to "international crimes" and to "international delicts", as two different categories of internationally wrongful acts, and that that difference should in due course be reflected in the rules to be formulated in subsequent chapters of the draft. There could be no doubt, however, that the Commission was suggesting a radical change in the basic concept of State responsibility and, therefore, without knowing the further conclusions of the Commission in that regard no final position could be adopted on article 19. Others pointed out that the commentary to the article suggested that the legal consequences of such crimes would be more serious than those of an "international delict" regarding both the redresses at the disposal of the injured party and the States which would be allowed to take appropriate measures in response to the internationally wrongful act concerned and that in some instance it might be a question of _actio popularis_. All this involved matters requiring thorough examination before a definitive endorsement could be given.

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155. In this connexion it was stated that there was a clear trend in modern international law to recognize the interests of both the international community and the individual as being protected by rules of international law, and to give increased attention to the international legal aspects of the preservation of the human environment as a shared resource. Somewhat less clear was the impact of those developments in the primary rules on the secondary rules of State responsibility, in particular, those dealing with the content, forms, degrees and implementation of international responsibility and the settlement of disputes. A breach of the international obligation not to use armed force against the territorial integrity or political independence of any State had the legal consequences set out in the United Nations Charter. However, the legal consequences of an armed attack under the United Nations Charter could not be attached to all other international crimes. It was also added that it might be assumed that in the case of "international crimes" the provisions of Chapter VII of the Charter should apply. However, that still left a loop-hole, since the international crimes mentioned in article 19 were not all covered by the said Chapter. It was thus important to close that loop-hole in order to ensure that article 19 had an effectively preventive force.

(iv) The distinction made in the article and the implementation of international responsibility and peaceful settlement of disputes

156. Certain representatives recalled likewise that, in the course of its future work on the topic, the International Law Commission intended to examine procedures for invoking and giving effect to the international responsibility of States. Some of those representatives referred in that respect to the relationship between the powers accorded to the Security Council under Chapter VII of the United Nations Charter and the codification of the international legal rules on State responsibility. Some emphasized that such procedures would not but confirm and consolidate the powers of the Security Council. The Council would then be better able to ensure the peaceful settlement of international disputes and, as might be required, to impose sanctions or take enforcement measures. Unless it was realized that measures such as sanctions were readily available to the Security Council and could be applied, as appropriate, for the purpose of implementing the Council's resolutions, it would not be possible to curb effectively acts of aggression and other forms of international crimes and the Council would fail in its primary responsibility under Article 24 of the Charter.

157. It was said that it was high time that the long-neglected arrangements between Member States, as provided in Article 43 of the Charter, were given the consideration they deserved. Despite the growing awareness among Member States of the need for such action, the question of maintaining international security through due implementation of Security Council decisions remained unresolved. Even Security Council resolutions which had been adopted unanimously remained entirely unimplemented. Any apparent unconcern for measures to preserve international security through the United Nations might, in the case of some States, be attributed to past reliance on military alliances, within the concept of the balance of power. However, that concept was really only an escalating competition in armaments. In the case of those States which would welcome the establishment of legal order and

security through the United Nations, rather than through military power, the urge for effective action was dampened by the feeling that the task was too difficult. Other States held that international peace and security could and should be attained through the United Nations. That end should be relentlessly pursued in both the political and legal fields.

158. Other representatives pointed out that one of the reasons to fear that it would be extremely difficult in the present-day world to impose criminal responsibility on sovereign States was the insufficient institutionalization of the international community. The Security Council was a political organ primarily responsible for the maintenance of international peace and security, not a judicial organ. Under Chapter VII of the Charter, the powers conferred on the Security Council were designed as a means of maintaining or restoring peace, rather than of establishing responsibility, which was only one of the factors to be taken into consideration by the Council in making what was essentially a political assessment. Furthermore, the Security Council could also decide on preventive sanctions, which were not compatible with the régime of responsibility as currently understood. On the other hand, since Article 36, paragraph 2, of the Statute of the International Court of Justice dealt only with reparation for damages, responsibility for crimes could not be established through international judicial proceedings. If the role of a judicial organ was to be entrusted to individual States, the competence to apply sanctions or penalties might be abused, especially by the stronger Powers, and such abuses would be disruptive to the existing political and legal system.

159. It was emphasized that the reference made in article 19 to "international crimes" was not intended merely to indicate the existence of a special category of internationally wrongful acts. It would in fact introduce in the draft article the system of collective security established under the United Nations Charter, which suffered from short-comings.

160. Lastly, certain representatives considered that any dispute as to whether an "international crime" had been committed should be subject to the compulsory jurisdiction of the International Court of Justice, without prejudice to the existing powers of the Security Council under the Charter.

(b) Specific comments on the various provisions of the article

161. Most of the comments on the various provisions of the article recorded below were advanced by representatives who approved, generally speaking, article 19 as formulated by the International Law Commission. On a few occasions comments of that kind were also made by representatives who, without objecting in principle to the distinction between "international crimes" and "international delicts", reserved, however, their final position on article 19. Practically no specific comments on the various provisions of article 19 were made by representatives who opposed the article and its underlying concepts.

Paragraph 1

162. Some representatives stated expressly that paragraph 1 of article 19 embodied a firmly established rule of international law which was subject to no restriction.

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Certain representatives, including representatives who supported in principle paragraphs 2 to 4 of the article, considered it advisable to separate paragraph 1 from the subsequent paragraphs. For some of those representatives the drafting of two separate articles would underline the incontrovertible and codifying character which distinguished paragraph 1 from the remaining provisions of article 19. Others stated that such a division would help to clarify the difference of treatment in the responsibility régimes to be attached, on the one hand, to ordinary breaches and, on the other, to international crimes. The view was also expressed that by detaching paragraph 1 it would be possible to draft a new article paralleling article 17, namely with a title indicating the essence of the rule (the subject-matter of the obligation breached) and with a reference to the notion of international responsibility.

Paragraph 2

163. Several representatives who approved the underlying concepts of article 19 supported this paragraph as formulated by the Commission. They emphasized that by referring to breaches of international obligations "essential for the protection of fundamental interests of the international community" and to breaches "recognized as international crimes" by that community "as a whole", the provision distinguished breaches of peremptory rules (*jus cogens*) of international law and offences *erga omnes* from other breaches. It was also noted by some of those representatives that the provision was formulated taking duly into account certain elements of the general definition of the norms of *jus cogens* codified in article 53 of the Vienna Convention on the Law of Treaties and that, as in that article, the prerequisite of the recognition as an international crime by the international community "as a whole" did not mean that each State had a right of veto as the International Law Commission had rightly pointed out in the commentary.

164. Underlining that the rule in paragraph 2 fell into the sphere of the progressive development of international law rather than its codification, some of the representatives who reserved their final position on article 19 considered that such a rule was acceptable if one agreed with the basic principle that a special category of very serious internationally wrongful acts should be created. Certain of those representatives felt that the Commission had made a wise choice of wording in paragraph 2 in stating that the international obligation concerned must be "essential" for the protection of "fundamental interests" of the international community and that its breach must be recognized as a "crime by that community as a whole". Some other representatives belonging to the same trend of opinion considered that it was premature to discuss the formulation of the abstract definition of "international crimes" contained in paragraph 2 of article 19.

Paragraph 3

165. Referring to paragraph 3 as a whole, several representatives spoke in favour of including in the text of the article a non-exhaustive list of breaches that, subject to paragraph 2 and on the basis of the rules of international law in force, may result in an international crime. The method of clarifying the abstract rules by a number of concrete examples was welcomed by those representatives, some of whom

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recalled that paragraph 3 reflected a consensus reached in the International Law Commission and provided a framework that would facilitate the determination in concreto of the international obligations so essential for the protection of fundamental interests of the international community that their breach constituted an international crime. Without prejudice to the drafting improvements suggested, most of those representatives also shared the view that the main areas of international law in which are found international obligations the violation of which could eventually amount to an international crime were, broadly speaking, those identified by the Commission in paragraph 3 of the article. Thus, several representatives referred expressly in this respect to international obligations of essential importance "for the maintenance of international peace and security" (subpara. (a)), "for safeguarding the right of self-determination of peoples" (subpara. (b)) and "for safeguarding the human being" (subpara. (c)) as well as to the specific examples mentioned in those subparagraphs, namely aggression, colonial domination, slavery, genocide and apartheid. Some of those representatives mentioned likewise in this connexion the international obligations concerning "the safeguarding and preservation of the human environment" referred to by the Commissic in subparagraph (d) of the article. Others, however, expressed reservations regarding the inclusion of such kinds of international obligations in the enumeratic made in paragraph 3 (see paras. 175-178 below).

166. Some of the representatives mentioned above emphasized that they approved the inclusion of paragraph 3 in the text of article 19 on the understanding that the list contained therein was purely illustrative and non-exhaustive in character. In their view, the present wording of paragraph 3 would not seem to cover all the main categories of international obligations the violation of which may result in an international crime and should be supplemented as appropriate. The following main additions to the list were suggested: obligations concerning the respect of the sovereignty and independence of States aimed at protecting the existence of States as subjects of international law; and obligations relating to the preservation and exploitation of the resources which were the common heritage of mankind, like resources of the international sea-bed area and of the moon. Reference was also made in this connexion to the need to take into account in formulating examples of current developments of international law such areas as outer space, the law of the sea, and international humanitarian law. Different interpretations were advanced by certain representatives concerning the obligations referred to in paragraph 3 in the light of the present wording of some of its provisions. For instance, it was said that it was unclear from paragraph 3, as currently worded, whether an international crime might or might not result from a serious breach of international obligations prohibiting racial discrimination and piracy. On the other hand, it was noted that obligations concerning the prohibition of racial discrimination and of exploitation of foreign workers were covered by the present wording of that paragraph.

167. Some of the representatives who reserved their final position on article 19 underlined that a distinction should be made between the contents of paragraph 3 and the general principle contained in paragraph 2. Certain of those representative considered that the examples of serious breaches listed in paragraph 3 were provisionally acceptable. Others questioned the advisability of including in the text of the article a non-exhaustive list of examples of international crimes such as the one contained in paragraph 3. Two main arguments were advanced in that

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respect by those representatives. First, that by including such a list the codification of the "secondary" rules on State responsibility could become involved in areas pertaining to "primary" rules of international law which, as stressed several times by the Commission, lay outside the draft articles under preparation. Secondly, that the definition of each international crime must be undertaken with great care and be as precise as possible in view of the relevance of the principle of *nullum crimen sine lege*, particularly if the legal consequences attached to international crimes went further than the duty of the perpetrating State to make reparation. In this connexion, and as an alternative solution, it was suggested that the types of crimes could be mentioned in the commentary, an approach the Commission had followed in relation to article 53 (*jus cogens*) of the Vienna Convention on the Law of Treaties.

168. For one of the representatives referred to in the preceding paragraph, the use of the expression "may result" in the introductory sentence of paragraph 3 weakened the effect of the examples given. All the breaches mentioned were certainly, according to that representative, international crimes and many of them had in addition been the subject of international conventions. Nevertheless, the fact of enumerating them, and even more of qualifying them with the expression "such as", was highly questionable, for it was a rule of penal law that the definition of an offence was accompanied by the particulars of the penalty or sanctions prescribed for the offence. Furthermore, even if the international community had sufficient authority and power to draw up an international penal code, it would find it difficult to ensure that the prescribed penalties and sanctions were carried out. Experience showed, moreover, that States, according to the circumstances, usually resorted to acts of self-defence, to reprisals or to individual or collective economic sanctions without initiating the procedures for the pacific settlement of disputes provided for in international instruments. What was more, any restrictive enumeration was always apt to be incomplete.

169. Certain representatives welcomed the fact that each subparagraph of paragraph 3 referred to a "serious breach", since the concept of international crime must be narrowly circumscribed, particularly if it was to carry with it sanctions or penalties rather than reparations. In the view of those representatives, that very expectation raised serious doubts about the content and wording of paragraph 3, and in particular of *subparagraph (e)*, which was very general and seemed to be different in kind from the other examples given. On the other hand, the view was also expressed that to introduce a subjective element into the determination of an international crime by the use of the expression "serious breach" in the subparagraphs of paragraph 3 was inadvisable. For example, should every act of a colonial Power in contravention of a United Nations resolution be regarded *per se* as a "serious breach"? The problems raised by the introduction of that subjective element, it was added, were complicated still further in *subparagraph (d)*, which referred to the massive pollution of the atmosphere or of the seas as a "serious breach". If that subparagraph was adopted as it stood, it would undermine, in the view of those representatives, one of the most innovative concepts devised in the United Nations - namely, the exploitation of natural resources shared by two or more countries - the codification of which had already been begun by the United Nations Environment Programme.

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170. Concerning the present wording of subparagraph (a) of paragraph 3, some representatives expressed the opinion that the subparagraph should include in its examples of international crimes certain breaches of the obligation on the non-use of force or the threat of force, which had already been cited in the Vienna Convention on the Law of Treaties. While it was true that the definition of aggression had been adopted, it defined a category of acts which constituted serious breaches of the obligation not to use force, but not the obligation itself. More specifically, certain representatives felt that the reference made in the subparagraph to "aggression" should be replaced by a reference to "the use of force" or to "the threat or use of force against the territorial integrity or political independence of any State", as was stated in Article 2, paragraph 4, of the United Nations Charter. It was pointed out, in this connexion, that the Security Council had only rarely declared a State to be an aggressor, whereas it had often found States to be in violation of the prohibition of the use of threat of force. It was also regretted by one representative that the subparagraph did not mention the exception of self-defence provided for in the Charter.

171. The second main point made regarding subparagraph (a) related to the meaning to be given to the term "aggression". Certain representatives considered that such term should not be confined to "armed aggression", but should also cover other forms of aggression, in particular "political aggression" and "economic aggression". The latter forms of aggression were, in the view of those representatives, as reprehensible and as contrary to the principles of sovereignty, independence and self-determination as was military or armed aggression. One representative stressed that his delegation could not accept the text of article 19 unless it included a reference to the economic blockade of routes used by land-locked countries in the exercise of their right of free access to and from the sea as an act of aggression, even though it was not included in the provisions of General Assembly resolution 3314 (XXIX). He urged the Commission to study State conduct, other than armed aggression, which could be considered as aggression.

172. Certain representatives favoured the deletion of the words "by force" in subparagraph (b). For some of them the denial of self-determination was an international crime, whether or not it was accompanied by the use of force. Moreover, the variety of forms of force in use made it possible for colonial domination to be established or maintained without the use of force of arms. Others considered that the words concerned were superfluous because colonial domination could be established and maintained only by force, the notion of force being inherent in colonialism and neo-colonialism. It was also stated by other representatives that the wording of the subparagraph should be revised because the reference to the maintenance by force of colonial domination was ambiguous; it seemed to imply that the establishment and maintenance of colonial domination could also be affected by peaceful means, that is, with the consent of the subjects.

173. Recalling that the United Nations Charter referred to "human rights and fundamental freedoms" and that such rights and freedoms had for the most part already been defined by the international community, some representatives suggested replacing the expression "safeguarding the human being" in subparagraph (c) by the expression "safeguarding human rights" or "respect for human rights and for fundamental freedoms". In their view the use of the latter expressions would

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render the text clearer. It was also stated that the expression "on a widespread scale", which appeared in the same subparagraph, was rather subjective and imprecise. What was significant was not the degree of the international crime, but rather the importance which the international community attached to the crime.

174. Regarding subparagraph (d), certain representatives praised the International Law Commission for having paid particular attention to recent developments in international law on the subject of the safeguarding and preservation of the human environment. For them the inclusion of that subparagraph in the article appeared legitimate, since it held that only "massive" pollution was referred to as an international crime. It was suggested by one representative that pollution of the "land" might be added to the list of breaches.

175. Recalling that the formulation of an international obligation whose breach would constitute an international crime must be based on rules of international law clearly expressed and recognized by the international community, other representatives were of the opinion that subparagraph (d) should be reconsidered by the Commission with a view to determining whether pollution should not be treated as an international delict rather than as in international crime. It was not impossible that there would be formulated in the very near future a category of international obligation prohibiting what might be termed "geocide" and it could then be considered whether a breach of such an obligation constituted an international crime. But at present it was doubtful, according to those representatives, that massive pollution could be regarded as an international crime to the same extent as aggression, colonial domination, slavery, genocide and apartheid in view of the rather primitive stage of development of the international legal norms on the preservation and protection of the human environment.

176. In this connexion, it was stated that the Declaration of the United Nations Conference on the Human Environment, notwithstanding its great importance, could not fill the legal vacuum which existed in that field of international law. It was true that some legal principles and even norms already existed, and that others were likely to emerge, but it did not seem that any trend towards regarding pollution *per se* as an international crime was discernible. It was also said that legal instruments or drafts such as the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof and the draft convention on the prohibition of military or any other hostile uses of environment modification techniques had originally been conceived as a means of curbing the arms race and maintaining international peace and security. There was therefore some question as to whether a violation of their rules should be regarded as a breach of an international obligation to maintain international peace and security or a breach of an international obligation to preserve the environment. In paragraph 4 of article III of the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, for example, it was stated that if there was a serious question concerning fulfilment of the obligations assumed under the Treaty, a State Party

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might refer the matter to the Security Council to take action in accordance with the Charter. It was difficult to see how the Security Council could take action in accordance with the Charter to punish a breach of an obligation concerning the preservation of the environment.

177. It was pointed out that an examination of the text and legislative history of the Stockholm Declaration on the Human Environment would reveal emphasis on the old maxim "*sic utere tuo ut alienam non laedas*" and examples of reparation or restitution, but not at all in the concept of peremptory norms and still less in international criminal responsibility.

178. It was also stated that if only because international legal rules for safeguarding and preserving the environment remained rudimentary, a distinction must be drawn between the consequences for States of a serious breach of subparagraph (d), on the one hand, and of subparagraphs (a), (b) and (c), on the other. Such would, in particular, be the case if redress was to come through the provisions of Chapter VII of the United Nations Charter.

Paragraph 4

179. Some representatives considered it advisable to avoid the use of terms that because of their meaning in penal law could create certain problems. The convenience of using a more appropriate term than "delict" to identify the less serious internationally wrongful acts referred to in article 19 was underlined by certain representatives. They pointed out that in several domestic legal systems that term was synonymous with the term "crime" and that in some languages, particularly Spanish, the words "delict" and "crime" had essentially the same meaning. Without denying it, certain other representatives indicated that it was hard to find more appropriate words and that the terminology used in article 19 had the merit of being based on the classical tripartite distinction between "offences, delicts and crimes".

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

180. Many representatives noted with satisfaction that the Commission had made substantial progress on the topic of succession of States in respect of matters other than treaties. The important contribution of the Special Rapporteur, Mr. Mohammed Bedjaoui, through his scholarly, high-quality eighth report on the subject was stressed. He had had to unravel a mass of State practice which was often contradictory in order to elucidate the principles involved.

181. Support was expressed for the Commission's intention to concentrate on the questions of succession to public debts as well as on archives at its next session, with reports to be submitted by the Special Rapporteur on those aspects of the topic. It was considered that the question of public debts was of the greatest interest to the developing countries. In the opinion of certain representatives, if the issue of succession in respect of public debts was not disposed of, it would not be possible to make an assessment of the Commission's work on the topic.

182. The belief was expressed that the Commission should be able to complete the work on the topic in the relatively near future. Doubts were, however, voiced that an acceptable compromise could be reached on that delicate subject at an early date. Some representatives recalled that the Commission had experienced considerable difficulty in its past work because of the scope and complexity of the subject, which covered State property, public debts and credits, the legal régime of the predecessor State, territorial problems and acquired rights.

1. Comments on the draft articles as a whole

(a) General comments

183. Many of the representatives who spoke on the subject fully supported, or saw no major difficulty in, the draft articles adopted by the Commission at its twenty-eighth session. It was pointed out that they were clear and responded to the present needs of the international community. They were furthermore consistent with important pronouncements made by the General Assembly on the political and economic self-determination of peoples and nations. The Commission was said to have acted wisely in stressing respect for the right of peoples to self-determination, internal constitutional legal systems and the sovereignty of States over their natural resources. Reservations were expressed with regard to the Commission's proposals, and it was stated that, at the current stage of international law, it was not possible to lay down absolute and incontestable rules on the topic concerned. The Commission could have made a greater effort to identify the principles laid down in treaties concluded in that field, rather than proposing rules which, in some cases, seemed to be based on abstract points of view. In his view, the conventional approach would be the most satisfactory in reaching an equitable solution in that field.

184. Some representatives stressed the need for including a number of additional definitions or clarifying further some of the notions contained in the draft articles, such as "property ... connected with the activity of the predecessor State in respect of the territory", "the contribution of the dependent territory" and "equitable proportion". In connexion with the expression "unless otherwise agreed or decided" used frequently in the draft articles, it was considered that the newly independent State should decide and agree with the predecessor State on all aspects, and it was urged that this should be expressly stated in the text.

185. With regard to the structure of the draft, several representatives shared the Commission's view that it was desirable to maintain some degree of parallelism between the draft articles on succession of States in respect of matters other than treaties and those on succession in respect of treaties. Such parallelism appeared to be not only desirable but ratione materiae absolutely indispensable, particularly in the use of common definitions and common basic principles. The view was expressed, on the other hand, that succession of States in respect of matters other than treaties was governed by principles different from those governing succession in respect of treaties and that the classification of such successions, to State property for instance, should consequently be different.

186. As for the question of the procedure to be followed for the peaceful settlement of disputes which might arise from the application or interpretation of the draft articles, it was suggested that its consideration would have to wait until the draft was finalized.

(b) Choice of types of succession

187. Several representatives endorsed the Commission's basic method of considering under three broad categories of succession of States the types of succession it adopted in draft articles 12 to 16. Approval was expressed for certain modifications made in the typology of succession which the Commission had established in its 1974 draft articles on succession of States in respect of treaties so as to accommodate the special characteristics of the topic of succession in respect of matters other than treaties, while not overlooking the need to maintain some degree of parallelism between the two sets of draft articles. On the other hand, certain representatives regretted that the Commission had felt obliged to draw a distinction between States formed as a result of the separation of part of a State. It was said that in so doing the Commission had referred to a political concept, the introduction of which into the draft was questionable and which limited the freedom of the newly independent States to negotiate. It was also considered that arguments put forward by the Commission for dealing in separate articles with the concept of "succession of part of territory" which had been dealt with in a single article in the Commission's draft articles on succession of States in respect of treaties, were not convincing.

(c) Choice between general rules or rules relating to property regarded *in concreto*

188. A number of representatives welcomed the approach, which the Commission had taken based on the Special Rapportuer's eighth report, of formulating general rules applicable to all kinds of State property rather than rules relating to property considered *in concreto*. It was pointed out that questions relating to the succession of States in matters other than treaties were extremely difficult due to lack of a frame of reference and the non-uniformity of the practice of States in that sphere, and that, therefore, the Commission should limit itself to establishing general rules which the parties concerned would use as a guide in the equitable settlement of disputes. It was also hoped that the possibility of conducting bilateral negotiations with considerable freedom on the part of each party would not be unduly restricted. While enforcing the general rule approach adopted by the Commission, several representatives also approved the exception of treating the question of archives separately in view of the particular nature of problems posed by that question. On the other hand, certain representatives regretted that technical matters relating to currency, treasury and the State funds had not been dealt with explicitly in the draft articles. It was hoped that more detailed rules, representing the current state of international law, would be produced on the fate of such concrete categories of property.

(d) Distinction between immovable and movable property

189. The distinction which the Commission made between movable and immovable State property in drawing up general rules was supported by many representatives as logical and appropriate. Such a method was a felicitous innovation and a very constructive new element in drafting general rules on the subject. In the opinion of one representative, however, to treat all immovable State property as falling into a single category was an oversimplification. He pointed out that in all Roman law systems the distinction between the State's public immovable property and its private immovable property was essential. When a succession involved a Roman law country and one of the its regions which had become an independent State, immovable State property would not be transferred automatically to the successor State. While the latter State would receive *ipso facto* such public property as defensive works, railways, ports and airports, certain property in the private domain, particularly vacant buildings, would either remain the property of the predecessor State or would be the subject of specific agreements. Thus he hoped that the Commission would be able to prepare a text which would take account of all the principles in force in the main legal systems. This proposition was criticized by another representative who considered that all State property of the predecessor State should be transferred to the successor State irrespective of whether it had belonged to the public or private domain. The fact that a distinction was made in that respect in Roman law countries could not, in his opinion, justify its inclusion in a universal convention. Moreover, property within the private domain could be of great importance for the development of the successor State, and to subject its passage to special conditions could burden that State with the payment of compensation and hamper its development effort.

(e) Criterion of linkage of the property to the territory

190. Several representatives expressed their agreement with the basic criterion of linkage of the property to the territory which the Commission adopted for the transfer of State property from the predecessor State to the successor State.

(f) The principle of equity

191. Many representatives endorsed the principle of equity introduced by the Commission in some of the draft articles. As a balancing and corrective factor, that principle was believed to provide a practical solution to some of the major problems relating to succession to State property. It was also said to best meet the fundamental interests of the successor State. Several of those representatives noted that the principle was in accordance with jurisprudential doctrines and the practice of States, as well as the decisions of the International Court of Justice, particularly in the North Sea Continental shelf cases. It was recalled that in those cases the Court observed that there was no question of applying equity simply as a matter of abstract justice but of applying equity as a rule of law which itself required the application of equitable principles. Equity in abstracto, it was pointed out, had no practical meaning. Other representatives considered that, while the principle of equity was subject to certain limits or lacking somewhat in precision, it was useful in the context of the draft articles. Although the draft articles could not take the place of individual agreements, they could suggest the ambit within which States might reasonably seek agreement.

192. Certain representatives, however, stated that caution should be exercised in respect of the principle of equity because States had always mistrusted it. They referred by way of example to article 38, paragraph 2, of the Statute of the International Court of Justice providing for the procedure ex aequo et bono, which had never gained acceptance by any State. Equity was, according to one of those representatives, the absence of law; it represented natural justice as opposed to legal justice. Despite the effort of the Special Rapporteur to establish a certain nuance between the concept of equity as abstract justice of natural justice and equitable principles applicable as a result of a rule of law, he thought it to be less dangerous to resort to some vabue formulae which spoke of what would be "reasonable" and "normal", such as those contained in article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations, and articles 14 to 46 of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. Another representative also doubted the value of provisions involving concepts such as "equitable compensation", because they might be extremely difficult to apply in practice.

2. Comments on the various draft articles

Article 2

193. It was pointed out that article 2 was not sufficiently precise and might give the impression that there could be cases of succession of States which would be in

contravention of international law. Such successions, however, were null and void *ab initio* and could not produce any effect. It was thus suggested that the text should make it clear that the draft articles referred solely to cases of the formation of new States and territorial changes which occurred in accordance with the principles of international law.

Article 3, paragraph (f)

194. Certain representatives expressed their endorsement of the definition of "newly independent State" in article 3, paragraph (f).

Article 5

195. One representative doubted the appropriateness of the definition of State property in article 5 because, in his view, it was the legal order of the successor State and not that of the predecessor State which should govern the reply to the question of what was and what was not State property. He believed that as a sovereign State, the successor State was not obliged to accept the views of the legal order of the predecessor State; otherwise its freedom would be inadmissibly limited.

Article 6

196. It was suggested that article 6 would more appropriately be entitled "Passing of the rights of the predecessor State to State property to the successor State".

Articles 7 and 8

197. One representative expressed its support of the idea, incorporated in articles 7 and 8, that unless otherwise agreed the date of the passing of State property should be that of the succession of States and that such passing should take place without compensation. In his opinion, such an approach was the only one that could safeguard both the legitimate interests of the successor State and the reasonable interests of the predecessor State when succession occurred in difficult circumstances. Another representative welcomed the fact that article 8 provided for equitable protection of the interests of third States wherever that was possible.

Article 9

198. It was stressed that the general principle set forth in article 9 applied only within the limits indicated in that provision. It was at the same time pointed out that the phrase "unless otherwise ... decided" was extremely vague, since it was not clear who was competent to take such a decision.

Article 11

199. While one representative doubted the necessity of the square brackets around article 11, another considered the Commission's decision prudent since there were great difficulties in connexion with the transfer of State credits. The view was also expressed that the criterion of sovereignty over, or activity in, the territory to which the succession of States relates could only complicate the problems posed by the passing of State debts. According to that view, when the debts of individuals passed to the successor State by virtue of a nationalization law, third world countries interpreted international law in different ways and those differences in fact reflected the conflict between capital-exporting and capital-importing nations.

Article X

200. In the opinion of a representative, article X should make no reference to the successor State, so that that State would not be tempted to change the rules of internal law at the time of succession. He suggested that the article read: "A succession of States shall not as such affect property, rights and interests, which, on the date of the succession, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State". Another representative welcomed the fact that article X provided for equitable protection of the interests of third States.

Article 12

201. One representative welcomed the separate provision in article 12 of the cases of transfer of part of the territory of a State as distinct from those of separation of a part of a State as a result of the exercise of the right to self-determination, which were dealt with in article 15. He suggested, however, specifying in the text that the territories transferred were of minor importance and that the transfer was effected freely in accordance with international law. In addition to several representatives who endorsed in general terms the basic criterion of linkage of the property to the territory (see para. 190 above), certain representatives specifically approved that criterion in the context of article 12. The connexion of movable property with the activities of the State in respect of the territory in question was also considered to be a fair criterion. However, the view was expressed that the principle of equity should appear more prominently in this article. Attention was drawn, in that connexion, to the original proposal of the Special Rapporteur and to the proposal which a member of the Commission had made at the twenty-eighth session of the Commission. While being in favour of paragraphs 1 and 2 separately, one representative thought the solution envisaged in the latter paragraph cancelled out that of the first, for if the successor State considered the second solution more advantageous to itself than an agreement, it would do nothing to promote such an agreement and would even attempt to prevent an agreement from being concluded.

Article 13

202. Many representatives expressed their full agreement with the provisions of article 13. Stressing the need for including the article in the draft, several representatives pointed out that despite the progress made in the decolonization process, there were still some Non-Self-Governing Territories which had yet to achieve independence; that independence did not dispose of all succession problems; and that the Commission could not ignore the problem of newly independent States since it had made it the cornerstone of the whole draft on the succession of States in respect of treaties. It was further stated that such provisions were of particular importance for the newly independent nations which had had to pass through a period of bloodshed in order to assert their statehood.

203. One representative, however, doubted whether article 13, as currently formulated, paid sufficient regard to State practice as it had developed over the past 30 years. In his opinion, it was preferable to give greater stress to the residual nature of the rules set out in paragraphs 1 to 5 of this article, thereby following more closely the pattern already adopted in draft articles 7 and 8. Another representative emphasized that new States emerged not only as a result of the process of decolonization but also as a result of other processes, for example, social revolution, and that the Commission should take that into account in the provisions in section 2 of its draft articles.

204. A suggestion was made to define movable property in article 13 more precisely, so as to make it clear whether it included, for instance, national treaures and works of art. Moreover, the article was felt not very clear as to whether the predecessor State was obliged to return to the successor State movable property removed from the Territory before independence.

205. In the opinion of one representative, paragraph 3, subparagraph (b), could be difficult to apply, particularly if the successor State achieved its independence through armed struggle, or if hostile relations between the successor State and the predecessor State prevented any negotiation, let alone agreement.

206. The pertinence of including paragraphs 4 to 6 was particularly stressed by one representative in view of the existing international situation, in which according to his view colonialist and neo-colonialist influences continued to reign. The view was expressed that paragraph 5 should be reintegrated into article 12.

207. Paragraph 6 of article 13 was particularly singled out by many representatives as containing very important rules for newly independent States. Several representatives emphasized that the principle of the permanent sovereignty of every people over its wealth and natural resources had been affirmed in a number of General Assembly and Economic and Social Council resolutions and declarations. Particular reference was made to the Charter of Economic Rights and Duties of States, the Declaration on the Establishment of a New International Economic Order and

Council resolution 1956 (LIX). Others stressed the relationship between that principle and the right of peoples to self-determination, which no succession could contravene. Underlining the need to include paragraph 6, certain representatives stated that history had shown that the attainment of independence was far from being always peaceful and easy and that devolution agreements of a leonine character abounded. The paragraph in question was therefore a necessary safeguard provision for the protection of the interests of newly independent States, in particular their economic independence. It was from the principle of the permanent sovereignty over wealth and natural resources that the concept of the people's inalienable right to economic independence sprang, the latter being an essential complement to political independence. It was believed the formulation in paragraph 6 was an improvement on the corresponding paragraph in the draft articles proposed in the Special Rapporteur's eighth report since the principle of permanent sovereignty over wealth and natural resources was affirmed for every people and not just for newly independent States.

Article 14

208. Some representatives specifically mentioned article 14 as acceptable. However, several others were not satisfied with its provisions. It was stated that paragraph 2 of that article was unnecessary, or at least the reference to internal law in that paragraph was not appropriate. It was also hoped that the meaning of the phrase "subject to paragraph 2" in paragraph 1 would be defined more clearly. Further study was thus urged on this article, especially in the light of the other provisions of section 2.

Articles 15 and 16

209. While one representative found no difficulty in these articles, another voiced some reservations to both articles. The ideas embodied in the terms "equitable proportion" in article 15, paragraph 1 (c), and article 16, paragraph 1 (d), and the term "equitable compensation" in article 15, paragraph 3, and article 16, paragraph 2, as well as the term "equitably compensated" in article 16, paragraph 1 (b), might, in his opinion, create problems when property passed from the predecessor State to the successor State, for it was difficult to determine just what was covered by the principle of equity when applied *ex aequo et bono*, particularly in the case of the separation of one or more parts of the Territory of a State. It could happen that the separation was effected against the wish of one of the States, which accepted it only reluctantly. He also suggested putting the word "territories" in article 16, paragraph 1 (c), in the singular form so as to be in accord with the expression "the successor State concerned" at the end of that paragraph.

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

1. General observations

210. A number of representatives paid tribute to the Special Rapporteur for the topic, Mr. Richard D. Kearney, who was commended for his incisive approach to the question and whose report was considered as auguring well for the future.

211. Several representatives expressed keen interest in this topic which, it was observed, was becoming increasingly important as a result of a variety of factors, among which mention was made of the growing shortage of water resources and of the ecological repercussions of scientific and technological advances. It was further stressed that the demographic growth, the expansion of agriculture and industry and the growing risk of hunger threatening the world continually exacerbated the problem of the use of international watercourses and especially the problem of its distribution between riparian States of contiguous or successive waterways. Emphasis was also placed on the importance of the problems raised by international watercourses in relation to international economic co-operation and on the need to seek formulas which would eliminate the drawbacks created by the uncontrolled use of watercourses.

212. It was generally agreed that the International Law Commission had accomplished useful preparatory work in the field under consideration and that it had made an encouraging start. A number of representatives took the view that consideration of the subject should be intensified; in this connexion it was stated that since the Special Rapporteur appointed for the topic had not been standing for re-election to the Commission, it would be necessary to select a new Special Rapporteur at the 1977 session of the Commission. Other representatives did not share the view that the subject should receive a higher priority, although they expressed no opposition to the Commission's continuing its work in that field.

213. The need for progressive development and codification of the law of the non-navigational uses of international watercourses was stressed by several representatives; the International Law Commission was right, it was stated, to consider the preparation of general legal principles applicable to all international rivers. The opinion was, on the other hand, expressed that since each river had different historical, social, hydrological and geographical characteristics, it might be preferable to hold negotiations in order to find solutions to the particular problems of specific international rivers.

2. Methodological aspects

214. The pragmatic method and cautious approach adopted by the International Law Commission in dealing with the topic was generally commended. Attention was drawn in this connexion to the complexity of the problems involved, to the need for the Commission as a body composed of members elected in their individual capacity

to take into account the diverse interests at stake and to the importance of State experience in that sphere. With regard to the latter element, several representatives noted that only a few replies to the Commission's questionnaire had so far been received and suggested that the General Assembly should renew its invitation to Member States to submit further comments so that the Commission could base its work on a more representative sample of views.

215. Most representatives agreed that the Commission had been well advised not to take any decision on the scope of the subject. In this connexion it was stated that the question whether the principles to be formulated should be broadened to include, for example, river basins was of secondary importance and need not be pursued at the outset. The opinion was further expressed that, in view of the sharp divergencies revealed by the replies received so far, it was difficult to see how States could arrive at a consensus, at least at the present time, on a definition of the term "international watercourse". It therefore seemed more sensible to start by formulating the general principles applicable to the legal aspects of the use of watercourses rather than allowing disputes over definitions to delay the work. An a priori definition could, it was added, be a restricting factor and it appeared wiser to let the constituent elements of a definition of the term "international watercourse" appear spontaneously in the course of the work.

216. On the question of expert assistance, it was generally agreed that the Commission would at some stage have to seek technical, scientific and economic advice on some of the aspects of the topic; the view was further expressed that the choice between the various courses opened to that end - establishing an advisory committee of experts, calling in experts and technicians or combining the two alternatives - ought to be left to the discretion of the Commission. The matter, it was added, could be taken up at a future date when the work on the subject had progressed sufficiently.

217. Some representatives expressed the hope that the Commission would remain in contact with the various international forums concerned with the topic. Mention was made in this connexion of the Economic and Social Council, the United Nations Environment Programme and the United Nations Water Conference. It was further stated that the Commission might with profit keep in mind the legal studies prepared on the topic by the Institute of International Law and the International Law Association.

3. General approach to the topic

218. Some representatives, while recognizing that the drainage basin concept was of relevance for the studies concerning the harmonious development and physical integration of river basins and had been incorporated in regional treaties concluded between States on the basis of social and geographical realities such as the 1959 Treaty on the Nile River and the Niger, Senegal and Lake Chad Treaties, considered that the concept in question could not be used as a point of departure for the formulation of general legal rules. The view was expressed in this

connexion that recognition by a State of the international nature of a watercourse for the purpose of carrying out a preliminary study only had declaratory force and did not imply the establishment of legal standards and objectives, and that for the purpose of elaborating an international legal régime, State recognition of the international nature of a watercourse had to be reflected in agreements having constituent value. The opinion was expressed that the task of the Commission was to examine not the purely territorial concept of river basin but a traditional concept of customary international law, which was embodied in treaties and conventions and a corollary of which was the distinction between successive and contiguous rivers.

219. Other representatives took the view that the international drainage basin was the most appropriate concept for the study of the legal aspects of non-navigational uses of international watercourses and that the traditional concepts were too restrictive to enable the Commission to complete successfully the task entrusted to it by General Assembly resolution 2669 (XXV) of 8 December 1970. Attention was drawn in particular to the interdependence of the various parts of a watercourse or a river basin common to several States. Support was also expressed for the drainage basin approach on the ground that it would provide a broader framework for the equitable sharing of waters and for their optimum utilization by all concerned and would also promote co-operation and good neighbourliness among interested States. In this connexion it was noted, with respect to the projects being carried out in the Lower Mekong Basin under the auspices of the United Nations, that the concept of drainage basin was indispensable for the efforts of riparian countries. Mention was also made, with reference to the Senegal River, of the emergence of a new concept: beyond the joint exploitation of the river, the foundations had been laid for co-operation aimed at the integrated development of riparian States under the authority of an institution; at the legal level, the integration of the river went beyond the limits of the river basin and extended to the national territories in their entirety. In this connexion, reference was made to the principles embodied in the "Helsinki Rules" as being particularly relevant to the question. It was also said that the distinction between succession and contiguous rivers was a purely theoretical one whose aim was to overcome temporary situations which were the subject of diplomatic negotiations.

220. In expressing their views on the general approach to be taken to the topic, representatives referred to the concepts of territorial sovereignty and sovereignty over natural resources.

221. With regard to the first concept, it was stated that according to the Final Act of the 1815 Congress of Vienna what were to be taken as international were the international rivers separating or crossing the territory of two or more States and not the physical portion of land within the divortium aquarum of an international river: the fact that such portion of the territory of a State was bathed by an international watercourse did not confer upon it a status other than that of being part of the national territory. The view was further expressed that it should be made clear that the rules being formulated did not apply to waterways which originated and terminated within the territory of a single State, since the

regulation of such waterways would be regarded as interference in internal affairs. On the other hand, it was deemed illogical that the work of the Commission should be based on a definition which had been elaborated a century before.

222. Attention was, on the other hand, drawn to the statement by the Special Rapporteur that "political boundaries are irrelevant to the physical unity of a river system", a statement, it was asserted, which emphasized the need to consider the hydrographical system of a basin as a whole since measures which were or were not adopted in one part of the basin could have consequences for other parts of the basin. Mention was also made of the conclusion of the Special Rapporteur that "the riparians in a river basin have an interest in what happens in the basin as a whole" and that the management of the waters of a basin depends on respect for the interests of all States belonging to that basin.

223. As far as sovereignty over natural resources is concerned, several representatives considered that the drainage basin concept was inconsistent with that of permanent sovereignty over natural resources. In their view, the physical nature of water did not change the fact that it was a natural resource and should, as such, be subject to the principles of permanent sovereignty over natural resources, on the understanding that international watercourses which crossed or constituted the frontier with another State should be subject to the rules of international law concerning co-operation between neighbouring or riparian States. Attention was further drawn to the serious consequences which a different approach might entail in connexion with other liquid natural resources such as oil.

224. The view was on the other hand expressed that, as pointed out by the Special Rapporteur of the International Law Commission, water, unlike minerals, had a multinational character and that any action taken regarding the water of an international river by one State might produce undesirable effects in another State. The need was therefore stressed for adherence to the principle that one State could not use water within its jurisdiction to cause injury to another co-riparian State. Water, it was further said, was a "shared natural resource", which meant that the concept of ownership, generally considered as being applicable to natural resources, had not been applied to water, a resource with very unusual physical properties like cohesion and mobility.

225. With reference to the Panama Canal which, it was stated, was basically a river made navigable by the damming of the Chagres river and fed to a large extent by Panama's rainfall, mention was made of the Latin American regional preparatory meeting which had been held in anticipation of the United Nations Water Conference. At that meeting, it was recalled, the view had been expressed that water resources in the Panama Canal Zone could not be considered international waters for joint use, but were inland fresh-water resources, and a resolution supporting that point of view had been adopted. The opinion was further expressed that there was no justification for separating the Panama Canal from the territorial sovereignty of Panama or for denying that State the full benefit of its natural resources. The view was, on the other hand, held that references to the Panama Canal were irrelevant to the question of the non-navigational uses of international watercourses and that a satisfactory solution to the matters at issue with regard to the Panama Canal should continue to be sought by way of negotiation between the States concerned.

4. Aspects to be covered in the Commission's study and nature and content of the rules to be formulated

226. As far as uses of fresh water are concerned, support was expressed for the outline suggested in question D of the Commission's questionnaire covering agricultural, economic and commercial, and domestic and social uses of fresh water. Uses not listed in the outline which were mentioned included livestock raising, commercial fishing, forestry and multipurpose dams. Several representatives agreed that the Commission's studies should cover flood control and erosion problems - referred to in question F of the questionnaire; mention was also made of sedimentation and desalination. Regarding the interaction between use for navigation and other uses, it was stated that question G of the Commission's questionnaire actually raised the problem of the priority to be accorded to the various uses of water because navigation was only one use, and that since the question of the priority to be given to the various uses of watercourses came under another heading in the questionnaire, question G appeared to be superfluous. As to pollution, some representatives considered that its study should be given priority while others took the opposite view. In this connexion, it was stated that since pollution resulted from the misuse or abuse of water resources, emphasis should be placed primarily on harmonizing or regulating the social and economic uses of international watercourses.

227. With respect to the nature of the rules to be formulated, several representatives approved the Commission's intention to focus initially on formulating general principles and to make them as widely acceptable as possible. The Commission's view that those principles should have a residual character was also supported by some representatives. However, it was said that the establishment beforehand of limitations could hamper the results of the Commission's work. In this connexion, the view was expressed that while there were general basic rules which applied to all watercourses, each river system had its own characteristics and therefore called for a different set of residual rules covering specific problems; caution was therefore urged in choosing the type of rules to be adopted.

228. Regarding the content of the rules to be formulated, agreement was expressed with the Commission's conclusion in paragraph 165 of its report that it would be necessary in elaborating legal rules for water use to explore such concepts as abuse of rights, good faith, neighbourly co-operation and humanitarian treatment. Emphasis was also placed on the rule that the utilization of international watercourses should always be subject to the principle of legal responsibility, which would constitute a sort of application of the old rule "*sic utere tuo ut alienum non laedas*". Other principles which were mentioned - aside from the principles of territorial sovereignty and sovereignty over natural resources referred to in paragraphs 220 to 224 above, in connexion with the general approach to the topic - included the principle of the sovereign equality of States and that of equitable apportionment of the waters of international rivers between riparian States. In the course of the debate, reference was made to the question of the protection of existing traditional uses; divergent views were expressed in that respect. Attention was also drawn to the question of the peaceful settlement of disputes related to the uses of international watercourses and to the need to provide for effective legal machinery in this respect.

F. Other decisions and conclusions of the International Law Commission

1. The question of treaties concluded between States and international organizations or between two or more international organizations

229. Several representatives noted the fact that at its most recent session the Commission had been unable to discuss the fifth report of the Special Rapporteur on the question of treaties concluded between States and international organizations or between two or more international organizations. They welcomed the Commission's intention to resume consideration of that topic at the following session and to devote four weeks for the purpose, as this would enable it to make meaningful progress at that session in the elaboration of the corresponding draft articles. It was said that the importance of the question should not be underestimated; although it was very different from the problem of State responsibility, it could in the end prove to be as broad and as complex a question.

230. A number of representatives pointed out that the topic was related to the Vienna Convention on the Law of Treaties and that the endeavours to codify and develop it would make it possible to supplement that Convention. It was, however, said that the Commission should be careful not to transform the existing link into an analogy. Agreements to which international organizations were parties differed in many respects from agreements between States, particularly with regard to the capacity to conclude treaties, the defects which might prevent a treaty from entering into force and the procedure to be followed in concluding a treaty.

231. In the opinion of some representatives, the Commission should give priority to the topic in order to conclude in the near future its first reading of the draft articles with a view to completing the series of conventions dealing with treaty law. The agreement on such a priority was the *quid pro quo* for agreement on the scope of the Vienna Convention. The likelihood that a treaty on succession would soon be completed underlined the anomaly that would result if work on the last part of the triptych was not expedited. For other representatives, however, despite its significance, the topic was not of absolute priority; rather than hastening its work unduly, the Commission should apply itself to consideration of the growing treaty practice of international organizations.

2. Programme of work

(a) Topics included in the current programme

232. Representatives generally agreed with the programme of work adopted by the Commission for its twenty-ninth session, namely, to continue the preparation of draft articles on the highest priority topic of State responsibility and on the two high priority topics of succession of States in respect of matters other than treaties and treaties concluded between States and international organizations. It was said in this connexion that although State responsibility would present difficult problems, they might be less serious than those dealt with in 1976. Work on the

succession of States in respect of matters other than treaties would no doubt proceed rapidly. Work on the most-favoured-nation clause and on the law of the non-navigational uses of international watercourses would have to be suspended until comments from Governments had been received on the first topic and the new Special Rapporteurs to be appointed for both topics had taken up their duties. Lastly, the Commission would be able to devote a substantial amount of time to the question of treaties concluded between States and international organizations or between two or more international organizations, which the Commission had been right to set to one side during 1976 since it could not have considered it satisfactorily owing to lack of time. Also, the hope was expressed that the Commission would appoint a Special Rapporteur to deal with the law relating to international liability for injurious consequences arising out of acts not prohibited by international law.

233. Some representatives noted the Commission's decision to request the Special Rapporteur on the topic "relations between States and international organizations" to prepare a preliminary report to enable it to take the necessary decisions and to define its course of action on the second part of that topic, namely, the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States.

(b) Other topics

234. The opinion was expressed that, as the principal organ of the United Nations concerned with the progressive development and codification of international law, the Commission should not be isolated from the different aspects of the emerging field of the law of international economic relations which was of crucial importance and relevance to the world community as a whole, and to the developing countries in particular. The work of the Asian-African Legal Consultative Committee and the Inter-American Juridical Committee showed that the developing world was concentrating on the economic reorientation of the international legal order. Accordingly, the Commission should spend more time on such topics as would develop a new and a more responsive and representative international legal order.

235. The hope was also expressed that the Commission would formulate rules governing the rights and conditions of work of migrant workers. It was said that the existence of large bodies of such persons was not confined to southern Africa and that it was time for the United Nations to prepare the basis of a convention on that subject.

3. Methods of work

236. It was considered that as the work of the International Law Commission was central to the process of codification and progressive development of international law, any reform of its methods of work which might undermine or downgrade the careful research upon which the Commission's proposals were based would not be welcomed. The Commission should continue to enjoy a high degree of autonomy in the

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conduct of its work. While the Sixth Committee should exercise restraint in issuing directives to the Commission, the views expressed in the Committee should be fully taken into account by the Commission in shaping its agenda. Also, the Commission should retain sufficient flexibility to be able to take up new questions to which the Assembly attached a certain degree of urgency. For its part, however, the Assembly should show restraint in assigning new topics to the Commission.

237. The opinion was expressed that the Commission's report did not mention what more the Commission thought it ought to do but was unable to do or the reasons why that was so. Nor did it say what the Sixth Committee and the United Nations must do to further the Commission's efforts. It was perhaps time for the Commission to state whether its mandate and its method of work were adequate for its task. It should report on whether it was overburdened, on whether requests for priority consideration of topics had become unrealistic and on the ways in which the codification and progressive development of international law could be accelerated. It might be appropriate to review the relative weight to be given to certain considerations which determined the Commission's method of work. It might be necessary to consider whether the high degree of care and caution that had characterized the Commission's approach and the need to seek a broad range of comments on its proposals had not obscured, and perhaps taken precedence over, the desirable and necessary objective of concluding the study of a given subject before events rendered the work of questionable value or its implementation extremely difficult. In essence, the codification or formation of a norm of international law began with the proposals put forward by the Commission. Governments and the international community in general would then involve themselves in completing that process only if they saw and felt a sense of urgency and relevance in those proposals.

238. The view was also expressed that the present structure and capabilities of the Commission seemed to prevent it from bearing the entire responsibility for the codification and progressive development of all aspects of international law. It was, therefore, suggested that if the Commission had to choose between emphasizing codification or progressive development, it should opt for the latter and that the Commission should select a smaller range of priority subjects. In this connexion some representatives expressed the hope that the Commission would try to organize itself in such a way as to concentrate on only one or two topics at a time so that it could complete its consideration of at least one topic within the term of office of the members who were to be elected by the General Assembly at the current session. If the work of the Commission on the various topics could be more narrowly drawn, greater progress would be made in their consideration, a more comprehensive presentation of the relevant drafts to the General Assembly could be achieved and the members of the Commission would see their labours bear fruit during their tenure in office.

239. Several representatives welcomed the establishment at the twenty-eighth session of the Commission of a Planning Group for improving the methods of work of the Commission and developing guidelines to assist it in completing its work on the active subjects. It was noted that the proposal to confer on the Group the status of a permanent organ of the Commission had not been adopted. Some representatives

considered that, given the importance of planning, the Group should become a standing committee of the Commission. For some, this position could be supported provided it did not modify the traditional relationship between the Commission and the General Assembly. The opinion was also expressed that it should be left to the Commission to decide whether the Group should become a permanent institution or not. The Commission had acted wisely in taking no decision concerning the desirability of establishing the Planning Group as a permanent committee, since that decision would have been imposed on the Commission's new members. Furthermore, the *ad hoc* planning groups had done useful work during the past two sessions. The relationship between the Enlarged Bureau and a possible permanent planning group required further study.

240. On the other hand, several representatives expressed doubts regarding the wisdom of setting up a planning group as a standing committee of the Commission although one could be created whenever needed. Such a move would not speed up the Commission's work, nor make it more effective. The tasks of the planning group could be discharged by the Enlarged Bureau, which comprised present and past officers of the Commission and the Special Rapporteurs, and within which the presence of the representatives of all the legal systems in the world ensured deep and comprehensive consideration of planning matters. In their view, the proliferation of subsidiary bodies and the risk of overlapping in their work could only be detrimental to the Commission's efficiency.

241. Reservations were expressed by some representatives concerning the proposal to establish a Review Committee whose task would be to review in advance the various language texts of the draft articles for the purpose of achieving co-ordination and uniformity. It was said that the establishment of such an organ would tend to impose some limitations on the work of the Special Rapporteurs and would duplicate the work of the drafting committees. The Review Committee consequently would be an unnecessary bureaucratic procedure which would tend to retard the work of the Commission rather than enhance it.

242. A number of representatives referred to the length of the Commission's report on the work of its twenty-eighth session. The report was a voluminous document which deserved careful consideration by the Sixth Committee and by Governments as it gave a comprehensive account of the deliberations of the International Law Commission at that session. In this respect, the view was expressed that while the report had an undeniable scientific value, reflected the serious work carried out by members of the Commission and was an important reference document, sight should not be lost of the fact that it was above all a document to be submitted to the General Assembly and that its main function was to serve as a link between the Commission and the Assembly and, as such, it was being submitted for a specific purpose. It should enable members of the Sixth Committee to scrutinize the Commission's work from the point of view of their Governments and to give the Commission some idea of the likely reaction of Governments to proposals in the report. That was a worth-while task which the Committee could only carry out if it was in a position to deal in a serious and detailed manner with substantive points. The Committee could bear in mind that mere general expressions of approval

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could, under certain circumstances, give rise to misunderstanding and that if its deliberations were too vague, the Commission might assume that certain proposals were receiving more support than was the case. While it was true that the discussions in the Sixth Committee should be more specific, it was important, in order to gain time, that representatives should limit their remarks to the most controversial items and to those on which the Commission and its Special Rapporteurs needed to obtain, as early as possible, the opinions of Governments.

243. In the opinion of some representatives, the Commission's report was too long. To limit its volume it was suggested that the Commission could restrict the length of some of its commentaries, particularly by not repeating academic commentary which appeared in special reports - published as an integral part of the Commission's Yearbook and by limiting itself to cross-referencing. Some representatives considered that in future reports of the Commission the historical introduction to each chapter might be shortened, thus enabling the reader more readily to concentrate on the new material deriving from the Commission's work at its current session. An exception might be made in the case of a complete set of draft articles adopted by the Commission on first reading. In addition, the report might be issued in separate parts as they were ready, as a means of ensuring an earlier distribution of the report to allow for a more thorough discussion.

244. However, several representatives did not favour any changes in the format of the report, whose aim should be to provide the most complete account possible of discussions in the Commission. It was said that the length of the report on the work of the twenty-eighth session was not surprising, in view of the extent of the work accomplished by the Commission at that session, and that the detailed commentaries required little justification, particularly since the materials referred to were not readily available in many developing countries. No drastic changes of the format were called for, as such changes might make it more difficult for Governments and legal institutions to understand fully the nature of the work of the Commission. While for some representatives it might be possible to streamline some of the historical background material, care should be taken to ensure that sufficient background material was retained, so that delegations which might not have adequate research facilities for the necessary staff in their countries could familiarize themselves with the various issues and their history. As it was at present, the report facilitated a quicker grasp of the issues discussed than would, for example, a system of cross-references to earlier reports.

245. With regard to the seat of the Commission, some representatives considered that the Commission's sessions should continue to be held at Geneva, for the reasons given by the Commission itself in paragraph 179 of its report.

4. Co-operation with other bodies

246. Several representatives noted with satisfaction the Commission's continuing co-operation with regional bodies having responsibilities in the legal field. It had once again been represented by its Chairman at meetings of the Asian-African Legal Consultative Committee and of the Inter-American Juridical Committee, and

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observers for the Inter-American Juridical Committee and the European Committee on Legal Co-operation had submitted reports on their recent activities. Such periodic contacts and exchanges of information were extremely useful and should be encouraged.

5. Gilberto Amado Memorial Lecture

247. Several representatives welcomed the success of the lectures established to honour the memory of the great Brazilian international jurist Gilberto Amado and expressed appreciation to the Government of Brazil for preserving that tradition.

6. International Law Seminar

248. Many representatives referred to the seminar on international law whose 12th meeting, held during the twenty-eighth session of the Commission, had been attended by legal experts from 26 countries, most of them developing countries. They expressed support for such seminars, which were extremely useful not only for the participants and their countries, especially from developing countries, but also for the entire international community of legal experts. However, it was noted that the financial situation of the seminar was not entirely satisfactory It had only been possible to organize the last seminar because of the voluntary contributions from some Governments, whose generosity was gratefully acknowledged. If the situation with regard to voluntary contributions did not improve, the question of the financing of the seminar would have to be reconsidered. It was considered that the only way of ensuring adequate representation of students from the developing countries was by financing a certain number of scholarships from the United Nations regular budget.

7. Handbook on "The Work of the International Law Commission"

249. Several representatives supported the Commission's recommendation concerning the publication of a new revised edition of the handbook entitled The Work of the International Law Commission, which constituted a very valuable working instrument.

IV. DECISION

250. At its 60th meeting on 1 December, the Committee adopted by consensus draft resolution A/C.6/31/L.9 as orally amended (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-eighth 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 Articles 1 and 2 of the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, 5/ and to give increased importance to its role in relations among States,

Welcoming the fact that the International Law Commission completed the first reading of the draft articles on the most-favoured-nation clause,

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 the law of the non-navigational uses of international watercourses,

Noting with satisfaction that the International Law Commission continued to pay special attention 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-eighth 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 1977;

4. Recommends that the International Law Commission should:

(a) Complete at its thirtieth session, in the light of comments received from Member States, from organs of the United Nations which have competence on the subject-matter and from interested intergovernmental organizations, the second reading of the draft articles on the most-favoured-nation clause adopted at its twenty-eighth session;

4/ Official Records of the General Assembly, Thirty-first Session, Supplement No. 10 (A/31/10).

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

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

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

(i) Succession of States in respect of matters other than treaties;

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

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

5. Urges Member States that have not yet done so to submit to the Secretary-General their written comments on the subject of the law of the non-navigational uses of international watercourses;

6. 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;

7. Supports the request of the International Law Commission to the Secretary-General to prepare and publish as soon as possible a new and revised edition of the handbook entitled The Work of the International Law Commission;

8. 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;

9. 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-first session of the General Assembly.