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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK  
OF ITS THIRTY-SIXTH SESSION (1984)

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

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## INTRODUCTION

1. At its thirty-ninth session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 21 September 1984, to include in the agenda of the session an item entitled "Report of the International Law Commission on the work of its thirty-sixth session" 1/ (item 130) and to allocate it to the Sixth Committee.
2. The Sixth Committee considered the item at its 33rd to 47th and 65th meetings on 1 to 15 November and 7 December 1984. 2/ At its 65th meeting, on 7 December, it adopted by consensus draft resolution A/C.6/39/L.26, entitled "Report of the International Law Commission", which it recommended to the General Assembly for adoption.
3. The General Assembly, at its 99th plenary meeting, on 13 December 1984, adopted resolution 39/85 as recommended by the Sixth Committee. By paragraph 9 of the resolution, the Assembly requested the Secretary-General, inter alia, to prepare and distribute a topical summary of the debate held on the Commission's report at the thirty-ninth session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of that debate.
4. Representatives in the Sixth Committee made reference to the topic "Draft Code of Offences against the Peace and Security of Mankind" not only in the course of the debate on item 130 (Report of the International Law Commission on the work of its thirty-sixth session), but also during its consideration of item 125, entitled "Draft Code of Offences against the Peace and Security of Mankind". Thus, part B of the present topical summary has been prepared taking into account the views on the topic expressed in the Sixth Committee during its consideration of both item 130 and item 125. 3/
5. At its 3rd meeting, on 25 September 1984, the Sixth Committee, at the invitation of its Chairman, observed a minute of silence in tribute to the memory of Mr. Robert Q. Quentin-Baxter, member of the International Law Commission. Subsequently, at its 35th meeting, on 5 November 1984, the Sixth Committee, at the invitation of its Chairman, observed a minute of silence in tribute to the memory of Mr. Constantin A. Stavropoulos, also a member of the Commission. The Chairman, on behalf of the Sixth Committee, and many representatives expressed sorrow on the loss to the international legal community of two of its most devoted and pre-eminent members and offered sincerest condolences to the bereaved families of Mr. Quentin-Baxter and Mr. Stavropoulos.
6. On 7 November 1984, the Security Council and the General Assembly elected five members of the International Court of Justice. Among those elected were two members of the International Law Commission, Mr. Jens Evensen and Mr. Ni Zhengyu. At its 37th meeting, held on the same day, the Chairman of the Sixth Committee congratulated the five Judges-elect of the International Court of Justice. During the debate on the report of the International Law Commission on the work of its thirty-sixth session, numerous representatives congratulated the

two members of the Commission who had been elected to the International Court of Justice. The significant contributions which Mr. Evensen and Mr. Ni had made to the work of the International Law Commission were recalled and best wishes extended to them as Judges of the International Court of Justice.

#### TOPICAL SUMMARY

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

7. A number of representatives congratulated the International Law Commission on the work it had accomplished at its thirty-sixth session. The work accomplished was encouraging and demonstrated the Commission's desire to meet the concerns of the modern world. Appreciable progress had been achieved and useful work had been done on various topics on the Commission's current programme of work despite their complex and delicate nature. Satisfaction was expressed that work on some of the topics dealt with by the Commission seemed to be on the verge of providing results. It was essential, therefore, to enable the Commission to take into consideration the views of States, so that it might produce texts which would be acceptable to the international community.

8. Representatives believed that the Commission's activities were extremely important, as the progressive development and codification of international law made a substantial contribution to the strengthening of peaceful co-operation between States with different social systems. Reference was made to Article 13, paragraph 1 (a), of the Charter of the United Nations and emphasis was placed on the political significance of the work of the Commission and the intimate link between the political will of States to co-operate with one another and the strengthening of the international legal order. It was said that the International Law Commission was one of the most important United Nations bodies, especially as other bodies had become less effective owing to the non-implementation of the provisions of the Charter. That its work almost always led to a consensus reflecting all legal and political doctrines proved its value to mankind.

9. The primary task of the International Law Commission was, it was maintained, to enhance the effectiveness of international law. The Commission must gear its activities to the current state of international relations, help extend the areas in which they were regulated by international law, consolidate the content of existing rules and clearly formulate new legal norms applicable to the requirements of the modern world. Since its composition had been enlarged in 1982, the Commission had become a much more representative body and was in a better position to accomplish its task in the interests of the international community as a whole. It was to be hoped that it would play a more positive role in the struggle for peace and development. Gratitude was expressed for the valuable contribution made by the Commission to the codification and progressive development of international law.

10. Certain representatives pointed out that the codification and progressive development of international law constituted an essential part of United Nations activities aimed at maintaining international peace and security and strengthening

peace and co-operation among peoples. The post-war years had shown that absolute respect by all States for the main principles of international law was a necessary condition for rechannelling international relations towards détente, averting the threat of nuclear war and overcoming the current deterioration in the international climate, which had been caused by the policy of those countries which acted in gross violation of the generally accepted norms of international law and their international treaty obligations.

11. The view was expressed that far-reaching changes had had a profound impact on the environment in which legal standards were applied. The adoption of the Charter of the United Nations had upset many values of a permissive legal order and, although certain traditional circles were unwilling to accept the new realities, it was comforting to see that the Commission, in a participatory and innovative spirit, would not a priori tolerate halting the exchange of ideas or resignation in the face of difficulties. It was noted that international law, as developed in the past, had favoured the rich and mighty as against the poor and defenceless nations. A better balanced body of rules of international law required a more balanced approach and wider participation of the third world at every stage of the international law-making process, from codification of the practices of States and progressive development of law to its actual application in international adjudication and arbitration.

12. One representative felt that on the eve of the fortieth anniversary of the United Nations, it would be well to ponder the role of the Commission and the Sixth Committee in the overall United Nations scheme. In his 1984 report on the work of the Organization in 1984 (A/39/1), the Secretary-General had pointed out that during the past 40 years, more had been done by the United Nations in codifying international law than had been accomplished during the previous centuries. The Committee and the Commission could take pride in the role they had played so far in that process, but they also had the responsibility to continue and improve their own performance, thereby enhancing the public image of the United Nations as a whole. A continuing effort and an open mind were needed to remedy existing weaknesses and maximize possible improvements both in targets and methods of work, for, as the Secretary-General had said, it was only thus that the Organization would again prove to be responsive to change and continue to meet the growing expectations of mankind. The role of the Sixth Committee was not to go into matters of detail which the Commission had the expertise to accomplish, but to provide political guidance and as clear-cut answers as possible to questions raised on politically sensitive issues, when the Commission found itself deadlocked. The majority opinion of the Sixth Committee was then a determining factor in breaking such deadlocks.

13. Technical bodies of the United Nations, and especially the Sixth Committee, should not lose sight of the wider issues of social policy and of the role of international law in shaping events in the real world. The primary duty of those bodies was to contribute to making the world a better, more just and safer place through the elaboration of rules designed to protect against the abuse and the arrogance of power. He said that recently there had been some examples of the peaceful settlement of disputes through third-party settlement on the basis of the rules of international law. Those examples were unfortunately all too rare, and many other disputes remained unresolved, causing injustice and human suffering.

14. The Chairman of the Commission, in his concluding statement, emphasized that the role of the Sixth Committee as a unique and highly representative international body in the field of the elaboration of international law should be evaluated both quantitatively and qualitatively. It was important, he said, to note that there had been 75 statements made in the Sixth Committee on the report of the International Law Commission on the work of its 1984 session; that so large a number of statements reflected the importance States attached to the Commission's work and to the law-making process within the United Nations system. The fact that, of those 75 statements, 36 had been made by representatives of developing countries was worth emphasizing as proof that those countries were taking that law-making process very seriously. Qualitatively, he pointed out that the debate in the Sixth Committee on the Commission's report had been of a high intellectual and technical standard. The wealth of ideas and suggestions presented would be an invaluable asset for the further work of the Commission. The process of codification and development of international law would derive new impetus from the fruitful exchanges of ideas between the members of the Commission and the representatives of various States, as those exchanges made it possible to pin-point the particular problems relating to the main topics considered. There was no doubt that the Commission and its Special Rapporteurs would derive great benefit from those discussions through a careful study of the summary records and the topical summary that would be prepared by the Secretariat. The broad range of opinions to be reconciled in the multilateral process of development and codification of law in the United Nations called for moderation on the part of the Commission and a realistic approach to the study of the main topics.

15. On the completion of work of the Sixth Committee at the thirty-ninth session, the Chairman of the Sixth Committee said that there had been a high standard of discussion in the Committee on the progressive development and codification of international law, which had been particularly evident in the Committee's consideration of the reports of the International Law Commission, UNCITRAL and the Special Ad Hoc Committees. He emphasized the effort made by all delegations to concentrate their remarks on those issues where the views of the Sixth Committee were essential for policy guidelines, methods of approach or the acceptance of specific articles prepared by subsidiary bodies of the General Assembly. Those efforts would be helped if the International Law Commission and other bodies focused in their reports to an even greater extent on those matters for which the Sixth Committee had to provide concrete legal and political guidelines.

## B. DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

### 1. General observations

16. Several representatives expressed satisfaction at the progress made by the Commission in its work on the draft Code of Offences against the Peace and Security of Mankind. The reports prepared by the Special Rapporteur, Mr. Doudou Thiam, were commended.

17. The importance of a code of offences against the peace and security of mankind was emphasized by several representatives. They believed that the elaboration of a

code of offences was important and most timely, particularly in the light of the current international situation, characterized by the aggravation of international tension and the increased danger of nuclear war, as well as the continuation of explosive and tense situations in many parts of the world. Such a code of offences would, it was said, contribute to the development and stricter application of the principles and norms relating to the responsibility of States, groups and individuals. It would also be an additional guarantee for the strengthening of international peace and security. Developments in the world had made a code of offences more urgent than ever as acts recognized as crimes against humanity in the Charter of the Nürnberg Tribunal had been committed in various parts of the world. The adoption of a code of offences would be a major contribution towards giving effect to article 1, paragraph 1, of the Charter of the United Nations and would promote progressive development and codification of international law. A code of offences would, a number of representatives considered, assist in safeguarding the sovereign integrity of small and medium-sized countries. It would be wise, it was also said, to keep in mind what the International Law Commission had recognized in 1954, namely, that offences against the peace and security of mankind must be understood as serious threats to the international community and that the purpose of a code of offences was to give the community the means to defend itself against such threats. The view was expressed that preparation of a code of offences against the peace and security of mankind would involve a number of difficulties, particularly because of the absence of any real codification of international criminal law at the present time. The view was also expressed, however, that the topic, though sensitive and difficult, was codifiable and would promote the purposes and principles of the Charter of the United Nations. A suitable instrument reflecting a consensus in the Commission would, it was said, have a moral persuasive force of considerable value.

18. Some representatives stated that the Code of Offences against the Peace and Security of Mankind as originally conceived reflected the unique circumstances prevailing at the end of the Second World War. Since then the international situation had undergone great changes and new developments necessitating urgent resumption of deliberations on the subject were not discernible. Consideration of the topic was not likely to produce useful results for the progressive development of international law and the international community, and the Commission's time might more profitably be devoted to other more promising topics on its agenda. The view was expressed that the London and Tokyo Charters and consequent judicial actions were singular achievements. A central element in those achievements was a tribunal without which the Charters would not have come into being. There had also been the, equally necessary, element of an exceptional degree of international agreement. These necessary elements were lacking in the case of the present topic. While it was true that there had been no decision to exclude the idea of a tribunal, many delegations seemed to consider that it was prudent or possible to contemplate a code of offences without a commitment to at least consider the question of a tribunal. Also, to press for progress on the topic in the absence of the necessary level of international agreement could jeopardize the consensus that existed with regard to the achievement of the 1940s. When work was conducted in a manner which, because of lack of precision, risked converting legally important conclusions into political slogans, however popular, the risk of undoing existing achievements was all the greater and the more disturbing.

19. Some representatives considered that the Commission should accord priority to its work on the present topic. Other representatives did not consider that the topic should be accorded priority. Some representatives considered that the subject of the draft Code of Offences should continue to be considered as a separate item on the agenda of the Sixth Committee. Other representatives did not see the reason why the item should continue to be considered separately, in the Sixth Committee, from other items on the agenda of the Commission.

2. Scope of the draft Code of Offences: *ratione personae*

20. Several representatives agreed with the Commission's decision that its efforts at the present stage should be devoted exclusively to the question of the criminal responsibility of individuals, leaving aside for the moment the question of the criminal responsibility of States. The view was expressed that the Commission should concentrate at the present stage on the less controversial issues and the question of the criminal responsibility of States was, it was said, a matter on which there were substantial differences of opinion. The criminal responsibility of States, it was also noted, could not be governed by the same régime as the criminal responsibility of individuals, if only from the point of view of penalties and procedural rules.

21. Some representatives, believing that the Commission should not take up the question of the criminal responsibility of States, considered that a principle of the criminal responsibility of States did not exist in international law. Some representatives were of the view that the concept of the criminal responsibility of States was contrary to the principle of the sovereign equality of States.

22. The view was expressed by one representative that the Commission's intention to limit itself at the present stage to the question of the criminal responsibility of individuals "without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility in the light of opinions expressed by Governments" could imply that the Commission may later decide not to deal with the question of the criminal responsibility of States. The Commission, it was said, ought to have taken an unequivocal decision to address the question of the criminal responsibility of States at a later stage. The Commission, in elaborating the draft articles on State responsibility, had already dealt with important issues relating to the criminal responsibility of States.

23. Another representative, agreeing with the view that a principle of the criminal responsibility of States did not exist in international law and ran counter to the principle of the sovereign equality of States, considered, nevertheless, that it was possible to set out in the draft Code of Offences both the special international responsibility of States and the criminal responsibility of individuals for offences against the peace and security of mankind. The special international responsibility of States for such offences would mean not only that States incurred political and material responsibility for such offences but also that sanctions could be applied against them. The criminal responsibility of individuals would mean that individuals committing such offences would be subject

not only to national courts but also to norms of international law and to the jurisdiction of special international tribunals.

24. One representative stated that the Commission should not be locked into traditional and stereotypical models in its examination of penalties and punishment for crimes committed by a State. The view was expressed that, while it was not possible to incarcerate a State, other sanctions were feasible. A mere determination that a State had committed an international crime could be a sufficient response if other States had, in those circumstances, the obligations set out in article 14, paragraph 2 (a), (b) and (c) of the draft articles on State responsibility (namely, (a) not to recognize as legal the situation created by such a crime; (b) not to render aid or assistance to the State which has committed such a crime in maintaining the situation created by such crime; and (c) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b)).

25. One representative, referring to the view that the responsibility of States for acts classified as international crimes should be considered only within the context of State responsibility, stated that it would be necessary to delimit the scope of the draft Code of Offences and the scope of the draft articles on State responsibility. The possibility of keeping such a delimitation in abeyance until progress within the context of State responsibility could be evaluated should, he stated, be considered. Such a compromise may serve as an incentive to the work on State responsibility, which was advancing too slowly, but it should not serve as an excuse for indefinite delay on the question of the draft Code of Offences. The Commission's decision to devote its efforts at the present stage exclusively to the criminal responsibility of individuals was not, it was said, inconsistent with such a compromise.

26. Some representatives made the point that restricting the scope of the draft Code of Offences to the criminal responsibility of individuals would diminish the value of the Code as an instrument of prevention and deterrence, and would disregard the progressive development of the law on that subject over the past 30 years. The implications of the concept of the criminal responsibility of a State were not, it was noted, unrealistic and failure to achieve progress in that area would be tantamount to codifying, by omission, the current impossibility of ensuring strict observance of the principles of the Charter of the United Nations and of international law. The view was expressed by one representative that an appropriate connection with Chapter VII of the Charter would be a good point of departure for the elaboration, in the draft Code of Offences, of a section of the draft Code on sanctions, which could include measures of a moral, political, and if necessary, military and economic nature. Moreover, concepts of criminal law, such as complicity, duly adapted to the juridical status of a State, could be used when the international community sought to isolate one of its members who was responsible for an international crime. The establishment of a dual régime of individual responsibility and State responsibility would, it was said, be the best way to give credibility and effectiveness to the future instrument.



3. Scope of the draft Code of Offences: *ratione materiae*

27. Several representatives expressed agreement with the Commission's conclusion that, as not every international crime could be regarded as an offence against the peace and security of mankind, the draft Code of Offences should cover only the most serious international offences. Thus, they stated, they were in favour of the minimum content, and not the maximum content, approach to preparation of the draft Code.

28. One representative raised the question as to how the distinction between less serious and most serious international offences could be made. The suggestion was made that perhaps in the first instance an exhaustive list of all relevant offences should be established and that, thereafter, decisions should be taken as to the serious nature of each offence.

29. One representative was of the view that determination of the most serious international offences should be made in light of general criteria and also of relevant conventions and declarations, including elements which had emerged in the context of decolonization, the need to protect human rights and the development of jus cogens.

30. One representative considered that difficulties would arise in practice when distinctions were sought to be made between serious breaches of international law, which should be considered international crimes, and, on the other hand, such serious breaches of international law which should be considered offences against the peace and security of mankind. An evaluation of what constituted a serious breach of international law and what constituted an offence against the peace and security of mankind was largely subjective.

31. Some representatives were of the view that no distinction should be made between offences against peace and offences against security. The two concepts - peace and security - had always been considered together as in the Charter of the United Nations. The view was expressed that the two concepts were organically linked and that it would be difficult to make a clear distinction between them; and the purpose of such a distinction was, in any event, unclear.

32. Another representative thought that in the interests of clarity the Commission might further develop the concept of "mankind" and the factors specifically affecting peace and security.

33. The view was expressed by one representative that the Commission had used the expressions "offences against the peace and security of mankind", "crime against humanity" and "international crime" as if they were synonymous; though the Commission had recognized that not every international crime was an offence against the peace and security of mankind. Also, posing a choice between a "minimum content" and a "maximum content" might, it was said, imply that general agreement already existed on the crimes listed under the rubric "minimum content". It was questionable, it was said, whether all the crimes listed under "minimum content" had a sufficient connection with criminal conduct under international law.

Methodology for preparation of the draft Code of Offences

Representatives expressed agreement with the Commission's decision that the Commission should commence work on preparation of the draft Code of Offences by drawing up a provisional list of the offences for inclusion in the draft Code, bearing in mind the drafting of an introduction summarizing the general principles relating to offences against the peace and security of mankind; (b) the 1954 draft Code was a sound basis for future work (as it embodied principles in the Charter of the United Nations and principles on which the Nürnberg and Tokyo Tribunals had been established) and the offences in the 1954 draft Code were appropriate for inclusion in the provisional list of offences, with modification of form and substance to be considered by the Commission at a later stage; and (c) as to offences recognized since 1954, an inventory of the relevant legal instruments should be prepared for identification of such offences.

35. A number of suggestions were made with respect to the inventory of legal instruments to be prepared for identification of offences recognized subsequent to the 1954 draft Code. The suggestion was made that account should be taken of the Definition of Aggression and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. It was suggested that the section of the draft Code dealing with the breach of obligations of States in the field of disarmament should take into account relevant provisions of such instruments as the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water; the 1968 Treaty on the Non-Proliferation of Nuclear Weapons; the 1971 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 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction. The view was expressed that the draft Code should also reflect the international legal instruments which developed the principles of individual criminal responsibility for war crimes and crimes against humanity, including the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the 1977 Protocols Additional to the Geneva Conventions of 1949.

36. One representative stated that the Commission should take due account of the results achieved through progressive development of international law since preparation of the 1954 draft Code. One representative cautioned against the Commission's beginning its work on the present topic de novo.

37. The suggestion was made by one representative that the categorization, in paragraph 42 of the Commission's report, of the offences listed in the 1954 draft Code (namely, offences against the sovereignty and territorial integrity of States; crimes against humanity; and offences violating the laws or customs of war) might, if they were not to appear in the text of the draft Code of Offences, be incorporated in the introduction or in a preamble on the understanding that further categories may have to be introduced.

38. Some representatives considered that the Commission had been wrong to devote itself exclusively to the preparation of a list of offences instead of elaborating an introduction as the General Assembly had invited the Commission to do. If the work of the Commission was to have useful results, they said, it must be determined what in reality constituted an "offence against the peace and security of mankind". They believed that the Commission should have first established, even on a provisional basis, criteria to be used for the purpose of testing offences which had been or might be suggested for inclusion in the list called for in General Assembly resolution 38/132 of 19 December 1983. Such a procedure, it was said, would have made it possible to refine the criteria while testing proposed offences against the criteria. A listing of offences without reference to carefully worked out criteria, based on established international law, could result in a concept of offences against the peace and security of mankind as a further pejorative slogan with little specific legal content.

39. These representatives were of the view that the 1954 draft Code, notwithstanding criticisms which had been levelled at it in the past, had contained elements of a general definition in articles 1, 3 and 4. These provisions had at least established that offences against the peace and security of mankind were crimes under international law; that the responsible individuals should be punished; that if a person who had committed such an offence had acted as head of State or as responsible government official, this did not relieve him of responsibility; and that if a person charged with such an offence had acted pursuant to an order of his Government or of a superior, that did not relieve him of responsibility in international law if it had been possible for him not to comply with the order. The Commission, it was said, might have started with such elements as the first step towards the selection of criteria that would make it possible to determine what constituted an offence against the peace and security of mankind. Otherwise, what ILC had called the study of the living tissue might degenerate into an exercise that was not only in abstracto but also in vacuo and the subsequent preparation of an introduction would become mere self-validation.

40. One representative thought that the primary task of the Commission was to draw up a list of crimes which should follow a logical and coherent order and that it would be premature, before such a list was compiled, to seek to define the general criteria for the inclusion of offences in the draft Code. In his view, only after such a list of crimes had been compiled, using an inductive method, would it be possible to draw up an introductory section comprising general rules and principles.

41. One representative thought that in preparing an introduction, it would be necessary for the Commission to start from rational criteria in order to identify the most serious crimes and in order to determine their legal consequences. He thought it would also be necessary to look more closely at the causes of such crimes and study them in greater depth from the qualitative standpoint. He thought, however, that questions should also be considered from the point of view of the solidarity of the international community which was bound to adopt sanctions against a State that committed offences against the peace and security of mankind. He considered that a cautious but vigorous approach should be adopted in drawing up the list of offences and that the deductive and inductive methods should be combined.

5. Comments on the question of possible offences for inclusion in the draft Code of Offences

(a) Comments on possible offences for inclusion referred to in report of Commission

42. Colonialism. Several representatives were of the view that greater emphasis should be laid on the crime of colonialism and neo-colonialism since its horrific character and cruel effects in many cases exceeded those of aggression. A failure to recognize realities would, it was said, be an affront to the peoples of Africa, Asia and Latin America who were still suffering as a result of those shameful practices. Some representatives, noting that the term "colonialism" seemed to elude a definition which would do justice to the many forms the phenomenon of colonialism could assume, agreed with the Special Representative's use of the expression "denial of the right of self-determination" to refer to colonialism and neo-colonialism. Some representatives found unacceptable the replacement of the term "colonialism" by formulae which, in their view, did not identify the true content and scope of the phenomenon. The phenomena of colonialism and neo-colonialism, they said, had been condemned in innumerable international documents.

43. The view was expressed by some representatives that the term "colonialism" was too imprecise to form any basis for criminal legislation and was a mere political slogan.

44. Apartheid. Several representatives made reference to apartheid which, they considered, should be included in the category of crimes against humanity as it was associated with offences such as the violation of the right to life, ill-treatment of political prisoners, detained persons and freedom-fighters, force displacements of population and racial discrimination. Though some States were not parties to the International Convention on the Suppression and Punishment of the Crime of Apartheid, none the less apartheid was, they stated, a crime against humanity.

45. One representative, stating that some offences not covered by the 1954 draft Code should be taken into consideration in the present draft Code particularly apartheid by reason of its unique character as a constitutional system, expressed the opinion that he did not accept the view of some members of the Commission for whom the fact that some States have not acceded to the International Convention on the Suppression and Punishment of the Crime of Apartheid did not deprive it of its force as jus cogens, since if that were the case, a test of jus cogens should be satisfied before an offence could be placed on the list of offences. Probably any offence committed in breach of jus cogens where that was relevant to the question of peace and security should, he said, qualify for a place on the list of offences. Jus cogens, however, could only serve as a guide. It should not be employed inflexibly as a test, if only because it was notoriously difficult to determine whether a rule constituted jus cogens in the sense of a pre-emptory norm of general international law under article 53 of the Vienna Convention on the Law of Treaties.

46. Some representatives also expressed the view that it could not be said that apartheid was not an "international crime" merely because it was practised by only one country.

47. Use of atomic weapons. Several representatives were of the view that a code of offences against the peace and security of mankind could not remain silent on the use of atomic weapons which they considered to be the most horrible and inhumane of all weapons posing grave danger to mankind. Nuclear war had been defined as the gravest of all crimes in many instruments, including the Declaration on the Prevention of Nuclear Catastrophe adopted by the General Assembly in its resolution 36/100 of 9 December 1981. The Declaration of the Right of Peoples to Peace, adopted by the General Assembly in its resolution 39/11 of 12 November 1984, proclaimed that the peoples of the planet had a sacred right to peace and that the preservation of that right and co-operation in its implementation constituted a fundamental obligation of each State. The Declaration appealed to all States to do their utmost to assist in implementing that right through adoption of appropriate measures at the international level. An express prohibition in the Code of Offences against use of nuclear weapons would, it was said, constitute a significant step in that direction and provide a legal barrier which would serve as a deterrent to nuclear war.

48. One representative, agreeing that political difficulties should not stand in the way of stating a rule de lege ferenda, recalled that the General Assembly had condemned nuclear war in paragraph 1 of resolution 38/75 of 15 December 1983, resolutely, unconditionally and for all time, as being contrary to human conscience and reason, as the most monstrous crime against peoples and as a violation of the foremost human right - the right to life.

49. One representative, considering that in the absence of an express prohibition, it had to be admitted that an act could not be considered to be a crime within the meaning of article 19 of the draft articles on State responsibility and consequently did not at the present stage have a place in the list of offences, stated that inclusion of the use of atomic weapons in the list of offences could be envisaged only through a broad interpretation of the whole legal basis for the preparation of the draft Code of Offences. However, he was of the view, since the Commission was working on an international instrument which would define precise and serious legal consequences for certain acts, that vigorous criteria should be followed.

50. The view was expressed by one representative that the Commission's inability to reach agreement on the inclusion in the draft Code of Offences of the use of atomic weapons as a crime was a serious failure as one of the purposes of the Code of Offences was to serve as an important legal means of preventing a nuclear catastrophe. The use of nuclear weapons, he stated, met the criterion of seriousness and danger for the international community as a whole which was a criterion for the offences to be included in the Code.

51. Some representatives were of the view that the question of the use of nuclear weapons should not be dealt with in the Code of Offences. They were of the opinion that the Commission would risk jeopardizing its credibility and authority as a legal organ if it were to do so. The question of disarmament, including the

question of nuclear disarmament, was dealt with in the First Committee of the General Assembly. The First Committee's discussions revealed the complexity of such matters and the extent of existing divergencies of view. It would be unrealistic to believe that a consensus could emerge on the matter of characterizing the use of nuclear weapons as an offence against the peace and security of mankind. Such a characterization would jeopardize deterrence and, consequently, peace itself. Moreover, there could be no question of reformulating the principle of the non-use of force and its indispensable corollary, the right of self-defence. The view was expressed that the vague reference in paragraphs 54 to 57 of the Commission's report to the use of atomic weapons clearly illustrated the problems that existed. As the Commission had pointed out, there was no treaty forbidding the use of atomic weapons. It was therefore understandable that the Commission had decided to wait for more specific guidance on the subject. Thus, it was inappropriate that the subject should be listed as part of the "minimum content" of the draft Code. The Commission would be guilty of an error of judgement if it countenanced the proposition that the use, or even the first use, of atomic weapons was per se illegal.

52. Other representatives did not agree that, because the question of the use of atomic weapons was under consideration in other forums, the Commission should not deal with the matter. They were critical of the view that the possibility of use of nuclear weapons was a deterrence to war. They were unable to accept the view that inclusion of a specific prohibition against use of atomic weapons in the draft Code of Offences would not be acceptable to States possessing such weapons and would constitute a mere theoretical prohibition. The absence of a treaty forbidding use of nuclear weapons or arguments that prohibition of their use would deprive them of their deterrent effect could not, it was said, serve as justification for omitting to refer to atomic weapons in the Code of Offences.

53. The view was also expressed that the Code of Offences should contain provisions making nuclear war propaganda, even for a limited nuclear war, a crime against the peace and security of mankind.

54. Environment. Some representatives expressed the view that serious damage to the environment should be included as an offence in the list of offences against the peace and security of mankind. The point was made that article 19 of the draft articles on State responsibility recognized that, under certain circumstances, causing serious damage to the environment could be considered an international crime. One of the reasons for the partial test ban on nuclear weapons, it was noted, was the enormous damage to the environment caused by nuclear-weapon tests.

55. The point was also made that not all damage to the environment would constitute an offence against the peace and security of mankind and that, indeed, not all damage to the environment would constitute an international crime within the meaning of article 19 of the draft articles on State responsibility. It was noted that under paragraph 3 (d) of article 19, environmental damage would be considered an international crime if it resulted from breach of an international obligation and if the international obligation was of essential importance for the safeguarding of the environment. Thus, the question to be resolved, it was said, was whether a crime within the meaning of paragraph 3 (d) of article 19 should or should not be considered an offence against the peace and security of mankind.

56. Mercenarism. Several representatives considered that mercenarism in so far as it was used to infringe State sovereignty, undermine the stability of Governments, or oppose national liberation movements was a crime against the peace and security of mankind.

57. Some representatives stated that use of the term "mercenarism" in the report of the Commission led them to fear that a decision by the Commission to employ such a term may prejudice the outcome of the negotiations currently being undertaken in the Ad Hoc Committee on the Drafting of a Convention against the Recruitment, Use, Financing and Training of Mercenaries. Several representatives supported the view that the Commission should await the outcome of the work of the Ad Hoc Committee. It was also noted, however, that in the Ad Hoc Committee the view had been expressed that mercenarism was an international crime against the peace and security of mankind and that the Ad Hoc Committee was not the proper forum for discussing the matter as it was before the Commission.

58. Some representatives were of the view that the crime of mercenarism should be included in the draft Code of Offences independently of the work of the Ad Hoc Committee.

59. Taking of hostages, internationally protected persons, hijacking of aircraft. Some representatives were of the view that international delicts such as the taking of hostages, the threat of, or violence against diplomatic or other internationally protected persons, or serious disturbance of the public order of the receiving State by a diplomat or other internationally protected person, or the hijacking of aircraft, could impair the peaceful coexistence of States but could not be characterized as offences against the peace and security of mankind and, thus, should not be included in the draft Code of Offences.

60. One representative was of the opinion that the taking of hostages, the hijacking of aircraft, violence against persons enjoying diplomatic privileges and immunities and piracy should be treated on the same footing. They were politically motivated actions and were condemned under positive law or customary law. There was no doubt that those responsible for such actions should be punished. If the Commission were to follow the example of the 1954 draft Code, such offences would be covered in the new draft Code of Offences to the extent that they were committed or authorized by a State. Acts committed by individuals not acting on behalf of States would be treated in accordance with the provisions of existing specific conventions. Thus, in the view of this representative, the question arose whether there should be two different régimes applicable to the same offence: one applicable to individuals acting on behalf of a State and the other applicable to individuals acting on their own behalf. He was of the opinion that in principle two régimes should apply to ensure that acts committed on behalf of States were punished.

61. The question was raised by one representative whether the new draft Code of Offences should make specific reference to offences which, in the 1954 draft Code, were included under the general heading of terrorism. If the list of offences in the 1954 draft Code was maintained, and it seemed that the Commission had decided that the 1954 list should be maintained, it could be argued that it was unnecessary

to specify such offences in the new list of offences. If the Commission were to adopt a different approach, the question, in his view, would have to be re-examined. The list in the 1954 draft Code should, he believed, be revised before a final decision was taken on the matter.

62. Economic aggression. Some representatives considered economic aggression a contemporary phenomenon whose numerous manifestations included the undermining of the principle of permanent sovereignty over natural resources, direct military intervention in defence of "vital interests", and coercive measures against Governments which exercised prerogatives inherent in sovereignty such as nationalization.

63. Some representatives expressed the view that the concept of economic aggression did not lend itself to precise legal definition and should, therefore, not be included in the Code of Offences. Moreover, it was stated that the 1954 draft Code already prohibited the use of economic measures as a means of intervention in the affairs of another State. More serious acts, such as taking possession of another State's natural resources by force, were included in the Definition of Aggression adopted in 1974.

64. One representative said that the matter was closely connected to the question of the new international economic order and that it would be premature, before that order came into effect, to establish a category of economic crimes. In that connection, his delegation had, at other occasions, spoken against certain aspects of the new international economic order, and its position had not changed.

65. One representative reserved his position on the question pending the elaboration of a legal definition of the concept of economic aggression.

66. Some representatives were of the view that the Commission should start its consideration of the question of economic aggression with article 2, paragraph 9, of the 1954 draft Code. They considered that "intervention ... in the internal and external affairs of another State, by means of coercive measures of an economic or political character" commenced when such measures became the sole explanation for a course of conduct adopted by a State against its will. They added that the 1974 Charter of Economic Rights and Duties of States also prohibited such actions. Article 32 of the Charter provided that "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights".

67. Some representatives expressed the opinion that those phrases were ambiguous because, in their view, it could not be clearly determined at what moment the economic measures became coercive.

68. Piracy. The view was also expressed that piracy on the high seas, considered a crime under customary international law, was unlikely to constitute a threat to the peace and security of mankind if confined to a limited geographical area; and that it should not be included in the provisional list of offences to be prepared by the Commission.



(b) Comments on other possible offences for inclusion

69. One representative was of the view that war propaganda and incitement to hatred among peoples should be expressly prohibited as they constituted psychological preparations for the commission of grave international offences.

70. One representative was of the view that slavery and slave trade should be covered by the draft Code of Offences.

71. One representative was of the view that torture should be covered by the draft Code of Offences.

72. Some representatives were of the view that the crime of genocide should be included in the draft Code of Offences as a crime against humanity.

6. Question of implementation of a draft code of offences

73. The view was expressed by some representatives that a code of offences against the peace and security of mankind would not in itself ensure the peace and security of mankind and that establishment of mechanisms for implementation of provisions of the code would be necessary. There would be difficulties to be considered but the progressive development of international law required development of the necessary instruments for application of the law.

74. Some representatives considered the establishment of an international criminal tribunal, having the competence to conduct trials and to ensure implementation of sentences, to be necessary. The view was expressed that such a tribunal should also have the competence to consider claims for reparations submitted by victims of international crimes or their dependants.

75. Other representatives were of the view that establishment of an international criminal tribunal had not been successful in the past, was not appropriate to the current state of international relations, and did not conform to the principle of sovereign equality of States.

76. One representative was of the view that establishment of an international criminal tribunal was unlikely in the foreseeable future and that, until the establishment of such a tribunal, attempts to codify the law on the present topic might result in providing a spurious basis for victors to impose justice unilaterally upon the vanquished or for a group of States politically to condemn an individual or group of individuals without due process of law.

77. Some representatives considered that jurisdiction over offences under the Code should in principle be entrusted exclusively to national courts although the possibility of establishing in the future, if necessary, an ad hoc international criminal court should not at this stage be excluded. The opinion was expressed that although it seemed necessary to establish an international criminal jurisdiction to try individuals for acts attributable to a State ("State authorities" of the 1954 draft Code), individuals whose acts were not attributable to a State could be tried by national courts.

78. The point was made that statutes of limitation should not apply to offences under the Code of Offences and that judgements of the Nürnberg and Tokyo Tribunals would provide necessary precedents.

79. The point was made that appropriate rules on jurisdiction, judicial assistance and extradition should be envisaged.

C. STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG  
NOT ACCOMPANIED BY DIPLOMATIC COURIER

1. General observations

80. The considerable progress achieved on the topic by the Commission at its last session was acknowledged and appreciated. Appreciation was also expressed for the work and the reports of the Special Rapporteur, Mr. Alexander Yankov.

81. The progress achieved by the Commission, it was pointed out, had been realized in spite of the difficulties encountered and the problems left unresolved, such as the questions concerning the jurisdictional immunity of the diplomatic courier and the inviolability of the diplomatic bag. The draft articles so far provisionally adopted have provided sound basis for further work on the topic. In the view of one representative, the Commission had shown encouraging awareness of the growing problem of abuse and appreciation of the danger that provisions which were too elaborate or which granted new immunities to the bag or the courier would not be acceptable to Governments. Such concerns, it was said, should remain in the forefront of the Commission's thinking. In the view of another representative, all the groundwork had been done and only policy and philosophical differences stood in the way of consensus.

82. Some representatives stressed the importance of the topic and the need for its codification and progressive development. Diplomatic couriers and diplomatic bags, it was said, were one of the most important means of communication for States in carrying out their foreign policy. The constant maintenance of unimpeded communications between States and their representatives abroad was an inalienable element of international relations. Maintenance of normal inter-State relations presupposed that favourable conditions were ensured for delivery of bags. The importance of the question, together with infringements of the inviolability of bags, called for urgent codification and development of the principles governing the status of the courier and bag, which were only partially consolidated in the 1961 Vienna Convention on Diplomatic Relations and other multilateral treaties. The importance of the question was a direct consequence of the rapid evolution of the diplomatic function which had always been considered a means of harmonious communication among States and intended to reinforce mutual trust and foster the peaceful settlement of disputes. All States, regardless of their political and social systems, had taken care to protect the diplomatic function, especially since relations between States were currently gaining in scope and taking forms as diversified as they were complex. The diplomatic courier's role was crucial and his status required more specific and more complete legal protection. Should there be a case in which the courier was not sufficiently protected, his mission would be

impeded, and that would seriously affect the proper functioning of diplomatic and consular missions. The diplomatic courier was an indispensable factor in the exercise of the diplomatic and consular function.

83. Other representatives expressed reservations as to the advisability and usefulness of undertaking the codification and progressive development of international law on the topic. They were of the view that the question was already covered by treaty law in all significant respects. A consolidation of rules was required rather than a codification and progressive development of the law. The international community should be concerned not with inadequacies in but with failures to observe existing law which sometimes amounted to flagrant breaches of law. All States must adhere to the law, in particular to provisions requiring that diplomatic bags carry only diplomatic documents and articles intended for official use. The present topic had been accorded undue urgency and importance. Other topics, which concerned international peace and security, were of far greater significance and should be accorded priority. The draft articles on the topic were not really necessary in view of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. The relatively few problems that had arisen over the years had generally concerned abuses, and the draft articles not only failed to deal with abuses but provided extra protection for abusers. The existing legal framework, as set out notably in the 1961 Vienna Convention on Diplomatic Relations, was not inadequate. There appeared to be no urgent need to draft a separate convention regulating the legal status of the diplomatic courier and unaccompanied bags. It was more important that each State should increase its efforts to ensure observance of existing rules. One representative expressed doubt as to the work accomplished thus far both in terms of substance and in terms of time taken from other, more important, topics such as State responsibility. The Commission, it was stated, should give serious consideration to whether its formulations would receive the general acceptance necessary for successful codification. Various codification exercises in the past that could have represented useful contributions to international law had become dead letters because of a failure to realize at a sufficiently early stage that certain elements simply would not, in the long term, be generally acceptable to the international community and would therefore be void of any practical effect.

84. Some representatives did not agree that, in view of existing conventions on diplomatic and consular law, no need existed for separate codification of the present topic. Codification was, in their view, one of the main means of ensuring respect for existing norms and the relevant provisions in existing documents were very general, dispersed over a number of conventions, and needed to be given practical form, in view of the importance of the subject and the problems that had arisen in practice. Though doubts had been expressed as to the timeliness of the exercise, the issue related to a sphere of legal relations whose importance was such that it was not possible to merely continue with the relatively satisfactory state of established practice. Once diplomatic law had been organized and codified in four international conventions it became necessary to unify rules governing practical questions. A clearly defined régime regulating the legal rights of the courier and the unaccompanied bag would guide States in their mutual relations. Although abuses existed and must be eradicated, the interests of States were paramount and must be protected in order to safeguard their sovereign rights. As

to the view expressed by some representatives that similar instruments had not received general recognition and not entered into force, this disregarded the fact that the 1963 Vienna Convention on Consular Relations had entered into force even though not every State agreed with all its provisions.

85. Some representatives, without denying the usefulness of a measure of codification of the topic, remained critical of the draft articles being considered by the Commission from the point of view of their degree of detail and the numerous matters covered, notwithstanding the Drafting Committee's efforts at simplification. The point was made that the original purpose was to bring together in a single instrument the rules that could be found in a variety of instruments. It was a consolidation rather than a codification or progressive development of the law. The Special Rapporteur had gone beyond that original and somewhat modest conception. He had produced a more comprehensive codification than had been anticipated. Under certain conditions, such a codification might serve a useful function. It was uncertain, however, whether at the present time it was prudent for nations to be preparing a draft convention that at the very least gave the impression of enhancing the scope of immunities or of consolidating and expanding them. The Commission's current draft ran the risk of being too broad in scope and too detailed, as was demonstrated by the number of articles. The draft articles were, moreover, similar to those in the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations. The Commission should redouble its efforts to limit the scope of the draft articles. The formulation of acceptable provisions required appreciation of the priorities of the international community and the credibility States placed on the intentions, motivations and acts of other States. The draft articles should not extend beyond the parameters of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. The Commission should not produce a new set of concepts which would serve only to open new spheres of discussion rather than unifying elements that already constitute acceptable practice. The desire to enter into details seemed to make consideration and final adoption of the draft articles more difficult. The length of the draft articles militated against their practical implementation.

86. The main objective of the Commission, it was observed, should be the consolidation into a single instrument of existing rules of international law relating to the diplomatic courier and the diplomatic bag, making the rules more precise where necessary. The focus of attention should be the bag, since the courier was only the means employed by Governments for delivery of the bag. The possible abuse of the privileges and immunities of the courier should not be in the forefront of consideration. Also, it was important to recognize that some Governments were not in favour of further extension of privileges and immunities or anything that might be perceived as such. The Commission should not attempt, therefore, to elaborate a draft convention equal to or rivaling the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations but should adopt a more prudent approach and shorten the draft articles considerably, thus perhaps enhancing their chances of acceptance. The increased misuse of the diplomatic bag generated scepticism as to the principle of the inviolability of the bag. The draft articles should provide adequately for the prevention of misuse, if the Commission's work on the topic was not to be merely an academic exercise. The present draft articles on the diplomatic courier were so elaborate and extensive

that they conveyed the impression that every bag was accompanied and that couriers stayed at places for long periods. The draft articles did not reflect existing practice and went beyond the régimes established by the 1961 or 1963 Vienna Conventions. They needed to be adapted, in that light, as well as in order to balance the interests of all States concerned.

87. A number of representatives expressed support for the draft articles being made applicable to all types of couriers and bags. A uniform régime governing the question would reduce uncertainty. While there were clear rules in the relevant multilateral conventions, problems occasionally arose, not necessarily because of abuse, but rather because of different views as to the legal aspects of a particular situation or the scope of a particular rule. There was a need for functional rather than doctrinaire rules to serve the interests of States in maintaining friendly relations. To limit the scope of the draft articles to the diplomatic courier and the diplomatic bag in the strict sense would make for further debate in the future on other categories of courier and bag.

88. Some representatives believed that the eventual convention should cover the status of all couriers and bags used for official purposes. Some representatives expressed hope that the purpose of unifying all relevant provisions would not lead to grant of maximum status to diplomatic couriers. The point was also made that all bags should not be treated in the same way as diplomatic bags, and that the text under consideration should deal only with the diplomatic courier in the strict sense and the diplomatic bag not accompanied by diplomatic courier, to the exclusion of any other category of bag including the consular bag.

89. Some representatives emphasized that diplomatic couriers were not diplomats or members of the technical and administrative staff of missions or members of special missions. Reliance on the 1969 Convention on Special Missions, which after 15 years was not in force and was thus a warning against the granting of excessive privileges and immunities, was inadvisable. The reference made in the Commission's report to a diplomatic courier as an officer of State could be applied to almost any civil servant and did not justify a grant of privileges and immunities. Privileges and immunities were not rights but extraordinary legal exemptions which required explicit justification. The Commission should re-examine the functions of the diplomatic courier and should limit the privileges accorded him to those necessary for performance of such functions. The facilities to be accorded the diplomatic courier, it was observed, should be considered as a separate case. There was no reason to equate the diplomatic courier to a diplomat or to a member of the administrative and technical staff of a diplomatic mission in order to reduce certain rules. The protection accorded the diplomatic courier was intended to facilitate free communications of diplomatic missions. The criterion to be used in such a case was a functional criterion, having regard, in particular, to the temporary nature of the courier's function. The rules laid down on that matter by the 1961 Vienna Convention on Diplomatic Relations should not be amended. The sole aim should be, without altering the instruments in force, to find solutions to practical problems that remained unsolved under existing provisions. Though it was true that the practice of sending and receiving classified documentation through diplomatic bags carried by couriers was of long standing and indisputable value, and should be respected, the courier should be accorded immunities and privileges

to the extent that they were essential for the smooth conduct of his functions. Practical necessity should be regarded as the key element in the definition and elaboration of the courier's immunities and privileges. The courier should enjoy immunities and privileges provided he was acting in the performance of his official functions.

90. One representative, stating he was considering the question from the perspective of third-world countries, observed that the courier's status as well as the privileges, immunities and facilities to be accorded him appeared to be dictated by functional necessities, namely, the performance of the task of receiving, carrying and delivering a bag to its destination. A courier who was not concurrently a diplomatic agent could enjoy his privileged status, immunities and inviolability only ratione materiae not ratione personae. Third-world countries would have to decide with greatest care the extent of the privileges and immunities to be accorded couriers, which should reflect the practical need for complete security of the carriage and delivery, as well as the confidential nature of the messages transmitted through couriers, without imposing unnecessary hardship or burden upon the receiving and transit States. A proper balance should be achieved and the views of the third world, however varied and unharmonized, needed to be taken more fully into consideration. The Commission, it was pointed out, must seek to present final draft articles likely to be acceptable to the large majority of States. A large number of small developing third-world countries rarely used special diplomatic couriers and were therefore especially sensitive and somewhat circumspect in extending excessive privileges and immunities to the diplomatic couriers of other States.

91. Another representative, considering the extent of privileges and immunities to be granted the courier, stated that if there was controversy on the matter such controversy could only concern exemptions not covered or not readily derived from the 1961 Vienna Convention on Diplomatic Relations. The Commission, in order to determine the acceptability of proposals, should consider whether they represented custom in the form of State practice or were in accordance with the direction in which the law should be progressively developed. It was in that flexible and pragmatic spirit that the question of privileges relating, for instance, to temporary accommodation and means of transportation should be approached. Care should be taken in dealing with cases where a diplomatic agent performed the functions of a courier and was thus granted a status different from that of a diplomatic agent, since he would enjoy greater or lesser privileges according to the function he was performing. The view was also expressed that it should be clearly provided that in cases where a diplomatic agent performed the functions of a courier he had the privileges and immunities which attached to him in his capacity as a diplomatic agent. The role and functions of the diplomatic courier was an issue that must be treated in such a way as to strengthen peaceful and friendly relations between the sending State and the receiving State and avoid abuses of privileges and immunities. Account should be taken of the temporary nature of the functions of the diplomatic courier, whose stays in receiving or transit States were brief. Thus he must not be accorded privileges and immunities identical to those of representatives accredited to Governments who required such privileges and immunities for longer periods.

92. Some representatives considered that there was a clear tendency in the Commission and in the Sixth Committee to belittle to a certain extent the role and hence the legal status of the diplomatic courier. The argument that his status should not be assimilated to that of diplomatic personnel, on the ground that his mission was temporary, and that his personal inviolability should be based on the principle of functional need, was objectionable since it was being used as a means of weakening the legal protection accorded the diplomatic courier. Work on the draft articles must take account of the importance of the courier's functions and not lose sight of the fact that privileges and immunities were granted not for personal benefit but for fulfilment of official functions. The temporary nature of the courier's missions must not serve as ground for unjustifiably limiting his legal guarantees in the receiving and transit States. Reference to abuses of the diplomatic bag did not constitute valid arguments for such restrictions. The immunity of the diplomatic courier was a basic principle, any deviation from which should be expressly provided for and limited to cases where there were serious grounds for believing that the courier had abused the confidence of the receiving State.

93. The question of the extent of privileges and immunities to be granted the courier as well as the amount of protection to be accorded the bag was associated by several representatives with the need for achieving appropriate balance between the interests of the sending State and the interests of the receiving and transit States. A realistic balance was necessary between the principle of inviolability and the principle of respect for the laws and regulations of a State. The purpose of immunities was not to benefit individuals but to ensure efficient performance of diplomatic functions. Additional legal regulation in this field should be based on an appropriate balance between the sending State's interest in maintaining confidentiality and speedy communications with its missions abroad and the receiving or transit State's interest in preserving its security. A balance had also to be sought, it was observed, between the need to protect the diplomatic bag and the wish not to infringe the sovereignty and security of either the receiving or the transit State.

94. Another representative emphasized that the courier's status as official agent of a Government was also a consideration of importance. It was necessary to strive for a qualitative and quantitative balance between the two elements of the issue, namely, the diplomatic courier and the diplomatic bag, just as it was necessary to balance the interests of States in each of the three possible situations they might find themselves (that of sending State, transit State or receiving State).

95. The view was expressed that the approach of the Special Rapporteur and the draft articles provisionally adopted by the Commission had already reflected a proper balance among the interests of the sending, transit and receiving States; the role of the diplomatic courier and the extent of the immunities granted him; and the safeguards provided for protection of the inviolability of the diplomatic bag.

96. As to the form of the legal instrument to be prepared by the Commission with respect to the diplomatic courier and the diplomatic bag, some representatives referred to an "international legal document" or to a "universal document" or a

"universal legal document". Other representatives referred to a "legal instrument" or to a "binding legal regulation". Another representative stressed that the draft articles should be adopted in the form of a convention and not as a protocol or other supplement to existing instruments. The view was also expressed that there appeared to be no urgent need to prepare a separate convention on the topic.

97. Some representatives expressed preference for a simpler structure in the Commission's report on the present topic. They were of the view that the report, rather than being presented in the chronological order in which consideration of the topic had proceeded in the Commission, should be presented article by article and should deal successively with: the Special Rapporteur's presentation of his report; the Commission's comments on the presentation; the Special Rapporteur's observations on such comments; the Drafting Committee's report; and, finally, the text of the articles provisionally adopted with the commentaries.

98. As to the future work of the Commission on the present topic, several representatives were of the view that the Commission should complete a first reading of the draft articles at its thirty-seventh or thirty-eighth session. One representative considered that the Commission would complete examination of the topic at its next session, while others hoped the draft articles could be finalized before expiration of the present membership of the Commission. Some representatives were of the view that the topic should be considered by the Commission on a priority basis because of the importance and universal character of the problem and the urgent need for comprehensive and uniform regulations.

## 2. Comments on draft articles

99. Comments were made on the following draft articles: draft articles 1, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19 and 20 provisionally adopted by the Commission; draft articles 28 to 34 and 36 to 42 proposed by the Special Rapporteur; and draft article 23 as reported by the Drafting Committee to the Commission.

### (a) Articles provisionally adopted by the Commission

#### Title

100. One representative stated that the title of the draft articles seemed narrower than their content and could more accurately be worded "draft articles on the status of the diplomatic courier and the diplomatic bag".

### Article 1. Scope of the present articles

101. One representative considered that draft article 1 was too broad in scope and allowed for possibilities of abuse. The draft article should apply solely to official communications between the sending State and its missions, consular posts or delegations, not to communications between missions, consular posts and delegations.



Article 4. Freedom of official communications

102. One representative was of the view that draft article 4 should not prescribe that the receiving State should ensure the freedom of the official communications of the sending State, which was a matter provided for in such conventions as the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions, and the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The draft article should be limited to the question of the protection of such official communications and should not touch on the question of their freedom.

Article 5. Duty to respect the laws and regulations of the receiving State and the Transit State

103. The view was expressed that the final sentence of paragraph 2 of draft article 5, requiring the diplomatic courier not to interfere in the internal affairs of the receiving or transit State, should be deleted as it was superfluous.

Article 6. Non-discrimination and reciprocity

104. One representative considered that paragraph 2, subparagraph (h), of draft article 6 limited the contractual freedom of States unjustifiably and should be deleted.

[Articles 8 and 9]

105. One representative wondered whether draft articles 8 and 9 were indispensable, or whether they should not simply state that unless the receiving State so agreed, the diplomatic courier should neither be a national of the receiving State nor, unless he was a national of the sending State, a permanent resident of the receiving State.

Article 8. Appointment of the diplomatic courier

106. One representative considered that there was an inconsistency between draft article 8 and the definition of a "diplomatic courier" in draft article 3. Another representative considered that draft article 8 added nothing to draft article 3.

107. Another representative was of the view that draft article 8, as provisionally adopted, especially when considered in relation to draft articles 11, 12 and 14, afforded a clear example of the problems caused by using the above-mentioned Conventions as model. The draft articles gave the impression that the diplomatic courier, once appointed, remained in his functions until the sending State declared them terminated or unless the receiving State declared the courier persona non grata. They also implied that the sending State communicated the name

of the courier to the receiving and even the transit State. This was not the case in practice. The draft articles, especially draft article 11, did not adequately recognize the limited duration of the functions of the diplomatic courier.

[Articles 9 to 12]

108. One representative considered that draft articles 9 to 12 appeared to maintain a reasonable balance between the interests and concerns of the sending and receiving States.

Article 9. Nationality of the diplomatic courier

109. One representative considered that the wording at the end of paragraph 2 of draft article 9 was too elastic and might give rise to abuse of the rights there prescribed.

Article 10. Functions of the diplomatic courier

110. One representative considered draft article 10 quite satisfactory.

111. Another representative suggested inserting the word "exclusively" in the draft article to make it clear that the diplomatic courier should never be entrusted with functions other than taking custody, transporting and delivering the diplomatic bag.

Article 11. End of the functions of the diplomatic courier

112. One representative noted the absence in the draft articles of a parallel provision on the commencement of the diplomatic courier's functions.

113. Another representative wondered whether the draft article, which provided for the possibility of terminating the courier's functions through notification, was useful. A similar notification, provided for in article 43 of the 1961 Vienna Convention on Diplomatic Relations, was necessary for diplomatic agents because of the permanency of their functions. It was not necessary, however, for couriers. Their functions were temporary and their privileges and immunities were of limited duration, a matter governed by article 27, paragraphs 5 and 6, of the 1961 Vienna Convention and reflected in the draft article proposed by the Special Rapporteur.

114. See also comments on draft article 11, noted under article 8 above.

Article 12. The diplomatic courier declared persona non grata or not acceptable

115. The opinion was expressed that the transit State, which was to accord the diplomatic courier the same privileges and immunities as those accorded by the receiving State, should be granted the right to declare a diplomatic courier persona non grata.

116. The view was expressed by one representative that the Commission should review draft article 12 in light of provisionally adopted draft article 14 and draft article 39 as submitted by the Special Rapporteur. The point was made that prior to commencement of a journey, the problem posed by couriers who were personally undesirable could in most cases be settled by refusal of a visa, but that in the course of a journey the question of how a courier declared not acceptable should transfer custody of the diplomatic bag would need to be resolved. This representative agreed with the observation in paragraph 147 of the Commission's report that the courier should be able to complete performance of the functions entrusted to him, namely, to deliver the bag to officials of the sending State.

117. See also comments on draft article 12, noted under draft articles 8 and 14 above.

### Article 13. Facilities

118. One representative welcomed the provisions of draft article 13, which he described as flexible in that they did not stipulate the extent or the quality of the facilities to be accorded the courier.

119. Another representative considered paragraph 1 of draft article 13 unnecessary, and paragraph 2 excessive.

120. One representative expressed reservations with respect to paragraph 2 of draft article 13. The phrase "upon request" was, in his view, obscure in that it did not clarify whether the request should issue from the dispatching State or from the courier. The point was also made that a diplomatic courier was usually expected to resolve problems he might encounter in the course of his journeys though a problem might be so difficult that it could not be resolved by the diplomatic courier alone. Thus, in a case involving a change in the courier's itinerary, article 13 should apply only if the courier was constrained to stop in a transit State not included in his original schedule and only if the sending State had no mission in the transit State.

### Article 14. Entry into the territory of the receiving State or the transit State

121. One representative wondered whether draft article 14 did not go too far in the obligations imposed on the transit State, which would not have the opportunity - given to the receiving State under draft article 12 - of declaring a courier persona non grata or not acceptable.

[Articles 16 and 17]

122. Some representatives expressed reservations with respect to the deletions and alterations made in the provisions of draft articles 16 and 17, which reduced the courier's status to a minimum. Such a restrictive interpretation of the principle of functional necessity was inappropriate for protection of the courier and the bag.

Article 16. Personal protection and inviolability

123. Some representatives considered draft article 16 satisfactory and, as the draft article, in their view, adequately provided for the protection of the diplomatic courier, supported deletion of paragraph 2 of the draft article as submitted by the Special Rapporteur (former draft article 20, reproduced in footnote 67 to paragraph 81 of the Commission's report). Attention was drawn to the last sentence of paragraph (5) of the commentary to the draft article.

124. One representative, however, considered that the text of the commentary to draft article 16 should be reconsidered in light of the number of statements that had pointed out, inter alia, that a courier was not a diplomat or an administrative or technical employee.

125. Another representative believed that the future legal instrument should contain clear-cut regulations on the obligation of States to prosecute and punish persons responsible for attacks on couriers. He felt that the original version of the draft article, submitted by the Special Rapporteur, with respect to the personal inviolability of the courier had fully met that objective.

126. Certain amendments to the draft article were suggested: inclusion of the words "the diplomatic courier" in place of the word "he" in the second sentence of the draft article, and the inclusion of the words "or any other form of restriction on his personal freedom" at the end of draft article 16 to clarify the draft article and render draft article 23 unnecessary.

Article 17. Inviolability of temporary accommodation

127. Several representatives considered that, having regard to the courier's personal inviolability and the proposed provisions for protection of the bag, it was unnecessary to provide in draft article 17 for the inviolability of the courier's temporary accommodation. The draft article also seemed functionally unnecessary in view of the short duration of the courier's functions.

128. The view was expressed that the provisions of the draft article, though excessive, made no mention of the need for the bag to be in the temporary accommodation. Another representative stated a preference for a more balanced formulation in the draft article. The draft article dealt exclusively, and perhaps too extensively, with prohibiting agents of the receiving State from entering the temporary accommodation but failed to require the receiving State to protect the premises from intrusion. Such an obligation was dealt with in paragraph (8) of the commentary, and an explicit paragraph to that effect should be inserted in the draft article.

129. Several representatives observed that, so long as there was no well-defined standard which could be used to establish a prima facie case to justify inspection or search of the temporary accommodation of the diplomatic courier, paragraph 3 of draft article 17 would open the way to abuse. The draft article had weakened the guarantee of immunity and made violations possible. They could agree with the text

of the paragraph only on the understanding that the qualifications and restrictions it contained in no case permitted violation of the immunity of the courier and the bag, their detention or delay. The suggestion was also made that paragraph 3 be deleted.

Article 19. Exemption from personal examination, customs duties and inspection

130. Paragraph 1. Several representatives considered paragraph 1 of draft article 19 satisfactory and supported the deletion by the Commission of the words: "including examination carried out at a distance by means of electronic or other mechanical devices" contained in the draft article as submitted by the Special Rapporteur. The words would, it was stated, be contrary to the security measures adopted by almost all States.

131. One representative, in favour of the deletion, noted that if diplomats were exempt from personal examination for Customs purposes, the privilege would be breached when an electronic device was used to carry out such an examination without the consent of the diplomat. The exemption in the case of diplomats was, however, in his view, implicit and not explicit in the 1961 Vienna Convention on Diplomatic Relations. Thus, to provide expressly for such an exemption in the case of a courier would seem to question the existence of an exemption in the case of a diplomat.

132. The view was expressed that though the question of personal examination of the diplomatic courier, which arose mainly at airports, was not expressly covered in the 1961 Vienna Convention, personal inviolability was such that those enjoying it should not be obliged to undergo personal examination. However, monitoring of the diplomatic courier, but not of the bag, by electronic procedures was possible. Paragraph 1, therefore, seemed acceptable provided it was made clear that the courier could claim immunity only in the performance of his functions.

133. Other representatives expressed reservations as to the acceptability of paragraph 1. One representative, noting that the exemption in paragraph 1 was said to derive from the right of the diplomatic agent to personal inviolability in articles 27 (5) and (29) of the 1961 Vienna Convention, pointed out that the 1961 Vienna Convention did not expressly provide that the diplomatic agent was exempt from personal examination. He considered that, even for purely formal reasons, the provisions concerning the diplomatic courier should be exactly the same as those concerning the diplomatic agent, and thus, the right to exemption from personal examination should simply be inferred from the context. Another representative was of the view that the present provisions of paragraph 1 were inappropriate as there was no such express stipulation in the 1961 Vienna Convention, and that, provided there was voluntary compliance with technical security procedures, adopted in the interest of the safety of civil aviation, the courier's personal inviolability seemed adequate to cover the case.

134. Paragraphs 2 and 3. Serious doubts were expressed by one representative as to the need for the provisions of paragraphs 2 and 3 of draft article 19.

135. Another representative considered that there was a contradiction between paragraphs 2 and 3. Paragraph 2 permitted entry of articles for the personal use of the diplomatic courier imported in his personal baggage, whereas paragraph 3 stipulated that the personal baggage of the diplomatic courier should be exempt from inspection. Thus, the authorities could, under paragraph 2, decide which articles were for the personal use of the courier and would be entitled to conduct a search for that purpose. Such an action, however, would be tantamount to searching the personal effects of the courier and would be prohibited by paragraph 3.

136. One representative, expressing a reservation similar to a reservation expressed with respect to paragraph 3 of draft article 17, stated that so long as there was no well-defined standard which could be used to establish a prima facie case to justify inspection or search of the temporary accommodation of the diplomatic courier, paragraph 3 of draft article 19 would open the way to abuse. He preferred the original formulation proposed by the Special Rapporteur (in former draft article 24), though the words "serious grounds" should be omitted.

137. Another representative, noting that the Special Rapporteur had, in determining the privileges and immunities to be accorded the diplomatic courier, used as a model the privileges and immunities accorded the administrative and technical staff of a diplomatic mission under the 1961 Vienna Convention on Diplomatic Relations, stated that if there was a model it should be strictly followed. Yet in draft article 19, paragraph 3, the proposal was made that the personal baggage of a diplomatic courier should be exempt from inspection when such an exemption was not accorded the administrative and technical staff of a diplomatic mission under the 1961 Vienna Convention. Thus, aside from the question whether such a privilege was justified on the basis of functional necessity, there was deviation from the established model. (It was noted that under article 37 (2) of the 1961 Vienna Convention the administrative and technical staff of the mission were accorded the privileges and immunities specified in articles 29 to 35 and article 36 (1) of the Convention. Article 36 (2) of the Convention accorded exemption from personal baggage inspection to a diplomatic agent but not to the administrative and technical staff of a mission.)

#### Article 20. Exemption from dues and taxes

138. One representative expressed the view that draft article 20 had been improved by specifying that the diplomatic courier would enjoy exemption from dues and taxes in the performance of his functions.

139. Another representative considered that a special provision in the draft article to cover cases of diplomatic couriers who might be nationals of the receiving State or the transit State was necessary.

140. Other representatives questioned the necessity of the draft article.

(b) Articles proposed by the Special Rapporteur or reported by the Drafting Committee

Article 23. Immunity from jurisdiction

141. The comments made on draft article 23 usually concerned the provisions of the draft article as reported from the Drafting Committee to the Commission, and as set out in paragraph 188 of the Commission's report. The original version of draft article 23, as proposed by the Special Rapporteur and as set out in footnote 70 in paragraph 84 of the Commission's report, was also referred to.

142. Some representatives stated that the future legal instrument should contain specific regulations on a diplomatic courier's immunity from the jurisdiction of receiving States and transit States. The courier was an official agent of the sending State, exercising official State functions in connection with the transport of the diplomatic bag. The courier needed absolute protection to carry out his mission; and the sole object of draft article 23 was to codify the practice of States and to strengthen the legal authority of the provisions applicable to the courier in the four Vienna Conventions of 1961, 1963, 1969 and 1975. Moreover, draft article 23, which granted the courier immunity from arrest, detention and criminal proceedings, in no way duplicated draft article 16, but instead completed it. Some representatives expressed preference for the original version of draft article 23, as proposed by the Special Rapporteur, rather than for the draft article as reported by the Drafting Committee. Privileges and immunities, it was said, were granted to the courier on account of his function, which was to deliver the diplomatic bag with the required dispatch. Draft article 23 as presented by the Special Rapporteur was essential for enabling the courier to fulfil his mission under the best conditions. The fact that a courier's functions were not of a representative kind should not be used to determine the scope and nature of the protection afforded him. The minimum guarantee of adequate protection would be unconditional immunity from criminal jurisdiction and functional immunity from the civil and administrative jurisdiction of receiving or transit States. The fact that the courier's mission was of very short duration underlined the need to guarantee its prompt performance.

143. Other representatives expressed serious doubts concerning draft article 23, particularly with respect to the provisions appearing within brackets concerning immunity from jurisdiction and exemption from obligations to testify. The argument that respect for the sovereignty of the sending State required the grant of immunity was not, in their view, persuasive. They expressed support for the views expressed in paragraph 190 of the Commission's report. Of the two sovereignties involved, that of the receiving or transit State was more immediately affected. The qualification of territorial jurisdiction which the grant of immunity would entail had to be justified by functional need. The Commission must be objective in its approach but it was questionable whether serenity was an appropriate state of mind when certain recent events involving abuses of immunity were under consideration; and to characterize responses to such abuses of immunity as "over-dramatization" or "over-reaction", as was done in paragraph 191 of the Commission's report, was unacceptable.

144. Paragraph 1. Some representatives fully supported granting the diplomatic courier immunity from criminal jurisdiction and favoured deletion of the brackets in paragraph 1 of draft article 23 as reported from the Drafting Committee to the Commission. This, it was said, was justifiable in light of the position and functions of the courier as an official of the sending State performing official tasks of a highly confidential nature. The courier should be free from disturbance and pressure which could be caused if criminal proceedings were instituted against him. The concept of the immunities of a diplomatic courier flowed directly from the principles of respect for the sovereignty and sovereign equality of States laid down in the Charter of the United Nations. Observance of the principle of the complete independence of States in carrying out their domestic and foreign policies was of utmost importance for normal relations among States. It was the foundation for the grant of the immunities under consideration. The necessity of granting immunity to diplomatic couriers stemmed from the need to ensure the confidentiality, effectiveness and security of diplomatic communications and normal conditions for the operation of a State's missions abroad. The status of the diplomatic courier as an official servant of the State was in accordance with his functions, taking into consideration the direct connection between the status of the diplomatic bag and those to whom it was entrusted. There was no doubt that the diplomatic courier had to be given complete immunity from criminal jurisdiction.

145. The view was also held that subjecting the courier to the criminal jurisdiction of the receiving or the transit State might jeopardize the principle of smooth communications, where the diplomatic courier was required to carry out a number of successive missions, as was the practice of many States. The protection and immunity enjoyed by the courier were a natural extension of the protection and immunity enjoyed by the diplomatic bag, which meant that he could not be separated from it without the consent of the dispatching State. It was important to link paragraph 1 with the principle of reciprocity, without prejudice to the provisions of draft article 6.

146. Other representatives were of a different view. They considered that paragraph 1 could be amended to limit the immunity of the courier from criminal jurisdiction to immunity for acts committed in the performance of his functions, as was the case for civil and administrative jurisdiction. The status of the courier should not, in their view, be assimilated to that of a diplomatic staff member, and to grant a courier immunity from criminal jurisdiction would go beyond what the discharge of his duties warranted. The courier would be adequately protected by his personal inviolability under draft article 16. The words placed in brackets in paragraph 1 should be deleted.

147. As to the possibility that the courier's personal inviolability may, even if he were denied immunity from jurisdiction, be invoked to frustrate his arrest or detention, the view was expressed that in such a situation there would be an obligation on the part of the courier not to resist arrest or on the part of the sending State to waive the immunity of the courier. If the courier insisted on his inviolability or the sending State decided not to waive his immunity, and if he had to submit manu militari to jurisdiction, there should at least be certain safeguards designed to protect the courier against abuse which would interfere with his duties. One representative suggested that the solution may be to accord the diplomatic courier jurisdictional immunity while he remained in possession of the bag and had not delivered the bag to its addressee.



148. Another representative pointed out that it was important to note that denial of immunity from jurisdiction would seem to run counter to the personal inviolability which the courier enjoyed under article 27 (5) of the 1961 Vienna Convention, which also specified that the diplomatic courier was not liable to any form of arrest or detention. If the new draft article intended to be complementary to the four Conventions already adopted, including the 1961 Convention, it would be logical to grant the courier not only personal inviolability but also immunity from criminal jurisdiction. However, the latter immunity had not been expressly mentioned in the 1961 Convention. It was the 1963 Vienna Convention on Consular Relations which explicitly granted consular officers immunity from criminal jurisdiction except in respect of serious offences, though, strictly speaking, formulations which would withdraw the courier's immunities in the case of "serious offences" or confine it to "acts within the performance of his functions" would appear to be inconsistent with article 27 (5) of the 1961 Convention. A possible compromise may be to provide, in the new draft article, expressly for personal inviolability while remaining silent on the question of immunity from criminal jurisdiction.

149. Paragraph 2. One representative, referring to paragraph 2 of draft article 23, which guaranteed the diplomatic courier immunity from the civil and administrative jurisdiction of the receiving or transit State in respect of acts performed in the exercise of his functions, stated that the diplomatic courier must enjoy immunity from the jurisdiction of receiving and transit States; otherwise, the rights and interests of the sending State would be violated and free communication with its missions would no longer be guaranteed.

150. Another representative was of the opinion that though the diplomatic courier was an official agent of the sending State, acting on its behalf, he was not a diplomatic agent and should be accorded privileges and immunities only in respect of acts performed in the exercise of his functions. Thus, the last sentence of paragraph 2 of article 23 was, in his view, acceptable.

151. Paragraph 4. The view was expressed that the proposed grant to a diplomatic courier of immunity from the civil and administrative jurisdiction of receiving and transit States, in respect of acts performed in the exercise of the courier's official functions, was supported by the provisions of paragraph 4 of draft article 23 which stated that the courier was not obliged to give evidence as a witness. If the courier was not in a position to refuse to give evidence as a witness, his immunity, it was stated, would be meaningless.

152. Another representative considered that the difficulties that seemed to arise with respect to paragraphs 1 and 4 of draft article 23 were due to the different concepts that existed with respect to the diplomatic courier and the performance of his mission. If it was acknowledged that in many cases the courier's mission was not confined to one destination, then it would follow that the grounds for protecting the diplomatic courier from arrest and detention, as provided in draft article 16, were also grounds for granting him immunity from the criminal jurisdiction of the receiving State and the transit State and ensuring that he was not obliged to give evidence as witness. In the absence of paragraphs 1 and 4 of draft article 23, the sending State would suffer considerable injury because its

messenger would be forbidden to continue his mission in order that he might be available to the courts of a transit State or a receiving State. Functional necessity required inclusion of the provisions of paragraphs 1 and 4 and that, of course, implied that the sending State assumed responsibility for punishing its courier for any misdeed he might have committed in the territory of the transit State or the receiving State.

153. Other representatives believed that since immunity from criminal jurisdiction should be confined to acts performed in the exercise of official functions, there was no reason why the courier should not be required to testify, so long as that did not interfere with the performance of official functions. The wording of the paragraph therefore should be considerably attenuated. One representative saw no good reason to exempt the courier totally from giving evidence as a witness, but agreed with the comments contained in paragraph 122 of the report of the Commission that the exemption should be limited to evidence on questions relating to the exercise of his functions and that, in requesting him to give evidence, the competent authorities should avoid interfering with his exercise of such functions.

154. One representative considered that the principle that the courier should not be required to testify should be retained, but the commentaries should note that it would be desirable for a courier who had been witness to a serious occurrence (for example, a traffic accident - generally covered by criminal law) to be required to provide the authorities with a letter explaining what, in his view, were the relevant circumstances.

155. Another representative stated that paragraph 4 of draft article 23 should be deleted altogether.

156. One representative considered that the differences of opinion could perhaps be overcome by adding to paragraph 4 the words "except in the cases envisaged in paragraph 2".

157. Paragraph 5. One representative believed that State interests should be given priority, and that the reference to the administrative jurisdiction of the receiving State in paragraph 5 of draft article 23 should be deleted.

158. Another representative favoured the substance of paragraph 5, since its main aim was to protect possible victims, but had difficulty with the provision's practical application. In some countries civil proceedings involved time-limits which the parties were required to respect and it was obvious that the courier could not remain until expiry of such time-limits. Also, once the courier had left a country, it would be impossible to summon him. (The police were not empowered to trace an individual summoned before a civil or administrative court and victims may be unaware of the country of origin of the diplomatic courier, let alone his address.) Thus, if paragraph 5 were not to be a dead letter a saving clause should be included, preferably in the official commentary to the article, obliging States to help victims in their inquiries.

159. One representative was of the view that the immunity of the courier from jurisdiction was minimized by the provisions of paragraphs 5 and 6 as presented by

the Special Rapporteur. It was important to specify cases in which the immunity of the courier was total and cases in which it was not. The diplomatic bag could not be placed on the same footing as the courier, who did not have immunity ad personam but enjoyed immunity only because of his function of delivering the bag.

Article 28. Duration of privileges and immunities

160. Some representatives expressed their concurrence with draft article 28 and stressed the need for its inclusion.

161. The point was made that having regard to the specific character and short duration of the diplomatic courier's mission, it should be made clear that only the sending State could terminate his official functions. It was for the sending State to determine which acts were performed in the exercise of official functions. It was also noted that in practice the immunity referred to in the draft article was granted on a reciprocal basis.

162. The view was expressed that the draft article as presented by the Special Rapporteur did not take the case of the ad hoc courier, who would normally take charge of the diplomatic bag while already in the territory of the receiving State, into account.

163. One representative, while agreeing that the personal inviolability accorded the courier under draft article 16, as provisionally adopted, appeared sufficient to protect the courier in the exercise of his functions, stated that he would have no objection to the courier also being accorded immunity from jurisdiction with respect to the exercise of his functions. This would guarantee that a courier would not be prosecuted in the future in the receiving State for acts committed in the exercise of those functions.

164. The view was expressed that it was unclear from the draft article, as proposed by the Special Rapporteur, whether the functions of a courier came to an end on his delivery of the diplomatic bag in the receiving State or on his return to the sending State. The point was made that it should be made clear in the draft article that the official functions of diplomatic couriers could be terminated only by the sending State, and that it was for the sending State to determine which acts were performed in the exercise of the courier's official functions and which were not.

Article 29. Waiver of immunity

165. The draft article, it was noted, incorporated principles already accepted in public international law and reflected in, for example, article 32, paragraph 1 of the Vienna Convention on Diplomatic Relations.

166. Several representatives expressed agreement with the deletion of the second sentence of paragraph 1. It should be made clear, it was said, that only the sending State could waive the diplomatic courier's immunity from jurisdiction; and

deletion of the second sentence of paragraph 1 would ensure uniformity with other conventions on diplomatic law.

167. One representative considered that paragraph 2 could be improved by making it clear that the consent in question should be in writing. Another representative stated that his delegation interpreted paragraph 2 as meaning that the express consent had to be in writing.

Article 30. Status of the captain of a commercial aircraft, the master of a merchant ship or the authorized member of the crew

168. Paragraph 1. The view was expressed that members of the crew of a commercial aircraft or merchant ship could be entrusted with custody, transportation and delivery of the diplomatic bag only if expressly authorized by the captain of the aircraft or the master of the ship. One representative stated that he understood that to be the meaning of the draft article. Another representative was of the view that a member of the crew could not be so authorized by the captain of an aircraft or master of a ship. A member of the crew could only be authorized by the sending State entrusting him directly with the bag.

169. Paragraph 4. The point was made that it was important in paragraph 4 to ensure that an authorized member of the mission or consular post had direct and free access to the tarmac and aircraft or to the port and the ship, in order to take delivery of the bag in a free and unimpeded manner consonant with the nature of diplomatic or consular communications.

170. The view was expressed that the draft article should make it clear that it applied to aircraft and ships registered in the sending State, as cases of diplomatic bags being sent through foreign crews could scarcely arise. If such a possibility was not completely excluded, it was obviously covered by the provisions of draft article 34, but it would be necessary to solve the question of access by a member of the mission of the sending State to a foreign aircraft or vessel. Also, it was necessary to provide in draft article 34 for a case where a member of a mission required access to an aircraft or ship not to take possession of but to deliver a diplomatic bag.

Article 31. Indication of status of diplomatic bag

171. Paragraph 1. The view was expressed that the Commission's consideration of the question of the identification of the diplomatic bag seemed to be progressing along the right lines. The essential purpose of identifying marks was to indicate authenticity. There was little to be gained by requiring more information. The official seal and the label showing the origin and destination of the bag were the best proof of authenticity.

172. Paragraph 2. One representative was of the view that a provision on the maximum size or weight of the diplomatic bag should be included in the draft article to, indirectly, prevent abuses. Another representative believed that limits on the weight or size of the bag would hardly prevent abuse.

173. One representative considered that there was no justification for a provision stating that the maximum size or weight of the diplomatic bag should be determined by agreement between the sending State and the receiving State, as the content of the bag was contingent upon the activity, official reports and correspondence of the sending State. Such a provision would not, in his view, constitute an indirect guarantee against abuse of the bag. The principle of the absolute inviolability of the diplomatic bag should be maintained, and no provision inconsistent with the principle of absolute inviolability should be included in the draft articles, as it may lead, as a result of political circumstances, to a breach of such inviolability.

174. The view was expressed that the sending and receiving States should reach agreement on the size of the diplomatic bag. If the size of the bag was such as to cast doubt on its contents, the receiving State should return it unopened to the sending State. The confidential nature of the contents would, in such a way, be respected.

#### Article 32. Contents of the diplomatic bag

175. Some representatives stated that the provisions of paragraph 1 of draft article 32 were satisfactory and should remain unchanged. The provisions established an acceptable balance between the interests of the sending State and the receiving State. The limitations in the draft article on the contents of the diplomatic bag would protect the interests of the receiving State and would be further strengthened when reinforced by the obligation which the sending State was to assume under paragraph 2 of the draft article. The view was expressed that defining the contents of the bag in greater detail than done in paragraph 1 might create more problems than it solved, and the proposals made on the matter seemed too restrictive. The view was also expressed that it would not be useful to divide bags into two separate classes.

176. One representative considered that the words "articles intended exclusively for official use" should be interpreted restrictively, as freedom of communication and freedom of transport should not be confused. The diplomatic bag should contain only those articles serving to maintain freedom of communication. A broader definition would distort the very meaning of the diplomatic bag.

177. The suggestion was made that if doubts arose as to the contents of a bag, a procedure similar to that prescribed in article 35 of the Vienna Convention on Consular Relations could be adopted in terms of which the diplomatic bag would not be opened without the consent of the sending State and, if the sending State refused, would be returned to its place of origin.

178. The suggestion was made that the words "and shall prosecute and punish persons responsible for such infringements" should be deleted since the methods by which

States performed such obligations could be various. It was also important to avoid possible violations of the immunity of the diplomatic courier. The words "and in the case of such infringements being committed, shall take all necessary measures to prevent their repetition" might be included in place of the deleted words.

Article 33. Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or the authorized member of the crew

179. The point was made by one representative that in draft article 33 (in a case where the diplomatic bag was entrusted to the captian of an aircraft or the master of a ship) it was the régime applicable to the bag and the direct and safe delivery of the bag to a member of the mission, and not the status of the captain, that was of particular importance.

180. Another representative considered that the draft article should be reworded and brought into conformity with draft article 30.

Article 34. Status of the diplomatic bag dispatched by postal service or other means

181. The view was expressed that draft article 34 was in conformity with the corresponding provisions of the Conventions on diplomatic law. However, the provisions of the Conventions were not sufficient to prevent misuse of the diplomatic bag, in view of the variety of objects destined for official use of diplomatic missions. The Commission should examine the possibilty of limiting the bag to small objects of a highly confidential nature utilized in communications between States and their missions and consulates.

182. The suggestion was made that draft article 34 should provide for cases where a mission required access to an aircraft or ship not only for the receipt but also for the delivery of a diplomatic bag.

[Articles 36 to 42]

183. One representative stated that the Commission's debate on articles 36 to 42 showed awareness of the concern aroused by abuse of the facilities accorded the diplomatic bag and willingness to deal with the problem of balancing the legitimate rights and interests of sending and receiving States. A number of ideas had been suggested which deserved study. The recent incidents had led to acute consciousness of the realities and dangers of abuse. Measures to prevent such abuses as the use of the bag for illicit importation of guns, explosives and drugs should be considered at the international level. There was also the general need to protect communications between States and their diplomatic posts abroad and for Governments engaged in friendly relations to deal with one another on a basis of trust.

Article 36. Inviolability of the diplomatic bag

184. Some representatives supported the draft article in its present wording. They stated that the principle of absolute inviolability of the diplomatic bag not accompanied by the diplomatic courier conformed to the norms of customary law and to established practice among States and was set forth in the Vienna Convention on Diplomatic Relations, the Convention on Special Missions and the Convention on the Representation of States. The principle was essential to ensure free and prompt delivery of the bag as well as free communications between a State and its missions abroad, and was the only appropriate basis for elaborating the status of the unaccompanied bag. The possibility of opening the diplomatic bag, it was noted, had been envisaged only in the Vienna Convention on Consular Relations and only under special circumstances and with special guarantees. Such deviation from the general principle had inhibited wider acceptance of the Convention. The régime under consideration should allow no deviation from the generally recognized principle of absolute inviolability of the diplomatic bag. Strict observance of the principle was the only guarantee of safe and free delivery.

185. Among representatives supporting the principle of absolute inviolability of the bag, opposition was expressed to examination of the bag by electronic or mechanical devices. The current state of electronic technology would, it was said, clearly make it possible to extract confidential information from the diplomatic bag, thus undermining the very foundation of the principle of its inviolability. The provision that the diplomatic bag should be exempt from any examination, including electronic screening, was in conformity with the basic aims of the draft articles. The point was made that prohibiting electronic screening of the bag also addressed the legitimate interests of the developing countries, which were not in a position to acquire sophisticated electronic devices and, in so doing, reaffirmed the principle of equality in relations between States. Examination of the bag by electronic and other devices not only infringed the inviolability of the bag but also discriminated against States that did not possess advanced technology.

186. One representative considered that even the opening of the bag by mutual consent should not be explicitly provided for. States could, by mutual agreement, establish any régime which, in their view, provided maximum protection of their interests. Yet it was not advisable to include provisions which could serve as a pretext to impose, under the guise of reciprocity, a régime which would favour those with better technological equipment. Thus, in the light of the provisions of paragraph 3 of draft article 42, the expression "unless otherwise agreed by the States concerned" should be deleted from paragraph 1.

187. Several representatives stated that past abuses of the diplomatic bag should not lead to a denial of the principle of its inviolability. One representative, noting the concern expressed with respect to abuses of the diplomatic bag, stated that individual abuses should not be the basis for a general rule. To regard all diplomatic couriers as potential smugglers was to mistrust not only the couriers but also States which were responsible for the moral standards of their officials.

188. It was also noted that unification of the law applicable to all types of official bags involved a choice between the régime of inviolability as codified in

the 1961 Vienna Convention on Diplomatic Relations and the régime of the 1963 Convention on Consular Relations. Not all States parties to the 1961 Vienna Convention would wish their diplomatic communications treated with the uncertainty affecting consular communications, which were generally less in volume than diplomatic communications. Real or supposed abuses should not cast doubt on the principle of the inviolability of the diplomatic bag on which protection of the confidentiality of official communications depended. The validity of a principle could not be negated by showing violations of the principle. While it was true that a balance had to be achieved between the inviolability of a sending State's bag and the security of any other State, the good faith of States would still seem to be the best means of establishing such a balance on a basis of equality. The Commission, it was also said, should use innovative methods to find a proper balance between the interests of the sending State and the justified security concerns of transit and receiving States.

189. Some representatives expressed strong reservations with respect to draft article 36 as formulated at present. The draft article should be worded in such a manner as to reflect a more adequate balance between the interests of the sending State and those of the receiving and transit States. The difficulty in dealing with the crucial issue of the inviolability of the diplomatic bag lay in balancing the need to protect diplomatic communications and the need to prevent abuse. The draft article did not give adequate consideration to the integrity and security of receiving and transit States. A more balanced solution similar to that embodied in the 1963 Vienna Convention on Consular Relations was preferable. States parties to a convention on the diplomatic courier and diplomatic bag should have the right to make a declaration to the effect that they would apply to all bags the provisions contained in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Elaborating on this idea, one representative stated that it was essential to maintain a balance between the protection of the diplomatic bag, in the interests of the sending State, and prevention of the regrettable abuses which had become common in recent years. It would also be appropriate to take account of the purpose and to analyse the meaning of the concept, of the protection of the diplomatic bag. It was clear, as recognized in draft article 1 and draft article 3, paragraph 2, that protection of the diplomatic bag was intended solely to ensure freedom of communication between the sending State and its missions abroad or between its missions. It was possible, without affecting the concept of the protection and inviolability of the bag, to include a provision similar to that of article 35 of the Vienna Convention on Consular Relations, under which the diplomatic bag could be opened with the consent of the sending State, or if the latter refused, could be returned to its place of origin. States tempted to abuse that prerogative would be deterred by the effectiveness of the rule of reciprocity. He also thought it pointless to provide for two kinds of diplomatic bag, one of which would enjoy absolute inviolability, since that would enable the same abuses to be committed. Another representative, though expressing preference for the above-mentioned régime of article 35 of the 1963 consular Convention believed that a compromise solution might be found in certain bilateral consular conventions which provided that, if there was serious reason to believe that a consignment contained something other than official correspondence, documents or articles for official use, it could be returned to its place of origin. Reciprocity would probably prevent a State from making undue use of such a provision.



190. Some of the representatives who favoured extension to all diplomatic bags of a régime similar to that of article 35 of the 1963 Vienna Convention on Consular Relations, also agreed that the diplomatic bag might be subject to electronic or mechanical screening or examination. The well-known recent and unfortunate abuses which had taken place involving diplomatic bags justified, it was stated, the recognition of a limited right of verification of the bag by transit and receiving States. There had been no difficulty in accepting the idea that the personal inviolability of diplomatic agents was in no way affected by pre-flight security procedures, and it was not inconceivable either that a diplomatic bag could be subjected to the sensory devices required for security reasons. Further clarification might be needed in relation to certain types of electronic sensors, but on the whole there were no serious obstacles to the use of some of those procedures. If, as a result of security screening, a question arose as to the contents of the diplomatic bag, the problem should be solved bilaterally by the Governments concerned. Only in the most exceptional cases would the passage of the diplomatic bag be delayed. The bag could be opened only with the express consent of the authorities of the sending State and, if no other solution were possible, it could be returned intact to that State and its inviolability would be maintained. In favour of a limited right of verification by electronic or mechanical means, the argument was also made that there was a question of safety of international transportation involved and not only the interest of the receiving or transit State. Therefore, persons unwilling to agree to the screening of their person or baggage, including diplomatic bags, as demanded by the airlines, risked being denied transportation.

191. Still other representatives, who could accept an extension to all bags of a régime similar to that laid down in article 35 of the 1963 Vienna Convention on Consular Relations, found it difficult to support the idea that diplomatic bags might be subjected to electronic or other mechanical devices. In their view, the use of such sophisticated devices might infringe on the confidentiality of the bag.

Article 37. Exemption from Customs and other inspection

192. See also comments on draft articles 36 to 42 in paragraph 183 above.

Article 38. Exemptions from Customs duties and all duties and taxes

193. One representative considered that in draft article 38 the provision that made entry, transit, exit or exemption of a diplomatic bag dependent on such laws and regulations as the receiving or transit State might adopt ought to be deleted, since such a provision would undermine the basic principle in the draft article.

Article 39. Protective measures in circumstances preventing the delivery of the diplomatic bag

194. The view was expressed that the importance of draft article 39 lay in its providing for the protection of the bag in circumstances preventing its delivery. Free communication between the State and its missions abroad would not be

sufficiently guaranteed unless every facility for the delivery of the bag was provided. The provisions of draft article 39 were of great practical significance, even though they might be rarely applied. The obligation of the receiving and transit States to take measures to ensure inviolability and safety of the bag in such cases was of major importance.

Article 40. Obligations of the transit State in case of force majeure or fortuitous event

195. The view was expressed by one representative that the transit State should assume obligations to ensure inviolability of the diplomatic bag. It was evident that the obligations provided for in the draft article, which were reduced to a minimum, were necessary to ensure receipt of the bag under extraordinary circumstances.

196. The comment was made by another representative that the concept of protection of the bag and its movement in the situations referred to in draft article 41 should be extended to the situations foreseen in draft article 40.

Article 41. Non-recognition of States or Governments or absence of diplomatic or consular relations

197. The point was made that the provisions of draft article 41 were necessary to guarantee a State freedom of communication with its missions abroad. The cases in which the provisions of the draft article would apply were not rare, particularly in communications with missions to international organizations. The absence of appropriate provisions for such cases could create serious obstacles to diplomatic communication and undesirable complications in relations between States, particularly when those missions were situated in States which it did not recognize or with which it did not have diplomatic or consular relations.

Article 42. Relation to other conventions and international agreements

198. One representative expressed the view that the present provisions of draft article 42, which dealt with a matter of importance, required further examination, particularly in the light of the Vienna Convention on the Law of Treaties.

199. Another representative considered that certain improvements seemed advisable in paragraph 1 of the draft article.

## D. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

### 1. General observations

200. Several representatives noted that appreciable progress had been achieved by the Commission in dealing with a complex subject and in provisionally adopting a number of draft articles, especially in parts I and II of the draft articles, though substantial complications had arisen in part III of the draft articles. The Special Rapporteur, Mr. Sompong Sucharitkul, was commended on his untiring and productive efforts.

201. A sharp controversy, it was observed, continued to divide those who supported "absolute immunity" and those who supported "restrictive immunity". The existence of the two schools of thought was attributed to different political and economic realities. The first group advocated broad jurisdictional immunity and the other an immunity limited to what they considered to be the strict attributes of sovereignty. The first group, it was observed, did not advocate unqualified or strict immunity in every case, while the various theories of restrictive immunity sought to justify inconsistencies in State practice by drawing distinctions between different types of State activities.

202. Several representatives, in favour of absolute immunity, were of the view that the historical background and the legislation and jurisprudence of States showed that the principle of State immunity had long been and continued to be a fundamental rule of international law. They were of the opinion that the draft articles should reflect State immunity as a well established principle of international law, based on the sovereign equality of States as enshrined in the Charter of the United Nations and as upheld by the national laws and judicial practice of many countries. The point was made that State immunity could be compared to an exception to the principle of the territorial sovereignty of States, and that the voluntary and mutually undertaken obligation of every State to respect, within the sphere of its jurisdiction, the immunity of other States was not a limitation but an affirmation of sovereignty. The point was made that, in light of the modern tendency for the State sector to occupy an important place in the economy of many countries, including the developing countries, attempts to view the aspects of the economic functions of States as not relating to their public activities were increasingly futile. The view was expressed that in international relations a State always acted as the holder of governmental power, regardless of the organ which acted in its name in pursuing economic activities. It was incorrect, it was said, to attribute differences in approach on the question of State immunity to ideological differences, as such was not in fact the case. A careful study of the positions of States showed that the groups of States supporting the two differing concepts of State immunity were not divided on the basis of differences in ideology.

203. The principle of sovereign equality of States, it was said, offered broad possibilities of protecting the interests of different States in an appropriate way. Exceptions to the principle of State immunity should be elaborated on the basis of State consent by means of agreements entered into when contracts were signed. The issue was not a conflict of sovereignty between two States but the question of the status of the State in relations governed by civil law or in other

similar relations. In such cases immunity from jurisdiction should be the rule and exceptions should be based only on a waiver of immunity by a State on a purely ad hoc basis. A State could be sued in a foreign court only if it gave its clearly expressed consent, as indicated in draft article 8. Materials on State practice, including the practice of the socialist countries and developing countries, should be consulted as widely as possible. Part III of the draft articles did not take that practice into account, but the fact that a large number of States based their development on the State sector of the economy could not be ignored.

204. The view was expressed that the immunity of States from the jurisdiction of foreign courts was based legally on the accepted principle of par in parem non habet imperium, on which part II of the draft articles was based. The attempt in part III of the draft articles to utilize the concept of restricted or functional immunity was, in effect, a violation of that principle and the main cause of the complications in the work of the Commission. The concept contradicted the principles of sovereign equality of States and non-interference in internal affairs laid down in the Charter of the United Nations. Supporters of the concept of restricted immunity sought to draw a distinction between the public and the private activities of States and contended that a State was comparable with a private individual when conducting commercial activities. There were no grounds for considering that a State acted in the economic field as a private and not as a sovereign person. The concept of "functional immunity" was, it was said, even less justified in countries with centrally-planned economies where foreign trade activities were carried out not by the State itself but by State enterprises completely separate from State juridical entities under national law and, as such, enjoying no immunity from foreign jurisdiction.

205. The view was expressed that court practice in States which sought to apply the concept of functional immunity was variable and inconsistent and could not be accepted as conclusive. It was not true that the concept of functional immunity provided two-way advantages. In reality, it worked to the advantage of the stronger, developed States, and against the weaker States since most commercial transactions were concluded in developed countries and most proceedings were initiated there, whereas the States involved in those proceedings were often developing countries. Cases where distraint was imposed upon the property of a foreign State and it was summoned to appear in property actions before a foreign court were, it was said, violations of international law and could not serve as precedents for the work of codification. The question of the jurisdictional immunities of States was a matter of public international law, while civil cases in national courts were a matter of private international law. The attempt to combine the principles of public and private international law in one convention could hardly be considered productive.

206. The premise on which the draft articles were based, namely, that there was a prevailing adherence to a functional or restrictive concept of State immunity did not, it was said, correctly reflect the existing situation. The concept of "functional immunity" was based on the premise that a State could act in two different capacities: acts which were manifestations of State power, jure imperii, and acts of a commercial nature, jure gestionis. There were basic doubts as to whether a concept was practicable and sound, and whether a distinction between the sovereign and non-sovereign acts of a State.

207. Ideological and doctrinal differences should, it was said, be taken into consideration inasmuch as they were reflected in State practice and in national legislation. However, attempts to impose the existing practice of a few developed Western countries on the entire international community, while disregarding the practice of the entire group of socialist States and that of a number of developing countries, was unacceptable. The sixth report of the Special Rapporteur took insufficient account, it was observed, of the positions of all groups of States and had consequently come to unbalanced conclusions. If that process continued, it would result in draft articles which limited in essential respects, or even eliminated, the jurisdictional immunities of States and their property.

208. Several representatives expressed support for the principle of restrictive immunity as reflected in judicial practice. The provisions of draft articles 13, 14, 16, 17 and 18 which, it was said, followed the restrictive doctrine, with respect to actions in rem and in personam, reflected a realistic approach to the establishment of unified rules on State immunity. The endeavours to draw a workable distinction between acta jure imperii, which were covered by immunity, and acta jure gestionis were commended. Attempts to view State commercial activities differently from those conducted by private entities would grant States unfair advantages. In principle, when a State engaged in private-law activities, it placed itself on an equal footing with private contracting parties and must also accept the terms of law applicable to the latter.

209. The view was expressed that examination of actual State practice clearly evidenced the recognition that immunity was far from absolute. The operation of reciprocity was bound to lead to an increasingly clear record of State practice restricting jurisdictional immunities. For the Commission to take anything but a functional approach would be unrealistic and retrogressive. Criticisms that the functional approach, which recognized the limited nature of sovereign immunity was aimed at maintaining the dominance of certain States were, it was said, puzzling. Such criticisms were out of place unless they could be substantiated. The sovereign equality of States was not at issue. To suggest a greater or lesser degree of immunity was not to imply that States were not equal or that some enjoyed limited sovereignty, but simply to discuss at what level all equally sovereign States enjoyed immunity. The idea that not regarding States as immune in every respect amounted to support of colonialism was so bizarre as not to deserve comment. Rather, there was the question whether those who favoured the broadest possible notions of sovereign immunity were seeking to give their State-owned multinational corporations a competitive advantage and still greater power in developing countries. The question was the practical one of whether to exclude a particular type of activity by a State from the jurisdiction of the courts of another State.

210. One representative, regretting that the work of the Commission was still hampered by the inflexibility with which proponents of absolute immunity and proponents of restrictive immunity adhered to their respective positions, expressed the view that the partisans of absolute immunity seemed to overlook the fact that they did not hold that a State could never be cited as defendant before the courts of another State, but merely that it could not be so cited without its consent. In practice, most States proclaiming theoretical adherence to absolute immunity had

entered into a considerable number of bilateral agreements which made their actual positions on immunity indistinguishable from that of States which followed the restrictive doctrine. There was no reason why the Commission should not be permitted to elaborate a draft multilateral instrument or a set of draft articles based on the restrictive doctrine which would only bind those States that chose to sign and ratify it.

211. Another representative expressed the view that, while the traditional rule had always been that no State could be impleaded in the courts of another State without its consent, the rule dated back to the days when Governments and instruments of State were reserved exclusively for preserving law and order and for self-defence against external powers. Yet as State activities extended to other areas, notably in the field of international commerce, the doctrine of absolute immunity had been questioned in the case of activities which were not strictly State functions.

212. The view was expressed that the structure of the draft articles was logical and conformed to a general principle, of uncontested importance, that of immunity. However, immunity should be limited in order to prevent a situation in which an individual would be helpless in his legal dealings with a State of which he was not a national. The view was expressed that the draft articles in part III were limited in scope and would not adversely affect the sovereignty of a State claiming immunity. It was noted with satisfaction that among the materials available to the Special Rapporteur was the 1972 European Convention on State Immunity which served as a model for some States.

213. The observation was made that most of the conclusions reached by the Commission, in the five new draft articles, were based on considerations of logic and followed the two basic cases formulated in draft articles 12 and 15 provisionally adopted at previous sessions of the Commission, albeit with some reservations. The five new draft articles sought to avoid any possible abuse in the interpretation of the exceptions to State immunity. The Commission had tried to describe with as much precision as possible the situations in which the basic principle of State immunity should not apply, limiting the exceptions to cases in which the application of the principle of State immunity would result in a jurisdictional vacuum and to activities carried out within the territory of the forum State. It was understood that the general rule of State immunity would prevail since the clause "unless otherwise agreed between the States concerned" was used at the beginning of each of the draft articles. The point was made that the provisions of draft articles 13, 14, 16, 17 and 18 depended on the will of the parties and were therefore binding only in so far as the parties had not entered into other agreements. The clause "unless otherwise agreed between the States concerned" at the beginning of each draft article meant that the substantive provisions of all five draft articles were, in effect, of a purely residual nature and that States may choose to act quite differently from the rules established in the draft articles. The observation was made that, though the spirit behind the formulation of that clause was understood, uncertainty arose as to whether the exceptions envisaged would actually be incorporated into State practice.

214. One representative stated that, as party to the 1972 European Convention on State Immunity, his country was interested in seeing the law develop on the basis of a pragmatic compromise between the two conceptual approaches through a spirit of realistic adjustment to contemporary requirements. It was in that light that he viewed the five new draft articles and he hoped that a compromise text would emerge which would remove existing uncertainties and inconsistencies and unify and harmonize the different approaches currently evident in both the national and international fields.

215. Another representative considered that it was likely that agreement could be reached on an exception to the jurisdictional immunity of States with respect to their enterprises in the territory of another State and cases of rights in rem in immovable property situated in the territory of another State, even though in the latter case a distinction should be made based on the use and character of the immovable property. Such property could be subject to local legislation and courts in so far as it was subject to the civil jurisdiction of the State in which it was situated. That was one example of the application of the principle of State immunity and of the fact that exceptions to the principle could exist, though only in very limited areas and in very clearly defined circumstances. A thorough study of the legislation and practice of States could lead to a generally acceptable text based on the principle of State immunity and containing a reasonable number of precisely defined and strictly limited exceptions relating to certain specific areas of States' activities.

216. The view was expressed that there was merit in the argument that within certain fields of contract law the restrictive doctrine ought to be somewhat modified because of the fact that the distinction between commercial purposes and governmental service was not always workable with respect to developing countries.

217. Some representatives expressed misgivings at the number of exceptions to the principle of State immunity in draft articles 13 to 18. The draft articles should be carefully reviewed so as to prevent, it was said, the exceptions from becoming the general rule. An indiscriminate number of exceptions would, it was said, undermine the basic principle of immunity. The point was made that draft articles 16, 17 and 18 included, among the exceptions, activities which were not clearly attributable to a State. The question was raised, with respect to draft article 17, whether a State's involvement through a public enterprise in activities giving rise to fiscal obligations justified the approach that such activities were directly attributable to the State. The same observation, it was said, applied with respect to draft article 18 and the question of participation in companies and other collective bodies.

218. The point was made that the draft articles should define more precisely the immunity of States with respect to activities and properties serving to accomplish diplomatic and consular functions, and it was also necessary to take into account the fact that States were engaging more and more in economic activities under intergovernmental agreements or contracts and must enjoy full jurisdictional immunity in that respect.

219. The view was expressed that the draft articles should not affect the immunities enjoyed by foreign States under such specific rules of international law as those concerning embassies and consulates; nor could part III of the draft articles regulate immunities from measures of execution. The reservation expressed in paragraph (4) of the commentary on draft article 17 should therefore be extended to all of the relevant provisions of the draft articles. Only exceptions that met a recognized need, it was observed, should be included, provided they respected the principle of the sovereign equality of States. The latter principle should be reconciled with that of co-operation.

220. The view was expressed that the difficulties in the present topic stemmed in part from the fact that the practice of States was rather limited and that only a few countries had enacted legislation on the matter. Though, for historical reasons, there was a lack of relevant case-law in many countries, the study of State practice should not be limited to judicial proceedings but should also include legislative practice. The absence of judicial practice in some States which recognized the absolute immunity of States should not be interpreted as practice substantiating a trend towards restrictive immunity on the ground that there were no judgements or decisions on matters relating to State immunity. The total, or almost total, absence of legal practice in the field of jurisdictional immunity of States in the socialist countries did not mean that they had adopted a restrictive approach to immunity. On the contrary, the non-existence of judicial decisions showed that no proceedings had been held in those countries against a foreign State. When an action against a foreign State was filed in their courts, the case was dismissed on the grounds that a foreign State could not be sued. Such procedural decisions taken by their courts were as a rule not made public.

221. The observation was made that, while several States had recently embodied in their legislation the concept of restricted immunity, the great majority of States, and particularly the developing and socialist countries, did not share that concept. Imposing such a concept on the work of the Commission would give rise to complications and reservations. The results were apparent in draft articles 12 to 14, 15 (2), 16 and 18, which were unbalanced and unacceptable. It was difficult to imagine that many States would be able to support a trend in which States were assimilated to private individuals for the conclusion of commercial contracts and would be bound to submit progressively, exception by exception, to the jurisdiction of a foreign court. The Commission should give further thought to whether it was appropriate to prepare texts on the basis of the idea of restricted sovereignty. Otherwise, the document prepared by the Commission would be only an intellectual exercise and would not serve any useful purpose, since States which could accept it already had national legislation on the matter and would continue to abide by it, while States whose national legislation was based on the principle of the jurisdictional immunity of States would not accept it as a codification and progressive development of the norms of international law.

222. Some representatives, noting that the jurisdictional immunity of foreign States was a basic principle of the national legislation of their countries, made the point that it was difficult to find cases in which jurisdictional immunity had been recognized in their judicial practice. Their judicial institutions strictly respected the principle of the jurisdictional immunity of foreign States and, in



the absence of the explicit consent of the foreign State, they dismissed cases in which a foreign State was named defendant. It was understood in such cases that the court decided neither on its competence nor on the problem of immunity, since immunity was prescribed by law. Problems relating to the jurisdictional immunity of foreign States were disposed of in the same way in the legislation of many other countries. That went to substantiate the contention that conceptual differences could not be ignored, because they stemmed from the legislation and practice of States, neither of which had been thoroughly studied. The point was made by one representative that a decree enacted in 1979 in his country in the field of private international law prescribed that its courts and other authorities could not assume jurisdiction, in proceedings against a foreign State, authority, or agency, or a person acting as diplomatic representative or otherwise enjoying immunity from jurisdiction, unless the foreign State had expressly waived its immunity. The same rule was stated inversely in that part of the decree dealing with decisions of foreign courts in proceedings instituted abroad against the State.

223. Several representatives drew attention to difficulties faced by newly independent countries, in that their experience, particularly their judicial experience in relation to the topic under discussion, was relatively limited. They had, most often, participated not as a forum State but as a defendant or potential defendant State. This did not necessarily mean that such countries had no law on the subject, since, for example, developing Commonwealth countries followed the common law. Yet few of such countries had codified their domestic law. The essential point was, therefore, that in determining their policy, developing countries had to see themselves both as a forum State as as a defendant in another forum. They must survey the whole spectrum of political, legal and economic considerations involved, taking into account that the interests of a developing country were, in some important respects, different from those of a developed country. Hesitancy was expressed with respect to some of the proposals provisionally adopted by the Commission. It was necessary, it was said, to provide more evidence of State practice in respect of certain draft articles, such as draft article 16.

224. The draft articles as a whole, it was said, were at variance with certain basic tenets of the strategy for the establishment of a new international economic order which was aimed at restructuring international economic relations on a more just and more democratic basis. The view was expressed that existing juridical practice protected developed countries rather than developing countries. The proposed draft articles were designed, it was said, not only to sanction the privileged position of some industrialized countries but also to favour economic domination by transnational corporations. The view was expressed that the Commission should deal with the concerns of developing countries in a manner that would enable those countries to pursue their socio-economic programmes. The Commission should take more fully into account the concerns and needs of the developing countries in the reasonable protection of their sovereign rights to pursue policies in line with the objectives of economic and social development. Where there was a conflict of sovereignty between States as a result of the presence of one sovereign authority within the jurisdiction of another, a balance had to be struck on the basis not only of equality of sovereign rights but also of equality in sovereign duties. The acceptability and durability of that balance

depended to a large extent on how responsive it was to the actual needs of most States. The Commission should arrive at appropriate safeguards which would prevent undue sacrifice of jurisdictional immunities in particular situations.

225. The view was expressed that some States, in the absence of a body of treaty norms, had begun to adopt internal legislation which could have the effect of precluding States from flexibly negotiating and accepting a multilateral instrument in the future. Some of the laws, based on the theory of restrictive immunity, contained many norms that greatly diluted the right of States to jurisdictional immunity. Some forum States, referring to the independence of the executive and judicial branches, refused to intervene in their own courts on important matters when so requested by foreign States. A State, however, could be held directly responsible for the acts or omissions of any of its organs which violated the rights of another State. Without necessarily violating the principle of the division of powers provided for in its constitutional system, the executive branch of a State had an influential role to play in that field. Likewise, it was found to be true that, with notable exceptions, the legal obligation upon which States based their behaviour, when they followed customary international law, was less evident in the judiciary and the legislature than it was in government organs in direct contact with foreign States. The divergencies of approach in different States made it all the more important to clarify the existing law on State immunity and promote its standardization.

226. Several representatives favoured the adoption of a universal legal instrument, on the jurisdictional immunities of States and their property, which would be acceptable to the largest possible number of States. The need to strike a balance between the notions of absolute and restrictive immunities was emphasized. It was noted that all States granted and enjoyed jurisdictional immunities and that there must therefore be a continued search for a just and equitable solution to the problem of the allowable extent of jurisdictional immunity to be accorded in a given set of circumstances. The hope was expressed that part IV of the draft articles would help to enhance the balance of the provisions of the draft articles as a whole.

227. One representative, referring to the difficulties encountered by the Commission, considered that the process of codification would be further improved by incorporation of the following ideas in the draft articles: (a) explicit recognition of the principle of the sovereign equality of States; (b) full reflection of international practices, taking into account the interests of all parties; and (c) the promotion of exchanges and co-operation between all States. As to the first idea, it was quite obvious, it was said, that two different doctrines currently existed on the subject, but it was also obvious that the principle of immunity was still widely respected and that its validity was generally recognized even by States advocating limited immunity in their legislation and judicial practice. Though draft article 6 had yet to appear in its final form, the Commission was already flooded with exception clauses whose scope sometimes went beyond the present practice of States advocating limited immunity and which threatened to overshadow the key article. Such a situation, if left uncorrected, would render the important principle of jurisdictional immunity meaningless. There was no objection to inclusion in the draft of certain reasonable exception clauses,

for circumstances which were exceptional, such as counter-claims, ownership, possession and use of property, and ships employed in commercial service, on the understanding that such exceptions would complement and not negate the principle of the jurisdictional immunity of States. As to the second idea, the extensive documentation provided by the Special Rapporteur had been mainly drawn from certain countries advocating limited immunity, while the practices of other countries, in particular developing countries, were poorly represented. A considerable number of countries which were not in favour of limited immunity had neither legislation nor practice in the field, or had only limited legislation and practice. However, when a foreign court sought to impose compulsory jurisdiction on them, they had to object by various ways and means, including diplomatic negotiations. Great importance should be attached to practices of that nature in the codification process. Any legal instrument that was to be generally acceptable to the international community must be based on a wide range of practices of the majority of the members of the community and take into account the interests of all sides. Such was the essence of induction, whose importance in the codification of international law was self-evident. As to the third idea, it should be asked whether recognition of the jurisdictional immunity of States might affect international economic exchanges by putting States in which trade relations were State-run above the law when business disputes arose. In that regard, it should be pointed out that the jurisdictional immunity of States had never been a truly absolute rule, because States could always accept the jurisdiction of a foreign court on a voluntary basis or agree on dispute settlement procedures other than judicial settlement. Even more important in that respect was the fact that many States carried out their commercial and other activities mainly through corporations which had legal personality; when those activities gave rise to a dispute, they would not invoke jurisdictional immunity. The courts of many countries had never heard arbitrary cases against another State. The principle of jurisdictional immunity did not, therefore, imply the relief of responsibilities incumbent upon a State, but merely required the court of one State not to impose its jurisdiction on another sovereign State at will. As to disputes arising out of international exchanges, especially economic exchanges, after reviewing all practices in that field, it should be possible to elaborate practical provisions to complement and develop the principle of jurisdictional immunity of States. The wish to maintain friendly relations and enter into economic exchanges with all countries on the basis of equality and mutual benefit was an important factor.

228. The point was made that the ultimate objective of the work of the Commission on the present topic - a treaty or some other kind of "normative statement" - would depend upon a variety of factors, including the particular needs of the international community, the degree of agreement among States and the current condition of State practice. The question was raised as to whether State practice on the present topic should be left to itself to continue its process of development, or whether that process should be accelerated by the drawing up of a convention. The advantages and disadvantages of leaving State practice to develop in its own way needed to be considered. The Special Rapporteur had provided a compilation of the law which represented current State practice in the area and which contributed to the development of such practice. The time was approaching when the Committee must look ahead to the future direction to be taken by the Special Rapporteur's remarkable contribution. The view was expressed that, having

regard to the range of solutions adopted by all existing national legal systems, it was almost impossible to find universally acceptable common denominators. Thus, the Commission had to choose between two different concepts and questions may be raised as to the fate of the draft articles once they were adopted. A less ambitious draft, which attempted to set forth more general principles and rules, would perhaps have been more useful.

229. As to the forthcoming seventh report of the Special Rapporteur on State immunity, with respect to attachment and execution, it was observed that the interests of developing countries would be better served if an adequate level of immunity from attachment and execution could be maintained. The current practice of States was far from uniform. It was said that too many presumptions of consent to jurisdiction should be avoided but, at the same time, the doctrine of State immunity should not be rendered meaningless by too wide exceptions to State immunity with regard to execution and attachment. Nevertheless, a decision of a court of law would lack meaning if it could not be executed against the will of the losing party and it was important to bear this consideration in mind. There was, it was said, no strict parallelism between, on the one hand, the question of immunity from jurisdiction and exceptions to such immunity and, on the other, immunity relating to attachment and execution. The former concerned legal relationships, such as contracts; the latter concerned assets. The right balance had to be found between considerations relating to the nature of the assets and the need to respect rules on State immunity, and especially on exceptions thereto. Confidence was expressed that the Special Rapporteur and the Commission would achieve the right balance without indulging in considerations of an a priori or political nature which would hinder the development of the law.

230. The view was expressed that the Commission should, once it had examined all the exceptions to the principle of State immunity, review all the draft articles of part III, with a view to resolving disagreements, before embarking on a second reading of the draft articles as a whole. Though not the Commission's normal practice, such a procedure may ensure wide acceptance of the draft articles. The hope was expressed that the Commission would expedite its deliberations on draft articles 19 and 20, establish the overall scheme of the draft articles on the topic as soon as possible, and try to complete a first reading of the draft articles as a whole before the end of the five-year term of its current membership. One representative hoped that the Commission would complete its work on exceptions at its forthcoming session and move on to the question of immunity from execution.

231. The point was made that the report of the Commission did not contain the usual summary of the discussion on draft articles 16, 17 and 18, though these draft articles had been examined for the first time in 1984. Information on the main trends of debate would have been very interesting. The point was also made that the objections of some of the members of the Commission reflected in the summary records had not been adequately summarized in the report of the Commission.

## 2. Comments on draft articles

### (a) Articles provisionally adopted by the Commission

#### Article 1. Scope of the present articles

232. The point was made that draft article 1 could be interpreted as stating the basic principle of the immunity of a State. A more specific and prominent statement, in draft article 1, of the basic principle of the immunity of a State would be desirable, however, as the draft articles dealt mostly with exceptions.

#### Article 2. Use of terms

233. The point was made that the term "commercial contract", which paragraph 1 (g) of draft article 2 sought to define, was found repeated in the English and French texts of subparagraph (i) and this seemed incorrect. The observation was also made that in the country of the representative making the statement, a contract was a contract whether or not concluded for commercial purposes and the same civil law was applicable in either case.

234. It was noted that draft article 2, correctly, did not mention profit-seeking in its definition of "commercial contract" in subparagraph (i) of paragraph 1 (g).

#### Article 3. Interpretative provisions

235. The point was made that paragraph 2 of draft article 3 had been improved by inclusion of a reference to the purpose of the contract. However, the text of paragraph 2 of draft article 3 would need, it was said, further review in light of paragraph 1 (g) of draft article 2. There was, for example, no reference to "transaction" in paragraph 2 of draft article 3.

236. The view was expressed that the nature of the contract should be the sole criterion for determining the public or private character of a contract. An additional reference to the purpose of the contract may make it possible to exclude virtually everything from the jurisdiction of the court of another State. This would be a regressive step.

237. The point was made that the purpose of a contract may not be a useful interpretative criterion as it would introduce a subjective element and could lead to non-uniform application of the draft articles.

238. The observation was made that, in a field so vital to developing States as that of commercial relations, there seemed to be a possibility of dangerous confusion. It was also said that if the exceptions to State immunity were to be considered derogations from the principle of immunity, it went without saying that they would be interpreted restrictively and that, in case of doubt, interpretation should favour State immunity.

239. One representative was of the view that, unfortunately, the false criterion of profit-making appeared to have influenced the language of draft article 3. As contrary to observable current tendencies in the development of law on the subject, the purpose of the contract was to be taken into account, in draft article 3, in determining the character of the contract. This would imply that if profit-making was not the motive behind the contract, the latter would not be a commercial activity. The intrusion of the purpose of the contract into characterization of a contract as a public or private act was contrary to the unmistakable trend in recent years. More and more States, whether the members of the Council of Europe in the 1972 Convention or Canada in its 1982 Statute, had, it was said, opted for the nature of the contract as the sole criterion of its public or private character. Such a trend was likely to continue and represented the progressive development of law on the subject. It was reflected in the work of learned bodies such as the International Law Association and in recent literature on the subject. Any return to the criterion of the purpose of the contract would be a regressive development and would not receive the acceptability which was the only measure of success of any new formulation of legal norms by the Commission. Thus, draft article 3 deserved a further hard look with a view to ruling out the purpose of the contract as a measure of its public or private nature, and so bringing the draft article into line with the spontaneous progressive development of the law.

240. The point was made that the language of paragraph 2 of draft article 3 was vague and did not clarify which entity was competent to determine whether a contract was commercial or otherwise. If such a determination were exclusively unilateral, the foreign State would be placed in a disadvantageous position and that would give rise to constant disputes. The observation was made that, in the penultimate line of paragraph 2 of draft article 3, it was unclear to which State the words "that State" referred.

#### Article 6. State immunity 4/

241. Several representatives, noting that draft articles 13 to 18 established a régime of exceptions to State immunity and related to a wide range of subjects on which there were divergent attitudes and practices, pointed out that draft article 6, on the basis of which such a régime had been established, did not set out the jurisdictional immunity of States as a general rule or principle. They were of the view that there should be a clear and unambiguous statement of the main principle, given the existence of wide-ranging exceptions.

242. The view was expressed that the paragraphs of draft article 6 should be combined in a single provision stipulating that a State enjoyed immunity from the jurisdiction of another State under international law, and that such immunity would be enjoyed in accordance with the provisions of the present articles.

243. The provisions of draft article 6, in their present form, seemed to reflect, it was said, an absence of theoretical clarity on the subject. The draft article should, it was also said, simply declare the principle that a State was immune from the jurisdiction of another State.

244. The point was made that the provisions of paragraph 1 of draft article 6 were incorrect since they stated that a State enjoyed immunity from the jurisdiction of another State in conformity with "the present articles", when in reality it enjoyed such immunity under international law.

245. The view was expressed by one representative that the jurisdictional immunity of States and their property had always been recognized as a firmly established rule of international law. Yet the principle had not enabled the Commission to make progress despite provisional adoption of six additional draft articles at its thirty-sixth session. The adoption of six additional draft articles, before draft article 6 had clearly and definitively stated the fundamental rule of State immunity, exacerbated serious differences of opinion. Many representatives would have preferred, it was said, constructive criticism and suggestions with respect to the present wording of draft article 6 and the Commission had decided to reconsider the draft article at subsequent sessions. Yet draft article 6, which had been termed the key to the draft articles as a whole, had not been properly considered at the Commission's last session.

#### Article 7. Modalities for giving effect to State immunity

246. The observation was made, with respect to paragraph 2 of draft article 7, that it was not sufficient that a State should have been the object of the proceeding against it, but also that the result indicated was produced. The point was made by one representative that the provisions of paragraph 2 of draft article 7 (in terms of which the court of the State of the forum must declare that it had no jurisdiction in cases where a determination which might affect the rights, interests, properties or the activities of the foreign State was to be obtained, even where the foreign State was not named as a party to the proceeding) would raise a serious problem. The jurisprudence of the representative's country took a different position, as could be seen from a recent decision of its Court of Cassation. Such jurisprudence could no doubt be explained by a desire not to give the State of the act a monopoly over the determination on rights, interests or property which might belong not to it but to someone else, for example a national of the State of the forum, and by the fact that the court of the claimant's nationality was all too often the only court to which he had in fact recourse. It was clear that paragraph 2 of draft article 7 would be read in the light of the exceptions to the principle of State immunity set out in part III of the draft articles, but it was questionable whether such exceptions were capable of allaying misgivings.

247. The view was expressed that paragraph 3 of draft article 7 should include the concept that the State itself had the right to determine, in conformity with its national legislation, what should be considered its organs, agencies or instrumentalities.

248. The view was expressed that it would be more appropriate, in paragraph 3 of draft article 7, to refer to "functionaries" rather than "representatives". The term "representatives" could, it was said, be confused with diplomatic and consular agents who had a different legal status in international law.

249. The view was expressed that two additional paragraphs should be added to draft article 7, the first requiring States to enact legislation on State immunity from the jurisdiction of the courts of other States, the second requiring a State to take necessary measures to prevent physical or legal persons of its nationality from abusing procedures under its national legislation to the detriment of other States.

Article 8. Express consent to exercise of jurisdiction

250. The suggestion was made that a second paragraph, with a view to strengthening the provisions of paragraph 2 of draft article 9, should be included in draft article 8, providing that the entering of an appearance by a State in a proceeding before the court of another State should not be interpreted as proof of express consent to the jurisdiction of the court.

251. The point was made that in subparagraph (c) of draft article 8, a State's declaration of consent to the jurisdiction of a foreign court should be express and in writing.

Article 9. Effect of participation in a proceeding before a court

252. The point was made that a provision should be included in paragraph 3 of draft article 9, to the effect that a State's failure to appear in court would not result in the State losing its immunity under international law.

Article 12. Commercial contracts

253. The observation was made that draft article 12 tried to find a middle path between varying approaches and had much to commend it, but it would be preferable, for various reasons, if the article were drafted in terms of commercial activities rather than commercial contracts, since that might simplify or eliminate many other problems, such as those relating to contracts of employment in draft article 13, and might even make such a separate article completely unnecessary.

254. The view was expressed that the provisions of draft article 12 found sufficient support in case-law and treaty-practice. The point was made that in private international law the connection with the territory of the State of the forum was a basic requirement; though the parties to a contract were permitted to choose a forum notwithstanding the absence of a territorial or other connection.

255. The view was expressed that draft article 12 envisaged that jurisdiction would be asserted on the basis of the applicable rules of private international law. The problem was whose standards would be applied in determining such rules and whether there was agreement on all aspects of the rules relating to the taking of jurisdiction. The area of the extra-territorial application of laws provided a specific example. The Commission should, it was said, give some further thought to the implications of the present provisions of draft article 12.



256. The view was expressed that a State with enterprises whose funds were clearly separated from those of the State should not be subject to the jurisdiction of other States for the liabilities of such enterprises. No agreement, it was said, could be reached on any draft article which did not provide definitively for such cases.

257. The point was made, with respect to paragraph 2 (a) of draft article 12, that there was no clear distinction between a "contract concluded between States" and a contract concluded "on a Government-to-Government basis". The point was also made that the concept of implied consent to the jurisdiction of a foreign court introduced in draft article 12, paragraph 2 (a), was not acceptable.

258. The question was raised, with respect to paragraph 2 (b) of draft article 12, as to whether the express agreement of the parties to a commercial contract would be accepted by the courts of a State which applied the restrictive theory. If that provision was not to be interpreted as running counter to the specific provisions of the municipal laws of the forum State or its public policy, the words "cannot invoke immunity" in paragraph 1 should be replaced by "may not invoke immunity".

#### Article 13. Contracts of employment

259. Some representatives considered draft article 13 acceptable in principle and, subject to certain drafting reservations, approved of its general structure and content. They were of the view that courts of the State of the forum should exercise jurisdiction over matters relating to local labour and that the exceptions in paragraph 2 of draft article 13 made clear that such was the intention.

260. The draft article, in the view of one representative, sought, successfully, to maintain a delicate balance between the competing interests of the employer State with regard to the application of its administrative law and the overriding interests of the State of the forum in the application of its labour law and, in certain exceptional cases, in retaining exclusive jurisdiction over the subject-matter of a proceeding.

261. One representative noted with satisfaction the statement, in paragraph (12) of the commentary to draft article 13, that employees might still have recourse in the State of the forum for compensation or damages for "wrongful dismissal".

262. One representative, noting that paragraph 1 of draft article 13 stated that immunity could not be invoked in a proceeding which related to a contract of employment if the employee was covered by the social security provisions of the forum State, questioned what the position would be in a proceeding instituted with a view to obtaining local social security coverage. Such a case often arose and had generally been concluded by agreement between the parties following correspondence with the foreign State. The present formulation of paragraph 1 of draft article 13 would, it was said, accord the employer State the absolute discretion to decide whether its employees were to be placed under the social security system of the forum State or under its own system or, even, whether to provide them with any coverage. Thus, a foreign State could easily avoid being made subject to the jurisdiction of the forum State with respect to contracts of employment simply by

not having its employees covered by the local social security system. Such a possibility was unacceptable. One solution would be to state in paragraph 1 of draft article 13 that proceedings relating to local social security coverage would be subject to the jurisdiction of local courts. Another solution would be to omit reference to local social security in paragraph 1 of draft article 13.

263. The view was expressed that draft article 13 was unnecessarily protective of States with advanced social security systems and may adversely affect developing countries which might not have a choice as to whether or not to place locally recruited employees under a local social security system. It appeared to be another way, it was said, of taking away rights or options granted under the Vienna Convention on Diplomatic Relations, particularly in article 33 of the Convention.

264. The view was expressed that the provisions of paragraph 1 of draft article 13 should be extended by eliminating the condition relating to social security or replacing it with a more general and flexible condition. One representative was of the view that subjection of an employee to local social security provisions was not the most relevant criterion for establishing absence of immunity. A more appropriate criterion would be absence in the contract of clauses excluding the application of local law. Another representative considered the applicability of the whole body of labour law a suitable criterion. Not all States had social security provisions in the narrow sense of the term; and the State of the forum had a legitimate interest in other areas of employment relations, such as those mentioned in paragraph (5) of the commentary to draft article 13.

265. The overriding interest of the State of the forum did not stop at the enforcement of its social security provisions but extended to "the application of its labour law" in general, as indicated in paragraph (6) of the commentary. The wording of draft article 13 should therefore be amended.

266. Another representative considered that a distinction should be drawn between persons employed for general tasks and persons employed for specific tasks; immunity applying only in the former case. The nature of the work done and services performed should be the criterion. As presently worded, draft article 13 used the object of work as the criterion and this was not appropriate.

267. The exemption from local jurisdiction provided for in paragraph 2 (a) of draft article 13 with respect to the performance of services associated with the exercise of governmental authority was not, in the view of one representative, appropriate. The broad interpretation of the provisions of paragraph 2 (a) in paragraph (11) of the commentary to article 13 tended, he said, to confirm his reservations. Another representative did not share the broad interpretation of the provisions of paragraph 2 (a) in paragraph (11) of the commentary to draft article 13 and was of the view that if such an interpretation were accepted, article 13 may lose almost all its value.

268. The point was made that the present provisions of subparagraph 2 (b) of draft article 13 did not seem to precisely reflect what paragraph (12) of the commentary to draft article 13 seemed to consider was the intention of subparagraph 2 (b), namely, that proceedings relating to the renewal of a contract or to reinstatement would not fall within the competence of local courts, whereas proceedings to obtain compensation would do so.

269. The point was made that employees of dual nationality, i.e. nationality of the employer State and of the State of the forum, should also be covered by the exception in paragraph 2 (d) relating to a national of the employer State.

270. The point was made that the provisions of paragraph 2 (e) seemed to conflict with the provisions of paragraph 1 of draft article 13.

271. The view was expressed that the provisions of paragraph 2 (e) could be omitted, since the fact of determining whether there was immunity from jurisdiction presupposed that jurisdiction would otherwise exist. The existence of an agreement denying jurisdiction to local courts and of public policy rules making such agreement inapplicable concerned the existence of jurisdiction in the first place. The situation would be the same between private subjects. Such provisions, therefore, were outside the scope of the law on State immunity or exceptions thereto.

272. Furthermore, doubts were expressed as to the interpretation of paragraph 2 in relation to the beginning of paragraph 1 of draft article 13.

273. The observation was made that draft article 13 covered an area distinct from that covered by draft article 12. State immunity was not wholly denied but merely confined to areas where the exercise of local labour jurisdiction would constitute an infringement on the sovereign authority of another State. There appeared to have been an overlap or concurrence of jurisdiction, and the choice must be made between local labour law and jurisdiction and the administrative law and jurisdiction of the employer State.

274. The view was also expressed that the redrafting of draft article 12 in terms of "commercial activities" might simplify or even make draft article 13 unnecessary. If draft article 12, however, remained as presently drafted, article 13 seemed correct but it might not cover all the situations it should in all legal systems.

275. Some representatives considered that the provisions of draft article 13 as well as the provisions of other draft articles showed a clear trend towards limiting State immunity. The wording of such draft articles permitted a broad interpretation of provisions which, in turn, promoted the concept of "functional" or "limited" immunity. The same purpose was served by the unsubstantiated inclusion in some draft articles of a list of cases in which a State could not invoke immunity from the jurisdiction of the courts of another country. Thus, draft article 13 excluded the invocation of immunity in proceedings relating to contracts of employment, but did not indicate whether it was the law of the State of the forum or that of the employer State that was applicable in such proceedings. The draft article was unacceptable even from the point of view of private international law. For example, not only did it not clarify the question of which State's law the court was to apply, but it unjustifiably established dual standards for individuals performing exactly the same functions. The justification for draft article 13 was, thus, doubtful and the draft article was likely to create more problems than it solved. It was not conducive to good relations between States.

Article 14. Personal injuries and damage to property

276. Some representatives were of the view that the provisions of draft article 14, which were similar to provisions in the 1972 European Convention on State Immunity, were basically acceptable. A person who had suffered injury or damage should be able to seek remedies in the State of the forum.

277. The point was made that the limitation of the application of draft article 14 to torts occurring within the territory of the State of the forum should alleviate concern about the draft article's reach. Since such an article was essential, those who had expressed concern as to its provisions were urged to reconsider matters. The requirement that the author of an act or omission causing injury or damage be present in the State of the forum at the time of occurrence seemed sufficiently restrictive.

278. The observation was also made that, as noted in paragraph (4) of the commentary to draft article 14, the draft article was important because it precluded the possibility of an insurance company's shielding itself behind the cloak of State immunity.

279. The view was expressed (with respect to the requirements in draft article 14 that the act or omission causing the injury or damage should have occurred wholly or partly in the territory of the State of the forum, and that the author of the act or omission should have been present in the territory of the State of the forum at the time of the act or omission) that certain limits had to be established. However, it was not certain, it was said, whether the criterion of territoriality was really the best in all cases. Some transboundary damage caused by a State's commercial activities may not be covered.

280. One representative was of the view that draft article 14 was too categorical and should differentiate between various possibilities, particularly regarding the nature and purpose of the act which caused the injury or damage.

281. Some representatives found draft article 14 unacceptable. The article was said to lack the necessary clarity and completely overlooked the obvious, namely, that the nature of a State's conduct could be determined only on the basis of international law within the framework of the concept of the international responsibility of States, a matter which did not lie within the competence of national courts. The current text of draft article 14, therefore, contradicted both international and national law and was legally invalid. The view was expressed that the draft article could not be considered a reflection of international practice.

282. One delegate questioned the briefness of the references, in the commentaries to draft article 14, to the doubts expressed concerning its advisability.

283. Another representative, noting that he had reservations both as to substance and the form of draft article 14, was doubtful whether there was an emerging trend in favour of granting relief to individuals for personal injury or property loss which, he said, had been the basic justification for draft article 14. The Commission had left that point for future consideration without providing any

convincing explanation. Also, given the nature of the acts or omissions envisaged in draft article 14, it was not clear what was meant by an act or omission occurring only partly in the territory of the State of the forum. The commentary to the draft article did not clarify that point. There were a number of references to the lex loci delicti commissi and to the existence of a "substantial connection" between the territory where the act was committed and the forum. The problem was not simply one of drafting, especially since one of the Commission's main concerns had been to exclude cases of transboundary damage from the scope of draft article 14. A simple reference to an act carried out partly in the State of the forum was not sufficient to make it clear that transboundary damage was not covered by the draft article. The Commission, it was said, should review the whole text of draft article 14.

Article 16. Patents, trade marks and intellectual  
or industrial property

284. Some representatives considered draft article 16 correct and consistent since judicial practice showed that States which competed with private entities in the commercial field in order to obtain profits did not enjoy any immunity in that respect. A State either requested another State to protect its trade marks through legislation or sought judicial protection of such rights which logically implied the exercise of jurisdiction by the State of the forum. Also, provisions of the kind contained in draft article 16 were said to reflect the position of States parties to various international conventions. It was not clear that there were real grounds for concerns expressed as to the draft article's possible adverse effects on developing countries. The interests of developing countries would hardly be served if, for example, foreign States could infringe patents applied for in developing countries and then claim immunity in relation to proceedings before the courts of such developing countries. The view was expressed that draft article 16 would probably not be necessary if a more general approach were taken in draft article 12 but otherwise draft article 16 would, it was said, be crucial. There could be no justification for granting States freedom to violate the copyright and trade-mark laws of other States with impunity. The issue was not one of intellectual property, but rather of recognizing that a State was not free to commit acts which would not be permitted of private or legal persons. The view was expressed that it might be useful to specify in draft article 16 that the exceptions to the rule of immunity prescribed in the draft article would be limited to infringements of patents, industrial designs, etc., in the State of the forum.

285. The view was expressed that the provisions of subparagraph (a) of draft article 16 presented no difficulties - as it applied only to one case. This was where a State having registered a patent or any other form of industrial or intellectual property in the State of the forum and, thus, enjoying the forum State's legal protection, initiated proceedings for determination of its rights in the patent or other form of intellectual or industrial property registered; and the exception to State immunity applied in that case mainly to counter-claims. Subparagraph (a) was, in that sense, unnecessary since the provisions of paragraph 1 of draft article 10 already covered the matter in more general form.

286. The point was also made that subparagraph (b) of draft article 16 covered the reverse situation to that covered by subparagraph (a), namely, if a State decided to enjoy legal rights in another State, it was logical for it to recognize that third persons in that State enjoyed similar rights, and this was where the exception to the basic principle of State immunity applied. One could, however, imagine a situation in which a State preferred not to have any legal protection over patents in the State of the forum. In that circumstance, it would be valid to inquire whether subparagraph (b) of draft article 16 was still appropriate. The nature of the link between subparagraphs (a) and (b) of draft article 16 was not yet, it was said, clearly established.

287. The point was also made that it would be desirable to include the word "legally" before the word "protected" in subparagraph (b) of draft article 16.

288. Some representatives considered the provisions of subparagraph (b) of draft article 16 unacceptable. They were of the view that it was directed essentially against developing countries, since the third persons which it protected were for the most part transnational corporations and capitalist monopolies, while the States affected were primarily developing countries. Adopting such a principle would amount to legalizing the policy of neo-colonialism.

289. The view was expressed that the provisions of draft article 16 were too broad and might work against the interests of developing countries which were not as technologically sophisticated as other States. The practice of all States must be studied before the codification work was complete, it was said, as it would be unfair if developing countries were faced with a fait accompli without having the opportunity to act or study the implications carefully. The provisions of draft article 16, in the view of another representative, might hinder the economic and industrial development of developing countries which were not as technologically sophisticated as other States, despite the safeguard clause contained in paragraph 2 of draft article 11.

290. One representative reserved his position on draft article 16 in light of the Commission's decision, in paragraph (10) of the commentary to draft article 16, to include a reservation in draft article 11, paragraph 2, so as not to prejudge the question of the extent of the extraterritorial effect of expropriation or other measures of nationalization. Another representative, referring to paragraph (10) of the commentary to draft article 16 concerning the extraterritorial effect of measures of nationalization, expressed reservations with respect to the Commission's decision and observed that the judicial practice of his country refused to recognize such an effect. For, he stated, if draft article 11, paragraph 2, as set forth in footnote 182 in the report of the Commission (A/39/10) reserved the substance, namely, the question of ownership, was it logical to remove the procedural immunity of the State in article 16 which dealt with rights which the State might well claim to have under, for example, a nationalization measure?

#### Article 17. Fiscal matters

291. Some representatives expressed general agreement with the approach in draft article 17. The draft article was said to be acceptable though the proviso it

contained may only be of marginal importance once the principle of restricted immunity in the field of commercial activities of States was accepted.

292. One representative expressed agreement with the approach in draft article 17 because to accord immunity in such a case would jeopardize the exercise of the sovereign right of each State to stipulate conditions and to impose fiscal obligations on any activities pursued by other subjects, including foreign States, within its territory.

293. Other representatives considered that draft article 17 represented an attempt to undermine the principle of the jurisdictional immunity of States, since foreign States were normally exempt from the payments in question by virtue of international agreements or were unilaterally granted exemptions. The term "fiscal obligations" in draft article 17 was considered too broad and could, it was said, affect immunities granted under the Vienna Convention on Diplomatic Relations. The view was expressed that the draft article did not take into account the practice of many developing and socialist States. The point was made that given the degree of reciprocity in existing State practice, draft article 17 was prejudicial to the interests of some States and was superfluous.

294. Concern was noted with respect to the briefness of the references, in the commentary to draft article 17, to the doubts expressed as to its advisability.

#### Article 18. Participation in companies or other collective bodies

295. Some representatives considered that draft article 18 presented no difficulties and was adequate. Where a foreign State engaged in corporate activities on an equal footing with nationals of another State there was, it was said, no basis for according the foreign State immunity.

296. The point was made that it would be preferable if the expression "or is controlled from" in paragraph 1 (b) of draft article 18 was deleted. A reference to the place of incorporation of a company and its principal place of business would, it was considered, be sufficient. The place of control did not offer the same kind of clear-cut criterion.

297. The view was also expressed that draft article 18 was another example of a provision which would be unnecessary if draft article 12 were more appropriately drafted.

298. The draft article was, in the view of one representative, too categorical and should differentiate between various possibilities, particularly regarding the nature and purpose of the act which caused the damage.

299. The question was raised as to whether paragraph 1 of draft article 18 dealt only with a proceeding instituted for the purpose of obtaining a declaratory judgement. Paragraphs (5), (8) and (10) of the commentary to draft article 18 did not, it was said, clarify the matter. As currently worded, draft article 18 seemed to indicate that the proceeding should be aimed at the determination of a

relationship by the court without the court's drawing any conclusions from such a determination. Moreover, in light of paragraph (7) of the commentary to draft article 18, should it be deduced from draft article 18, paragraph 1 (b), that the immunity of the State, in the circumstances envisaged in the article, could give rise to as many different interpretations? In other words, could not the immunity function differently in different cases? Paragraph (9) of the commentary did not solve the problem.

300. Some representatives reserved their positions on draft article 18. The point was made, with respect to participation in companies or other collective bodies, that should a State engage in such activities the presumption should arise that it consented to the jurisdiction of the courts of the other country, and it was therefore unnecessary to take such cases into account in the draft articles. The point was made that it was unclear which companies or other collective bodies were being referred to in draft article 18 and that the draft article was open to conflicting interpretations and, thus, would permit abuse and violations of State immunity. Some representatives were of the view that the Special Rapporteur had limited himself to the practice and laws of fewer than half a dozen countries. Thus, the general assertion in paragraph (9) of the commentary to draft article 18, that in State practice increasing use was being made of exceptions whereby States could not invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its participation in a company or other collective body, did not seem warranted.

301. One representative was struck by the briefness of the references, in the commentaries to draft article 18, to the doubts expressed concerning its advisability. He was gratified to note that the Commission would review some of those important provisions relating to exceptions and urged that such reconsideration should not be limited to terminology only.

(b) Articles proposed by the Special Rapporteur

Article 11. Scope of the present part

302. The view was expressed that the Special Rapporteur and the Commission had been right in establishing the principle of immunity before attempting to identify possible exceptions. The Commission should be given credit for having sought to reconcile the principles of sovereignty and territoriality without giving precedence to either of them. Paragraph 2 of draft article 11, concerning the extraterritorial effects of measures of nationalization, reflected such a balanced approach. See also the comments noted, with respect to paragraph 2 of draft article 11, under draft article 16 above.

Article 19. Ships employed in commercial service

303. The view was expressed that the revised version of draft article 19, submitted by the Special Rapporteur in light of discussions in the Commission (A/39/10, footnote 185) was satisfactory and broadly corresponded to established practice. It was an improvement on the previous alternatives A and B in the earlier version of draft article 19 (A/39/10, footnote 183).



304. The revised version of draft article 19 had been introduced by the Special Rapporteur, it was noted, in light of preliminary exchanges of views within the Commission, with a view to covering the case of shipping outside the common-law world as envisaged in the Brussels Convention of 10 April 1926.

305. The point was made that the provisions of the Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, as supplemented by the Additional Protocol of 24 May 1934, were satisfactory. States from every part of the world were parties to the Convention. Subparagraph 2 (a) of draft article 19 should be revised so as to provide immunity of jurisdiction not only to ships of war but, to use the terms of article 3 of the Brussels Convention, ships "used at the time a cause of action arises exclusively on governmental and non-commercial service".

306. It would be more precise, it was said, if the words "governmental service" in subparagraph 2 (a) of draft article 19 were replaced by the words "government non-commercial service", which corresponded to the wording used in codification conventions prepared by the United Nations.

307. The view was expressed that subparagraph 2 (a) of the revised version of draft article 19 (A/39/10, footnote 185), which provided that paragraph 1 did not apply to warships or ships operated by a State in governmental service, may be superfluous in light of the provisions of draft article 6.

308. The view was expressed that the distinction between ships employed in commercial service and those employed by a State in governmental service did not always provide a realistic criterion, especially in the developing world.

309. The point was made that the distinction between actions in rem and actions in personam contained in one of the Special Rapporteur's alternative proposals in the earlier version of draft article 19 (A/39/10, footnote 183) was not viable in provisions meant for implementation in some countries whose legal systems made no such distinction.

310. Some representatives were of the view that State-owned ships in commercial service should not enjoy immunity and that draft article 19 took account of a trend towards restricted immunity that had existed for almost 60 years. Such a draft article was essential to maintain equality between public and private shippers. It related not to North/South issues but to practical needs such as, for example, salvage and rescue. Those who used State trading companies wanted preferential treatment but had produced no valid argument for their position.

311. Some representatives expressed reservations with respect to draft article 19. The view was expressed that the Commission seemed to have acted prematurely in an extremely complex and vast area. A more thorough consideration of the draft article by the Commission and Governments, of the developing countries in particular, was required. It was feared that the draft article might have a severe economic impact on developing States owning vessels. Many developing States acted as maritime carriers to save shipping costs and not to make profits. If adopted, the article would put the maritime transport and trade of developing countries in a

disadvantageous position. It was said that emphasis must not be unduly placed on distinctions made under admiralty law and hope was expressed that the Commission would take into account the divergencies which existed in different legal systems before agreeing on an appropriate text for draft article 19. The point was made that certain governmental activities in the field of aviation and maritime transport, for example, were not always motivated by profit-making. Governments, especially those of developing countries, often undertook such ventures as a public service and often at substantial losses underwritten by the taxpayer. Such activities were not, in general, indulged in for national pride alone, since it was usually cheaper for the consumer/taxpayer to have his products transported by a national carrier.

312. The view was expressed by one representative that the debate on draft article 19, as summarized in paragraph 210 of the Commission's report, seemed to reveal a basic misunderstanding of the meaning of the term "commercial activities" in the terminology of the law of State immunity. Those trained in the civil law tradition, where a distinction between civil law and commercial law was made, tended to carry over to the law of State immunity the civil law concept whereby commercial activities, governed in their system by the commercial code, were by definition those which were motivated by profit-making. In the area of State immunity, however, "commercial activities" did not carry that connotation and need not be motivated by profit-making. Also, the English term "commercial activities" was not the equivalent of the French term "actes de commerce". The "commercial activities" of a State were simply non-public or non-governmental activities, i.e. activities which were not carried out in the exercise of public authority, and included all kinds of contracts and other transactions to which private individuals or entities might be party, regardless of any profit motive.

#### Article 20. Arbitration

313. The observation was made by one representative that the text of draft article 20 seemed to be a good starting point and that, as noted by the Special Rapporteur, if a State decided to submit disputes concerning civil or commercial matters to arbitration, there was irresistible implication that that State had renounced its jurisdictional immunity on all questions relating to the arbitration. If it were otherwise, the State's decision would be incompatible with the aim of arbitration, namely, to deal with matters expeditiously on the basis of equality between parties. The point was made that the debates in the Working Group on International Contract Practices of the United Nations Commission on International Trade Law (UNCITRAL), which had recently completed a model law on international commercial arbitration, showed that it was important to establish a clear relationship between arbitral proceedings and the court competent for deciding questions relating to the proceedings. Any measure of uncertainty as to the consent of States in accepting the jurisdiction of that court could hamper, it was said, the development of smooth commercial relations between States and private individuals and corporations.

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

1. General observations

314. Representatives paid tribute to the late Special Rapporteur, Mr. Robert Q. Quentin-Baxter. They referred to his creativity and vision and to the outstanding contributions he had made to the Commission's work on the topic. His passing was a great loss to the Commission.

315. A number of representatives addressed, among other matters, the factual basis of the topic. Reference was made to the unity of the ecosystem, which did not coincide with political boundaries. The rapid growth of technology and its increased role in the exploration, production and utilization of resources made necessary the elaboration of a régime which would define the principles applicable to the prevention and mitigation of injury beyond political boundaries and the provision of compensation. The principles of State responsibility were not in such circumstances entirely adequate.

316. A number of representatives referred to the great complexity of the topic which touched on many unresolved areas of international law. Activities causing extraterritorial injurious consequences were not always wrongful nor, they stated, was it desirable to so characterize them. The purpose should be to design a normative régime which would protect a State from injury caused by activities of others outside its territory, while allowing appropriate freedom of activity to States to use modern technology for their development.

317. As to the legal basis of the topic, many representatives referred to a number of bilateral and multilateral agreements dealing with similar factual circumstances. They noted, in that connection, the law of outer space, the law of the sea and, in particular, marine pollution as a result of oil spillage, etc., which, they stated, provided firm foundation for the principle that States were under an obligation, first, to prevent damage and, secondly, to provide compensation where damage was caused. They were of the view that such State practice was sufficient to constitute a legal basis for the topic. While the subject was novel, it was not unknown to legal analyses. They recognized, however, that efforts should be made to achieve careful balance between the interests of States to act freely and their duty to avoid injury.

318. Certain representatives considered it unrealistic to assume that existing State practice provided adequate legal basis for elaboration of a general or of a framework régime. They referred to a number of activities which could cause injury either to a particular State or to the international community as a whole. As such activities might take place in a variety of circumstances, it was difficult to draw general conclusions. It was true that international co-operation was assuming greater significance with respect to such matters; but the subject was best suited for specific treaties, bilateral or multilateral, in which States consciously commit themselves to specific behaviour with respect to a specific subject. However, it may be possible and feasible to elaborate a recommendatory "code of conduct" of which States would make use in order to negotiate relevant agreements. It was also suggested that the title of the topic was not fully satisfactory; it

would be more accurate to speak of international liability for injurious consequences arising out of acts that did not constitute international offences.

319. Some representatives referred to the relationship between the present topic and that of State responsibility. It was noted that a number of activities which might cause transboundary harm were in the course of or might become subjects of a treaty; and, thus, cases might be attributable to breach of treaty obligation and, thus, involve State responsibility. The connection between the current topic and the non-navigational uses of international watercourses was also noted by some representatives who referred to the common element of transboundary harm. Co-ordination of the work of the Commission on the current topic and on the topics of State responsibility and the non-navigational uses of international watercourses seemed necessary.

320. One representative considered that it was necessary to decide whether the present work of the Commission with respect to transboundary harm should be limited to the consequences of acts not prohibited by international law or whether it should extend to the whole subject of transboundary harm in all its aspects, including transboundary harm arising from prohibited activities.

## 2. Comments on draft articles

### Article 1

321. Some representatives expressed agreement with the limitation on the scope of the draft articles proposed in draft article 1, namely, the limitation to identifiable or foreseeable physical consequences. One representative, however, thought that it would be regrettable to exclude from the scope of the topic activities causing injury to the common heritage of mankind. The structure of draft article 1 and its division into three elements, namely, the activities or situations giving rise to physical consequence, affecting the use or enjoyment of areas, was considered to be clear, systematic and in accordance with the nature of the topic. The requirement that the effects of a physical consequence should be weighed against the benefits of the use or enjoyment of an area within the territory of another State was considered, by some representatives, essential. It would, however, be necessary, it was stated, to see how the three elements were incorporated in the various provisions of the draft articles before a definitive opinion was possible on their real effect.

322. A number of representatives, while agreeing with the general principles incorporated in draft article 1, raised specific questions. Some thought that it was unclear whether the phrase "use or enjoyment of areas within the territory or control of any other State" would exclude personal injury from the scope of the draft articles. Clarification was also necessary, in the view of some representatives, on the question whether industries "exported" from developed to developing countries involved a "transboundary element". The Special Rapporteur, they noted, seemed to intend to exclude this matter from the scope of the draft articles, but the fact that draft article 1 provided for coverage of activities "within the territory or control of a State" raised uncertainties. One representative found it difficult to accept a system of liability for injuries

which had not actually taken place. It was suggested that as the purpose of the topic was the avoidance, minimizing and repairing of "harm", it may be more appropriate to think in terms of actual or potential adverse effects rather than in terms only of an "effect" caused by an activity. An "effect" might not always constitute "harm". Another representative thought that situations such as floods or earthquakes might involve only minimal or no duties for repairing injuries, even though the States involved should remain obligated to prevent or reduce the consequences of natural phenomena.

323. Many representatives agreed that special attention should be paid to the needs of the developing countries with respect to their industries that were a source of pollution but were making a contribution to their economies. Other representatives, while agreeing in principle with such a point of view, recommended caution and the introduction, in such cases, of a qualification to ensure that the source developing country did not have, and should not have had, knowledge of the fact that the activity would produce adverse transboundary effects. Thus, after such effects had been produced and brought to the attention of the source country, it seemed to them that there should be an obligation on that country to mitigate such effects. It should be remembered, they thought, that the victims may also be other developing countries. Thus, with respect to the interests of the developing countries, it was suggested that in sharing costs and benefits strict equality in cost sharing should not be imposed when the parties involved were not economically and financially equal.

324. Some representatives believed that a few of the terms referred to in draft article 1 were unclear. Some were not entirely clear as to the meaning of the term "use or enjoyment of areas". Some considered the term "situation" unclear. Some stated that the term "physical consequence" needed clarification.

## Article 2

325. A number of representatives were of the view that the definitions in draft article 2 rightly prevented the scope of the draft articles from becoming too extensive. The view was expressed that States should be liable for the transboundary effects of activities conducted by private entities situated within their territories. However, others believed that it would be reasonable to include, within the scope of the draft articles, the activities of those entities only to the extent that they, by their very nature, involved an inherent substantial risk of causing harm. State practice, it was noted, provided many examples of this kind, such as, for instance, the 1960 Convention on third party liability in the field of nuclear energy.

326. A number of questions were also raised as to specific provisions of draft article 2. It was stated that, although the commentary to draft article 2 was very helpful in clarifying the meaning of the terms, it still contained ambiguities, particularly in other languages such as in Spanish. A number of questions were raised as to the exact definition of the terms "territory or control". One representative referred, for example, to the case of activities within an economic zone by a flag State and thought the definition did not provide a sufficient

guidance to determine whether a claim by injured parties could be made against the coastal State or against the flag State. In addition, others thought draft article 2 needed drafting improvement in order to crystallize its terms, since the article was dealing with a very complex situation.

327. One representative thought that some elements of the definitions in draft article 2, in particular the third paragraph, strayed too far from the common use of words and, thus, jeopardized the comprehensibility of the articles and the clarity of the proposed rules. A formulation closer to the common meaning of the words should be found. In relation to the phrase "continuous passage", one representative thought it would be better to replace it with "passage", while another representative suggested the phrase "the right of innocent passage". In the view of another representative, there were currently no rules recognizing the right of innocent passage of space objects through the airspace of foreign States, contrary to what draft article 2 implied.

### Article 3

328. Some representatives stated that draft article 3 was important and that it should be carefully considered. The residual character of the draft articles was of significance to States that were already, or might in the future become, parties to conventional régimes tailored to specific needs. In relation to activities within the economic zone, it was suggested by one representative that since the United Nations Convention on the Law of the Sea provided for dispute settlement, it was necessary to ensure that dispute-settlement procedures under the new draft articles did not conflict with régimes established under the Convention.

### Article 5

329. Some representatives thought that it was premature, at this stage, to decide on the content of draft article 5. The Commission should await further development of the topic. It was stated that, as a matter of fact, some international organizations might have control over an activity with transboundary consequences.

330. Many representatives expressed satisfaction with the conceptual framework of the topic and its schematic outline designed by its late Special Rapporteur. They expressed hope that the Commission would continue its work on the topic within that framework.

## F. THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

### 1. General observations

331. The Commission was congratulated for having achieved appreciable progress in its consideration of the topic "The law of the non-navigational uses of international watercourses" despite the delicate nature of the subject-matter. Any study of the topic was beset with many problems because of the length, location and hydrography of various watercourses and the wide variety and often inconsistency in

the customs and practices of riparian States. It was felt that the theoretical approach to the question should be based on the principle of the sovereignty of States and their right to dispose in a sovereign manner of the natural resources in their territory. At the same time, the need for watercourse States to take account of the interests of the other States was undeniable. The main difficulty lay in establishing the proper balance between the two principles. The Special Rapporteur, Mr. Jens Evensen, was praised for his singular efforts in striving to achieve realistic compromise formulations which were generally acceptable.

332. The revised text presented in the form of 41 draft articles reflected, it was said, the Special Rapporteur's commitment to achieving consensus formulas which reflected the interplay between two fundamental international legal principles: the sovereignty and independence of States on the one hand and the necessity of co-operation among States resulting from their interdependence on the other. It was stressed that despite certain conceptual difficulties which had arisen both in the Commission and in the Sixth Committee, the revised draft articles provided a general basis on which further work on the topic could be pursued. While expressing gratitude to the Special Rapporteur for his contribution to the development and codification of international law on the topic, the Commission was urged to appoint a new Special Rapporteur as soon as possible to replace Mr. Evensen who had recently been elected to the International Court of Justice. It was also suggested that consideration of the topic could be placed in the hands of an ad hoc working group.

333. Confidence was expressed that the new Special Rapporteur would take into account the various observations presented in the Sixth Committee and would seek to accommodate conflicting views and arrive at a harmonious draft which elicited general approval. Despite the disagreements which seemed to remain within the Commission, it appeared that the draft articles had already reached an advanced stage and that work on the topic constituted a priority task for the Commission. The hope was expressed that at its next session the Commission would be able to complete its consideration of the first nine draft articles which had been referred by it to the Drafting Committee and to take up consideration of the remaining draft articles with a view to an early conclusion of its work on the topic. Furthermore, it was hoped that the spirit of accommodation which had guided the Special Rapporteur would guide the work of the Drafting Committee. It was also suggested that at its next session the Commission may wish to concentrate its efforts on the questions of co-operation and management and environmental protection, namely, chapters III and IV of the draft, and to leave the remaining chapters for subsequent sessions.

334. Several representatives stressed the extreme importance of the topic in view of mankind's dependence on and increasing demand for fresh water resources. The regulation of the uses of watercourses was a vital factor in the development of certain States and their peoples since increasing population and industrial and agricultural expansion were drawing heavily on diminishing water resources.

335. Certain representatives referred to the practice and experiences of their own countries in tackling some of the issues posed by the topic and stressed their fundamental interest in the Commission's work. For example, one representative

said that through bilateral and multilateral conventions with its neighbours and other States of the region, his country had settled a number of questions on use of the waters flowing through it or its borders. The co-operation that had thus been established in the most diverse forms was part of a good-neighbour policy based on understanding and mutual respect. Another representative recalled that his country had institutionalized its practice through the establishment of effective mechanisms such as bilateral boundary and water commissions, which covered some aspects of the uses of international watercourses. Other aspects, however, such as underground watercourses, required a general, multilateral agreement.

336. It was urged that rather than entering into hydrographic studies, the Commission should draw on known international practice and study the relationship between, on the one hand, the exercise of the undeniable sovereign rights of States concerning the use of international watercourses in their territories and, on the other, the need for those States to co-operate, in view of the diversity of uses of those watercourses. International practice had demonstrated that it was on the basis of these two basic principles of international law, namely, the sovereignty and independence of States and international co-operation, that a viable solution could be worked out which would take into account the legitimate interests of all States concerned and ensure both the exploitation of their natural resources and the establishment of mutually beneficial co-operation. The principle of sovereignty of States, and the consequent definition of international watercourses, could not be set against solidarity among peoples, regional co-operation or the community of interests of the States in question, because solidarity among States could not be based on a negation or violation of sovereignty. Rather, it should rest on the free agreement of the States concerned as a result of good faith negotiations and in terms of the legitimate interests of those States.

337. Support was, however, expressed for the principle of absolute regional unity whereby any State whose territory was crossed by an international watercourse had the absolute right to ensure that the amount and quality of the water it received were not modified, given that a watercourse constituted a regional unit without political boundaries and that no State, therefore, had the right to exercise absolute sovereignty over the part of the watercourse which crossed its territory; the implication was that any State had the right to benefit as it wished from the part of an international watercourse which crossed its territory, on condition that no prejudice was caused to the other watercourse States.

338. It was recognized that although the topic was essentially of a legal nature, it contained certain economic and political overtones which would have to be taken into consideration in order to arrive at a viable instrument of international law on the non-navigational uses of international watercourses. All non-navigational uses required regulation, it was said. Reference was made in this regard to the regulation of fishing, hydroelectric dams, irrigation dikes, thermohydraulic plants, timber floating, fish culture and other uses of an agricultural nature. The Commission was urged to pay more attention to the role of specific geographical, political and economic conditions in the elaboration of legal norms regulating the use of international watercourses. This notwithstanding, belief in the absolute geographical unity of a watercourse from its source to its estuary regardless of political boundaries was reaffirmed by some representatives.



339. The highly technical nature of the subject-matter brought forward the suggestion that an ad hoc group consisting of scientific and technical experts could be set up to deal with various aspects of the topic. This would not only help to clarify any possible misconceptions on the actual import of certain obligations spelt out in the draft but could also place the draft in its proper perspective.

340. The link between the present topic and that of "international liability for injurious consequences arising out of acts not prohibited by international law" as well as the topic of "State responsibility" was noted by certain representatives. It was said that there was a clear overlap between the present topic and the international liability topic with regard to the element of transboundary harm. Also, the liability topic had a contribution to make to the Commission's work on the watercourses topic, particularly in relation to the sharing principle laid down in draft article 6 and the duty to avoid appreciable harm enunciated in draft article 9.

2. Comments on the general approach suggested by  
the Special Rapporteur

341. Many representatives who addressed themselves to the issue commended the Special Rapporteur's "framework agreement" approach to the topic, which followed the approach adopted by the Commission in 1980. The method of drafting a framework agreement setting forth only the main legal principles, while allowing for the conclusion of more specific supplementary agreements adapted to different watercourses, it was said, was the most realistic way to facilitate a universal agreement on the topic. Such an agreement would, in combination with the specific watercourse agreements dealing with the uniqueness of specific watercourses and uses thereof, become a means of achieving a marriage of general principles and specific rules. It was also stressed that such an agreement would need to be flexible. The right balance had to be struck between the interdependence of riparian States and their sovereign independence and right to benefit from the natural resources within their territories; between upper riparian States and lower riparian States; and between the various uses of the waters.

342. It was felt that precisely because of the various difficulties involved, the Commission should seek to establish a framework agreement laying down the most acceptable fundamental legal principles. That solution would have the advantage of promoting both the progressive development of international law and the conclusion of specific watercourse agreements between States. Also, that dual approach was justifiable not only because each watercourse had individual characteristics but because the political relationships and disposition to co-operate among riparian States varied greatly. It was therefore neither politically realistic nor legally justified to presume, generally, that States would co-operate in the management and utilization of watercourses since, in the last analysis, such a postulate rested on the elusive concept of good-neighbourly relations. The general rules included in the framework agreement should be precise and detailed enough to safeguard the rights of interested parties in the absence of specific agreements. Hence, it was said, the formula of a framework agreement supplemented by specific watercourse agreements was preferable, despite its shortcomings, to all other possible alternatives.

343. With regard to the elements to be included in a framework agreement, some representatives supported the Special Rapporteur's view that apart from containing legal principles, the framework agreement could also contain guidelines and recommendations which might be adapted to specific watercourse agreements. In this way, when riparian States were disposed to act in co-operation, the guidelines contained in the framework agreement would make it possible to define the modalities of such co-operation. Furthermore, in those instances where riparian States were unable to agree, the framework agreement would delineate their rights and duties as clearly as possible and serve as a yardstick for appraising the activities of such States.

344. However, it had to be recognized, it was stated, that the framework agreement approach led to the inclusion of general and somewhat vague language, based on reasonableness, equity and the duty not to affect the other watercourse States' interest to an appreciable extent. The set of institutional and procedural provisions, including those on the settlement of disputes, in the Special Rapporteur's draft was therefore all the more important. The general concepts must be complemented by precise mechanisms that could give them specific content and avoid conflict in actual cases. There was therefore need for efficient dispute-settlement procedures, and a future framework agreement should include compulsory fact-finding and conciliation procedures as well as binding provisions for third-party settlement of disputes.

345. Doubts were, however, expressed by certain representatives concerning the framework agreement approach. According to one view held, it was difficult to see the cases in which all the States sharing the same watercourse would become parties to the framework agreement and not conclude a specific watercourse agreement. The idea of shaping the draft articles as a set of model rules still had some appeal. However, whatever their final form, the draft articles could serve as a guide for the conclusion of watercourse agreements and for crystallizing the few substantive rules on the subject. Another view maintained that it would be unrealistic to try to prepare at the international level an overly detailed convention on the subject and that it would be better for the Commission to draw up a framework agreement which the countries concerned could use and adapt to their particular needs. While the Commission seemed to have adopted that approach, it was far from evident that the draft under consideration quite fitted the definition of a framework agreement which should be a more flexible and freer text. The work completed so far, it was said, did not seem always to have succeeded in reaching the objective of striking the right balance between the rights and duties of all riparian States. A framework agreement should be short and adaptable to the specific conditions of international watercourses, thereby enabling riparian States to elaborate watercourse agreements corresponding to the specific conditions of their respective watercourses.

346. One representative wondered whether it would be more advisable to slow down the process of codification on the topic until the law was sufficiently developed to require codification. In any case, the necessary and appropriate preparatory work had yet to be done. In his delegation's view, the draft resembled more a General Assembly resolution than a proper legal instrument. Another representative considered that the actual nature of the instrument did not have to be determined at this stage of the Commission's work and that all possible options, including

conventions, codes of conduct, standards or other rules, should be left open and decided at the appropriate time and in the light of the content of the draft articles. It was suggested that the use of the expression "draft articles" rather than "draft convention" would be more accurate in this regard. Yet another representative stressed that the final form of the instrument must be fair, pragmatic and reasonable; if those conditions were met, the same result would be achieved no matter what formula was adopted.

347. As to what constituted fundamental legal principles to be included in the draft, certain representatives singled out one or more of the following: good neighbourliness, good faith, the duty not to cause appreciable harm to the rights and interests of others, the sharing of resources in a reasonable and equitable manner, the sovereignty and territorial integrity of States, permanent sovereignty over natural resources, and acquired rights with regard to the amount of water to which States had access.

348. According to one representative, the international community of lawyers, in collaboration with scientists and engineers, had sought to clarify certain concepts and to crystallize some generally acceptable policies. It had thus been accepted, he said, that at the international level only general principles should be dealt with and the States concerned should be allowed to enter into specific agreements with respect to individual rivers; that each State was entitled to an equitable share of the waters of an international river and had the sovereign right to determine the manner in which it would use its share, with the obligation, however, to protect the quality of water and the environment and to avoid any appreciable and avoidable harm to other basin States; that no use by one State was entitled to a preference over another use by another basin State, nor could any State be denied a current reasonable use of waters belonging to its share in order to provide for a future use by another basin State; and that a basic objective of the framework containing general principles should be to promote co-operation by balancing relevant and legitimate interests of all the basin States.

349. In the view of another representative, the draft articles should be based on the following principles: (a) the waters of an international river should be equitably apportioned among riparian States, having due regard to special circumstances, such as dependence on or traditional use of water by a particular State; (b) the exercise of rights within its territory by a riparian State should not affect the flow of water, which might result in harmful ecological and physical changes in the territory of other riparian States; (c) the utmost care should be taken to prevent the pollution of waters; (d) where the utilization of water was likely to cause damage or hardship to another riparian State, the prior consent of that State should be required; (e) a right which could be exercised in more than one way should be exercised in such a manner as not to cause damage to another riparian State; (f) a riparian State should be compensated adequately for the loss suffered or the damage caused by the misuse by another riparian State of its rights; (g) riparian States should be under legal obligation to settle their disputes peacefully, either bilaterally or in international forums.

350. Regarding the notion of good neighbourliness, attention was drawn to the necessity of clarifying and defining the content of the notion so as to facilitate the Commission's consideration of the topic.

351. The Commission's attention was also drawn to the fact that the question of the legality of massive diversions and violations of natural flows of an international watercourse had not been covered by the Special Rapporteur's second report. According to one view, such diversities and violations harmed good relations between States and caused appreciable harm to the principle of reasonable and equitable use of an international watercourse. The Commission was requested to examine that aspect of the question. According to another view, it should be noted that certain diversions of limited extent constituted normal practice for many States. An express prohibition would therefore not seem realistic or conducive to "optimum utilization" of the waters concerned. The rules laid down in draft articles 6 to 9 seemed sufficient to prevent any detrimental consequences.

352. Several representatives referred to the Special Rapporteur's general approach as evidenced by the revised texts of certain draft articles (draft articles 1 and 6, see below) incorporating changes in terminology which he had used in his first report and which had provisionally been adopted or agreed upon by the Commission at its 1980 session. Some representatives welcomed those revised texts and believed they constituted a valiant attempt to reconcile individual sovereign interests with wider community claims. It was noted with satisfaction that the changes suggested by the Special Rapporteur in his second report were not intended to change the meaning of the substantive provisions contained in his first report.

353. Concern was expressed by other representatives that the Special Rapporteur had reworked some of the basic conceptual issues underlying the draft articles, such as the concept of "system", the definition of an "international watercourse" and the concept of "shared natural resources". According to this view, the differences of opinion which continued to be expressed concerning those concepts made one wonder whether that state of affairs was beneficial to the profitable continuation of the Commission's work. It was asked whether the new definitions, which had been changed in order to reach a consensus, really constituted progress; they seemed to indicate that the fundamental theoretical problems had not yet been clearly resolved. The Commission and the new Special Rapporteur were urged to avoid an annual reconsideration of texts which had already been provisionally adopted by the Commission. Otherwise, the Commission would be forced to reconsider the entire question, in particular draft articles 4, 5 and 6, and that would delay its work considerably.

354. Differences of opinion were also voiced regarding whether the changes in the texts were purely terminological changes, as asserted by the Special Rapporteur, or whether, in actual fact, they implied more fundamental conceptual changes. The view was held that the Commission should provide clarification and assurances regarding the full substantive implications of the changes introduced; in such cases, it would be best, it was suggested, to reject not only the discarded words, but also their content. Furthermore, it was maintained that although the new draft articles 1 to 9 included several clarifications, there were still considerable difficulties outstanding and the Drafting Committee was possibly not the best place to resolve them. It was suggested that the Commission might wish to consider other possible methods of work. If the conflict generated by imprecise use of notions persisted, the draft would, it was suggested, continue to be unbalanced; perhaps an ad hoc working group should be established to try to settle the matter.

355. Finally, some representatives made technical comments on the drafting of the Arabic and Spanish versions of the draft, which they considered to have been rendered in some respects inaccurately.

3. Comments on the chapters and articles included in the revised draft presented by the Special Rapporteur

CHAPTER I. INTRODUCTORY ARTICLES

Article 1. Explanation (definition) of the term "international watercourse" as applied by the present (draft) convention

356. Some representatives endorsed the Special Rapporteur's replacement of the term "international watercourse system" by the term "international watercourse". It was considered that the term "international watercourse" was simpler and more precise and, thus, more acceptable. In addition, such a concept as "watercourse system" and that of "shared natural resources", when combined with the requirement of prior notification of projects, had the effect of internationalizing the territory of other States and of introducing the notion of a veto power over the use of water. The term "international watercourse" had been used at the outset by the General Assembly in its resolution 2669 (XXV) of 8 December 1970, which had recommended that the Commission should undertake the study of the topic with a view to its progressive development and codification.

357. Other terms which had been provisionally adopted or proposed as a working basis for the study, such as the geographic notion of the "international drainage basin", and such concepts as "system" or "network", which were related to the unitary approach of the drainage basin concept, had met with considerable controversy, it was maintained, and had proved to be major stumbling blocks towards achieving progress on the topic. Although the "system" approach might have appeared attractive from a scientific point of view, it could not be a source of rights and obligations of States since it did not correspond to international practice in that field. It was considered that the "system" approach had both territorial and political connotations which were not in keeping with the principle of permanent sovereignty over natural resources and would meet with the firm opposition of some States.

358. More specifically, it was said that the use of the "system" concept was somewhat ambiguous because it might connote the idea of jurisdiction over land areas. Its earlier approval by the Commission had been tentative and contingent upon the final shape which the draft articles would take. There should also be no misgivings as to the conceptual change from "international watercourse system" and "system State" to "international watercourse" and "watercourse State", because even though surface water, the bulk of the resource, was emphasized, other relevant parts or components were not ignored and could be elaborated in the commentary to the draft article. The Special Rapporteur's flexible approach was therefore commendable.

359. Since the purpose of draft article 1 was not to create a superstructure from which legal principles could be distilled, the new formulation was considered a satisfactory starting point; the definition of an international watercourse should be as neutral as possible. The new definition was considered of sufficient scope and flexibility for the purposes of the draft. It had the advantage of placing the watercourse in the central position without the territorial implications necessarily attached to the use of the term "system". It was felt that the quantity and quality of water at the point it crossed a frontier was the decisive element in the draft, and that all the component factors of the watercourse and possible influences upon its transboundary use had to be taken into account. The provisions of draft article 1, paragraph 2, reflected that adequately. It was also considered that the new formulation could facilitate the task of combining functional aspects which were foreseeable with conceptual aspects which involved unforeseen and possible uncontrollable consequences.

360. While supporting the change in terminology suggested by the Special Rapporteur, certain representatives cautioned that his report continued to include elements of the "system" concept, such as the use of the phrase "the relevant parts or components". The explanation or definition of the term "international watercourse" as set out in draft article 1 should be made clearer so that it would not invite a reintroduction of the concept of "drainage basin" or "watercourse system".

361. Certain representatives welcomed the Special Rapporteur's assurances that the new wording in draft article 1 was a purely terminological and not a conceptual change. The change was not intended to cast doubt on the inherent unity of an international watercourse or on the interdependence of its various components. In view of that fact, the belief was expressed by one representative that the definition of the "international watercourse" given in revised draft article 1 was a negation of any absolute or monopolistic use or control of an international watercourse by a particular country. The definition of the term "international watercourse", which took into account the volume of water that flowed into and through the watercourse, must also take into account the economic realities of riparian States. While agreeing that the replacement of the words "international watercourse system" by "international watercourse" was basically a change of terminology, his delegation considered that the explanation given in the commentary to the first version of draft article 1 was still valid. The definition of the international watercourse was based on the very nature of things, which meant that the definition was, in the final analysis, anchored in the unity of the hydrological cycle.

362. Another representative remarked that the Special Rapporteur had implied that the proposed change was entirely terminological, which would presuppose that the definition of the concept remained unchanged; yet the change of terms appeared also in the definitions. There were different interpretations of the word "system", and a certain relativity was connected with the concept of "international watercourse system". Although the physical consequences of the various uses and other activities might differ from each other in different parts of a watercourse, that did not mean that there would be different systems with respect to different uses of the same watercourse at the same time. Therefore, although the concept of "watercourse system" was not inapplicable, his delegation preferred the term proposed by the Special Rapporteur.

363. Other representatives, however, expressed regret at the abandonment of the "system" concept which was considered to be a rich, modern notion. The abandonment of that concept resulted in an unacceptable loss of clarity and meant that one of the cornerstones of the draft had been removed. The lack of precision of the term "international watercourse" was highlighted: what was in fact a watercourse "ordinarily consisting of fresh water" and what were the "relevant components" referred to in articles 1 and 3?

364. It was urged that the Commission return to the "system" approach. The natural connection between various elements - namely, that they formed a system - could not be overlooked. A wider concept was deemed to be more practical and closer to living economic and social realities than an abstract view of the watercourse, considered as an autonomous entity, subject to the absolute sovereignty or exclusive control of riparian States. The latter approach was considered questionable inasmuch as it supposed that it was possible to isolate the running watercourse, which was a living being, from the time dimension.

365. According to one representative who favoured the "system" approach, the use of the term "watercourse system" had the advantage of introducing a certain relativism in so far as different systems could coexist for the same international watercourse, since a system relative to pollution did not necessarily include the same States as a system relative to irrigation. Another representative said that his delegation was decidedly in favour of the system concept, because of its geographical situation. It considered that that idea should be understood to mean that watercourses that were tributaries of a river should be considered to form an integral part of the system. It might also be asked if the term "system", although acceptable in itself, adequately brought out the fact that in reality there could be more than one system of networks. In that connection, his delegation approved of the suggestion made in paragraph 296 of the report of the Commission that a scientific and technical study of the question was needed. Hydrographers and hydrologists could demonstrate the advantages and disadvantages of the various existing systems, assuming that watercourse systems varied from one territory or one continent to another - and the Special Rapporteur would then study their replies. If two principal systems existed, the States concerned with the first of those systems would readily understand that they had nothing to fear from the principles emerging from the study of the second system; their possible objections to the expression "system" might then disappear.

366. Another suggestion made was that in view of the severe controversy surrounding the "system" concept, it ought to be replaced altogether by another expression such as "the inherent unity of an international watercourse or the interdependence of the various parts and components thereof".

367. The Drafting Committee was urged to consider the proposed changes in draft article 1, of "international watercourse system" to "international watercourse", very carefully in order to ensure that it involved only a terminological change and not a substantive change because the inherent unity of an international watercourse and the interdependence of its various components could not be questioned.

368. Certain representatives were of the view that work on the topic should not be held up by disputes over definitions and that the Commission's customary practice, of deferring adoption of definitions pending the development of substantive provisions, should be followed. It might be advisable not to try to formulate the definition dealt with in draft article 1 until a number of the substantive provisions had been agreed upon and a clearer picture had emerged of the concept covered by the draft. It was also suggested that further clarification was required in the future and that technical and scientific advice ought to be sought with a view to amplifying the definition.

369. Several representatives made reference to the phrase "relevant parts or components" of the watercourse. Some representatives believed that the phrase required clarification and should be spelt out in greater detail, specifying the criteria for identifying what constituted such relevant parts or components, as had been done in the Commission's 1980 note of tentative understanding of the term "international watercourse system". The examples given by the Special Rapporteur in his report - rivers, lakes, canals, tributaries, streams, brooks and springs, glaciers and snowcapped mountains, swamps, groundwater and other types of aquifers - could provide a useful basis. It was considered uncertain, however, whether there was really a need to distinguish between relevant and non-relevant parts or components of an international watercourse and, if there was, whether the distinction should be made on the basis of legal or hydrological considerations.

370. Certain representatives felt that the general character of the draft seemed to justify omitting from draft article 2 any indication of which particular hydrographic elements of the international watercourse had to be considered as relevant parts or components for the purposes of that article. It was not deemed proper to enumerate those various hydrographic parts and components. For the sake of clarity, an attempt should be made, it was suggested, to replace "parts and components" with words more capable of giving a hydrographical and hydraulic description of different régimes of watercourses.

371. Certain other representatives questioned the inclusion of the phrase in the draft article. It was said that the reference was redundant and could be criticized on the same grounds as the unitary notion of drainage basin or system. Those "relevant parts or components" must therefore be defined, indicating the criterion for their identification, or else the reference should be deleted. As the reference could be interpreted as including elements of the "system" concept, it would be sufficient to include in a framework agreement a definition such as "an 'international watercourse' is a watercourse ordinarily consisting of fresh water situated in two or more States". According to another view, the question whether components other than the actual parts of the watercourse were to be taken into consideration and be the object of international co-operation was subject entirely to the sovereignty and consent of the countries concerned. However that might be, it should be made clear that those other components could not be part of an international watercourse unless the States concerned agreed. The same held true, it was maintained, where articles 2 and 3 of the draft were concerned.

372. With regard to groundwater, certain representatives endorsed the Special Rapporteur's distinction between groundwater that was related to a specific surface



watercourse and groundwater which was totally independent of, and unrelated to, a specific surface watercourse. It was only the former category which ought to be regulated by a future watercourse convention, because the latter category consisted of aquifers formed in ancient times and was not fed by any other source. In that connection, it was pointed out that a geographically unlimited inclusion of groundwater would amount to a de facto extension of the watercourse concept to a concept encompassing all waters, which would seem to remove any prospect for agreement on the draft articles within the foreseeable future. The Commission should confine its deliberations for the time being to surface waters. Yet according to another point of view, the general reference to groundwater found in the Commission's 1980 note of tentative understanding of the term "international watercourse system" was supported, as opposed to the new approach suggested by the Special Rapporteur.

373. Concerning the possibility of including tributaries in the notion of an international watercourse, it was said that that could be done but only to the extent that their use concerned other States as well. The question was raised whether or not the expression "watercourse" covered tributary watercourses.

374. With reference to paragraph 2 of draft article 1, one representative remarked that it contained one of the basic rules of the draft convention and was obviously based on the principle of hydrological coherence of an international watercourse; it should be read together with draft articles 6, 7 and 8, which prescribed the rules on equitable sharing in the uses of the waters of an international watercourse. Those rules were conclusions drawn from the principle of coherence and were in conformity with the existing law of international watercourses. Another representative suggested that the words "are not affected by or do not affect", in paragraph 2 of draft article 1, should be changed to read "could not be affected by or could not affect", since the phrase as it now stood seemed too closely linked to a situation existing at a given time to serve as a basis for a normative legal provision. In either case, the problem of proof remained.

375. Concerning paragraph 4 of draft article 1, it was suggested that it be made perfectly clear that deltas, rivermouths and other similar formations were natural formations that were part of an international watercourse, unlike canals and other formations created by a State in its territory, which were internal watercourses and were regulated accordingly.

376. Finally, it was pointed out that while paragraph 1 of draft article 1, referred to "States" or "watercourse States", paragraph 2 only referred to "State". The appropriate term alone should be used in various contexts.

#### Article 2. Scope of the present articles

377. One representative considered that draft article 2, together with draft articles 4 and 6, went into needless details on the uses of an international watercourse; this was inconsistent with the Commission's objective of formulating a set of general principles. Measures of administration, management and conservation relating to the uses of watercourses were matters which fell within the competence

of a State's executive and legislative bodies and any attempts to deal with such matters in the draft would only make its acceptance and understanding more difficult.

### Article 3. Watercourse States

378. Certain representatives commented on draft article 3 in conjunction with their comments on draft article 1, particularly with reference to the term "relevant components or parts" of an international watercourse (see art. 1, above). Noting the reference to "relevant" components or parts in draft article 3, one representative wondered whether there could possibly exist components or parts of the waters of an international watercourse which were of an international character, as defined in draft article 1, but which were not relevant to the definition of a watercourse State. Another representative observed that since draft article 3 did not provide any criteria to determine "relevant components or parts", clarification was necessary to avoid future disputes on the interpretation and implementation of the draft articles.

379. Reference was also made to the interplay between draft article 3 and draft article 4, paragraph 3, which dealt with the duty of a watercourse State to negotiate in good faith. In this regard, one representative wondered whether watercourse States were to be considered on an equal footing in respect of the obligation to negotiate in good faith regardless of the differences in the source components present in the sovereign territories.

380. Finally, one representative pointed out that the Spanish terms "Estados del curso de agua", and "Acuerdos de curso de agua" in draft articles 3 and 4 and elsewhere in the draft were unacceptable to his delegation.

### Article 4. Watercourse agreements

381. Several representatives raised drafting questions or points of clarification with regard to draft article 4. Certain representatives expressed reservations to the Special Rapporteur's new formulation in paragraph 1. They considered that the new paragraph 1 should be revised since, as worded, it seemed to grant a higher status to the draft articles vis-à-vis existing agreements because it subjected the validity of these agreements to the condition that they should "provide measures for the reasonable and equitable administration, management, conservation and use" of the international watercourse. Such an interpretation could also cast doubt on the scope of draft article 39.

382. Some representatives criticized the new paragraph 1 of draft article 4 as going too far towards granting the provisions in the framework agreement the status of jus cogens from which watercourse States would be unable to derogate by special agreement. This was presumably not the intention behind the draft. Certain representatives suggested that the residual nature of the draft article should be made more explicit. Every possible encouragement should be given to watercourse States to conclude agreements governing its uses.

383. Certain representatives suggested that the first part of paragraph 1 might be more appropriately placed among the final provisions of the draft and should be aligned with, or take into account, draft article 39. It was considered that the scope of draft article 39 was being placed in doubt by the new formulation of paragraph 1. Draft article 39 was a blanket provision which respected the validity of existing watercourse agreements but the wording of draft article 4 seemed to subject all agreements to the conditions set forth in paragraph 1.

384. One representative did not interpret draft article 4 as casting doubt on the continuing validity of existing agreements but recommended its reformulation for the sake of clarity. Another representative added that the Vienna Convention on the Law of Treaties seemed adequate to cope with the issue of compatibility.

385. Another representative wondered whether the standards laid down in the proposed convention might not be weakened if the rule indicated in the draft article only extended to watercourse agreements to be concluded after its entry into force.

386. One representative considered that it was not necessary to deal at this point with the issue of compatibility between the uses of water by several States because that aspect was covered by chapter II of the draft. His delegation expressed the view that, if at all, "reasonable and equitable use" in paragraph 2 would be more suitable since it gave the States concerned a guideline for harmonizing their respective interests.

387. With regard to the concept of "special watercourse agreement", certain representatives observed that it was ill-defined and unnecessary, while another representative suggested that draft article 4 could be improved if agreements were referred to as "watercourse" as opposed to "special watercourse" agreements.

388. Concerning paragraph 2 of draft article 4, several representatives criticized the vague import of the expression "to an appreciable extent". How was it possible to establish whether the use of the waters was likely to be affected "to an appreciable extent" and, assuming a criterion could be defined, what would be the position of those States whose use of the waters of the watercourse was likely to be affected, although not "to an appreciable extent"? Criteria should therefore be set down to clarify that expression. Similar observations were made with respect to the same expression appearing in draft article 5.

389. One representative maintained that since the drafting of a rather general instrument required the use of fairly general wording, it was very important to have rules on the compulsory settlement of disputes concerning questions such as the scope of the expression "affected to an appreciable extent".

390. With regard to paragraph 3 of draft article 4, one representative expressed his approval of the words "negotiate in good faith" since considerations of good-neighbourliness and solidarity and belief in a common destiny had always been significant factors in negotiations leading to the conclusion of bilateral agreements regarding the use of watercourses.

391. Another representative drew the attention of the Commission to the fact that adoption of the phrase "should" rather than "shall" "negotiate in good faith" would be more in keeping with the recommendatory nature of the draft. His delegation was of the view that the distinction between mandatory and recommendatory provisions should be made more clear-cut throughout the draft.

392. Finally, one representative believed that the term "co-operation" could be inserted in paragraph 3 since its use in modern bilateral and multilateral agreements had made it an acceptable general legal formulation.

Article 5. Parties to the negotiation and conclusion of  
system agreements

393. While certain representatives expressed their qualified approval of the draft article, other representatives expressed doubts or reservations. It was said that the draft article was of a novel nature; for it to be accepted, it was imperative that certain terminological ambiguities be eliminated. One representative was of the opinion that the abandonment of the "system" concept in the draft as a whole had rendered draft article 5 meaningless and that it should therefore be deleted.

394. Concerning paragraph 1 of draft article 5, one representative expressed his satisfaction therewith, in view of draft article 39 which stipulated that the provisions of the proposed convention did not affect other international agreements relating to the watercourse or to any of its parts. It was thus understood that such international agreements bound only the States parties to them and not other watercourse States.

395. Another representative considered that even though the "system" concept had been abandoned, a State seeking to participate in the negotiations referred to had to prove that it belonged to the system. Thus, whether given another name or not, it needed to be defined, as draft article 5 clearly envisaged a special legal community. From what else could the right to participate in negotiations between other riparian States and the right to become party to a treaty derive? From the physical point of view, that community could be identified with what some have called a "shared natural resource" (see art. 6, below). The Special Rapporteur had been right in stating that the water did not belong to the riparian State but that the latter had sovereign powers to use that water provided that no injury was done to other States. It was precisely because of that special legal community that each riparian State should be able to claim the right of participation mentioned in draft article 5, be it a riparian of a main watercourse or of a river that was a tributary thereof.

396. There were differing views expressed on the extent of participation envisaged in paragraph 2 of draft article 5. One view advocated was that a State participating in negotiations should also have the right to become a party to the agreement if such an agreement affected it to an appreciable extent or substantially. Another view held was that to envisage the right of a third State to participate in the negotiation of an agreement between the State concerned that applied to a part of the watercourse or to a particular project or programme which

was of concern only to those countries appeared contrary to general rules of law and to the Vienna Convention on the Law of Treaties. The negotiation and conclusion of agreements between two States could not be subordinated to the participation of third States, whatever the interests involved. Other formulas must be found, it was suggested, to reflect the legitimate interests of third States; the problem could perhaps be solved in the context of draft article 9. If really necessary, States negotiating such an agreement could, in accordance with the concept of reasonable use, bear in mind the legitimate interests of other States in the watercourse.

397. Certain representatives expressed their reservations to paragraph 2 in view of the ambiguities introduced by the term "to an appreciable extent". One representative stressed that it was important to clarify whether "affected to an appreciable extent" meant "harmed to an appreciable extent". As to when the criterion "affected to an appreciable extent" would start to operate, the only way to resolve the difficulty, it was maintained, was for the Commission to seek technical advice with a view to incorporating the necessary quantitative element into the text.

398. One representative urged that the legal situation regarding the problem of non-recognition needed clarification. Another representative believed that the solution to the problem of non-recognition when watercourse agreements were to be negotiated and concluded lay in the elements of good faith and good-neighbourly relations formulated in draft article 7, which would be based on pragmatic, practical needs and the common welfare of populations, not necessarily having a bearing on the political aspects inherent in non-recognition.

## CHAPTER II. GENERAL PRINCIPLES, RIGHTS AND DUTIES OF WATERCOURSE STATES

399. Chapter II was viewed as being of prime importance in the overall scheme of the draft. Concerning draft articles 6 to 9, which formed chapter II of the draft, it was considered to be of the utmost importance not to minimize the significance of the point that the reciprocal rights and obligations of the States concerned were inevitably centred on their shares, which were the subject of those rights and obligations. One representative suggested that chapter II should fully reflect the established principles regarding permanent sovereignty of States over their natural resources, equitable sharing of the use of the waters, equality and mutual benefit, good-neighbourliness and the obligation not to cause harm to the rights and interests of other States. Furthermore, chapter II should strike a balance between the rights and interests of upper and lower riparian States. Another representative said that draft articles 7, 8 and 9 constituted the proper basis upon which the entire draft could be built.

### Article 6. General principles concerning the sharing of the waters of an international watercourse

400. Several representatives welcomed the Special Rapporteur's replacement in draft article 6 of the concept of "shared natural resources" with the notion of "sharing in the use of waters in a reasonable and equitable manner" and considered the

revised version a major improvement, striking a better balance in the draft article as a whole. Although the concept "shared natural resources" had found its place in several international conventions, its meaning and content were considered ambiguous and not yet established; a reference to it in the draft convention could lead to controversial interpretations. Its use could create the impression of a legal superstructure which lent itself to claims and disputes of every kind. The view was held that that concept infringed the sovereign rights of States over their permanent resources and wrongly implied that the ownership of the resource was shared. It was considered clear that the "shared natural resources" concept tended to cast doubt on the right of States to exercise their sovereignty over natural resources and to imply consequent limitations on their territorial integrity. Furthermore, viewed from the legal angle, the concept would lead to rules of law with ill-defined legal consequences, and such rules of law might be ill-interpreted or misinterpreted by States which could then put forward claims and demands that might well cause disputes and conflicts of unforeseeable scope. The fact that waters flowed through more than one State did not automatically turn them into a "shared natural resource". How to use the waters within its territory was a matter within the sovereignty of the State concerned. However, the principle of good-neighbourliness and the maxim sic utere tuo ut alienum non laedas were designed to prevent abuses, it was stressed. Another view held that the concept at issue placed upstream riparian States in a disadvantageous position vis-à-vis downstream riparian States. It was said that without that concept, draft article 6 no longer weakened the protection afforded to watercourse States to enjoy within their territories the benefits arising from uses of an international watercourse.

401. According to some representatives, the new wording seemed to take greater account of reality and offered a better approach to the development of an equitable régime for international watercourses. It was not made clear that it was the use, and not the waters, that was shared. Unlike the concept of "shared natural resources", the revised formula sought to strengthen the right of every State to the exclusive use of that part of the watercourse coming under its sovereignty; the result would be to relieve the serious anxieties of riparian States for which the international watercourse was a natural frontier and whose sharing of the waters had been clearly defined in treaties signed for that purpose.

402. One representative stressed that, in any case, the shared use of the waters of an international watercourse was above all subject to political factors notwithstanding its economic and social aspects. That was particularly true when the international watercourse constituted a natural frontier between States. Experience showed that conflicts which had arisen in the past between riparian States had been man-made or caused by groups whose motives were selfish and unlawful. The use of the waters of an international watercourse could bring substantial advantages to the riparian States and also promote fruitful co-operation in the economic and social as well as in the cultural field if an atmosphere of confidence, good faith and friendship prevailed in relations between the riparian States and if those States scrupulously applied the principles of good-neighbourliness, mutual advantage and respect for each other's sovereign rights.

403. Note was taken by certain representatives of the Special Rapporteur's assurances that the changes introduced in the revised version of draft article 6 were of a terminological nature and not intended to affect substance; it was deemed important to retain the spirit of the original text as it related to the notion of sharing. This was welcomed by some representatives who considered that while the notion of sharing still formed the basis of the draft, it did so in a more general manner and avoided the doctrinal overtones implicit in the concept of "shared natural resource". It was suggested that that concept could usefully be retained, not in the text of the draft article, but in a commentary. Each watercourse State was entitled within its territory to a reasonable and equitable share of the uses of the waters of an international watercourse. However, it was recognized that the concept involved limitations on the territorial sovereignty of States; upstream riparian States had a right to use the waters in their territory but must do so in a manner which did not deny the rights of downstream riparian States to share in the utilization of the waters in their territories.

404. However, certain representatives believed that the revised draft still did not strike the right balance as it appeared to place more emphasis on the "sharing" notion, even without the objectionable term "shared natural resource", than on the principle of permanent sovereignty over natural resources on which greater emphasis was required. The new draft did little to allay the fears of those States which considered that their sovereignty was being impinged. The draft article should indicate more clearly that watercourses formed an integral part of the territory of States and that States exercised their sovereignty over them while complying with their international obligations. The proposed modifications, deemed terminological in nature, should be considered from the point of view of affecting the substance of the provisions as well.

405. Thus, according to certain representatives, the notion of sharing in any form should be done away with altogether in the draft article. It was not a matter of dividing or sharing but of setting forth in the appropriate legal form the rights of the watercourse States, both downstream and upstream, as well as their obligation to respect, in using the watercourse, the rights of all States. There were many agreements which did not provide for the sharing of water, still less of its use, but organized co-operation between different States. One suggestion made was that the article could simply stipulate that "each State has the right and duty to use, within its territory, the waters of an international watercourse in a reasonable and equitable manner" or that the term "transboundary natural resource" could be used, thus referring to geographical location. According to one representative, if the intention behind draft article 6 was to establish a limitation on the use of the waters, that limitation was already provided by the obligations not to cause harm to other States and not to prevent other States from using the waters in a reasonable and equitable manner; if the intention was to indicate that the use of the waters by one State had to be governed by general principles of co-operation and respect among States, those principles were already well established in draft article 7, which spoke of good faith and good-neighbourly relations, and in chapter III of the draft concerning co-operation and management.

406. According to another representative, difficulties were presented by the notion that States should "share in the use of the waters". That notion could dilute the nature of the sovereign rights of a State over its natural resources, since it

could be interpreted as meaning that the waters on that State's side of the frontier could be used by a neighbouring State. The principle that, once a State had received its equitable share of transboundary waters, it had the sovereign right to use them exclusively, provided that it did not cause damage to others, should be respected. Any reference, therefore, to dividing or sharing a transboundary resource, or even to its use, should be rejected. The concept that States should "regulate the use of the waters" should be established. Any concept that would diminish States' ownership of their natural resources, including those in their portion of a transboundary location, would, in his delegation's view, be contrary to resolutions adopted by the General Assembly since 1962 on permanent sovereignty over natural resources.

407. On the other hand, certain other representatives regretted or deplored the elimination of the concept of "shared natural resource". It was said that it was one of the healthiest creations of contemporary international law and its reintroduction into the draft was advocated. The concept underlined the necessary interrelationship between the rights of adjacent riparian States and was the basis for certain essential obligations in that area. Water, like air, moved, and the water which a State upstream used one day was used the next day by a State downstream. To reject the expression "shared natural resource" was tantamount to denying the evidence. The abandonment of that concept, coupled with the deletion of the "system" concept in draft article 1, called into question the arguments underlying some of the draft articles. The use of a formula which defined very clearly the legal nature of the waters of an international watercourse was preferred. It was doubted whether the objective "reasonable" could adequately replace the idea of fair distribution conveyed by the notion of "shared natural resource".

408. One representative stressed that the concept of "shared natural resource" was considered a fundamental principle to be discussed and adopted at the very beginning. To discard the restrictive concept of watercourses might lead to acceptance of the notion of an international watercourse as a living reality. But all the problems relating to the acceptable participation of each riparian State in the shared resource would not automatically be solved thereby. Details would have to be worked out at the time of the formulation of a general legal rule to be applied to specific areas and criteria would have to be devised for the assessment of the equitable share of each riparian State.

409. Reference was made by certain representatives to the qualification that the use of waters is to be shared in a "reasonable and equitable" manner. That term was found to be very helpful and its inclusion in the article was supported. "Reasonable" described a method of procedure which would enable the watercourse to continue to function, whereas "equitable" meant that account must be taken of the legitimate interests of all the riparian States. It was considered to be an improvement over the highly controversial "shared natural resource", if it was recognized that the notion of equity implied a response to an individual situation and not the application of a fixed rule.

410. The view was also expressed that the terms "reasonable" and "equitable" were vague, but justice must be found for each individual case. The concept of an



"equitable" share had undoubtedly become the object of international customary law in the process of formation, even if specific application of equity to an individual case could not be generally determined. Reference was made to the recent United Nations Convention on the Law of the Sea as illustrating the increasing importance and acceptance of that criterion. In any event, the term "sharing" did not, it was emphasized, mean that sharing must be equal and that only distributive justice was possible, because States shared their rights and obligations according to their location.

411. Emphasis was also placed by certain representatives on the fact that, although States might obviously have different "shares" of the watercourse, they should enjoy equal benefits from the use of the watercourse as a whole. It was urged that the beneficial nature of the use of the watercourse should be emphasized; a possible formulation could refer to a State's right to a "reasonable and equitable share in the beneficial uses of waters". Furthermore, it was pointed out that several factors would have to be taken into account in determining what constituted a reasonable and equitable share (see art. 8, below).

412. Doubts were, however, voiced with regard to the notion of "reasonable and equitable" sharing. If it were to be applied to particular régimes of watercourses, it would mean that many factors would have to be taken into consideration; there was a need to determine what constituted a "reasonable and equitable" share. It was also highlighted that the starting point for the provision on utilization rights could not be the statement that every riparian State had a "reasonable and equitable share" in the use of water of the international watercourse on its territory. The starting point must rather be the principle of the permanent sovereignty of States over their natural resources. That principle, repeatedly confirmed by the General Assembly, should be included in a framework agreement which would recommend to riparian States that they should seek agreement on the distribution of the uses in an equitable and reasonable manner. In addition, the notion of "equitable and reasonable" shares did not have a clear juridical content, scope and meaning and would create serious problems in the practical application of the provisions of the draft.

413. One representative noted that various speakers had invoked the notion of permanent sovereignty over natural resources. His delegation suggested that lower riparian States think twice before they jumped to the support of an emotive slogan in that context.

414. Certain representatives referred to the overlapping between draft articles 6 and 7; it was suggested that the synchronization between them should be clarified. One representative suggested that draft articles 6 and 7 could be combined if the following changes were made: first, at the beginning of article 6, paragraph 1, the words "Subject to the provisions of article 8" should be added, with the rest of the paragraph remaining as it was. Secondly, the beginning of paragraph 2 should be deleted up to the words "in a reasonable and equitable manner" and the remainder of paragraph 2 should be added at the end of the current article 7; that composite text should become paragraph 2 of article 6. In addition, the word "relatively" should be inserted between the words "in a" and "reasonable" in article 7, in order to emphasize that what was reasonable and equitable must be

interpreted in a relative manner, in accordance with the criteria set forth in draft article 8. At the same time, it should be understood that the sharing in question concerned "residual rights", namely, the rights bearing on the additional amounts of water produced by the development of an international watercourse, without prejudice to long-standing acquired rights.

415. Finally, one representative, noting that the new approach of the Special Rapporteur was grounded in the concept of equitable sharing, drew attention to the fact that as worded the draft articles had the effect of subordinating the duty to share equitably to the duty to refrain from appreciable harm (arts. 9 and 13). That imbalance, which was inconsistent with the overall approach, should be redressed, he said.

Article 7. Equitable sharing in the uses of the waters of an international watercourse

416. Some representatives supported draft article 7 as a necessary corollary to draft article 6. It was suggested that the two draft articles could be merged so as to eliminate a certain degree of overlap (see also art. 6, above).

417. Doubts were, however, expressed regarding the terms "optimum utilization", "good-neighbourliness", "protection and control" and "shared" because they could give rise to misinterpretation or abuse.

418. Certain representatives were of the view that draft article 7 should be couched in recommendatory rather than mandatory language; "optimum utilization" was a desirable result of co-operation but could not be imposed as a matter of strict obligation. It was illusory to think that an international watercourse State could have the right to require optimum utilization of a watercourse. It must be left to the watercourse States concerned to determine what constituted "optimum utilization". That concept was essentially in opposition to "maximum use or yield" and encompassed all beneficial uses, the minimization of all adverse effects and the conservation of resources. It also appeared that a riparian State which was more technologically developed than its neighbours could abuse the criterion. Moreover, "optimum utilization" might be made at the expense of conservation of the resources of the watercourse as a whole. The suggestion was made that the term should be deleted due to its unsuitability and its being a source of confusion.

419. On the other hand, it was maintained that a joint reading of draft articles 6 and 7 would dispel any doubts regarding the term "optimum utilization".

420. Regarding the concept of good-neighbourliness, one representative noted that its inclusion in the draft unnecessarily created a new superstructure. Its use in the context of draft article 7 was inappropriate and did not reflect reality. However, another view advocated its retention together with that of the concept of good faith.

421. Some representatives made observations similar to those made with reference to draft article 6 concerning the concept of "sharing in a reasonable and equitable

manner" (see art. 6, above). One representative believed that in practice, reasonable and equitable use by a State implied taking account of reasonable and equitable use by another State. Accordingly, he felt that there was no need to refer to the notion of "sharing".

422. Another representative stated that, in principle, his delegation had no objection to the "equity" principle on which draft article 7 was based. Nevertheless, it considered it more favourable to regulate the allocation of possible forms of use among the riparian States of an international watercourse according to the principles laid down in article 59 of the United Nations Convention on the Law of the Sea and to leave it to the parties to bilateral and multilateral watercourse agreements to decide on the criteria for sharing in accordance with the principle of the sovereign equality of States.

#### Article 8. Determination of reasonable and equitable use

423. Certain representatives considered that the factors laid down in draft article 8 could provide non-binding, non-exhaustive reference points for determining whether waters were used in a reasonable and equitable manner. The article as a whole offered useful and reasonable criteria, albeit a little imprecise. The discussion in the Commission had clearly shown the impossibility of providing an exhaustive enumeration of such criteria and of a determination of priorities. One representative suggested that as draft article 8 contained, inter alia, provisions which were the only guidelines to be applied in case a watercourse State intended to refer to its right to use the waters of the watercourse in a reasonable and equitable manner, those provisions should be included in a separate article.

424. Other representatives questioned the utility of including a long, non-exhaustive list of factors and the Commission was requested to re-examine the matter. The question was posed whether the long list was of any utility or practical value, inasmuch as it mentioned points extraneous to the negotiations relating to a specific watercourse, such as the availability to the States concerned of alternative water resources, or points depending on an essentially subjective evaluation, such as the comparison of the needs of one State with those of another State. The basic premise of draft article 8 should, it was urged, be re-examined because the draft article seemed to presume that all the States concerned should in each case determine whether a particular use was in accordance with article 7. The criteria referred to in draft article 8 were already normally taken into consideration by each State on a case-by-case basis, and only in case of a dispute was that determination made by negotiation or other peaceful means. The article should be recast so that those criteria were presented only in order to guide the way in which each State used an international watercourse.

425. According to one representative, draft article 8 contained a list of parameters which was defective because it was not exhaustive and it failed to indicate the importance of certain priority uses. What was even more serious, the article omitted certain inviolable principles which should take precedence in cases where, for various reasons, the obligation to negotiate provided for in paragraph 2 could not be invoked.

426. Article 8 should, it was emphasized, be so drafted as to promote co-operation rather than conflict among watercourse States. It should also protect the basic autonomy of each State to determine its share of "reasonable and equitable use" and the manner in which it wished to utilize that share.

427. Also, the suggestion was made that if it seemed that the long list of criteria in draft article 8 could create more difficulties than it solved, it could be moved to the commentary or included in a footnote.

428. As to the list of factors included in paragraph 1 of draft article 8, it was suggested that paragraph 1 should indicate the list of factors in an illustrative manner and the term "inter alia" should be used in the chapeau of the article. The question was posed, however, whether it was necessary to enumerate in draft article 8 all the factors to be taken into account in determining the reasonable and equitable use of the water of an international watercourse. Only those fundamental criteria which would apply in virtually all situations should be included, it was suggested. It was also said that the notion of reasonable and equitable sharing, if applied to particular régimes of watercourses, would mean that many factors would have to be taken into consideration. In that connection, one representative did not fully agree that the demographic factor was paramount. Consideration should also be given to geophysical and socio-economic factors, as well as national security and sovereignty. Since all those factors were inseparably linked, it was erroneous to base determination of reasonable and equitable sharing on just one of them.

429. It was, however, suggested by certain representatives that particular factors should be singled out as having priority over others. One representative singled out drinking water supply as a priority use. Regarding geographical factors to be taken into consideration, it was proposed by another representative that the relative length of the parts of the watercourse which passed through or bordered a State should be the first factor to be considered. Yet another representative recalled his proposal made in connection with draft article 1 to undertake a hydrographic and hydrological study which might indicate which were the stable and variable factors in different systems.

430. One representative emphasized that determination of reasonable and equitable use would depend on various factors, particularly the cost of alternative projects. His delegation had previously indicated that the capital costs of such projects should be included among the factors listed in draft article 8, because the question of cost was related to the concepts of "efficiency of uses" and "optimum utilization". In addition, the concept of "reasonable and equitable" share was also related to the unity of the hydrological cycles peculiar to each watercourse.

431. The new paragraph 1 (c) of draft article 8 was singled out by one representative as a welcome addition because it emphasized the necessity of balancing the rights and interests of all. Another representative believed that paragraph 1 (g) perhaps went a little too far in referring to optimum utilization, protection and control of the watercourse and its waters.

432. Regarding paragraph 2 of the draft article, one representative considered it to be a very important provision which should be retained. Another representative considered that reference in that paragraph to resort to the peaceful settlement procedures in chapter V of the proposed draft was misplaced. Paragraph 2 did not relate to disputes over the interpretation and application of the draft articles, as envisaged in chapter V, but to disputes between the States concerned over the reasonable and equitable use of an international watercourse.

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

433. Some representatives expressed their approval of draft article 9 and considered it to be one of the core provisions of the draft as a whole. It was said to specify the arrangements for the sharing of the waters of a watercourse and the use of such waters in a reasonable and equitable manner in accordance with articles 6 and 7 of the draft. The maxim sic utere tuo ut alienum non laedas should occupy a privileged place in the draft since the obligation not to cause harm to other States was a basic obligation which was recognized as a generally accepted principle of international law. The draft reflected modern trends because it excluded from the scope of the prohibition those injurious effects which did not exceed the threshold of "appreciable harm". That limitation created a link between the article and the international liability topic. Draft article 9 also raised the question whether an agreed or otherwise arranged justification for causing injury actually was an exception to the prohibition, because the prohibition did not refer to harmful activities that were permitted by the suffering State.

434. According to one view expressed, the prohibition contained in draft article 9 was too absolute and such terms as "appreciable harm", "rights" and "special interests" too vague. It was preferable to strike a balance between the right of a State to use a watercourse in its territory and its duty not to cause appreciable harm in the territory of another State. This could be achieved through measures to prevent or minimize such harm and by information and co-operation activities. A mere prohibition in such a vital and dynamic area, which instead required co-operation formulas, seemed inadequate.

435. It was also suggested that draft article 9 or its commentary should indicate that the "harm" referred to would be estimated globally and not individually in order to take account of previous harm. Also, it must reflect the reality that, despite its best intentions and efforts, a State might sometimes be unable to prevent "harm" to another State. It was better to draft the article to suggest more clearly that a State should do everything in its power to avoid harm to another State.

436. One representative believed that the prohibition not only of uses or activities which might cause "appreciable harm" to the rights and interests of riparian States, but also of those which might have an "adverse effect" on those States should constitute the basis of any agreement on the non-navigational uses of international watercourses.

437. The determination of "appreciable harm" was considered to be a central question in the consideration of the law, of the non-navigational uses of international watercourses. To certain representatives, the term "appreciable harm" required further clarification in order to become acceptable. It was difficult to determine what constituted "appreciable harm" and a list of factors liable to cause appreciable harm to and have an adverse effect on the territory of a riparian State should be added to the article, according to one representative. He indicated, for example, that siting of factories along the watercourse should be taken into consideration in assessing the harm caused because, in general, the further downstream the factories were sited, the more lethal their effects, particularly in densely populated deltaic flood plains.

438. To yet other representatives, the notion "appreciable harm" was too vague to be appropriately employed in the article. As it now stood, a downstream State could interpret "harm" to mean that in the event of harm resulting from use of the waters of the watercourse by an upstream State, the downstream State could demand elimination of the harm, despite any advantage it might derive from any activity or use of the watercourse. Also, it was suggested that the term "appreciable harm" be replaced by "material harm". One representative considered that in the Spanish text, the word "apreciable" went too far. Another representative suggested that "harm" ought to be replaced, a more appropriate word in the French text being "atteinte".

439. It was also suggested that the words "or interests" should be deleted because the term "interests" was too general and was likely to be interpreted by each State according to its own interests. The view was also expressed that the meaning of the words "uses" and "activities" should be specified and the difference or connotational interrelationship between the two terms should be clarified.

440. Certain representatives referred to a potential conflict between the determination of reasonable and equitable use of the watercourse (arts. 6 to 8), on the one hand, and the prohibition against activities causing appreciable harm (art. 9) on the other. The relationship between draft article 9 and draft articles 6 to 8 was problematic because the latter did not deal with possible injurious effects caused by their application. In many cases, the equitable sharing in the uses concerned would not be possible without some transboundary consequences, and that problem therefore had to be examined in all its aspects. According to one view expressed, the emphasis should be placed on the prohibition against activities causing appreciable harm because the notion of reasonable and equitable use lacked the necessary precision and lent itself to subjective interpretations, as was confirmed by the long, though non-exhaustive list of relevant factors enumerated in draft article 8. Draft article 9 should thus be read in conjunction with draft articles 7 and 8. Besides, any uses or activities which caused appreciable harm to or had adverse effects on a riparian State could not be considered as "reasonable and equitable". Another view maintained, however, that the Special Rapporteur's approach was grounded in the concept of equitable sharing. As worded at present, the duty to share equitably was subordinated to the duty to refrain from appreciable harm (arts. 9 and 13); that imbalance, which was inconsistent with the overall approach, should be redressed.

441. Reference was made by some representatives to the inevitable link between the prohibition of harmful activities in draft article 9 and the topic of international liability for injurious consequences arising out of acts not prohibited by international law. One representative stated that in order to establish a link between the two topics, it seemed appropriate to defer formulation of the article until the ambiguity created by the term "appreciable harm" had been dispelled.

### CHAPTER III. CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSES

442. The formulations which were contained in draft articles 10 through 19, which formed the contents of chapter III, were considered by one representative to be desirable and progressive, not being based on any existing principles of law. However, he believed it would be more appropriate for these articles to be included in particular watercourse agreements, deserving only a brief reference in a framework convention.

443. One representative remarked that chapter III of the draft was too specific and not in character with the nature of a framework agreement. His delegation suggested that chapter III ought to be brought into line with the provisions of the 1979 Convention on Long-Range Transboundary Air Pollution which regulated the obligations of States with respect to co-operation and information. He also objected to the formulation of the notification obligations in draft articles 11 to 14 because, in his view, they placed upper riparian States at a disadvantage as compared to lower riparian States. As drafted, their sovereign right to utilize the watercourse was conceived as an exceptional right.

444. Another representative supported the proposal to place draft articles 11 to 14 in chapter II which concerned general principles and rights and duties of watercourse States. There, too, the duty to co-operate should be given a positive legal content in so far as it was consistent with legitimate national interests.

445. Certain representatives suggested that chapter III could be consolidated and simplified, or its subject-matter could be left to specific agreements. Superfluous details should not be included in the draft, so as to avoid any conflict between specific existing or future watercourse agreements and the proposed instrument and to win general acceptance for the latter. In that connection, it was said that draft articles 15 to 19 could be reduced to a single article.

#### Article 12. Time-limits for reply to notifications

446. With regard to draft article 12 concerning time-limits for reply to notifications, one representative noted that the draft article made no provision for a situation in which the parties could not agree on a reasonable time-limit, and feared that the States receiving the notification would use the time to prevent the notifying State from undertaking a project or a programme. The receiving States could, by virtue of paragraph 2 of draft article 12, request a reasonable

extension of the time-limit in order to evaluate the issues involved, but no specific criterion was given to determine which situations justified such an extension.

Article 13. Procedures in case of protest

447. According to one representative, draft article 13 was open to criticism because it did not maintain the proper balance among the interests of the States whose territory was crossed by an international watercourse. Paragraph 3, specifically, would authorize an upper riparian State which had been unable to reach an agreement with the lower riparian States to undertake a project or a programme without the consent of those States. Such a provision seriously undermined the principle of the sovereign equality of riparian States on the same international watercourse. His delegation believed that it should be stipulated that an upper riparian State might not undertake a project without having previously reached an accord through the settlement procedures provided for in the draft articles. Similarly, it should be stated specifically that upper riparian States had the right to compensation from lower riparian States for any delays in the execution of a project caused by the latter without justification or through bad faith.

Article 15 ter. Use preferences

448. One representative was of the view that draft article 15 ter (based upon draft article 29 presented in the Special Rapporteur's first report) might be placed after the current draft article 8 in chapter II. Further, the scope of the use of the term "equitable participation", as distinct from "equitable sharing", needed to be clarified, if those concepts were intended to be different.

CHAPTER IV. ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH  
HAZARDS, NATURAL HAZARDS, SAFETY AND NATIONAL  
AND REGIONAL SITES

449. One representative believed that chapter IV of the draft lacked the necessary conformity with State practice. In particular, draft articles 21 to 24 on environmental protection, which defined the objectives of environmental protection in the context of the draft, could not be accepted in the form suggested by the Special Rapporteur. The concern of the latter to protect, as far as possible, the natural resource water against pollution was, without doubt, fully justified. However, it had to be taken into consideration that industrialization and urbanization as well as technical and technological developments would require considerable consumption of water, which would necessarily lead to pollution. The majority of bilateral as well as multilateral conventions adopted for the protection of the sea, contained a relative prohibition of pollution and only prohibited the dumping of particularly dangerous substances. It seemed that the environmental protection obligations foreseen by the Special Rapporteur went beyond what the majority of States was at present prepared to adopt.



Article 23. Obligation to prevent pollution

450. One representative proposed that draft article 23 should prohibit pollution with transboundary effects of appreciable extent and should reserve its specifications to the riparian States of international watercourses. A framework agreement on the law of the non-navigational uses of international watercourses would only be useful for the riparian States when it realistically reflected the status of State practice, left room for future developments and formulated the rights and duties of upper and lower riparian States in a balanced manner.

451. Another representative suggested that the obligation to prevent pollution in draft article 23 should be couched in more restrictive language: in paragraph 1, States should be "obliged" not to pollute the waters of an international watercourse; in paragraph 2, the State where such pollutions originated should be "obliged" to take reasonable measures to abate or minimize it.

Article 28. Safety of international watercourse systems, installations and constructions, etc.

452. One representative suggested that draft article 28 should also include a paragraph on prohibition against the destruction of drinking water installations and irrigation works, in accordance with article 54, paragraph 2, of the 1977 First Additional Protocol to the Geneva Conventions of 1949. In his view, this would make the draft complete from a legal, political and humanitarian standpoint.

Article 28 bis. Status of international watercourses, their waters, constructions, etc. in armed conflict

453. Certain representatives expressed their approval in principle of draft article 28 bis; it was said that the article enriched the draft. One representative noted that it specifically extended the protective measures provided for in the two 1977 Additional Protocols to the Geneva Conventions of 1949. Another representative observed that the installations and works referred to in the draft should not, when used for peaceful purposes, be the object of attack during an armed conflict, since such an attack might have effects on the territories of countries not involved in the conflict.

454. Other representatives expressed reservations on the draft article. One representative stated that it was questionable whether the new draft article fell within the scope of the topic. Another representative suggested that a more suitable formulation should be found regarding the peaceful uses of international watercourses that would take into account the right of States at war to use the part of an international watercourse lying within their territories to transport war matériel, because waterways were of logistical importance. It should be specified, therefore, that the notion of peaceful use applied solely to installations and constructions situated on the shores of the watercourses.

## CHAPTER V. PEACEFUL SETTLEMENT OF DISPUTES

455. It was suggested that the Commission should give further consideration to the structure which chapter V should take. The framework agreement approach, while commendable in itself, resulted in general and vague language, thus necessitating the incorporation in the draft of efficient dispute settlement procedures. One representative considered that any future agreement should include fact-finding and conciliation procedures as well as binding provisions for third-party settlement of disputes. On the other hand, another viewpoint considered that regulation of dispute settlement went beyond the scope of a residual framework agreement and that resort to the means of settlement stipulated in the agreements between the respective States or to the pacific settlement of disputes provisions in Article 33 of the Charter would be more appropriate. It was not deemed advisable to impose any system of settlement of disputes without consideration of the type of friendly relations existing among the States concerned on the complexity of the particular case. More recommendatory language would be in order, in conformity with the basic principle of free choice of means.

## CHAPTER VI. FINAL PROVISIONS

Article 39. Relationship to other conventions and international agreements

456. For the comments on this article, see article 4 above.

## G. STATE RESPONSIBILITY

1. General observations

457. The fundamental nature of the topic of State responsibility was emphasized by representatives. The view was expressed that the topic formed the core of international law and its proper elaboration was of great importance to relations between the States. An international convention on the subject would enhance the effect of the principle pacta sunt servanda and promote peaceful relations among States. Establishment of generally acceptable norms in the field of State responsibility would strengthen the international legal order. Violation of primary rules on State responsibility were to some extent encouraged by the absence of secondary rules which would clearly set out the legal consequences of such violations. A convention on State responsibility, even before its entry into force, would influence the conduct of States and would serve as a reference text for international tribunals.

458. Several representatives stated that it was important that every effort be made by the Commission to make progress and complete its work on the topic at the earliest possible time. A number of representatives welcomed the Commission's statement of expectation, in paragraph 387 of its report, that it would be highly desirable to complete a first reading of Part Two of the draft articles on State responsibility, as well as of a possible Part Three, before conclusion of the

present term of membership of the Commission. More time should be devoted to the topic, it was said, than was accorded at the thirty-sixth session of the Commission. The view was expressed that the Commission had achieved steady but disappointingly slow progress on the topic over the past 20 years, and the fact that there was no clear assurance that the Commission was likely to complete its first reading of the entire set of draft articles within a reasonably short time did not reflect well on the codification process. The view was also expressed that scepticism with respect to certain aspects of Part One of the draft articles should not be allowed to hinder completion of a structure which had already begun to exert influence in international law.

459. The fifth report of the Special Rapporteur, Mr. Willem Riphagen, containing 12 new draft articles, was considered by representatives to be an important development and a major breakthrough, which provided sound basis for the further work of the Commission. The draft articles on the whole represented for the first time, it was said, a consistent, detailed and complex system for regulating the consequences of an internationally wrongful act and were a major step forward. Hope was expressed that the Commission would now be in a position to make real progress.

460. Some representatives stated that they would not at this stage, when the 12 new draft articles were still under consideration in the Commission and yet to be considered by its Drafting Committee, be commenting on provisions of the draft articles. A detailed analysis would be possible when the draft articles of Part Two were complete and all the legal consequences of breaches of international law were defined.

461. Several representatives, however, commented both generally and specifically on the draft articles before the Commission.

462. A number of representatives expressed concurrence with the general plan of the Commission, for the overall structure of the draft articles on State responsibility, which envisaged three parts: Part One dealing with the origin of international responsibility; Part Two dealing with the legal consequences of international responsibility; and a possible Part Three, which the Commission may later decide to include, which would deal with the question of the settlement of disputes and the implementation of international responsibility.

463. Some representatives were of the view that the 16 draft articles now before the Commission for inclusion in Part Two of the draft articles on State responsibility (the four draft articles provisionally adopted by the Commission at its thirty-fifth session in 1983, on recommendation of its Drafting Committee, and the 12 new draft articles submitted by the Special Rapporteur to the Commission at its thirty-sixth session in 1984) reflected a proper balance between the various interests that had to be taken into account. The view was expressed that the Special Rapporteur had, in the draft articles, given due weight to the concepts of jus cogens and international crime and, particularly, the legal consequences of aggression, while at the same time paying due attention to the more conventional and traditional aspects of State responsibility, such as the definition of the injured State, injury to aliens, reparation, reciprocity, reprisal, proportionality, etc. One representative was of the view that the present issue with respect to

Part Two of the draft articles was to a large extent one of direction. While excessively ambitious targets should be avoided and caution exercised, there should be no compromise on questions of principle. The Commission should, undaunted by difficulties, discharge its responsibilities in the progressive development of international law, thereby effectively responding to the legitimate expectations of the international community and remaining in the mainstream of public international law. Since the adoption of the United Nations Charter, the notion of jus cogens had been formally incorporated in the 1969 Vienna Convention on the Law of Treaties and, in the current state of development of the international community, that concept, even though it might not be easy to apply, was no less valid and must not be abandoned. While recognizing that flexibility in wording may be necessary to facilitate general agreement, the principles deriving from the Charter of the United Nations, such as the concept of jus cogens and international crime, were not open to compromise.

464. Some representatives considered it desirable to expand the scope of Part Two of the draft articles to deal more fully with the legal consequences of international crimes, particularly, aggression, genocide, apartheid and mercenarism. The view was expressed that the draft Code of Offences against the Peace and Security of Mankind would deal with the criminal responsibility of individuals, while the draft articles on State responsibility should prescribe in treaty form the responsibility of States for the Commission of international crimes which would include aggression, the maintenance of colonial domination by force, genocide, apartheid and acts leading to nuclear conflicts.

465. One representative stated that he thought the overall structure of the new draft articles was acceptable and saw no need to change the order of the draft articles so as to deal first with international crimes as he thought some representatives had suggested. Though he agreed to some extent with members of the Commission who had suggested that the draft articles should elaborate more on international crimes.

466. Another representative considered that the Commission should approach the question of the inclusion of aggression and its consequences in the draft articles on State responsibility in such a way as to avoid overlapping with other legal instruments such as the draft Code of Offences against the Peace and Security of Mankind.

467. It was, in the view of one representative, important that the draft articles should proceed from the position of the injured State and not from the standpoint of protecting against claims the State breaking international law.

468. Some representatives considered that Part Two of the draft articles should contain separate sections on international crime and international delict since both categories had their own characteristics. As a rule, international delicts occurred in a bilateral legal relationship and involved the responsibility of one subject of international law towards another subject, while the consequences of international crime had an adverse effect on the entire international community and all States were entitled, either individually or collectively, to institute a claim and, if necessary, to take appropriate measures against the offender.

469. Some representatives expressed serious reservation with respect to the introduction of the concept of international crime, the international criminal responsibility of a State, into the topic on State responsibility. The view was expressed that it would be regrettable if the draft articles on State responsibility, which would be a document purporting to deal with objective criteria, were allowed to reflect elements of a political nature as in the definition of an international crime. Reservations were expressed at attempting to lay down rules of conduct for States and including within such rules provisions which were of a theoretical nature, and were thus open to political construction, and which ought to be reserved for interpretative contexts rather than included in articles of a treaty. Extreme caution was thus advisable in dealing with the legal consequences of State responsibility, especially as regards the implications of paragraph (e) of draft article 5 and of draft articles 14 and 15. The view was expressed that introduction of the novel notion of the international criminal responsibility of a State into the draft articles on State responsibility gave rise to grave doubts; and that such doubts were heightened by the provisions of Part Two of the draft articles, on the legal consequences of international responsibility, which appeared to be an invitation to chaos. Though it might be possible for the provisions of Part Three of the draft articles, dealing with the implementation of international responsibility, to resolve some concerns. The Commission and the Special Rapporteur should clarify the circumstances in which States not directly affected by an internationally wrongful act could unilaterally take countermeasures against the author State.

470. The view was expressed that States involved in a particular case may not agree on whether an act violating international law had been committed and that it was probable that they would disagree. Thus third-party compulsory settlement of disputes seemed essential. Several representatives considered that the provisions of Part Three of the draft articles would unquestionably be important because they would facilitate effective enforcement of the provisions of Part Two of the draft articles.

471. One representative was of the view that the Commission should be careful not to incorporate tertiary rules, on dispute-settlement procedure, into the draft articles. The question of the peaceful settlement of disputes should be considered on its own merits. The Charter of the United Nations provided a framework and forum for the peaceful settlement of disputes and a whole body of law existed in that field. The main obstacle to using existing facilities was the reluctance of most States to allow an independent body to be entrusted with authority to settle disputes between States with binding force. The Commission should not introduce into its present work on the topic of State responsibility the sensitive question of optional or compulsory approaches to the settlement of disputes. This would only delay completion of the Commission's work on State responsibility which was a cornerstone of international law.

472. Some representatives stated that it was reasonable that the Commission should defer consideration of the question of implementation until it had dealt with Part Two as a whole.

473. The importance of the draft articles being coherent and consistent throughout their two or three parts was emphasized.

474. Some representatives stated that the Commission's work on the draft Code of Offences against the Peace and Security of Mankind should be co-ordinated with its work on State responsibility.

475. Some representatives stated that there was a connection between the topic on State responsibility and the topic on international liability for injurious consequences arising out of acts not prohibited by international law. The aim of the Commission's work on both topics was to elaborate norms that would enhance the liability of States with respect to other States. There may be circumstances in which the physical consequences of a State's activities, such as dumping within its territory of toxic chemicals or nuclear wastes, not prohibited by international law, amounted to a crime under article 19, paragraph 3 (d) of Part One of the draft articles on State responsibility.

## 2. Comments on draft articles

### (a) Articles on Part Two provisionally adopted by the Commission

#### Article 2

476. One representative was of the view that clarification was necessary with respect to the exceptions in draft article 2, namely, as to when deviation from the provisions of the articles would be permissible on the ground that the legal consequences of an internationally wrongful act were determined by "other rules of international law" relating "specifically" to the wrongful act. It would be useful if the commentary to draft article 2 could refer to an example of such "other rules of international law".

477. It seemed to another representative that the problem arose, under draft article 2, of determining when an "exclusive sub-system" of "other rules of international law" should be deemed in existence. He wondered whether such a sub-system should be regarded as in existence if as in the case of the International Covenant on Civil and Political Rights there were procedures which did not necessarily lead to a legally binding result, or only, and this was the approach he favoured, if there were procedures which necessarily led to a legally binding result as in the case of the European Convention on Human Rights.

### (b) Articles on Part Two proposed by the Special Rapporteur

#### Article 5

#### Observations on article 5 as a whole

478. Representatives referred to draft article 5 as a vital component of Part Two of the draft articles. It defined the term "injured State" and, thus, identified the States that would be entitled to the remedies in draft articles 6 to 9.

479. The view was expressed that the definition of "injured State" in draft article 5 was useful though there was bound to be disagreement on whether the

definition covered the whole range of internationally wrongful acts. The view was also expressed that, in light of the diversity of internationally wrongful acts, it would be preferable to adopt a definition that was sufficiently flexible to cover all cases.

480. Some representatives considered that the definition of "injured State" in draft article 5 should be examined further, as an offence could have different legal consequences for different States and, thus, give rise to different claims. Account should be taken of the degree of injury suffered and a distinction made between directly affected States and indirectly affected States.

481. The main question, in the view of one representative, was the extent to which a State that was not directly injured should be entitled to avail itself of the remedies in draft articles 6 to 9 which would, otherwise, all constitute internationally wrongful acts. The Special Rapporteur had proposed certain safeguards to prevent anarchic responses and to ensure consistency with the Charter of the United Nations. If the provisions were properly administered the system would probably function smoothly and, generally, in an acceptable manner. It was, however, doubtful that the provisions would be so administered and, thus, unless a threat to international peace and security was involved, each individual State might unilaterally determine whether the obligation allegedly breached was "stipulated for the protection of collective interests" (in terms of paragraph (d) (ii) of draft article 5) or whether the act in question amounted to a so-called "international crime" (in terms of paragraph (e) of draft article 5). Also, it hardly seemed common sense to allow a State that was not directly affected by the act in question to have recourse to the same remedy as the victim State. This was specially true in the case of international crimes since every member of the international community would be an injured State under paragraph (e) of draft article 5 and entitled to invoke remedies under draft articles 6 to 9. The Commission and the Special Rapporteur should clarify the circumstances in which States not directly affected by an internationally wrongful act could unilaterally take countermeasures.

482. Some representatives considered that the definition of "injured State" was fairly straightforward in purely bilateral relationships and in the case of multilateral treaties where the obligation breached was clearly in favour of a certain State or necessarily affected the exercise of the rights or performance of the obligations of all other States parties. The provisions of paragraphs (a) to (d) (ii) of draft article 5 were satisfactory. However, the remaining three categories of "injured State" in paragraphs (d) (iii), (d) (iv) and (e) (which included, within the definition of "injured State", States that had not been directly affected by the wrongful act) raised difficulties. The view was expressed that it was doubtful whether the safeguards provided in draft articles 2, 4 and 8 to 16 would prove sufficient in reality. An over-generous conferment of the status of "injured-State" may legitimize rather anarchical countermeasures and erode the system of safeguards. Much depended, it was stated, on whether the Commission succeeded in creating an obligatory third-party dispute-settlement machinery in Part Three of the draft articles. It could hardly be left to the States concerned to decide whether an obligation was stipulated for protection of collective interests. One representative expressed difficulty in understanding how the

Commission would be able to formulate a set of clear and viable provisions on international responsibility if a State injured by an internationally wrongful act was defined in the all-embracing manner suggested in draft article 5, paragraphs (d) (iii) and (iv) and (e).

Observations on particular provisions of article 5

483. Paragraph (a) - The question was raised as to why paragraph (a) of draft article 5 spoke of "infringement of a right" while paragraphs (b) to (d) spoke of "breach of an obligation" the expression used in Part One of the draft articles.

484. It seemed to one representative that reference ought to be made in paragraph (a) to the general principles of law which constituted a source of international law.

485. Paragraph (c) - The point was made that it would be preferable, in paragraph (c), to use the term "an obligation under" a treaty rather than the term "an obligation imposed by" a treaty.

486. Paragraph (d) - The point was also made that it would be preferable, in paragraph (d), to use the term "an obligation under" a treaty rather than the term "an obligation imposed by" a treaty.

487. Some representatives stated that paragraphs (d) (iii) and (iv) defined an "injured State" in too wide a manner. The definition of "injured State" to include all other contracting States, in the event of breach of a multilateral treaty obligation, would create difficulties in determining the practical measures that could be taken by the vast array of injured parties.

488. It seemed to one representative that paragraph (d) (iv) did not make entirely clear whether all other States parties to the multilateral treaty would be regarded as "injured States". Though the context and the nature of the matter seemed to indicate that in such cases all States parties to the multilateral treaty would be regarded as injured States.

489. The view was expressed by one representative that the approach in paragraph (d) (iv) was not in line with the erga omnes concept which allowed the group of injured States to be extended only if the internationally wrongful act was classified as an international crime.

490. The view was also expressed by another representative that, assuming there existed a defined catalogue of fundamental human rights in customary international law, the question arose whether those obligations, though not imposed by treaty, should not also be covered in a way similar to the provisions of paragraph (d) (iv).

491. Paragraph (e) - Some representatives expressed agreement with the provisions of paragraph (e) of draft article 5. They stated that they would not find difficulty in agreeing to the provisions of paragraph (e) being made a separate category or being recast but that it was essential that the principle, that an international crime and aggression in particular constituted a wrongful act against all members of the international community, be retained.



492. One representative considered that the point made in paragraph (e) (that if an internationally wrongful act constituted an international crime, all other States, not only the State directly affected, were to be considered injured States) did not seem to be fully developed in subsequent provisions. For example, draft article 6 provided that an injured State "may require" the State which had committed an internationally wrongful act to proceed as provided in paragraphs (a) to (d) of draft article 6, thus leaving a certain discretion to the injured State. It seemed preferable in the case of an international crime, which was a violation affecting maintenance of international peace and security or the integrity of a human being, to specify that all States had the obligation to demand a certain response from the State which had committed the crime; and such a provision would be in accord with the provisions of paragraph 2 of draft article 14.

493. Another representative was of the view that the concept of "injured State" should, in the case of international crimes, be extended to cover not only "other States" but also the international community as a whole, and even mankind. Thus, the obligations under paragraph 2 in draft article 14 would become the responsibility of the international community which would collectively censure and react in a concerted manner to the perpetration of any international crime.

494. Some representatives expressed reservations with respect to the application of the concept of international crime to State responsibility. They considered that the provisions of paragraph (e) raised the question of the definition of international crime in article 19 of Part One of the draft articles which still involved certain problems. The Commission, in the view of one representative, would have to reconsider the matter again, particularly in light of the discussions on Parts Two and Three of the draft articles.

495. Some representatives considered that paragraph (e) defined an "injured State" in too wide a manner and that difficulties arose in determining the practical measures which may be taken by the various injured parties. The point was made that a distinction should be drawn between a directly injured State and a State indirectly affected by an internationally wrongful act. The question whether and, if so, within what limits third States could take countermeasures on their own authority needed to be expressed more clearly. The assumption in paragraph (e) that all States were "injured" if the internationally wrongful act constituted an "international crime" was, it was said, questionable. The view was also expressed that paragraph (e) made no differentiation between international offences according to their seriousness and contained no indication as to the States that could view themselves as injured. A classification of international offences was necessary and could be made even if it meant abandoning the distinction between primary and secondary rules.

496. The point was made that compulsory settlement of disputes by a third party was essential for application of the provisions of paragraph (e).

497. One representative drew attention to the importance of consistency between the language versions of the draft articles and pointed out that the expressions "delito" and "crimen" were not appropriately reflected in the Spanish versions of the draft articles.

Article 6

498. The view was expressed by one representative that the Special Rapporteur had rightly chosen to deal only with the fundamental elements of the obligation to make reparations. However, it seemed preferable to deal separately with claims for restitution and those for compensation. The separate provisions on breach of international obligation in the treatment of aliens, in draft article 7, would then be redundant. It would make it possible to accentuate the duty of restitution in case of violation of a peremptory norm of international law. It would also enable a clearer statement being made of the point that, in the event of impossibility and should restitution represent unreasonable interference with sovereign rights, compensation would be permissible.

499. Some representatives considered that the relationship to draft article 6 of paragraphs (d) (iii) and (iv) of draft article 5 posed problems.

500. Some representatives suggested that the provisions of draft article 6 should be of a more general nature and that it was not advisable to specify the possible kinds of compensation for an internationally wrongful act. Other representatives, however, were not of that view and considered that draft article 6 represented the correct approach.

501. One representative considered that draft article 6 did not provide for adequate remedies in the event of death of individuals. The payment of compensation and the provision of guarantees against repetition were not adequate in such cases and consideration should be given to additional ways of compensating the injured State, for example, apology, or punishment of those responsible.

502. Paragraph (I), subparagraph (a) - It seemed to one representative that it was unclear whether the enumeration in subparagraph (a) was exhaustive or demonstrative; as currently formulated it did not seem to cover all possible cases.

503. Some representatives were of the view that the provisions of subparagraph (a) should be limited to requiring the author State to "discontinue the wrongful act and prevent the continuing effects of such act". The question of the release and return of persons and objects should be covered in a more general manner in subparagraph (c). The point was made that there was a degree of overlapping between the provisions of subparagraph (a) and subparagraph (c), as release and return of persons and objects under paragraph (a) may on occasion constitute "re-establishment" under subparagraph (c) of the situation existing before the wrongful act. Thus, it may be appropriate to combine subparagraphs (a) and (c) into a single provision on discontinuance of the wrongful act and re-establishment of the original situation.

504. Paragraph 1, subparagraph (b) - It seemed to one representative that it would be advisable to clarify in subparagraph (b) what "internal remedies" were to be applied by the author State.

505. Paragraph 1, subparagraph (c) - Some representatives considered that the manner in which the provisions of subparagraph (c) (providing for restitutio in integrum) would apply to cases under draft article 5 (d) (iii) and (iv) (which

would define "injured State" to include States not directly affected by the wrongful act) would need some further consideration.

506. Paragraph 1, subparagraph (d) - It seemed to one representative that in subparagraph (d) the question whether guarantees, against repetition of the wrongful act, should be specified required further consideration. Another representative was of the view that the nature of the guarantees referred to in subparagraph (d) would have to be examined.

507. Paragraph 2 - One representative observed that paragraph 2 reflected a widely-accepted position with respect to assessment of damages and, in particular, did not provide for "exemplary damages" which was a concept not found in all legal systems.

508. Some representatives considered that it did not seem feasible that every injured State, pursuant to paragraphs (d) (iii) and (iv) of draft article 5, should demand financial compensation if restitutio in integrum was no longer possible.

509. Some representatives were of the view that in the case of international crimes the right provided for in paragraph 2 should be available only to the directly injured State and not to all States.

#### Article 7

510. Some representatives were of the view that draft article 7, which concerned breach of international obligations in the treatment of aliens, should be deleted. It seemed inappropriate, it was felt, to deal with a particular type of internationally wrongful act to the exclusion of other types; the substance of the provisions of draft article 7 were covered by paragraph 2 of draft article 6; and Part Two of the draft articles was not concerned with primary rules of State responsibility.

511. The point was made that if the provisions of draft article 7 were to be retained they might be included in draft article 6 as an additional paragraph.

512. It seemed to one representative that it was unclear which injured State was being referred to in draft article 7, since the relationship between the person injured and the injured State was not specified. Explanation in the commentary to draft article 7 of the exact meaning of draft article 7 would be helpful.

513. Another representative was of the view that the relationship between draft articles 6 and 7 needed clarification. It was unclear whether draft article 7 permitted the State which had committed the wrongful act to have recourse to pecuniary compensation even when re-establishment of the original situation was still possible. If so, article 7 would not be appropriate for cases where the rights in question were not economic.

Articles 8 and 9

514. Some representatives were of the view that it would be difficult to distinguish between measures of reciprocity, under draft article 8, and measures of reprisal, under draft article 9. The point was also made that reprisal was usually viewed as somewhat broader than proposed at present in draft article 9 and could include measures of reciprocity.

515. Another representative expressed disagreement with the view that it was difficult to distinguish between measures of reciprocity and measures of reprisal; and expressed concurrence with the view implicit in draft article 8 that reciprocity concerned only obligations of the injured State which corresponded or were directly connected with the obligations breached by the other State; and that reprisal related to obligations of the injured State that did not correspond or were not directly connected with the obligation breached by the other State.

516. Some representatives considered the differentiation made in the draft articles between measures of reciprocity and measures of reprisal sufficiently clear, even if practical problems could arise in certain circumstances.

517. The view was expressed that an injured State was entitled to resort to both reciprocity and reprisal within limitations, and it was in the application of such limitations that the distinction became important.

518. The point was made the draft articles should determine when measures of reciprocity and reprisal should cease. They should, in principle, cease when reparation under draft article 6 was fully made. This should be clearly stated. Otherwise the concept of reprisal, in particular, could be interpreted too broadly.

Article 8

519. Some representatives stated that the provisions of draft article 8 on reciprocity required careful study. It seemed to one representative that the concepts of proportionality (para. 2 of draft art. 9) and "subsidiarity" (para. I of draft art. 10) made applicable to measures of reprisal should also be made applicable to measures of reciprocity, because the concept of reprisal in its usually understood sense included the measures of reciprocity referred to in draft article 8.

Article 9

520. Some representatives expressed the view that the subject of reprisal should be approached with great caution and maximum safeguard because of abuses that had occurred. The view was expressed that reprisal should not be dealt with in the articles. Application of the provisions of draft article 9 could create serious uncertainty in international relations. There was need, it was said, to consider its replacement by peaceful means of settlement. The view was expressed that third-party compulsory settlement of disputes was essential for the application of

the provisions of draft article 9. The provisions of draft article 9 may, otherwise, lead to intolerable situations involving uses of reprisal which had, hitherto, been inadmissible.

521. The point was made that prohibition of the use of force should be mentioned. The provisions of draft article 9 were thus not entirely adequate in their present form. The view was expressed that paragraph 2 of draft article 9 which introduced the concept of "proportionality" did not make sufficiently clear that reprisal should be used with utmost circumspection.

522. Some representatives considered that since reprisal had been widely used to conceal aggressive action, which had contributed to the exacerbation of conflicts, a formulation should be elaborated which would not legalize so-called "defensive measures".

523. One representative stated that draft article 9 seemed to imply a rather restrictive notion of reprisal, as the traditional concept referred to the violation, rather than the suspension of the performance of, an obligation.

#### Articles 10 to 13

524. One representative was of the view that there should be stronger safeguards than contained at present in draft articles 10 to 13 with respect to the measures which an injured State would be entitled to take under draft articles 6, 7, 8 and 9 against the author of an internationally wrongful act.

525. Another representative considered that the limitations proposed in draft articles 10 to 13 with respect to reprisal were too restrictive. Though a definite provision prohibiting armed reprisals was absolutely necessary.

#### Article 10

526. It seemed to one representative that some clarification was required in draft article 10 which seemed to imply that reprisal should be viewed as an extreme measure of coercion applicable only after all international procedures for peaceful settlement of disputes available to the injured State had been exhausted. It seemed necessary to clarify whether draft article 10 would be applicable to situations whose urgency made use of peaceful settlement procedures impracticable; and as to how draft article 10 would be applicable when a State alleged to have committed an internationally wrongful act did not consider the act wrongful and denied existence of a dispute.

527. The view was expressed by another representative that the general principle in draft article 10 was acceptable but too broadly formulated, since it could be interpreted as covering non-binding procedures or even binding procedures for which there was no institutional framework ensuring some degree of enforcement. Thus, a more restrictive approach seemed preferable.

528. The view was expressed that paragraph 2 of draft article 10, which concerned cases where an injured State took interim protective measures, before exhausting procedures for peaceful settlement of the dispute, gave an unjustifiably large role to international judicial organs.

529. The question was raised by one representative as to why paragraph 2 (b) of draft article 10 referred, exceptionally, to a "State alleged to have committed the internationally wrongful act", when the draft articles referred elsewhere to a "State which has committed the internationally wrongful act". He wondered whether the divergence in terminology was intentional, and noted that compulsory third-party settlement of disputes seemed essential to implementation of the draft articles.

#### Article 11

530. One representative considered that the central idea of the provision in draft article 11 (which provided that measures of reciprocity and reprisal were not permissible where they would be inconsistent with the régime established by a multilateral treaty in relation to third States) was undoubtedly correct, but the question arose as to what means of coercion should be used if the situation did not fall under paragraph 2 of draft article 11 (which provided for a case where the multilateral treaty prescribed a procedure for collective decisions on enforcement of obligations).

#### Article 12

531. Some representatives considered that the provisions of draft article 12 (which provided that draft article 8, reciprocity, and draft article 9, reprisal, would not apply to the suspension of the obligations of a receiving State with respect to immunities accorded to diplomatic and consular missions, and the suspension of obligations under a peremptory norm of international law) would need careful consideration.

532. One representative considered that the rules of general international law relating to protection of the human person should be added to those whose performance could not be suspended by the injured State.

533. Another representative, agreeing with the distinction between reciprocity and reprisal implicit in draft articles 8 and 9, considered that there were no grounds for depriving an injured State of its right to reciprocal treatment with respect to the matters mentioned in draft article 12. Reciprocity was, he stated, a pillar of international law and international relations and an expression of the sovereign equality of States. The fact that the conduct of one State towards another also constituted an internationally wrongful act should be further justification for reciprocal treatment rather than a bar to such treatment. A State committing a wrongful act would, otherwise, be in a more favourable position than the injured State. The commission of a wrongful act should not be rewarded by shielding its author from reciprocal treatment. The wording of draft article 12 should,

therefore, be reconsidered with a view to deleting the reference to draft article 8 on reciprocity. The exclusions in draft article 12 should apply only to reprisal dealt with in draft article 9.

534. As a matter of drafting, one representative suggested that it may be clearer if in the first line of draft article 12 the words "suspension of obligations" were changed to "suspension of the performance of obligations".

535. Paragraph (a) - The point was made that paragraph (a) of draft article 12 did not mention "privileges" and only referred to "immunities".

536. One representative raised the question whether the provisions of paragraph (a) (providing that draft articles 8 and 9 - permitting suspension by an injured State of performance of obligations towards the other State, by way of reciprocity or reprisal - would not apply to the obligations of a receiving State with respect to diplomatic and consular immunities) reflected State practice or progressive development of international law. The representative also questioned whether, aside from the provisions of paragraph (b) of draft article 12 (relating to peremptory norms of international law), paragraph (a) of draft article 12 would be the only type of case where suspension of obligations by an injured State would not be permissible.

537. Another representative considered it reasonable, if one State violated its obligations with respect to accord of diplomatic or consular privileges and immunities, that a similar response be available to the injured State. Though suspension of obligations with respect to privileges and immunities should not be permissible in response to breach of an obligation of completely different nature.

538. It was noted that the privileges and immunities of representatives of States to, and the staff of, international organizations were not mentioned. There was, it was observed, no reciprocal relation between, on the one hand, a permanent mission of State A accredited to an international organization in State B and, on the other, a diplomatic mission of State B accredited to State A. Also, it was clear that reprisal and reciprocal measures could not include suspension of the granting of privileges and immunities to missions accredited to international organizations, as such missions enjoyed special status outside the bilateral relations of the two States.

539. Paragraph (b) - It seemed to one representative that paragraph (b) of draft article 12 would require further examination from the point of view of the question of the legitimacy of armed reprisals.

540. The view was expressed by another representative that draft article 12 (which in paragraph (b) excluded from obligations that may be suspended by an injured State those under a peremptory norm of international law) should also specifically require non-use of force or of the threat of force.

Article 13

541. It seemed to one representative that the provisions of draft article 13, which provided for cases in which draft articles 10 and 11 would not apply, should be transferred to draft articles 10 and 11.

Articles 14 and 15

542. Some representatives expressed agreement with the provisions of draft articles 14 and 15 concerning international crimes and aggression. Other representatives expressed reservations with respect to the provisions of these two articles. (See also paras. 7 to 13, above.)

543. The view was expressed that separate treatment of international crimes and aggression was inappropriate and that they should be dealt with in one article.

544. Some representatives were of the view that the draft articles should contain clear and unambiguous provisions on the legal consequences of international crime and, more specifically, of aggression, and the right of self-defence. The view was expressed that the concept of "self-defence" should be defined more precisely as it was often used as an excuse for aggression and such a definition was indispensable to the implementation of the draft articles.

545. One representative considered that the provisions of draft articles 14 and 15 were insufficient and should clearly emphasize that the victim of an international crime could unilaterally and immediately apply necessary sanctions which, in the case of aggression, could culminate in the right of self-defence. There should also be mention of reparations, the right to demand guarantees against perpetration of crimes, and the criminal liability of individuals.

Article 14

546. Some representatives stated their concurrence with the provisions of draft article 14. The provisions of draft article 14 were a logical corollary to the recognition of the concept of international crime with armed aggression as the prime example.

547. Some representatives questioned the appropriateness of draft article 14 in the codification of the law of State responsibility.

548. Some representatives were of the view that the provisions on international crime (draft arts. 5 (e) and 14), while complementary to article 19 of Part One of the draft articles, needed to be supplemented by appropriate provisions in Part Three of the draft articles. International crimes could not be identified in specific cases without third-party compulsory settlement of disputes and the development of as uniform a case law as possible, and the International Court of Justice could play an important role.



549. Some representatives stated that the Commission should approach the question of aggression and its consequences in a way that would avoid risk of overlapping between the draft articles on State responsibility and the draft Code of Offences against the Peace and Security of Mankind.

550. Paragraph 1 - It seemed to one representative that in paragraph 1 of draft article 14 the expression "accepted by the international community as a whole" (derived, it would seem, from the expression "breach recognized as a crime by that community as a whole" in article 19, paragraph 2 of Part One of the draft articles) could be open to a variety of interpretations and should be changed to read "the applicable rules of international law".

551. Paragraph 2 - It seemed to one representative that paragraph 2, which prescribed obligations "not to act", should be supplemented by obligations "to act".

552. One representative was doubtful as to the appropriateness of the provisions of subparagraph (c) of paragraph 2, namely, that an international crime committed by a State entailed an obligation for every other State to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b). The provisions were vague and went beyond customary international legal rules on State responsibility. One representative questioned the appropriateness of the positive obligation in subparagraph (c).

553. Paragraph 3 - It seemed to some representatives that there were fundamental questions to be clarified in paragraph 3 of draft article 14. Paragraph 3 stated that rights and obligations under paragraphs 1 and 2 of draft article 14 were subject to United Nations Charter procedures with respect to the maintenance of international peace and security.

554. The point was made that, thus, paragraph 3 would subject the rights of individual States to United Nations Charter procedures. The appropriateness of such a solution was questioned. (It seemed incorrect to leave determination of the legal consequences of an internationally wrongful act to United Nations Charter procedures. It may impose too great a burden on the United Nations. In case of a threat to the peace or a breach of the peace or an act of aggression, Chapter VII of the Charter would apply. Yet Chapter VII did not cover all aspects of the international responsibility of States.) It seemed to one representative that the Commission may wish to examine further the extent to which rights and obligations under paragraphs 1 and 2 of draft article 14 should be subordinated to United Nations Charter procedures with respect to the maintenance of international peace and security. The view was expressed that the Commission may also wish to contemplate other ways of reflecting the erga omnes effect of international crimes.

555. The question was also raised as to whether paragraph 3 applied only to ("additional") rights and obligations arising under paragraphs 1 and 2 of draft article 14 or also to ("normal") rights under draft articles 6 to 9 granted an injured State. If the former was the case, then the position would be that States (the State directly affected and States indirectly affected) would individually be entitled to rights under draft articles 6 to 9 and that the international community as a whole, through the United Nations, would exercise the additional rights arising under paragraphs 1 and 2 of draft article 14.

### Article 15

556. Some representatives expressed agreement with the provisions of draft article 15, which provided that an act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter. The suggestion was made that the provisions of draft article 15 might be strengthened by providing for non-recognition of the consequences of aggression and of any advantages accruing to the aggressor as a result of the aggression.

557. Some representatives considered that the principle of "self-defence" should be more precisely defined. The principle, which was embodied in Article 51 of the Charter of the United Nations, had been wrongly invoked in justification of cases of aggression.

558. Some representatives were of the view that the provisions on aggression in draft article 15 seemed superfluous as they were fully covered by draft article 4 and paragraph 4 of draft article 14.

559. Some representatives questioned the special treatment accorded aggression in draft article 15. Article 19 of Part One of the draft articles dealt, it was pointed out, with several other forms of international crime which merited equal particularity of treatment, especially crimes included in paragraph 3 (c) of that article, such as slavery, genocide and apartheid; to which certain additions had also been proposed, namely, crimes against humanity, violations of internationally protected human rights, as well as terrorism and seizure of hostages.

### Article 16

560. One representative considered that it was unclear whether paragraph (a) of draft article 16 (which excluded from the scope of the draft articles any question relating to the suspension of the operation of treaties) was intended to cover only certain breaches of treaties, for example, "material breaches" (within the meaning of draft article 60 of the Vienna Convention on the Law of Treaties) and whether draft article 8 was intended to cover only less serious breaches.

561. It seemed to one representative that the reference to belligerent reprisals in paragraph (c) of draft article 16 was not entirely clear. The question whether belligerent reprisals should be excluded from the scope of the draft articles arose. It was generally known that humanitarian law applicable to armed conflicts called for the prohibition of reprisals against civilian populations, and that the party on whose behalf such reprisals were carried out bore international responsibility. Article 51, paragraph 6, and article 91 of Additional Protocol I of the 1949 Geneva Conventions would, it was stated, be of relevance to the matter.

## H. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

### 1. Programme and methods of work of the Commission

562. Representatives expressed general satisfaction with the conclusions and intentions of the International Law Commission concerning its programme procedures and methods of work, as reflected in paragraphs 385 to 397 of its report. There was, it was said, no doubt that the Commission would make every effort to expedite its work still further and that it would succeed in completing the programme of work outlined in its report.

563. The view was also expressed that while it was only natural at this stage in its quinquennium for the Commission to take a close look at the extent to which completion of work in hand was feasible during the present term of membership, the question arose whether the Commission itself had not reached the conclusion that either its productivity needed to be improved or else different arrangements should be made for the allocation of time available according to the relative importance of different topics on its work programme.

564. Some representatives expressed support for certain suggestions that had been made in the report of the Commission concerning the organization of work of sessions of the Commission. Of particular interest was the suggestion found in paragraph 385 of the report of the Commission that it should give major consideration at an annual session only to some of the topics on its current programme of work, bearing in mind those topics on which most progress could realistically be achieved and taking into account the importance of each topic. It was said that such an approach would facilitate the achievement of concrete results and would enable the Commission to make more progress on topics which were already in an advanced stage of preparation. Such a procedure might, moreover, enhance prospects for substantial progress on certain topics within the remaining two years of the current term of membership of the Commission.

565. The view was maintained that it was clearly not realistic to expect the Commission to work simultaneously on six or more complex topics; priorities should be set for each Commission session. The Commission was urged to devote each session to one, or at most, two priority topics which had previously been agreed upon, so that it could deal with them in a more concentrated and intensive fashion and conclude its work more swiftly than was currently the case.

566. On the other hand, it was said that while priority should be given, at each session, only to some of the topics under consideration, that should not preclude the consideration of other topics. The Commission should, it was hoped, bear in mind the necessity of working on all topics in its mandate in a balanced manner and that priorities should be set in the light of a variety of factors, including the views expressed in the Sixth Committee, and not in the light of fortuitous events such as the hiatus in the appointment of Special Rapporteurs.

567. According to certain representatives, it would be desirable for the Commission to improve its working methods. The observations to which those methods had given rise in recent years within the Planning Group of the Enlarged Bureau of the

Commission had been useful and it was now important for the Commission to establish a carefully considered short-term, medium-term and long-term work plan. Concern was voiced that despite the progress achieved in 1984 on a number of topics, there was very slow progress on other questions which were closely related to the essential and urgent problems confronting mankind. The hope was expressed that the Commission would spare no effort in speeding up the pace of its work. The Commission should, it was voiced, strive to finish the study of the topics on its current agenda as soon as possible. It was stated that of six topics before the Commission at its thirty-sixth session, four had been the subject of only a general discussion. While such a discussion might be necessary when the Commission took up a new topic or resumed work on an old one after a long interval, there were times when those debates were, it was said, unjustifiably prolonged on questions concerning the Commission's mandate, contrary to the General Assembly's clear recommendations. Such delays in the Commission's work naturally gave rise to concern, as they could result in a dilution of the importance of the topics or meant that work on them became partially outdated through rapid changes in the international situation. The effectiveness of the Commission should be increased and its efforts should be concentrated on the most urgent topics.

568. As to the degree of priority to be accorded particular topics on the Commission's current programme, various views were expressed, as indicated in the previous sections of the present document devoted to individual topics. The Commission's intentions with regard to its programme of work in 1985 and 1986 (para. 387 of the report) were noted. According to one view put forward, the main role in identifying the topics to be given priority must be played by the Sixth Committee. The remark was also made that delays in the finalization of draft articles could be rectified by, inter alia, requesting the Commission to finalize draft articles on at least some of its topics during each of its terms.

569. Certain representatives urged that thought should also be given to the long-term programme of work of the Commission and to the inclusion of important new topics in order to promote the development of international co-operation among States and the strengthening of international peace and security. The Commission should perhaps already be looking for new topics in order to avoid taking hasty decisions in the future. It was stressed that the Commission had gained 36 years of experience, and it was time for it to make greater headway in its work and adapt itself to the requirements of the present-day world by laying more emphasis on questions such as the maintenance of peace, the development of friendly relations among States and the establishment of equitable and reasonable international economic relations, so that every aspect of international relations had a solid legal basis. In 1949 and 1971, the Secretary-General of the United Nations had carried out surveys of international law which had proved to be extremely useful in helping the Commission to understand the needs of the time and give the appropriate direction to its work. On the eve of the fortieth anniversary of the United Nations, it was proposed to invite the Secretary-General to update those surveys so that the Commission would be correctly guided and able to realize its full potential (see para. 576 below). It was also remarked that, as a result of the increase in its membership, the Commission should be more sensitive to the concerns of the third world and, at the beginning of the next five-year term of its members, it should arrange to study topics which presented a new interest for the

international community, such as "development law". The Commission would thus, it was maintained, not only have contributed to extracting international law from the impasse which had persisted so long because certain parties wished to perpetuate relationships of domination and conquest, but it would also have attempted with some success to reflect the contemporary world.

570. Certain other representatives, however, believed that the long-term goal must be to relieve the Commission's agenda so that it could proceed more quickly by concentrating on a few topics. When assigning new topics to the Commission, States should exercise the utmost restraint until work on the current topics had been concluded. The remark was also made that long delays in finalizing draft articles could be rectified by, inter alia, restricting the number of topics allocated to the Commission at any given time.

571. Regarding the current practice of holding one annual session of the Commission at its permanent seat in Geneva, most representatives who addressed themselves to the question supported the Commission's conclusion that, in the absence of exceptional tasks to be performed, it was not in a position to suggest any change in that current practice. The view was expressed that it was undesirable for the Commission to hold two sessions a year in two different cities: in particular, such a practice would have the disadvantage of keeping members of the Commission away from their respective countries for longer periods of time and would increase the costs of the sessions. Furthermore, it was maintained, the holding of sessions in two parts, in New York and Geneva, would disturb the atmosphere of scholarly concentration that was necessary for the work of the Commission and might lead in practice to two different Commissions, as some members might concentrate on one site or the other. Nevertheless, certain representatives noted that when exceptional circumstances so required, there was the possibility of taking up the suggestion of extending the length of the Commission's session and holding it in two places at different dates. The financial implications of such an arrangement would need proper examination, but there were precedents, it was said, which could be borne in mind when the Commission came to such matters as the second reading of the draft articles on State responsibility.

572. Representatives were gratified to note that the Drafting Committee had begun its meetings at the start of the session, thereby considerably reducing the Commission's work-load. Support was expressed for the Commission's intention to continue its practice of establishing and convening the Drafting Committee as early as possible in its future sessions. One suggestion made was that the Drafting Committee could be divided into different groups in order to further enhance its effectiveness. Another suggestion made was that the Commission should continue to employ the device of establishing working groups for new or special items.

573. With regard to drafting techniques, the Commission was urged to continue to work in a balanced manner, trying to avoid over-detailed formulations wherever they were not really necessary. Also, one representative stated that his delegation had a number of technical comments to make on the drafts prepared by the Commission, particularly with regard to the drafting of the Arabic versions thereof, because there were some terms which were not accurately rendered. His delegation requested the Arabic-speaking members of the Commission to take note of that, and indicated

it would be able to furnish the Commission with some of its observations in writing at a later date. Another representative drew attention to certain expressions used in the Spanish version of texts and questioned whether they corresponded precisely with terms used in the other language versions of such texts.

574. Concerning the recommendations which the Commission submits to the General Assembly on the disposition of a draft upon which work has been completed by the Commission, it was observed that, thus far, the results of the Commission's work had been largely confined to conventions; there was no dispute as to the merit of that approach. However, given the complexity of some of the topics studied by the Commission and the differences of opinion in that regard which had prevented the adoption of conventions, it might at times be useful, it was said, to consider other types of instruments: model law, body of principles, declaration, handbook, etc. Such instruments would be immediately useful and would not prevent the subsequent adoption of conventions once conditions were sufficiently ripe.

575. It was also recalled, moreover, that the Sixth Committee had been advised by certain representatives not to move towards international agreements which would not command the necessary majority for implementation. In that connection, it was pointed out that the signatories to some international conventions which enjoyed majority support had endeavoured to obstruct implementation of the provisions of those conventions; what mattered was political will and good faith in the implementation of international norms.

576. Turning to the question of documentation, it was stressed that the Yearbook of the International Law Commission should be published more promptly since it was an invaluable reference tool. Support was also registered for the Commission's request that the important study prepared by the Secretariat, entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law" (ST/LEG/15) be translated into all official languages. In addition, it was considered useful for the Secretariat to prepare a new survey of international law which would prepare the ground for the future consideration of the Commission's long-term programme of work (see para. 569 above).

577. References were also made to the role of the Codification Division of the Office of Legal Affairs, which provided the substantive staff of the Commission. Satisfaction was expressed at the dedication and professionalism of the Legal Counsel and his colleagues in the Codification Division. It was stressed that the role of the Secretariat was critical and that there was a need for the Commission to be adequately staffed so that the research and studies necessary for its work could be completed, particularly for the purpose of providing assistance to the Special Rapporteurs. Proper staffing was a high priority and it was hoped that the necessary steps in that regard could be taken within the framework of existing arrangements for the recruitment of professional staff. It was remarked that it was not a matter of providing new staff posts but rather of filling existing vacancies in the Codification Division. Support was also registered for the suggestion that consideration be given to adding senior experts to the staff assisting the Commission.

## 2. Co-operation with other bodies

578. Satisfaction was expressed that the International Law Commission was continuing its constructive co-operation with bodies involved on the regional level with the process of the codification and progressive development of international law, particularly the Arab Commission for International Law, the Asian African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee. Representatives reaffirmed their wish that the Commission continue to enhance and strengthen such co-operation in the years ahead.

## 3. International Law Seminar

579. Representatives expressed appreciation for the organization of the twentieth session of the International Law Seminar in conjunction with the thirty-sixth session of the International Law Commission and for the opportunity it offered advanced students and junior professors of international law as well as young government officials to expand their knowledge of international law. It was noted that the annual Seminar constituted a positive contribution to the cause of international law and was of particular value for the nationals of developing countries. Such nationals were able to attend the Seminar through the awarding of fellowships made possible through voluntary contributions of Governments and institutions.

580. Appreciation was expressed to those States which had contributed to the fellowship fund. States which had contributed were urged to increase their contributions and all other States were urged to make a contribution, if only a token one, so that fellowships could be awarded to a larger number of candidates from developing countries, so as to enable them to attend the Seminar.

581. The wish was expressed by representatives that seminars would continue to be held in conjunction with sessions of the Commission and that an increasing number of participants from developing countries would be given the opportunity to attend those seminars.

### Notes

1/ Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10).

2/ Ibid., Thirty-ninth Session, Sixth Committee, 33rd to 47th and 65th meetings.

3/ Item 125 was considered by the Sixth Committee at its 47th to 49th and 63rd meetings, on 15 and 16 November and 5 December 1984. Ibid., 47th to 49th and 63rd meetings.

Notes (continued)

4/ Article 6 was adopted provisionally at the thirty-second session of the Commission. It was further discussed by the Commission at its thirty-fourth session and still gave rise to divergent views. The Drafting Committee also re-examined draft article 6 as provisionally adopted. While no new formulation of the article was proposed by the Drafting Committee at the thirty-fourth session, the Commission agreed to re-examine draft article 6 at its future sessions. Owing to lack of time, however the Drafting Committee was not in a position to consider the question during the thirty-fifth and thirty-sixth sessions of the Commission.

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