UNITED NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.4/446
25 January 1993

ORIGINAL: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-fifth session
3 May-23 July 1993

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (1992)

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

CONTENTS

93-02013 (E) 190293 240293 /...
GE.93-60723

CONTENTS (continued)

CONTENTS (continued)

CONTENTS (continued)

INTRODUCTION

1. At its forty-seventh session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 18 September 1992, to include in the agenda of the session an item entitled "Report of the International Law Commission on the work of its forty-fourth session" 1/ (item 129) and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 20th to 30th meetings and at its 35th meeting, held from 26 October to 6 November and on 16 November 1992. 2/ At the 20th meeting, the Chairman of the Commission at its forty-fourth session, Mr. Christian Tomuschat, introduced the report of the Commission. At its 35th meeting, on 16 November, the Sixth Committee adopted draft resolution A/C.6/47/L.14, entitled "Report of the International Law Commission on the work of its forty-fourth session". The draft resolution was adopted by the General Assembly at its 73rd plenary meeting, on 25 November 1992, as resolution 47/33.

3. By paragraph 14 of resolution 47/33, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the Commission's report at the forty-seventh session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document opens with a section A entitled "General comments on the work of the International Law Commission". Section A is followed by four sections (B to E), corresponding to chapters II to V of the report of the Commission.

TOPICAL SUMMARY

A. GENERAL COMMENTS ON THE WORK OF THE INTERNATIONAL LAW COMMISSION

5. Some representatives commented on the backdrop to the work of the Commission and emphasized in particular the role of international law in a rapidly changing world. One of them observed that, as a result of the historic transformation of the international political scene in the post-cold-war period, respect for international law in inter-State relations was the foundation of world peace and prosperity and that any new world order should be based on the primacy of the rule of law without exception. Another representative, referring to the changes witnessed in recent years, notably the end of the cold war and the Gulf crisis, said that the international

---

1/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10).

2/ Ibid., Sixth Committee, 20th to 30th and 35th meetings.

community was in a period of transition from confrontation to cooperation and was seeking a new and peaceful world order. He observed that, as circumstances in the international arena evolved, new problems were bound to arise which would be difficult, if not impossible, to resolve by resorting to traditional international law and that, at the same time, if a country chose to ignore international law, there would be even greater need for solidarity on the part of the international community to ensure that the accepted rules of international law were duly observed. He emphasized that in order to meet those two concerns, the international community should, first, promote the progressive development and codification of international law in order to ensure an adequate response to new needs in fields such as that of the human environment and, secondly, ensure respect for the accepted rules of international law by standing united in countering all violations of international law which could threaten the foundations of the world order and striving to eliminate the discrepancies between multilateral treaty provisions and the domestic laws of States parties to the treaties.

6. Referring specifically to the role of the Commission, some representatives advocated a future-oriented approach. One of them said that, instead of focusing on the codification of customary international law, the Commission should, in future, place greater emphasis on the progressive development of international law and the newly emerging needs of the rapidly changing international community, adding that the degree to which the Commission successfully fulfilled that task would determine its raison d'être in the future. Another representative encouraged the Commission to continue to play its constructive, scholarly and independent role by directing its efforts towards the establishment of an international legal framework for future generations.

7. Reference was also made to the Commission's contribution to the Decade of International Law. In this connection, one representative observed that the current term of office of the Commission's members coincided with the mid-point of the United Nations Decade of International Law - which offered an additional opportunity to prepare for what should be the crowning achievement of the Decade, namely, the convening of a third international peace conference which could make a significant contribution to the implementation of the Declaration on the Right of Peoples to Peace, adopted by the General Assembly in its resolution 39/11 of 12 November 1984, and to the establishment of truly democratic, equitable and peaceful international relations.

8. Tribute was paid to the Commission for its contribution to the codification and progressive development of international law. The remark was made in particular that the instruments formulated by the Commission were an expression of the teachings of the most highly qualified publicists of the various legal systems and schools in the world and could, as such, be implemented by the International Court of Justice under Article 38, paragraph 1 (d), of its Statute, even before they entered into force.

9. Some representatives insisted on the important interaction between the Commission and its parent body. It was pointed out in this context that the

annual consideration by the Sixth Committee of the Commission's report offered an opportunity to evaluate and comment on the report, to provide answers to questions of legal policy where the Commission required guidance from the General Assembly and to inject elements of a political approach whenever it was necessary to do so.

10. As regards the outcome of the latest session, a number of representatives stressed the high quality of the report and took note with satisfaction of the progress achieved on the topics on the Commission's agenda.

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

1. Desirability and feasibility of establishing an international criminal court

11. As indicated by paragraph 4 of General Assembly resolution 47/33, the Sixth Committee as a whole took note with appreciation of Chapter II of the report of the Commission, entitled "Draft Code of Crimes against the Peace and Security of Mankind", which was devoted to the question of the possible establishment of an international criminal jurisdiction. The report of the Working Group on the question 3/ was generally considered as very valuable and comprehensive and offering an excellent basis for further work on the topic.

12. It was recalled that the question of the possible establishment of an international criminal jurisdiction had a long history in international relations and that the need to establish such a court had already been felt at the time of the League of Nations although, after the Nürnberg and Tokyo trials, it had apparently seemed less urgent, perhaps because of a feeling that the lesson of war had vaccinated mankind against a repetition of the atrocities of the Second World War. The question whether there should be an international criminal court had been asked when the Convention on the Prevention and Punishment of the Crime of Genocide had been adopted in 1948 and again when the International Convention on the Suppression and Punishment of the Crime of Apartheid had been adopted in 1973. However, none of those conventions had been complemented by the establishment of a criminal jurisdiction. Other efforts such as those of the Commission in the late 1940s and early 1950s and those of the 1953 United Nations Committee on an International Criminal Court had not been followed by effective action on the part of the decision-making organs. The question had been raised once again in 1990, when the General Assembly had felt it opportune for the Commission once again to take up the matter. The Commission had now completed the first stage of its work and the time had come for the General Assembly to decide what course the Commission should follow next.

3/ Ibid., Supplement No. 10 (A/47/10), annex.

13. A large number of delegations pronounced themselves in favour of the establishment of an international criminal court.

14. The observation was made that the idea of establishing such a court represented the final goal of cooperation among States for international law enforcement in criminal matters. For many years, States had not been ready to accept such a mechanism and, in order to ensure the suppression and punishment of certain serious international crimes, the international community had made efforts to develop multilateral treaties which aimed at obliging States either to prosecute and punish such crimes by sending the case to an internal court or to extradite offenders. Particularly in the case of terrorism, States had preferred to establish norms to adjust or modify their national criminal codes and to ensure national jurisdiction over the crime, instead of establishing an international criminal court outright. However, both Governments and world public opinion recognized the gross inadequacy of the current international criminal justice system and the need to establish a criminal court. It had been demonstrated that the existing extradition system did not work very well, and that it was a source of serious jurisdictional conflicts between States, which were disruptive to inter-State relations. In that regard, the usefulness of an international criminal court was obvious, inasmuch as it would provide the important logistical base which the trial of an alleged international criminal would necessitate, and which the economic and social structures and criminal justice systems of many countries would not be in a position to supply. It was noted in this connection that the system of national jurisdiction had proved insufficient to prevent international crimes, in particular, those committed with the agreement of a State.

15. Other reasons of a more abstract nature were invoked in favour of the establishment of an international criminal court. In the first place, there had been an increased "global consciousness" and a great sense of oneness amongst the peoples of the world. To that must be added the end of the cold war, which had made it possible to overcome distrust and suspicion, and the fact that the world community had begun to look more and more to the United Nations for solutions to international problems.

16. It was also observed that recent events on the international scene, such as the Gulf crisis, the Libyan situation, the state of affairs in the former Yugoslavia and other recent cases which had led to confrontation between States had clearly shown that there was a gap to be filled in present-day international relations and that the existence of an international criminal court could have provided a smooth way out of situations susceptible of leading to international friction. A court could provide a permanent mechanism capable of responding immediately to events as they occurred, since it could be triggered by States without the delay that might be necessary to negotiate the creation of an ad hoc tribunal. Such a body would strengthen the principle of universal jurisdiction over individuals who had committed international criminal acts, since it would objectively and uniformly implement criminal liability provisions from existing treaty law.

17. Special emphasis was placed by a number of delegations on the fact that, further to new scourges such as drug trafficking, which demanded punishment at the international level, the world had witnessed a resurrection of criminal activities in the form of crimes of war and crimes against humanity, whose frequency required swift action. It was stressed that the frequent and widespread violations of international humanitarian law, including grave breaches of the Geneva Conventions which were occurring in many parts of the world, had led people everywhere, and not only the victims of such deeds, to expect a clear signal that the international community was determined not to tolerate any longer the flouting of the most basic norms for the protection of international peace and security.

18. The concept of deterrence was also invoked by several delegations in support of the establishment of an international criminal court. It was pointed out in this connection that although throughout the contemporary era there had been, and there continued to be, serious violations of rules for which, under international law, the perpetrators bore criminal responsibility, such perpetrators had seldom been called to account by the legal process. Efforts had been made in various legal bodies to define offences under international law and to establish the obligation to punish them. The purpose of such international efforts, including the creation of an international criminal court, should be not only punishment but deterrence and prevention as well. It was necessary to use the law in order to curb the commission of crime through fear of prosecution.

19. It was also stressed that several manifestations of international crime, including the illicit traffic in drugs, had put the sovereignty of small countries at serious risk. The enormous sums which international criminal organizations had at their disposal made it very difficult for small developing countries adequately to address the threat posed to them by organized criminality. Apprehending a major international criminal, trying him and then imprisoning him for a long period could pose major difficulties or even undermine a small country's financial and social stability. Hence, the interest of an international criminal court that would try not only traffickers but also their accomplices, as well as individuals accused of war crimes or genocide, mercenary activities, arms trafficking or other violations of constantly evolving international criminal jurisprudence.

20. The point was further made by some delegations that an international criminal court would be the most appropriate organ for an objective, impartial and uniform implementation of the draft Code of Crimes against the Peace and Security of Mankind. Now that the draft Code had already been adopted on first reading and the conclusion of the Commission's work thereon seemed closer than ever, the establishment of an international criminal court would undoubtedly help accelerate the adoption and application of the Code. The Code would be ineffective, it was added, if there was no jurisdiction to assert the authority of the international community in the struggle against international crimes. It was clear that the usefulness of the Nürnberg principles and of an international criminal code was subject to the existence of a judicial organ.

21. Many of the delegations favouring the establishment of an international criminal court recognized that such an undertaking might entail both political and technical difficulties and could raise a number of problems that would have to be considered, analysed and resolved if the court was ultimately to achieve universal acceptance. But these difficulties, it was said, could be overcome through a combination of political will, imagination and caution; the effort was particularly worthwhile during the United Nations Decade of International Law and at a time when people everywhere had high expectations for a new world order in which peace was more than the absence of war and justice more than a dream. By providing a clear and specific mandate to the Commission to draft the statute of an international criminal court, the General Assembly would be assisting in the task of constructing that new international order.

22. Other delegations expressed either strong reservations to the establishment of a court or serious doubts as to the feasibility of the idea. They stressed the numerous obstacles involved, including the surrender of a State's sovereignty, the relationship between international law and domestic laws and the undermining of the principle aut dedere aut judicare. The remark was also made that, as the Commission's report showed, it was very difficult to achieve uniformity of opinion on many basic issues concerning the creation of a court, such as who might be entitled to bring a complaint before the court, which State or States would have to give consent for the court to have jurisdiction in respect of an individual charged with a crime, which law would be applicable, what relationship would exist between the court and the Security Council and how compensation procedures should be defined.

23. One representative in particular elaborated on what he characterized as "insurmountable practical difficulties" in the establishment of a court. While agreeing that a court would no doubt be desirable as a form of international cooperation to combat the scourge of international and transnational crimes, he observed that desirability in this case did not necessarily translate into feasibility. In the first place, States would as a rule insist on trying the alleged offender in their domestic courts, being reluctant to surrender their criminal jurisdiction or see it diminished. He recalled in this connection that the International Conventions on the Prevention and Punishment of the Crime of Genocide and on the Suppression and Punishment of the Crime of Apartheid, while envisaging the possibility of trying the crimes in question before an international criminal tribunal, did not contain any specific provisions for the establishment of such tribunals. The 1953 draft statute for an international criminal court had, for various reasons, been shelved. The most that countries had so far been able to agree on in their joint efforts to combat certain international crimes was universal jurisdiction in the form of "try or extradite".

24. Referring to the view that the changed climate in international relations had brought the idea of an international criminal court closer to fruition, the same representative pointed out that, while the possibility of establishing such a court might indeed be slightly greater under the existing circumstances, guaranteeing the independence and impartiality of the court

would probably be more difficult, given their susceptibility to the influence of the dynamics of international politics. He did not think either that the problem was amenable to solution by provisions relating to the court's composition and rules of procedure or to general principles of criminal justice.

25. The same representative pointed out that even bringing the accused to trial before the court would encounter serious practical difficulties because most of the crimes mentioned as falling under the possible subject-matter jurisdiction of a court, with the exception of war crimes and international drug trafficking, could only be perpetrated by States. Although criminal responsibility was borne by individuals, those individuals would most likely be members of the State ruling hierarchy. The court could not try the alleged offenders in absentia, since that would violate the basic principles of criminal justice as well as the provisions of the International Covenant on Civil and Political Rights. How could then a State, even if it was a party to the court's statute and if the court exercised exclusive and compulsory jurisdiction over the crime in question, be expected to turn over its head of State or Government or other high-ranking civilian or military leader to the court for trial? The example of the Nürnberg and Tokyo Tribunals was not relevant because those tribunals were of an ad hoc nature and had been set up under the special international circumstances prevailing at the time. To apprehend fugitive offenders responsible for international crimes and bring them to justice would be virtually impossible without the use of force involving much suffering for the innocent people of the country concerned.

26. The representative in question furthermore thought that differences between national criminal justice systems and national philosophies on the subject of penalties would make it extremely difficult to draw up universally acceptable uniform rules on the sentencing of international crimes. If left unresolved, that issue alone could, in his view, render the proposal for an international criminal court ineffective. Similar difficulties also arose in connection with the execution of judgements and the enforcement of penalties.

27. Another representative stressed that the political context in which the Nürnberg and Tokyo tribunals had been created after the Second World War and the current political context did not lend themselves to comparison. The Allied Powers had rightly established an ad hoc tribunal at Nürnberg after the Second World War to judge the individuals chiefly responsible for that and other crimes against humanity. To the extent that the Nürnberg Tribunal was recognized as the precursor of the proposed international court which would try such criminals, it had, however, to be acknowledged that the Nürnberg trials had been held under circumstances radically different from those likely to prevail when the court was called upon to operate. A consensus had existed at the time among all the Members of the United Nations represented at Nürnberg as to the extreme criminality and bestiality of the acts attributed to the accused and the standards by which they must be judged. The accused had already been in the custody of the Allied Powers, and the question of how they should be handed over, and to whom, had thus not arisen; nor had the question of alternate venues arisen, for the judges had represented the

victims, and the State of nationality of the accused, the Third Reich, had been unconditionally vanquished. In the contemporary world, however - and after more than 40 years of deliberation - there was not yet a code of international crimes finally agreed upon by the international community as a whole. The representative in question stressed in this connection that the Code of crimes adopted on first reading by the Commission included some crimes which paled beside the atrocities with which the Nazis had been charged. He reiterated his concern at some features of the draft Code of crimes under which individuals could be charged and prosecuted, possibly before an international criminal court, and again advised the Commission to reconsider the scope of the offences to be included therein with a view to limiting it to the most serious crimes, those recognized by all as crimes against peace and humanity.

28. The same representative had other reservations with regard to an international criminal court. In his view, it was reasonable to expect that a State which was reluctant to try the accused persons for the reasons stated in the Commission's report would be equally reluctant to hand them over to an international court. He furthermore remarked that no person should be in jeopardy of being handed over to an international court merely on the basis of a State having filed an uninvestigated complaint against him with no proper extradition procedure or guarantee of his basic civil rights. There must be a mechanism to ensure that such a court would indeed serve international justice and would not be used by irresponsible States to further political ends.

29. The delegations having reservations or doubts on the establishment of an international criminal court objected to the Assembly asking the Commission, at least at this stage, to draft a statute for a court. They thought that States should be given sufficient time to express their views on the matter in writing.

30. Many other delegations felt that the Assembly should request the Commission to undertake, as of its next session, the drafting, as a matter of priority, of a statute for an international criminal court, without prejudice to inviting Governments to submit written views on the matter in time for the opening of the Commission's next session.

2. Structural and jurisdictional issues

(a) Mode of creation of an international criminal court

31. Many delegations endorsed the view expressed by the Working Group in paragraph 437 of its report that the most appropriate manner to establish an international criminal court would be by means of a treaty agreed to by States parties, which would contain the court's statute. Some of those delegations added that the treaty should be concluded under United Nations auspices, as it was important for the court to benefit from the universal representativeness which the Organization enjoyed.

32. One representative drew attention to the problem of determining the number of ratifications or accessions, as appropriate, required for the entry into force of the statute. He pointed out that the number should be neither so low as to detract from the court's representativeness nor so high as to delay unduly the commencement of its functions. Another representative warned that, notwithstanding its creation by means of a multilateral treaty, the court should not be fettered in its action by the classical law of international treaties. Yet another representative remarked that although the preferred form of creation of the court should be by means of a treaty, the possibility of establishing a mechanism by other means, and perhaps by a decision of the Security Council rather than a resolution of the General Assembly, should not be excluded. This method would solely apply in exceptional cases and the court thus established would be a special court.

(b) Structure and composition of the envisaged court

33. Many delegations supported the flexible approach recommended by the Working Group, particularly in paragraph 433 and paragraphs 438 and following of its report. They saw merit, for the reasons expressed in the Working Group's report, in envisaging a court which would not be a full-time body but an established structure to be called into operation when required, according to a procedure determined by its statute. It was said in this connection that the proposed court should be ad hoc not in the sense of an organ created ex post facto but rather in the sense of a pre-existing mechanism which would be convened when the need arose and the composition of which would be determined, in each specific case, through objective criteria aimed at ensuring the impartiality of the judges. The remark was made that such an approach would be better suited than a permanent organ to the types and volume of cases which would be submitted to the court and had the merit of addressing the arduous and complex issues posed by the creation of a court with caution, flexibility and a sense of practicality.

34. Several delegations, however, expressed reservations on this approach. Some of them found it difficult to conceive of a court, even one functioning periodically, which would not require a permanent administrative staff, if only to perform registry services, and to maintain archives. It was said in this connection that the establishment of a permanent court with its own registry and staff would enable the institution to formulate its particular jurisprudence and would render it less susceptible to possible manipulation. The remark was also made that the lack of continuity of the court might lead to a diminishing independence and authority and undermine its continued existence and that considerations of cost and political acceptability had to be weighed against the need to ensure impartiality, objectivity and uniformity of jurisprudence. In any event, one delegation observed, financial considerations should not impede the creation of a permanent institution as the court might begin modestly and then gradually develop, as the need arose. A further comment was that the importance and number of cases that could be set before the court's jurisdiction militated in favour of a permanent body rather than a part-time mechanism.

35. One representative was particularly critical of the Working Group's approach. He found it regrettable that the Commission should be adverse to setting up a full-time judicial body, on grounds such as the need to avoid an expensive institutional mechanism, the possible lack of work for the court and the absence of international experience in the exercise of criminal jurisdiction. He insisted that the idea of a standing court should not be shelved, even provisionally. A court which was a compromise facility would betray a lack of conviction and would be a far cry from the original conception of a vigorous bench dispensing international criminal justice and playing a leading role in developing criminal jurisprudence. He found it gratifying that some members of the Commission should be of the view that permanence was of the essence if an international court was to function on the basis of judges totally independent of any concerns other than the administration of justice. As far as costs were concerned, he felt that the Commission should concentrate on the legal aspects of the question rather than on its financial aspects, which were the business of the General Assembly. He concluded that the very existence of a court which was able to function without fear of national pressure would be a source of confidence and, consequently, of work.

36. One representative, while agreeing with the Working Group's recommendation that, in the first phase of its operations at least, the court should not be a standing full-time body, felt that in the future consideration could be given, in the light of experience, to setting up a permanent structure.

37. As regards the composition of the court and the appointment of its members, various views were expressed. Thus, one delegation endorsed the Working Group's suggestion that each State party to the statute nominate, for a prescribed term, one qualified person to act as a judge of the court. In this delegation's view, the specificity of criminal law and the diversity of legal systems were arguments in favour of direct representation not of States but of national legal systems.

38. Another delegation proposed that the treaty establishing the court should provide for a light and flexible body such as a small bureau entrusted with the task of constituting, each time the need arose, a tribunal composed of persons of recognized independence and impartiality who could serve as judges. The only requirement would be a list of persons designated by States parties to the convention establishing the court, from which the bureau would draw the appropriate names. Reference was made in this context to the European court for conciliation and arbitration recently agreed upon, at the level of experts, by the States members of the Conference on Security and Cooperation in Europe.

39. Other delegations mentioned the possibility that judges might be chosen from an existing list, analogous to the procedure of the Permanent Court of Arbitration. One of them pointed out that the experience of, inter alia, the European Court of Human Rights demonstrated that independence and impartiality were also guaranteed if a court was not composed of full-time judges.

Reservations were however expressed on the idea of drawing inspiration from the system of lists of experts used by the Permanent Court of Arbitration.

40. As regards the election of judges, some delegations favoured the system of election for the International Court of Justice (ICJ), which ensured regional representation. One of them suggested five to seven as a possible number of judges, and added that, while the court should be independent of the International Court of Justice, that did not imply that judges of the ICJ might not also act in the same capacity on the international criminal court or that other forms of joint organization might not underscore the universal character of the international criminal court. On the other hand, an approach whereby the judges of the International Court of Justice would also act as judges of an international criminal court gave rise to reservations on the ground that the qualifications and experience required for the respective tasks were quite different.

41. As to the selection of judges in a particular trial, one representative who, as regards the appointment of the court's membership, was in favour of each State party to the statute appointing a judge, considered that the States concerned should have the possibility of expressing their point of view. In this connection he suggested that even though no inter-State conflict was involved, Article 26, paragraph 2, of the Statute of the International Court of Justice and article 17 of its Rules could provide guidance. The Working Group's proposal that the President should appoint five judges who would be assisted by the Bureau was, in his view, too rigid a formula.

42. As regards the qualifications of the proposed judges, several delegations underscored independence and the possession of high moral and professional qualities. In the words of one representative, the proposed judges should be of the highest integrity and have specific qualifications in the fields of international criminal law or international humanitarian law and the administration of justice.

(c) Nature and modalities of acceptance of the jurisdiction of the envisaged court

43. Many delegations supported the Working Group's approach set out in paragraph 434 and paragraphs 438 and following of the Commission's report, whereby the envisaged court should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the statute would be obliged to accept ipso facto and without further agreement, nor exclusive jurisdiction, in the sense of a jurisdiction excluding the concurrent jurisdiction of States in criminal cases. In the view of these delegations, jurisdiction should rather be optional and concurrent with that of national tribunals. By becoming a party to the statute, a State would accept certain administrative obligations (e.g., to contribute to the budget of the court, to nominate a judge and make that judge available when required and to hold in its custody an accused person over whom the court was to exercise jurisdiction at the disposal of the court for trial). But becoming a party to the statute would not itself involve the acceptance of the jurisdiction of the court over

particular offences or classes of offence. That should be done by a separate juridical act, analogous to acceptance of the optional clause of the Statute of the International Court of Justice, or by a process of ad hoc acceptance or unilateral declaration.

44. This approach was viewed as a balanced and pragmatic one which was likely to meet with the acceptance of many States. One representative observed that the jurisdiction of the future court should be subsidiary to, or at the most concurrent with, that of national courts because it would be unfortunate to depreciate or even disrupt domestic punitive measures or to weaken the judgements handed down by national courts. He added that it would be paradoxical if the very existence of a court, because of its exclusive jurisdiction, were to demobilize the State judicial authorities who were primarily responsible for punishing international crimes, as the objective was to ensure that such crimes did not remain unpunished. Another representative pointed out that if the principal reason for establishing an international court was insufficient enforcement of existing criminal norms at the national level, then it would suffice to set up an optional and concurrent international jurisdiction which would supplement national jurisdiction without superseding it. The Commission could not overlook the fact that States would not be easily moved at the current time to totally cede to an international court their basic jurisdiction over crimes committed on their territory or against their own population. No State which wished to investigate and punish a crime against the peace and security of mankind must be denied an opportunity to exercise its jurisdiction.

45. Some representatives however questioned the Working Group's approach to the issue of the court's jurisdiction. Thus, one representative foresaw considerable difficulties in establishing a coherent system of conferment of jurisdiction and of ensuring that there were no conflicts between the jurisdiction of the court and national jurisdiction. In his view, difficulties were likely to arise whatever the approach taken; he therefore felt that it would be pointless to suggest modifications to the basis that the Commission intended to adopt for the elaboration of the statute; as the work developed, the General Assembly and the Commission would be able to see whether the basis adopted was allowing the desired progress. Another representative expressed doubts on the suggestion in paragraph 446 of the report that a State party to the statute would be able to accept the jurisdiction of the court ad hoc in relation to a particular offence. In his opinion, acceptance should be in advance and for a specific offence in a treaty to which the State was a party; an ad hoc ex post facto acceptance in relation to a particular offence could be seen as provocative and could sour the relations between the accepting States and other States, especially the State of which the offender was a national.

46. The same representative felt that the term "concurrent jurisdiction" had not been sufficiently explained by the Working Group. He warned that if the term meant that the court's statute would provide for, or accommodate, jurisdiction by national courts in respect of offences over which the court also had jurisdiction, confusion would result. In his view, it was clear that

States parties to aut dedere aut punire conventions would have jurisdiction over certain offences in respect of which the court had jurisdiction, such jurisdiction being the inevitable result of the application of the law of treaties, and in particular the rules governing the relationship between successive treaties dealing with the same subject-matter. He therefore insisted that a clear explanation be provided.

47. The representative in question also drew attention to another factor which might inhibit acceptance by States of the court's statute, and even cause States to entertain reservations about their acceptance of aut dedere aut punire conventions, namely the fact that the right of States parties to such conventions to prosecute offenders in their courts if they did not extradite them could be overridden by a contrary obligation arising under Article 103 of the Charter of the United Nations. That situation had been confirmed by the International Court of Justice in its recent ruling on questions of interpretation and application of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation arising from the aerial incident at Lockerbie. Thus, prospective States parties to the treaty establishing the statute of an international criminal court might well wonder whether there was any point in accepting the court's jurisdiction in respect of a particular offence, if a decision could be taken by the Security Council to require the surrender of the alleged offender to a particular State. The system of the paramountcy of the Charter obligations under Article 103 imposed a special burden on the Security Council to act with the utmost care in the discharge of its responsibilities when it considered taking decisions which conflicted with the rights and obligations of States under multilateral and other treaties; otherwise States would lose respect for, and faith in, the consensual regimes they had established under international conventions.

48. A number of delegations expressed clear preference for a court having compulsory and exclusive jurisdiction over specific crimes. In support of this position, the remark was made that it was doubtful whether a jurisdiction of an optional nature would be in conformity with the extreme seriousness of the crimes the court would have to deal with. It was also said that a system in which States were free to accept or confer jurisdiction in relation to a particular offence would severely curtail the powers of the court. The view was also expressed by one representative that the court's jurisdiction should be binding, irrespective of the nationality of the accused, with regard to all the crimes defined in the draft Code of Crimes against the Peace and Security of Mankind and in other international conventions. In other words, international law should take precedence over national law. The representative in question observed that it was in the interest of small States to provide for a uniform international criminal justice system to which they could have access, since they often had neither the requisite infrastructure nor adequate security mechanisms to bring accused persons to trial.

49. One representative suggested that the court be given exclusive jurisdiction over certain international crimes and concurrent jurisdiction

over others. In his opinion, the court could have exclusive jurisdiction over certain crimes of an international character defined in international treaties, inter alia, the Code of crimes. Another representative took the view that the court's jurisdiction should be compulsory in the case of crimes of extreme gravity of which humanity as a whole could be considered the victim, such as genocide. In the case of other crimes which, however serious, were not of such magnitude, its jurisdiction could be optional and accepted where appropriate by the State concerned.

50. Yet another representative advocated a system of preferential jurisdiction, under which the court would be competent as soon as an individual was accused of having committed one of the crimes defined in the Code. However, if a case was not brought before the international criminal court, national courts would be, or would again be, competent to try the suspect. If the case was brought before the international criminal court, it would give judgement as first and sole instance.

51. Several delegations supported the clearly predominant view within the Commission that the court should not be an appeals court to review decisions of national courts.

52. One representative suggested that the Commission should study the possibility of the international court exercising advisory jurisdiction at the request of the States parties to its statute in order to assist national courts in properly applying and interpreting the international instruments defining crimes against peace and security that were within their cognizance. He pointed out in this connection that the advisory powers of the International Court of Justice and of the Inter-American Court of Human Rights had been extremely positive.

53. Another representative contemplated entrusting the court with the additional task of deciding conflicts of jurisdiction, either positive or negative, between States.

(d) Subject-matter jurisdiction (jurisdiction ratione materiae)

54. Many delegations supported the Working Group's approach as reflected in paragraphs 449 and following of the report, to the effect that the jurisdiction of the envisaged court should be based on specified existing international treaties in force creating crimes of an international character, including, among others, the Code of crimes after its adoption and entry into force. Such an approach was viewed as suited to the first phase of the court's operation and in keeping with the objective of providing a simpler structure to set the mechanism under way. It was also considered as consistent with the principle nullum crimen sine lege and as having the advantage of allowing the international criminal court to function even if the entry into force of the Code of crimes was delayed for an extended period owing to lack of ratifications. It was furthermore viewed as best ensuring certainty - an essential element of criminal law - and as most effectively

responding to objections on account of the principle of the non-retroactivity of criminal law.

55. Several delegations, while favouring the approach in question, insisted that the subject-matter jurisdiction of the court should extend only to a number of exceptionally serious crimes, which indicated a high level of moral and criminal guilt on the part of their alleged perpetrators and constituted the most serious threats to human civilization. The remark was made in this connection that it was difficult to conceive that States would divest themselves of their national sovereignty in order to create a court which would compete with their own jurisdiction unless the competence of such a court was limited to the most heinous crimes. One representative, elaborating on this point, observed that in calling for the preparation of a Code of crimes, the General Assembly had intended to sanction crimes which were serious, fundamental and genuinely prejudicial to the peace and security of mankind and that it was therefore important not to overwhelm the future court by giving it jurisdiction over offences which, however serious, were not crimes against humanity. In his view, the purposes and principles of the Charter of the United Nations should be the defining criteria in that regard.

56. The crimes which were mentioned as meeting the criterion of special seriousness included aggression, genocide, serious breaches of the laws of war, international drug trafficking, State terrorism, hostage taking and the highjacking of ships and aircraft.

57. Several delegations pointed out that the conventions on which a court would base its subject-matter jurisdiction should be specified in advance and listed in the court's statute.

58. Some representatives felt that the criterion of seriousness in delimiting the court's subject-matter jurisdiction should relate not only to the abstract characterization or nature of a given type of crime but also to the specific degree of gravity of the crime concerned. Thus, one delegation pointed out that once a list of conventions had been drawn up, it would have to be determined whether in some cases only the most serious crimes should be included, in order to preserve the authority of the court. With specific reference to illicit trafficking in narcotic drugs, one representative endorsed the Working Group's approach as reflected in paragraph 450 of the report. In his view, the court should not be overwhelmed with routine cases. The concept of a "large-scale" narcotics offence should be interpreted in a flexible manner, taking into consideration the ability of the State whose interests were most affected by such offences to deal with them itself. According to him, the international criminal court should be empowered to exercise discretion in responding to requests from affected States.

59. Some representatives were of the view that, at least in its first phase, the Code of crimes might be elaborated as a code of conduct which could become a binding instrument later on. They therefore suggested that the Commission should opt for a modest initial approach and confine the court's jurisdiction

to those crimes which were already defined in international conventions in force.

60. Other representatives felt that the court's subject-matter jurisdiction should rather be confined to the crimes included in the Code of crimes. One of them remarked that, if the Code was to be accompanied by an international law-enforcement system with world-wide validity, the crimes included therein should meet certain requirements; he further observed that, in view of the reluctance of States to surrender powers in the field of criminal law and criminal law enforcement, it must be assumed that for the time being it would be possible only in exceptional cases to establish a form of international criminal law enforcement. He therefore felt that a form of world-wide criminal law enforcement was possible and desirable only in the case of crimes that contravened the elementary humanitarian principles generally accepted by the world community, crimes that were of such a nature that only international enforcement might offer some form of redress, and crimes for which individuals could be regarded as accountable, regardless of whether the individual had acted in a public capacity. On the basis of those criteria, he suggested that the Code should include only the crimes of aggression, genocide, systematic or mass violations of human rights and serious war crimes and that the court's jurisdiction ratione materiae should be limited to the crimes defined in the Code but should encompass all of them. The Code represented an evolution of international law not so much because it defined a number of acts as criminal but because it was to be accompanied by a system of international enforcement. If the system was to be feasible, the Code should initially include only a limited list of crimes, thereby making a minimal encroachment on the national jurisdiction of States.

61. Also referring to the question whether the court's jurisdiction should extend to acts defined as crimes in international conventions other than the future Code of crimes, another delegation stressed that, since the principle nullum crimen sine lege required that the norm to be implemented be sufficiently precise to provide a basis for a charge, it was necessary to ensure that the crimes defined in certain conventions examined by the Commission met that requirement. Moreover, as was observed in the report (para. 493), the same principle required that the alleged wrongdoer should have been under an obligation to observe the rule in question. It was not sufficient that the rule existed in an inter-State relationship, which in principle created rights and obligations for subjects of international law only; the accused person must have been an addressee of the rule concerned. The representative in question was not certain that international conventions other than the Code that would come within the subject-matter jurisdiction of the Court met that requirement. Although the draft Code covered some offences that were not devoid of political controversy, it satisfied the criteria of certainty and predictability without which the penalty would be tainted by arbitrariness and would infringe the fundamental rights of the defence.

62. Along the same lines, the remark was made that accused persons must feel directly concerned by the norms they might have violated, which meant that the rules applicable should be contained in international legal instruments and

also translated into national legal systems, at least as far as the definition of crime and the appropriate punishment was concerned.

63. Several delegations referred to the question whether the subject-matter competence of the court should extend to crimes against general international law or customary law which had not or not yet been incorporated in or defined by treaties in force, a matter which the Working Group had addressed (para. 451 of the report) and on which it had preliminarily concluded that at the first stage of the establishment of the court its jurisdiction should be limited to crimes defined by treaties in force.

64. A number of delegations supported this approach. It was pointed out in this connection that a different solution could lead to uncertainty and be contrary to the principle nullum crimen sine lege and could also prevent the concept of international criminal jurisdiction from receiving the broad acceptance which it would need in its preliminary stages if it was to evolve and develop further. As for General Assembly resolutions, one delegation noted that since they did not address individuals directly and were not coercive in character, they did not qualify to constitute a base for the court's subject-matter jurisdiction.

65. On the other hand, one representative took the view that the court's jurisdiction ratione materiae, rather than being restricted to offences classified in the future Code of crimes or to precise offences, should make allowances for other international crimes that might result from the progressive development of international criminal law. He added, however, that the international community should agree upon certain general criteria that would make it possible to define offences that were truly of an international character.

(e) Personal jurisdiction (jurisdiction ratione personae)

66. Two questions were examined in this connection. The first was whether the court's jurisdiction should be confined to individuals or should also extend to States. The second concerned the requirement of State consent for a court to actually have jurisdiction over an individual accused of having committed a crime falling under the court's purview.

67. As regards the first question, a number of delegations supported the Working Group's recommendation (para. 396 (ii) of the report) to the effect that "in the first phase of its operations, at least, a court should exercise jurisdiction only over private persons, as distinct from States" - an arrangement which was viewed as being in full accord with the Commission's approach with regard to the Code of crimes. In the view of one delegation, the extension of the court's jurisdiction to States might lead the latter to justifiably believe that the court was being transformed into an instrument of propaganda or defamation. Some representatives insisted on the difficulties that an extension of the court's jurisdiction to States might create. One of them further pointed out that other means were available under international law to punish unlawful conduct by States. In his view, the exclusion of

jurisdiction in cases of wrongful acts by States should have as a counterpoint the enhancement of the roles of the Security Council and the International Court of Justice and the strengthening of the international machinery to protect human rights. For another representative, however, restricting the court's jurisdiction to individuals was a valuable starting-point but did not take into account the situation envisaged in article 19 of the draft articles on State responsibility, which distinguished between international crimes and international delicts and was one of the most significant steps forward in the codification of the juridical regime of State responsibility. In that draft, the Commission had established that, in addition to making reparation, the State that had committed the international crime could be sanctioned.

68. At the other extreme, one representative, noting that the Working Group's recommendation to limit the court's jurisdiction to individuals seemed to be restricted to "the first phase of its operations", pointed out that this phrase diminished the significance of the principle set out and evoked the doctrine of the criminal responsibility of States, which his delegation could not support. He added that, even setting aside doctrinal questions, it would be difficult to accept the suggestion that a single court could ever have jurisdiction simultaneously to try individuals and States through the same criminal procedure.

69. As for the term "individuals", it was viewed by one delegation as obviously including State officials and by another as covering political and other representatives of State bodies as well as other perpetrators not directly related to those bodies. The latter delegation, referring to the problem of the treatment of juvenile offenders by an international court, observed that in such cases the court should comply with the provisions of the Convention on the Rights of the Child, which was applicable to every person below the age of 18, and also recalled that Additional Protocol I to the Geneva Conventions of 1949 explicitly prohibited the execution of the death penalty for an offence related to armed conflict on persons who had not attained the age of 18 years at the time the offence was committed.

70. As regards the requirement of State consent for a court actually to have jurisdiction over an individual accused of having committed a crime falling under the court's purview, a number of delegations supported the Working Group's approach as reflected in paragraphs 452 to 459 of the report and encouraged the Commission to continue exploring all the difficult and complex technical issues involved in the question. In particular, several delegations supported the system of "ceded jurisdiction", whereby the court would have personal jurisdiction in any case where a State party to the statute: (a) had lawful custody of an alleged offender; (b) had jurisdiction to try the offender under the relevant treaty or under general international law; and (c) consented to the court exercising jurisdiction instead. Some of these delegations stressed that the court's jurisdiction should not be hampered by additional requirements such as the consent of the State of the nationality of the perpetrator or of the victim. Doubts were also expressed as to the advisability of always requiring the consent of the country in which the crime was committed, particularly in cases of serious violations of human rights.

71. Some representatives, while not rejecting altogether the preliminary conclusions of the Working Group, underscored the complexity of the issues involved and took the view that a more in-depth study of the question was needed. One of them, after pointing out that customary international law contained a variety of principles with regard to the exercise of jurisdiction by States which helped to determine whether the State attempting to exercise jurisdiction had indeed the right to do so as against another State, suggested that jurisdiction based not on analogies of competing State jurisdictions but on the precise crime itself might recommend itself where the problem of competing criminal jurisdictions of States did not arise: in cases of genocide, for example, the proposed court might be seized of a crime committed within one State by and against nationals of that very State.

72. Another representative observed that various States could be concerned in a case: the State in whose territory the crime was committed, the State of which the accused was a national and the State which had been, or whose nationals had been, victims of the crime. Competing interests had to be reconciled in that respect, particularly those of ensuring that a State did not assert its jurisdiction over the jurisdiction of the court solely in order to avoid all punishment for its nationals; of ensuring that States were not forcibly deprived of the possibility of exercising the jurisdiction to which they were entitled under the conventions in force; and of avoiding a system which would require the agreement of a State for one of its nationals to be brought before the court for an act which was not criminal under its internal law or under the rules of international law it recognized as such. According to the same representative, the Commission should continue to study the question of the personal jurisdiction of the court. It was important that the consent of the State of nationality of the accused to the exercise of the jurisdiction of the court should be recognized as necessary, regardless of where the crime had been committed, if the person concerned was in the territory of that State.

73. Also insisting that the personal jurisdiction of the court required more detailed consideration, a third representative, while agreeing that the cases described in paragraphs 454 and 455 of the report were likely to be the more common forms of ceded jurisdiction and should not require the consent of any other State, not even the State of nationality of the alleged offender, took the view that in cases where the State ceding jurisdiction was neither the State in whose territory the offence had been committed nor the State of nationality of the offender, but was entitled to prosecute on the basis of some other connection, or on mere custody, the consent of the territorial State or the State of nationality should be required only if those States had agreed to prosecute in the event of extradition.

74. One representative considered the possibility that States parties to an aut dedere aut punire convention which had established jurisdiction over the offence concerned in the manner specified in the convention and were as such entitled to request the extradition of the offender might also be parties to the court's statute. He observed that in such a case article 30, paragraph 3, of the Vienna Convention on the Law of Treaties would apply - which meant that

jurisdiction could be ceded to the court by the State in whose territory the offender was found. In the case of States parties to the Convention which were parties to the statute, article 30, paragraph 1, of the Vienna Convention would apply, and the court's statute would prevail, but in the case of States parties to the Convention but not to the court's statute, the Convention would prevail - which meant that each one of those States would be entitled to insist on extradition of the offender. It seemed to him, therefore, that "ceded jurisdiction", as discussed in paragraph 456 of the report, would work only between States parties to both the aut dedere aut punire convention and the court's statute; States parties to the convention but not to the statute would always be able to insist on the extradition of an offender and thus prevent his transfer to the court. However, if a State in the latter category did not object to the transfer of the offender to the court, prosecution by the court should be able to proceed. According to him, further consideration needed to be given to the ramifications of that situation, which could effectively render the court non-functional. If an international criminal court was established, States parties to aut dedere aut punire conventions should be specifically targeted in an effort to encourage them to become parties to the court's statute.

75. Another representative advocated a restrictive approach to the question of the personal jurisdiction of the court so as not to undermine the national jurisdiction of the States concerned in criminal matters and to protect the rights of the accused. According to him, the consent of the State in whose territory the crime had been committed, the State of which the accused was a national, the State which had been the victim of the crime or whose nationals had been the victims of the crime and the State which had custody of the accused would be needed in order for the court to be able to exercise its jurisdiction. Furthermore, if it was decided that those States must be parties to the statute and must have accepted the court's jurisdiction over the offence in question, and if one or more of that group of States did not meet the requirement in question, then the court should not be able to exercise its jurisdiction.

(f) Relationship between the statute of the envisaged court and the Code of crimes

76. Many delegations supported the recommendation of the Working Group, contained in paragraphs 460 and following of the report, to the effect that, when drafting the statute of the envisaged court, the possibility should be left open that a State could become a party to the statute without thereby becoming a party to the Code of crimes and that, furthermore, the statute of the court and the Code of crimes might constitute separate instruments, with the statute providing that the court's subject-matter jurisdiction encompassed crimes covered by the Code in addition to those covered by other instruments. It was said in support of this position that too close a link between the statute, and the Code could constitute an obstacle for States wishing to become parties to the statute and could thus diminish the chances of an international criminal court attaining universal membership. The separation of the two instruments could serve to increase the number of States willing to

become parties to at least one of them. It was also observed that under current circumstances the establishment of an international criminal court was more urgent than the adoption of the Code of crimes. Since agreement on the Code might still take some time, linking the Code and the statute might prove detrimental to the advancement of the latter. If the two instruments were kept separate, this danger disappeared.

77. Some representatives, while concurring in principle with the Working Group's approach, warned that this approach should not lead to lowering the legal status of the Code itself and insisted that some kind of link be maintained between the Code and the court's statute so as to ensure that the court had a solid codified basis of law and the Code was accompanied by an effective mechanism of implementation. One of them, after voicing support for the view that the Code of crimes and the court's statute should constitute separate instruments and endorsing the position that a State could become a party to the statute without thereby becoming a party to the Code, remarked that the General Assembly had underscored the linkages between the Code and the court by deciding that the statute of the court and the draft Code of crimes should be dealt with in the same report. Moreover, the preparation of a draft statute had been placed in abeyance until one of the most important crimes to be covered in the draft Code, that of aggression, had been defined. Since many of the crimes defined in the draft Code, such as apartheid, State-sponsored terrorism, war crimes ordered by the leaders of a State, and so on, could be tried only by an international criminal court, the Assembly, in this representative's view, had intended that work on the two subjects should proceed concurrently. Striking a similar note of caution, another representative suggested that the Commission should examine the possibility of giving the Code of crimes a special place in the court's statute: while in principle the court's jurisdiction should be limited to crimes defined by treaties in force, it might be necessary to make an exception in favour of the draft Code, since the crimes covered therein, including intervention and colonial domination, which were neither defined nor prohibited in any multilateral treaty in force, would otherwise be excluded from the statute until the Code came into force. In order to fill that gap, he suggested that the Commission should consider the possibility of giving a special place to the Code, by making it provisionally applicable as an annex to the statute.

78. Some other representatives took the view that the Code of crimes and the court's statute were intimately linked and could not be dissociated. Thus, one representative insisted on the need for a criminal court to be able to rely on a clear, unambiguous indication of the rules it was to apply so that it could ascertain whether an individual had committed acts which the law defined as crimes and could impose on the individual the penalty indicated by the law. Such rules must be provided by the Code of crimes. In another representative's view, the draft Code and the question of the establishment of an international criminal court were closely interrelated and could not be dealt with separately. There could not be a Code of crimes against the peace and security of mankind unless there was an international criminal jurisdiction to administer it; likewise, without such a Code, a court would lack objective competence. For that reason, a State becoming a party to the

court's statute must ipso facto become a party to the Code; at the same time, a State party to the Code should have the option of applying any other international treaties mentioned in the statute. Still another representative supported the most formal and organic relationship possible between the Code of crimes and the court. According to him, each State which became a party to the Code should automatically accept the court's jurisdiction.

(g) Possible arrangements for the administration of the court

79. Several delegations addressed some of the points discussed in paragraphs 467 to 472 of the report.

80. On the question whether a court should be part of the United Nations system or should operate as an independent entity, the prevailing view was that the court should have some form of link with the United Nations system. This, it was stated, was the only way of ensuring a sufficient degree of international support for the court's establishment and operation and would strengthen the court's universal character while allowing for the possibility of utilizing structures that already existed in the Organization as well as the Organization's expertise in administrative and budgetary procedures. It was also pointed out that many questions pertaining to the court's activity could only be resolved on the firm foundation of the United Nations and the powers and authority of its principal organs.

81. Some delegations, however, indicated that the link with the United Nations should not be such as to jeopardize the court's independence and the confidentiality of criminal records and evidence.

82. As to the way in which the court should be associated with the United Nations system, one delegation proposed a General Assembly resolution which would adopt the treaty containing the court's statute and open it for signature and ratification or accession. Another delegation suggested that the court could enter into an agreement with the United Nations pursuant to Articles 57 and 63 of the Charter of the United Nations, very much in the form in which a specialized agency entered into relationship with the United Nations.

83. Some delegations contemplated administrative links with the International Court of Justice. It was said, for instance, that the court could operate, at least initially, with a very small staff that might rely on the infrastructure or facilities of the Registry of the International Court of Justice. One delegation suggested that the court could operate as a chamber of the International Court of Justice. Another delegation, however, expressed reservations on the establishment of close relations between a criminal court and the ICJ.

84. Some delegations suggested that the court could utilize the services of the Office of the Legal Counsel of the United Nations. One representative, while agreeing that the members of this office could serve as advisers,

objected to the idea that the office in question could perform registry functions.

85. As to the location of the court, one delegation, while foreseeing the possibility for the court to have a permanent home when its workload increased, suggested that at the initial stage the court should, wherever possible, sit in the State in which the alleged offence had been committed or within the same region, although due consideration should be given to security arrangements and to the willingness of the victim State to allow the trial to be held on its territory.

86. Another delegation however drew attention to the problems small States would face if the State in which the offence had been committed was invariably chosen as the venue of the court, and if sentences of imprisonment were served in the prisons of the complaining State. At the same time, this delegation added, small States realized that all relevant considerations and interests would have to be reflected in the establishment of an international criminal court.

87. As to the financing of the court's operations, some delegations pointed out that, by becoming parties to the statute, States should accept the financial obligations relating to the court's operating expenses.

3. An international trial mechanism other than a universal international criminal court

88. Referring to other possible trial mechanisms envisaged by the Working Group in paragraphs 473 to 487 of the report, some delegations stressed that, in their view, an international criminal court would be much more effective than any other such mechanisms.

89. As regards the possibility of setting up regional criminal courts, one delegation observed that universality was of the essence in creating an international criminal court to judge international crimes. Another delegation pointed out that although a regional court could be useful in addressing a problem particular to a region, international criminals such as drug traffickers, terrorists or traffickers in arms did not confine their activities to any one region and that it was doubtful whether an institution less than a universal court could gain widespread respect and support.

90. Other delegations viewed in a more positive light the notion of an international trial mechanism other than a universal criminal court. One of them noted that the General Assembly had given the Commission a mandate to consider not only the possibility of establishing "an international criminal court" but also the possibility of establishing "another international criminal trial mechanism", the idea being that it was appropriate, parallel to the efforts to establish a court, to reinforce the exercise of national criminal jurisdiction in the case of international crimes. Mechanisms such as a reference procedure, which allowed a national court trying an international

crime to ensure that it duly applied the relevant provisions of international law, or an international pre-trial procedure, whereby certain forms of State behaviour could be classified within a given category of international crimes, undoubtedly deserved, in this delegation's opinion, further consideration, and the Commission's reflections offered interesting prospects in that respect.

91. In another delegation's view, consideration might be given to making provision in the draft Code of crimes for an international fact-finding body of the kind contemplated in article 90 of Additional Protocol I to the Geneva Conventions of 1949. If the international criminal court was prevented from trying offences against the Code by the failure of the relevant States to accept its statute, the fact-finding facility would constitute a potent means through which the international community could express its concern. In this delegation's view, there did not appear to be such strong reasons as in the case of Additional Protocol I for making the competence of a fact-finding body dependent on the consent of interested States.

92. Some other delegations advocated the creation of an ad hoc international criminal court to judge the war crimes committed in the territories of the former Yugoslavia. They remarked that the establishment of a permanent international criminal court following the International Law Commission's work would still take considerable time and might therefore, on account of that factor, not be the most appropriate forum to deal with the atrocities committed in the former Yugoslavia, which required the urgent creation of an international criminal tribunal. While welcoming, as an initial step, Security Council resolution 780 (1992) of 6 October 1992 on the establishment of an impartial Commission of Experts to examine evidence of grave violations of international humanitarian law committed in that area, they felt that an ad hoc criminal jurisdiction should be created to deal with those violations, on the basis of the legal provisions in force in the territories concerned, which seemed to provide a sufficient legal foundation for international prosecution. It was noted that such a tribunal could be established by a treaty concluded by the most interested States, taking into account the useful deliberations of the International Law Commission on the subject of an international criminal court. The remark was made that, besides having legal and humanitarian importance, the establishment of an ad hoc international tribunal would also be of the greatest political importance, in that it would significantly contribute towards stopping and resolving conflicts in the region as a whole. The proposed tribunal should therefore have jurisdiction in respect of the entire territory of the former Yugoslavia.

4. Applicable law, penalties and due process

(a) The applicable law

93. As regards the definition of crimes, reference is made to the comments and observations concerning the court's jurisdiction ratione materiae reflected in subsection 2 (d) above.

94. As regards the general rules of criminal law to be applied by an international court in its proceedings, several delegations noted that, in contradistinction to the question concerning the definition of crimes, most treaties were silent about such matters as defences and extenuating circumstances, although the draft Code in its general part contained rules on those aspects. It was pointed out that the issue should be considered in greater depth, particularly for those cases where the Code of crimes did not apply. More specifically, one delegation felt that the determination of the applicable law as regards general rules of criminal law was especially important because of the impact it could have on the question of statutory limitations or the effects of amnesty measures adopted, for example, within the framework of the political settlement of a civil war situation.

95. Matters mentioned as deserving attention included defences and extenuating circumstances such as the age of criminal responsibility, mental state, duress, self-defence, insanity, etc. It was noted, in connection with the protection of the rights of the defence, that the accused might experience difficulties in defending himself if he was tried far from his own country, and might have trouble engaging a competent lawyer, especially if he was without means. In some cases, an interpreter might also be necessary.

96. Some representatives mentioned the possibility of relying on domestic law as regards the general rules of criminal law. One of them pointed out that, if necessary, resort could be had to the domestic law of the State on whose territory the crime had been committed, or of the State which had jurisdiction to prosecute the criminal, although, in that representative's opinion, such a system would have the disadvantage of a lack of uniformity even if it were consistent with the traditional territorial nature of criminal jurisdiction. Another representative noted that, with regard to the general rules of criminal procedure, an international criminal court would have to rely heavily on national law and the applicable international conventions. He pointed out that a defendant should not be placed in a disadvantageous position simply because he was to be tried by an international court instead of a national court - a remark which applied not only with respect to procedural questions, but also as regards the possible punishment. In the opinion of that representative, any State handing over an alleged offender to an international criminal court which would not have to apply the same kind of guarantees as a national court in conformity with that State's international obligations, such as those flowing from the International Covenant on Civil and Political Rights, would be in breach of those obligations.

97. As regards the applicable procedure, several delegations stressed the importance of applying a unified set of rules to important questions such as a fair, impartial and independent gathering of information and matters pertaining to evidence. In this connection one delegation noted that the issues with regard to evidence went beyond relatively straightforward matters, such as the collection of evidence; they also included the preservation, admissibility and relevance of evidence, the burden of proof, identification evidence, corroboration, expert witnesses, the right to silence, the right to confront the accuser, and so on.

98. Some delegations felt that rules concerning applicable procedure should be contained in the court's statute. National law should be resorted to, it was added, only if there were aspects not covered by the court's statute.

99. Some delegations also referred to the possibility that the court might develop its own rules of procedure. The court's initial rules of procedure could be annexed to the statute and supplementary rules added as practice developed. In the view of one delegation, States' domestic rules of procedure could also serve as a guide, and the Commission might furthermore wish to examine the differences and similarities in State practice.

(b) The penalties to be imposed

100. Some delegations supported the approach advocated in paragraph 502 of the report. Under this approach, an international court which did not have in its statute or in the conventions constituting its subject-matter jurisdiction the benefit of a rule setting forth the relevant penalties to be applied at the international level would necessarily have to base the sentencing of convicted persons on the applicable national law, or, perhaps, on principles common to all nations. However, since the latter formula raised problems related to the necessary clarity and certainty of the law, the need arose for a residual provision in the statute of the court on the question of penalties, which provision would apply in any case where no penalty was specified in the applicable law, or where the specified penalty fell outside the range of penalties which the statute allowed the court to impose.

101. One delegation, however, stressed that it failed to understand how national law could be invoked, which national law would be implied or which principles common to all nations could be found for the determination of penalties. In this delegation's view, an authorization given to the court to have recourse to those two sources would in fact be an authorization for the court to apply the penalty it thought adequate; such action would contravene the principle nulla poena sine lege, which was embodied in article 15 of the International Covenant on Civil and Political Rights and was a fundamental principle of criminal law.

102. Another delegation, after drawing attention to the need to ensure that the court did not prescribe penalties which violated human rights, stressed that a "residual" system would be liable to undermine the unity of the court's practice: too much in some cases, depending on the rules for the determination of the applicable law that were selected, particular difficulties could result if there were many States in whose territory, or against whose nationals, the crime had been committed, or if many States instituted proceedings before the court in respect of the same crime and had taken the perpetrators into custody.

103. As regards the specific penalties to be imposed, a number of delegations were of the view that the death penalty should be excluded. In the view of one delegation, the penalties might range from prison sentences and measures restricting freedom of movement to the confiscation of assets obtained, for

example, through the commission of a crime. One delegation suggested the possibility of including a regime of community service for offenders who had been found guilty of genocide, racial discrimination or apartheid.

104. Some representatives took the view that proceedings relating to compensation should be combined with criminal proceedings, as punishment in and of itself was not justice if there was no compensation for the damage caused by the crime. Accordingly, an international criminal court should have the power to rule in matters of civil liability, which would also have the advantage of expediting matters. One of them referred in this context to article 63 of the American Convention on Human Rights regarding the powers of the Inter-American Court of Human Rights. Another insisted that competence in matters of compensation should not be attributed to the International Court of Justice.

105. Other delegations expressed reservations on the idea of intermingling strictly criminal proceedings and civil claims for damage, which should be dealt with under the topic of State responsibility. One delegation took the view that the imposition of fines and the forfeiture of the proceeds of crime seemed more appropriate than the award of damages in the form of compensation.

(c) Ensuring due process

106. With reference to paragraph 503 of the report, many delegations stressed that the court should meet very high standards of justice and fairness and that, consequently, its statute should provide all the safeguards of law, including due process, contemplated in United Nations human rights instruments to individuals accused of international crimes to be tried by the court. Accused persons should enjoy all rights related to a fair trial and a regular, independent and impartial judicial procedure should be established. Specifically, one delegation suggested that the procedure be drawn up in accordance with the principles laid down in article 8 of the draft Code of crimes and that it fulfil the requirements contained in the universal human rights conventions, in particular in articles 14 and 15 of the International Covenant on Civil and Political Rights. In this connection, several delegations stressed that the accused could not be judged *in absentia* and that the principle *non bis in idem* should be respected.

107. The remark was also made that a system of preliminary hearings in which the adequacy of the evidence against the accused would be tested and the accused heard should be required before prosecution was initiated and that, in addition, it might be necessary to give the States concerned the right of appeal to the court, not only against the prosecutor's decision not to prosecute, but also against the decision to prosecute.

108. It was furthermore said that the accused should be brought lawfully before the court, failing which the court should dismiss the proceedings.

109. Several delegations referred to the "double hearing" principle or "two-tiered" jurisdiction. It was pointed out that, under article 14,

paragraph 5, of the International Covenant on Civil and Political Rights, every accused person was entitled to have his case reviewed by a higher court; no court or legal system was infallible and therefore, in order to serve the cause of justice, provision should be made for an appeal procedure. Some delegations held that such a procedure should for practical reasons be applied within the structure of the court, rather than by a separate appeals court. The court should be organized accordingly: a case should be heard in the first instance by a chamber of the court, and appeal should lie to the plenary court. In the view of one delegation, the appeal jurisdiction should not be called upon completely to re-examine a case from the standpoint of both the merits and the law and should confine itself to ensuring that correct procedures had been followed and the law had been observed.

110. On the other hand, one delegation took the view that the "double hearing" principle, as set out in article 14, paragraph 5, of the International Covenant on Civil and Political Rights, would be difficult to implement in international procedures and jurisdictions; rather, the statute should contain provisions that were sufficient to guarantee the rights of the accused and an objective procedure, in order to ensure that the court's judgements were reliable and to avoid their being reviewed by other jurisdictions.

5. Prosecution and related matters

(a) The system of prosecution

111. Some delegations advocated an independent, standing prosecutorial organ, whose expertise would be available to small States and would best avoid possible abuses of the international criminal jurisdiction. The prosecutor would have functions similar to those of a domestic prosecutor, namely, to investigate, collect and produce all the necessary evidence and prosecute at trials. The remark was made in this context that the accused should be entitled to a preliminary hearing before a panel of the court to determine the merits of the case. One delegation observed that a permanent prosecutorial office would serve as a valuable bridge between the court and the Security Council in respect of crimes of aggression and other crimes connected with the maintenance of international peace and security.

112. As regards the composition of such a permanent Prosecutor's Office, it was suggested that a Procurator General, appointed by the General Assembly, should head a group of Advocates General and a small support staff. The remark was made that the Secretary-General could not combine the functions of chief administrative officer of the United Nations and those of chief of the Prosecutor's Office because of the objectivity which he had to maintain in discharging his responsibilities under the Charter of the United Nations.

113. Other delegations favoured the appointment of an ad hoc prosecutor as a logical consequence of the idea of establishing a non-permanent court, without however ruling out the possibility of establishing an independent prosecutorial system.

114. Ad hoc prosecutors, it was stated, might be chosen by the court from a pre-established list upon consultation with the States immediately concerned; they would be independent and would only issue a formal accusation if they came to the conclusion, on the basis of all available evidence, that there was a case to answer.

115. One representative noted that consideration should be given to ways in which the Prosecutor's Office could make use of the services of national judicial bodies and/or prosecutorial organs. He suggested that regulations governing such international judicial assistance be elaborated in order to ensure the proper functioning of the court and the Prosecutor's Office.

(b) The initiation of a case

116. Two main questions were addressed in this respect. The first was whether the request to initiate proceedings before the court should be limited to States. Most delegations responded in the affirmative. Some of them indicated that the idea of enabling intergovernmental or non-governmental organizations to bring complaints before the court was premature and likely to give rise to difficulties. A few delegations however suggested that the Security Council might, in cases of aggression, violations of humanitarian law or other crimes of an international character, be given the right to initiate proceedings before the court.

117. A second question was whether the right to institute proceedings should be limited to States parties to the statute. A negative response was given by one representative, who held that any State, whether or not it had become a party to the statute, should have the right in question; a number of other representatives responded affirmatively to the question.

118. Among the latter group of representatives, some felt that the condition of participation in the statute was necessary but not sufficient. One of them said that there should be some kind of involvement of the complaining State in the crime in question, such as, for instance, the fact that it had been a victim of the crime. Another representative, while endorsing the view that limiting the right in question to the State whose consent was a prerequisite for the court's jurisdiction in a particular case would over-restrict the court's range of activities, pointed out that allowing all States parties to the court's statute to initiate a case, irrespective of whether they accepted the jurisdiction of the court with respect to the offence in question, would be going too far; a fortiori he opposed the idea that a case could be initiated by any State, since he saw no reason to support an actio popularis of that type. He therefore suggested that the right to bring a complaint should extend to any State party which had accepted the court's jurisdiction with respect to the offence in question and to any State which had custody of the suspect and which would have jurisdiction under the relevant treaty to try the accused for the offence in its own courts.

119. One representative, on the other hand, felt that any country which was a party to the Code of crimes and to the court's statute should be able to

submit a case to the Prosecutor's Office; it was not necessary that a State should have an interest or that it be involved in the crime in question.

120. As regards the prerogatives of the Prosecutor's Office, one delegation said that that Office should be empowered to submit an application to the international criminal court in the following cases: (a) of its own accord, for example, as a result of information provided by a State, in which case the Prosecutor's Office should accept information from government sources only; (b) in accordance with a decision of the General Assembly of the United Nations, in which case the Prosecutor's Office should be obliged to institute prosecution proceedings - since there was no veto over the decisions of the General Assembly, it would in principle be possible to prosecute nationals of States that were permanent members of the Security Council; (c) in response to an order of the international criminal court, which could be issued at the request of a State, should the Prosecutor's Office not wish to institute prosecution proceedings on the basis of information provided directly by that State.

(c) Bringing defendants before the court and relationship of a court to the existing extradition system

121. Several delegations agreed with the Working Group's conclusion that, regardless of whether the transfer of an accused person to the court was considered to be a form of extradition or a sui generis transfer, it was necessary to lay down the minimum requirements for transfer. One delegation suggested as a possible arrangement that any defendant whose surrender was agreed to by the State of which he was a national be, if convicted, returned to the national State for execution of sentence.

122. The proposal that such arrangements be set out in detail in an annex or protocol to the court's statute was supported by some delegations but found unacceptable by others.

123. The remark was made that since according to the approach recommended by the Working Group an international criminal court would supplement the existing system of national courts, there might be competing requests for extradition or transfer. In this connection, several delegations supported the proposal, contained in paragraph 553 of the report, to provide in the court's statute that a State which had accepted the court's jurisdiction with respect to an offence was obliged to hand over an accused person to the court, at the request of another State party which had accepted the same obligation. One delegation, however, observed that in the case of multiple requests from States, including from States which had accepted the court's jurisdiction, or from the court itself, the requested State should be able to choose which request to accept. One representative noted that the question of the limits which could be placed on an obligation to bring accused persons to court and the question of the conflict between international jurisdiction and existing extradition regimes were particularly sensitive. Another representative pointed out that, in practice, situations might always arise in which a suspect was not transferred to the international criminal court by the country

under whose jurisdiction he fell, especially in the case of States which were not party to the Code or to the court's statute.

124. Some delegations stressed that matters relating to bringing the defendant before the court and other related questions needed to be examined in greater detail at a later stage by the Commission. One of them pointed out that the practical problems involved in bringing defendants before a court, particularly custody of the individual and security, had not really been taken up. Such problems could conceivably be resolved on a case-by-case basis. However, to the extent that they raised questions of principle, such as the basis on which the individuals concerned were kept in detention under the authority of the court in the territory of the State in which it operated, those problems needed to be kept in mind.

(d) Implementation of sentences

125. The general remark was made that the issues of confidence and impartiality, which formed the underlying rationale for the establishment of an international court, should continue to apply at the level of punishment, including its implementation regime, access, pardon, parole, etc.

126. Most of the comments focused on the question of the place where the sentence should be carried out. Some delegations observed that the establishment of an international prison facility seemed unrealistic, particularly because of its probable cost, and that prison sentences should therefore be served in the penal institutions of States parties to the statute. One delegation suggested that they be served in the complainant State. Another delegation was of the view that the primary responsibility for carrying out the sentence should fall on the State conferring jurisdiction, it being understood, however, that the questions of parole, review, etc. should be left to the relevant body within the court structure. Attention was also drawn to the fact that, in general, small States might hesitate to have the term of imprisonment served in their own prisons. One representative furthermore noted that the imprisonment of an offender in a foreign country where there could be differences in language, climate, culture and social and economic conditions might constitute a supplementary, gratuitous punishment unrelated to the offence. He recalled in this connection that a number of countries had in recent years concluded mutual repatriation agreements covering nationals of one State who were convicted and sentenced in the courts of the other State. He accordingly suggested envisaging the inclusion in the draft statute of a provision allowing the State of nationality of the convicted offender to implement the sentence, if it so wished.

127. Other comments on the implementation of sentences included: (a) the remark that in cases of imprisonment the sentence should be served under conditions no less favourable to the prisoner than those provided in the United Nations Minimum Standard Rules for the Treatment of Prisoners; (b) the observation that, since the monitoring and implementation of sentences might vary from State to State, their administration should be subject to the supervision of the court or of an international control commission; and

(c) the suggestion that a separate and compulsory protocol on the implementation of sentences should be provided so as not to disturb the general terms or the court's statute.

6. Relationship between an international criminal court and the Security Council

128. A few representatives touched upon the question of the relationship between an international criminal jurisdiction and the Security Council, particularly as regards certain crimes such as aggression or the threat of aggression. This question was described as one of the most difficult the International Law Commission would have to resolve in connection with the establishment of an international criminal court, in view of the Council's responsibilities with regard to the maintenance of international peace and security. Emphasis was placed on the need to avoid conflicts of jurisdiction between the court and the Council.

129. One representative insisted that the court and the Council should be separate and independent of each another. He pointed out that while the Council was a political body acting in accordance with the powers attributed to it under the Charter, the court would be a judicial organ to which political considerations did not apply, and which would be motivated solely by the impartial administration of justice.

130. Another representative noted that, while many members of the Commission had taken the view that if the Security Council had expressed no opinion as to whether a specific act might be regarded as aggression the court would be at liberty to determine the matter, opinion had been divided as to what the consequences would be if the Council did express an opinion. His own view was that regardless of whether the Council had considered the political question of whether a State was guilty of aggression, the court would be completely free to consider the legal question of whether an individual was guilty of the same crime. However, a pronouncement by the Council to the effect that an act of aggression had been perpetrated was so exceptional and had such far-reaching consequences that it must be deemed impossible for the court to reach a different decision. For that reason, he did not regard it as necessary for the Security Council to be assigned a specific procedural role in prosecutions relating to alleged acts of aggression.

7. Future work on the topic

131. Many delegations stressed the importance to the international community of the struggle against international organized crime and accordingly accepted the idea of an international criminal jurisdiction. While recognizing that the work of the International Law Commission on such an important matter should not be subject to a rigid timetable and that the concerns of all States would need to be taken into account in order to make a statute for an international criminal court generally acceptable, they insisted on the

priority nature of the issue. In this connection the view was expressed that the draft statute should be submitted to the General Assembly in the shortest possible time, with a progress report to be submitted at the Assembly's next session to ensure that the project would be expeditiously completed. One representative noted that other expert bodies and interested organizations could contribute to the work of the International Law Commission on the matter. He drew attention in this connection to an international meeting of experts to be held at Vancouver, Canada, early in 1993 by the International Centre for Criminal Law Reform which would give experts from a wide range of countries an opportunity to discuss an approach to the establishment of an international criminal court in a concrete fashion.

132. Some representatives struck a note of caution as to the Commission's future work on the matter. One of them said that the Commission's mandate was only to continue the process whereby a fully informed decision on the establishment of an international criminal court could be made at the proper time. He stressed that clarification of the various legal and practical issues that remained to be examined would be critical to determining whether and in what manner an international criminal court should be established and that if those issues and the views of Governments, as well as the practical considerations involved, were to be thoroughly considered, the Commission could not be expected to complete the drafting of a statute at its next session and should confine itself to submitting a progress report for consideration by the General Assembly at its forty-eighth session. Another representative, while agreeing that the establishment of an international criminal jurisdiction would be an ideal form of international cooperation, queried its practical feasibility given the philosophical differences between States and the political complications involved. He added that the Commission would need to consider the report of the Working Group fully and to consult Governments before making very careful preparations and that setting a rigid timetable would be counter-productive. Yet another representative said that his positive attitude should not be interpreted as a commitment to accept any future draft statute before a very careful examination. He further reserved the right to express his views on the technical aspects of the proposed draft statute in due course.

133. More specifically, some representatives expressed reservations on the calendar of work assigned to the Commission. One of them said that requesting the Commission to continue its work before Member States had been given an opportunity to communicate their views prejudged the issue. Along the same lines, another representative indicated that she would have preferred the Commission to concentrate on examining the opinions of Member States in the coming year rather than proceeding with the elaboration of a draft statute for an international criminal court.

134. Some delegations expressed the view that, since the project of drafting the statute of a court constituted a major undertaking, it should be dealt with by the International Law Commission as a new and distinct item. A number of other delegations, however, believed that the question of an international

criminal court should continue to be considered within the framework of the topic "Draft Code of Crimes against the Peace and Security of Mankind".

C. STATE RESPONSIBILITY

1. Observations on the topic in general

135. Several representatives emphasized the importance of the topic and its relevance to the contemporary world and viewed its anticipated codification as essential to the development of international law. It was said in particular that in an international society lacking a universal legislature and judiciary, in which by virtue of its sovereignty a State took its decision in freedom and came into conflict with an equal freedom on the part of other States, the regulating mechanism of State responsibility played a major role in the mutual relations of States and appeared as the necessary corollary of their equality.

136. Emphasis was also placed on the complexity of the Commission's task inasmuch as, it was stated, the law of international responsibility remained basically customary law and was both controversial and confused. The remark was however made that various factors, among which one representative singled out the disappearance of ideological confrontation and another, the growing trend towards democracy which encouraged States to base their relations on international law, offered favourable circumstances for speedy progress on the topic.

137. A number of representatives invited the Commission to accelerate the pace of its work and to complete its draft articles on the topic in as near a future as possible. The remark was made that such an achievement would contribute decisively to the stabilization of international relations, the disappearance of inter-State confrontations and the creation of a favourable climate among countries and would be a particularly opportune highlight of the United Nations Decade of International Law.

138. Several representatives urged the Commission to give the topic sufficient priority to be able to complete the first reading of the draft before the end of the current quinquennium. A few expressed the hope that the draft could be finally adopted by the Commission in its existing composition.

139. Also referring to future work on the topic, some representatives pointed out that there was a close relationship between the draft articles on State responsibility and the draft Code of Crimes against the Peace and Security of Mankind and that the Commission should therefore keep progress on the two texts in step. This remark, they said, also applied, albeit to a lesser degree, to the international liability topic. In their view, the three topics were interrelated and covered the whole range of State responsibility from full-fledged crime to strict liability.

140. As regards the results achieved at the latest session, several representatives took note with satisfaction of the progress accomplished.

141. It was noted that the six draft articles relating to the substantive consequences of an internationally wrongful act, although they had not as yet been acted upon by the Commission, had been adopted by the Drafting Committee and introduced by the Chairman of the Commission whose presentation, it was stated, made for highly recommendable reading. These provisions, while they were considered by one delegation as needing to be reviewed in the light of the current practice of States, were viewed by others as reflecting a correct approach. The hope was expressed that work on those articles could be completed during the first part of the next session and that the draft commentaries would be available to members of the Commission sufficiently early to make that possible.

2. Observations on the question of countermeasures

(a) General approach to the question

142. It was widely recognized that the question of the measures which a State injured by an internationally wrongful act could take against the author State alleged to have committed such an act was one of the most difficult and controversial issues of the entire subject of State responsibility. In this connection several representatives referred to the divergences of views which the debate in the Commission had revealed and which one of them summarized as follows:

> "The Special Rapporteur's view, which served as the basis for the draft articles proposed by him on the question of countermeasures, [is] that, given the present relatively decentralized and non-institutionalized nature of the world community, and in the absence of well-developed international procedures to ensure observance of the law, it [is] necessary, albeit regrettably, that the future convention on State responsibility should allow an injured State to take countermeasures ..., the entitlement to take countermeasures being, of course, circumscribed by a number of qualifications and limitations. That view [has] been questioned by several members of the Commission who were not convinced that countermeasures were an appropriate means of coercing a State alleged to have committed an internationally wrongful act to go to dispute settlement or to acknowledge its wrong and make amends." 4/

143. In the view of some representatives, these divergences of views prompted questions as to the desirability of providing in the draft articles under elaboration for a regime of countermeasures and warranted further reflection on the legal, political and practical implications of the approach proposed.

4/ A/C.6/47/SR.27, para. 1.

144. The difficulties started, in the view of some representatives, with the very determination of the existence of a wrongful act justifying resort to countermeasures: in the absence of a mechanism for the impartial and rapid determination of the existence of an internationally wrongful act, the injured State had to be granted an exclusive right to determine the existence of a wrongful act - which opened the door to unilateral acts, many of which would be based on subjective decisions and to abuses with serious consequences for the peace and happiness of peoples. Furthermore, leaving it to the victim State to assess the gravity of the prejudice and to determine if all available settlement procedures had been exhausted meant that neither the impartiality nor the lawfulness of the decisions to be taken could be guaranteed. The identification of the injured and wrongdoing States was also viewed as a source of difficulties and reference was made in this context to the views reflected in paragraph 168 of the Commission's report.

145. A number of other arguments were presented in support of an extremely circumspect approach to the question of countermeasures.

146. It was first pointed out that States were unequal in size, wealth and strength and that it could not reasonably be expected that countermeasures taken by a small State against a much stronger State could force the latter to cease its wrongful conduct. As a result, a regime of countermeasures, far from affording equal protection to all States, would place powerful or rich countries at an advantage in the exercise of reprisals against the wrongdoing States and would lead to abuse of the weaker States. This fear, it was stated, was rooted in history as well as in the more recent experience of developing countries, for which countermeasures were frequently synonymous with aggression, intervention and gunboat diplomacy. Against this background the question was asked whether an attempt at codification of the subject might not tend to legitimize countermeasures as an instrument par excellence of the hegemonic activities of certain Powers.

147. Replying to this argument, some representatives pointed out that, while powerful and developed States were undeniably in a better position than weak States to adopt countermeasures, it had to be borne in mind that countermeasures could also be applied between States of comparable strength.

148. A second argument adduced by some representatives against the proposed inclusion in the draft articles of a regime of countermeasures was that, far from constituting a remedy intended to encourage the wrongdoing State to return to the path of legality, countermeasures were likely merely to inflame relations between the parties to the conflict, thereby rendering them still more intransigent.

149. A third question raised in this context concerned the compatibility of countermeasures with the rule of law. The view was expressed in this connection that the notion that the injured party should take the law into its own hands represented a lower stage in the evolution of legal techniques and implied an admission of the inadequacy of the international legal order. Concern was also expressed that the concept of countermeasures seemed

antithetical to the fundamental principles of international law; reference was made in this context to the views reflected in paragraphs 124, 125 and 128 of the Commission's report.

150. A fourth question was whether countermeasures would in practice be sufficiently understood and clear to be endorsed as an accepted coercive legal procedure. It was pointed out that resort to countermeasures would have to be subjected to a large number of intricate qualifications and limitations and that complexities also arose in defining the circumstances in which countermeasures would be permissible in cases where more than one State considered itself to have been injured. In such cases the question of who the injured States were, the extent of their entitlement to have recourse to a countermeasure and the question of the countermeasure's proportionality, viewed not only individually but also collectively, would be difficult to answer with precision.

151. Finally, the question was raised as to whether it was opportune to tackle the issue under consideration in the context of the present topic as it was doubtful whether countermeasures, which in some respects constituted means of enforcement, fell precisely within the scope of the question of State responsibility even if they were linked to it. Concern was expressed that by broadening the subject the Commission might be tempted to raise problems regarding the interpretation of specific treaties which should remain outside the scope of its study and find itself addressing particularly sensitive issues going beyond the limits which it had set for itself, by dealing with primary rules - in particular the definition of the areas in which countermeasures should be prohibited. The remark was made in this connection that the issue of countermeasures that would not be permissible under any circumstances came perilously close to touching upon some of the fundamental provisions of the Charter of the United Nations set forth, for example, in Article 2, paragraph 4, and Articles 51, 41 and 42.

152. The above arguments were generally recognized as inviting the Commission to take a very cautious approach to the question of countermeasures. A few representatives said that they found it difficult to endorse the notion that the way to deal with the consequences arising from a wrongful act was to commit another wrongful act, particularly as cases of non-observance by States of their international obligations were for the most part not deliberate, but due to genuine oversights, misunderstandings or differences of opinion. Furthermore, it was observed, countermeasures were not the only means of enforcing international law where an obligation under international public law had been breached and the margin for lawful resort thereto had been narrowed by the emergence of more suitable methods and procedures tailored to the special needs of certain groups of States.

153. Among those methods and procedures, some representatives singled out those relating to the peaceful settlement of disputes. One representative observed in this connection that it might be possible to expand existing dispute-settlement procedures to include additional and innovative ones so as to ensure that a State believed to be in breach of an international obligation

did not evade settlement of the differences which had arisen. In that connection reference was made to existing conventions in the environmental and other fields, which included provisions on the monitoring of the fulfilment of treaty obligations by States parties. The concept of interim measures of protection might also be developed to ensure that a State was in a position to preserve its interests against the consequences of a wrongful act by another State until such time as the differences that had arisen were resolved.

154. Attention was also drawn to the possibilities for effective bilateral or multilateral diplomatic protestations, as well as for measures of retortion not amounting to a breach of an international obligation, which, it was stated, were not inconsiderable and, if resorted to, were likely to prove effective.

155. Emphasis was furthermore placed on the opportunities offered by collective mechanisms for the prevention and redress of internationally wrongful acts. One representative said in this connection that at a time when processes of disintegration were impeding the harmonious development of the international community, it was important to refrain from granting a legally superior standing to reprisals which were unilaterally decided upon and to establish instead a common legal standard which would serve as a framework for the collective action undertaken by the community of nations on the basis of the Charter of the United Nations and other universally recognized instruments with a view to preventing and eliminating the consequences of internationally wrongful acts.

156. The above notwithstanding, many representatives felt that the realities of international life could not be ignored and that countermeasures, despite their shortcomings, had a place in any legal regime of State responsibility. The view that countermeasures were a reflection of the imperfect structure of the international society, which had not yet succeeded in establishing an effective centralized system of law enforcement, met with a wide measure of support, as did also the proposition that States could not be denied the right to react to breaches of international law which damaged them and that, given the current level of development of international law, countermeasures would continue to be needed for a long time to confront internationally wrongful acts.

157. At the same time it was widely recognized that a careful limit should be placed on the scope of enforcement of the unilateral means of action to which a State could legitimately resort in order to counter a breach of international law which had caused it prejudice and that it was essential to ensure that countermeasures were subject to particularly strict conditions so as to prevent abuse and dissuade States from resorting to means which would, in short, constitute the ultima ratio intended to persuade the wrongdoing State to resume compliance with the law. The remark was on the other hand made that the Commission should strike the right balance between the rights and obligations of the parties concerned. The view was expressed in this connection that placing excessive burdens on the injured State would serve only to strengthen the position of the wrongdoing State: requiring, for

example, the exhaustion of all available methods of dispute settlement as a precondition misperceived the important role of countermeasures in inducing agreement for the settlement of disputes. Many representatives emphasized the need, in devising a regime of countermeasures, to pay particular attention to the situation of developing States and of weak and poor countries in order to prevent the regime from becoming a tool of power politics.

158. Some representatives commented in broad terms on the essential conditions of lawful resort to countermeasures. The general principles of international law, including the principle of State sovereignty, and the principle of the territorial integrity of States, the principle of non-intervention, the principle of non-use of force and the principle of jus cogens were referred to in this context. Mention was also made of obligations erga omnes, 5/ respect for basic human rights, 6/ the requirement of the exhaustion of available means of peaceful settlement 7/ and the need to place countermeasures under collective control. As regards the last point, attention was drawn to the scope of the powers and functions of multilateral instruments, bodies and organizations, including the Security Council of the United Nations, in the maintenance of international peace and security. A number of representatives also addressed the question of the finality of countermeasures. 8/

159. As regards the question whether the Commission's task in devising a regime of countermeasures was one of codification or of progressive development of international law, some representatives took the view that countermeasures were firmly grounded in customary international law. Others remarked that, while considerable State practice already existed, it was not possible to rest content with a codification or systematization of the existing rules in that field, for fear of perpetuating a discredited order. On the contrary, the international community must, whenever the need arose, depart from those precedents and embark more resolutely on the road to renewal, while working for the progressive development of international law with a view to limiting recourse to countermeasures.

160. A number of representatives shared the view that the question fell under the heading of progressive development rather than of the codification of international law, and several of them insisted on the need to identify and combine all the progressive elements which had emerged from recent practice in order to strengthen the safeguards against the possible abuse of countermeasures. Among those elements one representative singled out jus cogens, obligations erga omnes and the notion of international crime. Another representative described the task with which the Commission was

---

5/ For detailed comments, see subsection (c) (iv) below.

6/ Ibid.

7/ For detailed comments, see subsections (b) (iii) and (c) (ii) below.

8/ For detailed comments, see subsection (b) (ii) below.

confronted as follows: if countermeasures did belong to rules of general international law, they could be codified and adapted to the new realities; on the other hand, if they did not belong to the rules of general international law, and yet the international community had a real need for them, the Commission could, in accordance with its statute, formulate rules of countermeasures as part of its mission progressively to develop laws. It would be the responsibility of the Sixth Committee to endorse them. However, the crux of the matter was that in either case - codification or progressive development - the formulation of rules on countermeasures would be beset with difficulties.

(b) Elements relevant to the inclusion of a regime of countermeasures in the draft articles

(i) The notion of countermeasures: conceptual and terminological aspects

161. The remark was made that in order to clarify the concept of countermeasures there was first a need to distinguish it from other concepts such as sanctions, self-defence, reciprocity and retortion.

162. As regards sanctions, agreement was expressed with the Special Rapporteur's opinion that that expression should be used solely to designate the measures taken by an international body. Self-defence was viewed, on the one hand, as falling outside the framework of countermeasures, which did not encompass acts involving the use of force, and, on the other hand, as an irrelevant concept in the context of delicts since it was a response to armed attack, i.e. to a crime. As for reciprocity measures, they were described as a specific form of countermeasure to the extent that they purported to secure cessation of the wrongful act and compliance with the obligation of reparation rather than to derogate from the primary obligation - a function which they could also perform and which should be distinguished from their reparatory function.

163. One representative raised the question whether it was wise to leave out retortion measures simply because they did not constitute countermeasures in the strict sense and whether it would not be preferable to encourage the injured State to attain satisfaction through an unfriendly but not unlawful act. Other representatives agreed with the Special Rapporteur that measures of retortion did not fit into the category of countermeasures inasmuch as they constituted licit, albeit unfriendly, measures, recourse to which was admissible even when no internationally wrongful act had been committed. One of them in particular stressed that the draft articles under discussion did not and could not seek to regulate acts that were lawful per se and that, for instance, it was difficult to imagine that the recall of an ambassador could be subjected to the conditions set out in article 12. He accordingly suggested that it be stated explicitly, perhaps in a commentary, that in the event of a violation of their rights States could freely resort to all licit measures, including retortion, which was in principle within their discretionary powers. He added that such a clarification would have the

further advantage of drawing attention to the fact that means other than countermeasures could contribute to the restoration of the law.

164. As for the use of the suspension and termination of treaties as countermeasures, the view was expressed that the matter should be left to the 1969 Vienna Convention on the Law of Treaties, in particular article 60 thereof.

165. As regards the choice to be made between the term "reprisals" and the term "countermeasures", the representatives who addressed the question generally opted for the second alternative. It was stated in this connection that "countermeasures" was a neutral term which was less associated with the use of force and which, without wholly eliminating the punitive element, more aptly reflected the objective of restoring the symmetrical positions of States by means of negative measures. The term "countermeasures" was also described as entirely appropriate in that it implied posteriority or a reaction to a previous action and thus encompassed the full range of means of pressure to which a State injured through a breach of an international obligation by another State could resort in order to ensure that its right was respected.

166. Although one representative felt that the notion of reprisals should not be maintained in modern international law, others felt that a distinction should be made between countermeasures in time of peace and countermeasures in time of war and that it would be advisable to use that term for enforcement acts taken unilaterally by a State in time of peace and the more pejorative term "reprisals" for time of war.

167. As regards the content of the notion of countermeasures, several representatives referred to article 30 of Part One of the draft articles. The remark was made that, although countermeasures themselves could be considered as violations of international obligations, wrongfulness was, under article 30, precluded if the act which was not in conformity with an obligation of a State towards another State constituted a measure which was legitimate under international law, in consequence of an internationally wrongful act of that other State. In this connection, one representative raised the question of why the reverse formulation - one placing the burden of proof upon the State taking the countermeasure - had not been adopted. He pointed out that the location of the burden of proof was of enormous importance in any international dispute-settlement process because of the great difficulty of assembling the necessary testimony in international proceedings and that, while the other circumstances in which, under articles 29 and 31 to 34 of Part One, wrongfulness would be precluded were objective circumstances which could be ascertained relatively easily, it would often be difficult or impossible to establish that a State having resorted to countermeasures had in fact not acted in bona fide belief. Thus, he concluded, it seemed likely that if article 30 continued to stand in its present form, a State taking a countermeasure might in many cases do so with impunity.

168. It was noted that the Special Rapporteur had defined countermeasures as measures that a State might take in response to breaches of international obligations causing injury to that State. While the definition proposed by the Special Rapporteur was viewed as technically unimpeachable, the question was asked whether it was not one-sided as it referred only to the aspect of non-compliance with an obligation.

169. One representative suggested that there be included in the draft a definitional article in which the various characteristics of countermeasures, including their purpose and temporary character, would be spelt out.

170. Some representatives stressed that the characteristics of countermeasures varied depending on whether they related to international crimes or international delicts. The view was expressed in this connection that international crimes, as violations of the rights and interests of all members of the international community, required a collective response and must entail sanctions within the meaning indicated in paragraph 162 above.

171. Other representatives refrained from commenting on the characteristics of countermeasures relating to crimes as it was in their opinion preferable to defer to a later stage, as proposed by the Special Rapporteur, the consideration of the instrumental consequences of crimes. One of them did not exclude, however, that the conclusion would be reached in due course that countermeasures for delicts and for criminal acts could not be dealt with separately.

(ii) Functions of countermeasures

172. It was widely agreed that the regulation of countermeasures was a constructive means of promoting respect for the law as long as the aim was to induce the wrongdoing State to resume the path of lawfulness. The primary purpose of countermeasures, it was remarked, was to compel States to respect their obligations, whether conventional or not, and to secure cessation of breaches.

173. The notion that countermeasures should not have a punitive function also met with general support. The remark was made in this context that in relations between equal sovereign partners no State could pose as a higher authority and that by giving countermeasures a punitive character one would restore the vicious circle of "power politics" and the outmoded distinction between powerful and weak States. Some representatives suggested that any punitive aspects should be expressly excluded.

174. Noting that the possible punitive nature of countermeasures had been linked to the notion of international crimes, one delegation reiterated its reservations regarding the attribution of criminal liability to States.

(iii) Relationship between the regulation of countermeasures and the proposed Part Three on settlement of disputes

175. Several representatives held the view that in devising a regime of countermeasures the Commission should consider the question of establishing, developing and enhancing institutionalized means of legal protection. Some insisted that the draft articles contain a settlement regime, particularly in the light of the fact that possible positive developments in international relations encouraged such a trend. Support was expressed for the Special Rapporteur's view that any regulation of countermeasures which did not go hand in hand with dispute-settlement procedures was fraught with the danger of abuse to the detriment of weaker and poor States. A well-balanced system of dispute-settlement was viewed as the best way of safeguarding the interests of the injured State and it was suggested that an outline be prepared for the Commission's next session since if a mandatory system of dispute settlement was foreseen in respect of State responsibility it would certainly have an impact on the chapter concerning countermeasures.

176. Other representatives felt that the Commission should not base its drafting of Part Two on the assumption that it would be possible to obtain widespread acceptance of meaningful dispute-settlement provisions for the whole of international law. The realistic goal must be to seek the simplest possible treatment of the subject consistent with the existence of a regime that would encourage or induce States to settle their disputes in a peaceful and expeditious manner. According to another opinion, the question of the settlement of disputes had no inherent connection with the topic of State responsibility and could therefore be treated separately in relation to the different systems of primary rules accepted by States.

(iv) Relationship between the draft articles under elaboration and the Charter of the United Nations

177. Several representatives stressed that in devising a regime of countermeasures due weight should be given to the provisions of the Charter on collective security. One of them urged the Commission to refrain from taking any decisions that would entail a conflict between the draft under discussion and the decision reached at San Francisco, since the Commission had no mandate to interpret the Charter. Although readily agreeing that armed reprisals were generally held to be prohibited by the Charter and that the requirements for self-defence were laid down in Article 51, he was unable to go along with some of the views and interpretations put forward during the debate. In his opinion, it would be counter-productive to ignore the scope of Article 103 of the Charter or to adopt positions tending to reject the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security.

178. Another representative expressed the view that the draft articles should not be subordinate to the Charter or to any recommendations or decisions of the Security Council; they should, however, be in conformity with the rules

and procedures of the Charter concerning the maintenance of international peace and security.

(c) Articles 11 to 14 as proposed by the Special Rapporteur

179. Some representatives commented in general terms on articles 11 to 14 as proposed by the Special Rapporteur. Those articles were generally viewed as reflecting a necessary and commendable effort to submit the right to resort to countermeasures to the strictest possible conditions. One representative stressed in this connection that countermeasures should not be considered and had never been considered to be unconditionally in conformity with international law and that any State which reacted to an initial violation of international law committed to its detriment by another State could not behave as it saw fit and disregard all its international obligations. He referred in this context to the Naulilaa ruling and to the resolution adopted in 1934 by the International Law Institute according to which justification for an act was subject to the following conditions: a motive provided by a prior act, which was itself contrary to international law; the impossibility of obtaining satisfaction by other means; an unsuccessful sommation prior to the reprisal; proportionality between the reprisal and the injury. Another representative elaborated as follows on the above list of conditions: first, a wrongful act on the part of a State must exist; secondly, a clear demand for cessation and reparation should be addressed to the wrongdoing State; thirdly, in the event of disagreement as to the wrongfulness of the act in question and the response demanded, there should be prompt resort to procedures for the settlement of differences if there was reason for such resort; and all dispute-settlement procedures acceptable to the two parties should be sought out in good faith; next, due recourse to the provisions of the Charter, to the United Nations and to other authorized multilateral institutions or organizations must be considered; also, the wrongful act itself must be of an unacceptable nature and not a minor or technical one; and finally, the wrongdoing State should not be able to deny reparations to the injured State or to persist in the alleged violation.

180. As regards the extent to which the Special Rapporteur had succeeded in his efforts to formulate the conditions of lawful resort to countermeasures, the view was expressed that the proposed articles, although they did not provide a totally satisfactory solution to all the problems involved, struck a proper balance between the need to provide legal rules that were workable and effective and the need to lay down strict conditions and rules under which the use of countermeasures could be regarded as lawful. Another opinion was that although the Special Rapporteur had tried his best to reduce the concern caused by the unequal balance of power, the proposed draft articles not only did not eliminate the concerns of the developing countries but were also to a certain degree impractical.

181. A drafting suggestion concerning all four articles was made as follows: articles 11, 12 and 13 would be merged into one article entitled "Conditions of resort to countermeasures", which would start out by stating the cases in which it would be lawful to resort to countermeasures. Resort to

countermeasures would then be conditional upon (a) the existence of an internationally wrongful act; (b) the prior submission by the injured State of a protest combined with a demand for cessation and/or reparation; (c) the exhaustion of amicable settlement procedures; (d) appropriate and timely communication of the intention to resort to countermeasures; and (e) the principle of proportionality. A second article would deal with prohibited measures, along the lines of article 14 proposed by the Special Rapporteur.

(i) Article 11

182. Several representatives noted that article 11 made lawful resort to countermeasures conditional upon the actual existence of an internationally wrongful act, the prior submission by the injured State of a "demand" of cessation or reparation and the absence of an adequate response. The focus of the article, as described above, was generally considered as correct and consonant with the finality of the provision which was to reduce possibilities for premature, and thus abusive, resort to countermeasures. A number of representatives, however, felt that the proposed text left many problems unresolved and did not foreclose the possibility of imprecise or subjective judgements, thus opening the way to abuse by the more powerful States which were, as history showed, most likely to resort to countermeasures.

183. Comments focused on the determination of three issues, namely, (i) whether a wrongful act had actually been committed; (ii) whether a "demand" had been submitted; and (iii) the concept of "adequate" response.

184. On the first point, some representatives wondered what was understood by the term wrongful act, who was qualified to judge any act as such and what criteria were to be applied in this connection. Concern was expressed that if the injured State was to determine whether a wrongful act had been committed, it would act as both judge and party, and that its determination could in turn give rise to disputes which might result in further wrongful acts. It was even conceivable that no prior wrongful act had been committed and that the State which had invoked the existence of such an act and resorted to countermeasures was thus responsible for two wrongful acts. In reply, the remark was made that a State which based its conduct on the existence of an internationally wrongful act acted at its own risk and might be held responsible if it turned out that none of its rights had in fact been infringed.

185. As regards the criteria to be applied in determining whether a wrongful act had actually been committed, several representatives shared the view that the bona fide conviction of the allegedly injured State was not enough and that there must be several objective signs, in addition to the wrongful act, including refusal to negotiate or refusal to accept resort to a settlement procedure.

186. On the second of the issues mentioned in paragraph 183 above, the remark was made that the article provided no procedure for the objective evaluation of compliance with the condition of submission of a "demand" and that the

matter would thus be left to the injured State. The concerns reflected in paragraph 184 above were therefore viewed as valid in the current context as well.

187. The same concerns were considered equally relevant as regards the third of the issues mentioned in paragraph 183 above, inasmuch as the text proposed by the Special Rapporteur did not indicate whether it was the injured State, the wrongdoing State or a third party which was competent to say whether a response was adequate or not. It was further suggested that clarification be given as to what was meant by "adequate response".

188. A number of representatives held the view that consideration should be given to the inclusion of additional elements in article 11.

189. One such element was the requirement of an injury. In this connection, some representatives argued that the adoption of a countermeasure found its justification in the prejudice caused by an internationally wrongful act and that for a countermeasure to be lawful the wrongful act must give rise to "damage" in the broad sense of encompassing legal or moral injury. The remark was made that this requirement had practical consequences inasmuch as, if injury was not a prerequisite, any breach of the law could give rise to countermeasures. At the same time, the view that countermeasures could be resorted to only in response to an unlawful act having significant or unacceptable consequences was objected to on the ground that the gravity of the unlawful act should not constitute a criterion of permissibility of countermeasures, although it was certainly a decisive factor the injured State would have to take into account when considering the question of the proportionality of the countermeasure to be applied.

190. A second element which it was suggested to include in article 11 concerned the finality of countermeasures. The delegations which commented on this question did not take a stand on whether article 11 should expressly deal with it but agreed that countermeasures should not have a punitive function. 9/

191. Other comments included the remark that the phrase "not to comply with one or more of its obligations" was unclear and the suggestion that the general rule contained in article 11 be couched in negative terms ("An injured State [...] is not entitled not to comply with one or more of its obligations [...] unless the following conditions have been fulfilled").

(ii) Article 12

192. The general orientation of the article met with the approval of a number of representatives, one of whom stressed that the proposed text, in addition to answering the concern expressed as early as 1934 by the Institute of International Law that the use of reprisals should always remain subject to

---

9/ For detailed comments on the question of the finality of countermeasures, see subsection (b) (ii) above.

international control and could in no case be exempt from discussion by other States, was also in line with the commentary to article 30, which stated that it was only in cases determined by international law that international law granted a State which had been injured by an internationally wrongful act committed against it the faculty of resorting to a countermeasure.

193. A number of delegations, however, took the view that the article as currently drafted did not entirely meet the requirements of logic and clarity and should therefore be reviewed. It was also said that further elaboration was called for with a view to achieving a balance between the need to control the use of countermeasures and the necessity of not giving an undue advantage to the wrongdoing State.

194. A number of representatives stressed the importance of paragraph 1 (a) on exhaustion of peaceful settlement procedures.

195. Some representatives, however, considered that the proposed text was too sweeping and that while the condition of prior exhaustion of all available peaceful settlement procedures might be applicable to certain situations, such as international trade disputes, there were cases where it was important to adopt countermeasures in time to prevent further aggravation of the injury caused. The obligation laid down in paragraph 1 (a) was also viewed as too onerous for the injured State. The remark was made in this connection that negotiations could be protracted and the legal process could extend over a period of years and that it would be unfair to oblige the injured State to refrain from taking countermeasures throughout that entire process, particularly if it was not certain that the other State would in good faith enforce the decision eventually handed down. In this context, one representative pointed out that there were many procedures for the peaceful settlement of disputes and that the proposed text did not establish an order of priority for implementing the procedures. She further remarked that States were under no obligation to settle their disputes, except those which could endanger international peace and security, adding that the proposed text might have the effect of preventing the States parties to the 1948 American Treaty of Pacific Settlement from resorting to countermeasures among themselves, since the Treaty did not provide that disputes submitted to procedures for peaceful settlement should be necessarily settled by those means. Concern was furthermore expressed that the requirement of exhaustion of all peaceful settlement procedures might favour powerful States to the detriment of weaker States and be used by the wrongdoing State as a delaying tactic allowing it to persist in wrongful acts and that the world community might face situations in which wrongdoing States continued their internationally wrongful acts indefinitely.

196. Some among the representatives in question suggested that the exhaustion of amicable settlement procedures should be a parallel obligation rather than a condition to be met before any resort to countermeasures - in other words, to provide for a regime under which the right to resort to countermeasures would be suspended if the wrongdoing State agreed to a dispute-settlement procedure which could give rise to a legally binding determination on the

wrongfulness of the act and the question of reparations. Another suggestion was to allow resort to countermeasures in cases where the peaceful settlement procedure did not lead to the settlement of the dispute within a reasonable period of time.

197. Other representatives supported the proposal that the injured State should not be able to take any countermeasures without having previously exhausted all the procedures for an amicable settlement available under general international law, the Charter of the United Nations or any other dispute-settlement instrument to which the State was a party. The view was expressed in this connection that so long as States had available to them means of settlement, from the simplest forms of negotiation to the most elaborate judicial procedures, recourse to countermeasures could not be justified and that only in the event of failure of a settlement procedure or in the absence of resort to such a procedure for certain permissible and strictly limited reasons - for example, if there were danger in delay - could a State be authorized to employ countermeasures. There was no question, it was stated, of legitimizing the use of countermeasures as a means of inducing the wrongdoing State to accept a settlement procedure that would lead to a legally binding decision as to the unlawful nature of an act and as to matters of reparation. Also in favour of the Special Rapporteur's approach, it was remarked that since under paragraph 2 (a) the injured State was relieved of its obligation to exhaust all peaceful settlement procedures if the alleged wrongdoer did not cooperate in good faith, the requirement in paragraph 1 (a) was not an insurmountable obstacle to the adoption of countermeasures.

198. With respect to paragraph 1 (b), there was no disagreement on the notion that before countermeasures were resorted to, the State concerned should be given notice and allowed time to consider the situation and, when appropriate, call a halt to its actions. Concern was however expressed that the current text might lend itself to subjective interpretations. It was furthermore remarked that countermeasures could not be taken automatically and must, in principle, be preceded by some form of protest, notification, demand or warning. In this connection attention was drawn to the need to make a distinction between, on the one hand, the serving of notice, which consisted in asking the State guilty of the wrongful act to put an end thereto and, if need be, to make the necessary reparations, and, on the other hand, the communication of an intention to resort to countermeasures if such notice remained unheeded. Paragraph 1 (b), it was noted, made mention only of the latter possibility.

199. As regards paragraph 2 (a), several representatives felt that the good-faith requirement did not provide an effective guarantee inasmuch as it would in practice be very difficult to demonstrate that negotiations had been unduly delayed. The remark was also made that the text provided no indication as to who would determine that a State had not "cooperated in good faith in the choice and the implementation of available settlement procedures", a phrase which one representative considered unclear.

200. Paragraph 2 (b) gave rise to doubts on the part of a number of delegations. Including a provision on interim measures of protection was viewed as both unnecessary, inasmuch as countermeasures were in themselves interim measures of protection of an exceptional character, and contrary to the spirit of paragraph 1 (a), which required prior exhaustion of peaceful settlement procedures. One representative commented extensively on paragraph 2 (b). He observed that the provision appeared to be tainted by a misunderstanding of the concept of interim measures of protection. Such measures were usually ordered by a court or a tribunal pending the outcome of a case, in order to safeguard the rights of one or both parties. One of the main conditions of admissibility of such measures, which were usually imposed on the wrongdoing State, was the existence of a risk of "irreparable harm". By definition, interim measures were narrower and more technical than countermeasures which, pursuant to article 11, could take the form of non-compliance by an injured State with one or more of its obligations towards the wrongdoing State, subject to the restrictions provided for in article 14. The injured State was usually incapable of "taking" an interim measure, in the proper sense of the term, if the wrongdoing State did not cooperate. Once that State did cooperate, however, its cooperation usually took the form of cessation and/or reparation, which ended the dispute. Hence, he concluded, paragraph 2 (b) was conceptually inappropriate.

201. The same representative saw another reason to question the current wording of paragraph 2 (b): in practical terms, it transferred to the injured State the power to order interim measures, which properly belonged to an international court, and thus the power to implement a "provisional" judgement by that State in sua causa. Aside from the fact that, as a result, judicial settlement became more problematic, it was to be noted that paragraph 2 (b) was applicable only when the States concerned had accepted the third party settlement procedure (and were therefore in a position to bring a case at any time before an international body) and that such a body could, as a matter of priority, render a decision as to the admissibility of interim measures before any need arose for a State to take action unilaterally. The representative in question furthermore remarked that paragraph 2 (b) left open the possibility that an application by a State having chosen to resort unilaterally to interim measures might be rejected by a court because of the frivolous invocation of its jurisdiction - a possibility which was a real one since practice showed that international tribunals were very much guided by considerations relating to jurisdiction over the case and the parties. Summing up his position, the representative in question said that unilateral resort to interim measures was either covered by paragraph 2 (a) or rendered unnecessary by the wrongdoing State's acceptance of a third-party settlement procedure.

202. Paragraph 2 (c) did not give rise to any objection.

203. As for paragraph 3, all the delegations which commented on it considered it to be unclear despite the explanations provided in paragraph 205 of the Commission's report. Some questioned the need for such a provision. Others felt that the reasons adduced by the Special Rapporteur in favour of its retention were convincing and that a formulation conveying his intentions more

clearly would have to be found. According to one delegation, the question raised was whether the countermeasures which were exempt from the requirement of the exhaustion of amicable means of settlement should or should not be subject to the requirement of compatibility with the exigencies of peace and security. In the view of that delegation, all countermeasures had to be governed by the same regime, and a general obligation for States parties to a dispute to refrain from any act or countermeasure that might aggravate the situation to the point of threatening the maintenance of international peace and security therefore appeared appropriate. For another delegation, the paragraph aimed at ruling out resort to countermeasures not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, were not endangered and should have a more general scope than that assigned to it by its current wording. A third delegation pointed out that the proposed provision would deprive States of the possibility of reacting to serious or very serious offences and that, in such cases, a third party - which could only be the Security Council - would have to intervene in the interest of peace, international security and justice.

204. Referring to paragraph 185 of the Commission's report, one representative indicated that he could not fully subscribe to the observation that States could not resort to countermeasures once the Security Council had adopted sanctions under Chapter VII of the Charter. Aside from the fact that it was not clear on what grounds the intervention of an international body, regardless of the body concerned, would in itself exclude any possibility of countermeasures, it was in any event the responsibility of the Security Council to decide, if it so desired, whether or not its decisions excluded any others.

(iii) Article 13

205. The principle of proportionality was generally recognized as playing an essential role in determining the legitimacy of countermeasures. The remark was made in this connection that countermeasures must always meet the test of reasonableness or proportionality, and thus should be proportional to the seriousness of the alleged wrongful act and should be designed to achieve the objectives of cessation of the alleged wrongful act and settlement of the dispute, if any. In no case, it was added, could the test of proportionality be stretched to justify totally unequal means, methods and measures or to obtain unequal results as compared to the consequences of an alleged wrongful act. The role of proportionality was viewed as all the more important as, in the words of one representative, there seemed to be general agreement that reciprocal measures should not constitute a special category of countermeasures requiring a separate regime; thus, a breach in one area of the law could give rise to a countermeasure not necessarily related to the obligation breached, and in the absence of such a link the scope of possible countermeasures and the risk of abuses were considerably increased.

206. The principle of proportionality was at the same time recognized as very difficult to apply in practice inasmuch as any evaluation of proportionality, whatever the criterion applied, included a substantial component of

subjectivity and thus an element of uncertainty. It was remarked in this connection that as long as the assessment of the gravity of a wrongful act and of its effects was left to the appreciation of the injured State abuses would inevitably occur and that such assessment should therefore be entrusted to a third party. Reference was made in this context to the concern expressed as early as 1934 by the Institute of International Law that the use of reprisals should always remain subject to international control and could in no case be exempt from discussion by other States.

207. A number of representatives insisted on the need to define the scope and content of proportionality and commented on the criteria to be applied to that end. The criterion of the seriousness of the harm caused was endorsed by one representative but objected to by others, who felt that a countermeasure proportionate to the injury would take on a punitive character and amount to an application of the lex talionis. The possibility of linking the proportionality of countermeasures to the objectives sought was mentioned by several representatives. One of them felt that this approach needed study. Others held the view that the usefulness of the countermeasure as a way of obtaining reparation or resort to peaceful settlement was a valid criterion. The remark was made in this connection that if the conditions for the legality of countermeasures included the requirement that they aim at obtaining the cessation of the wrongful conduct and the initiation of a peaceful settlement procedure, the principle of proportionality could be formulated in general terms.

208. A number of representatives commented on the text proposed by the Special Rapporteur. Some supported it in its current form which, it was remarked, was in line with the commentary to article 30 of Part One of the draft, where it was stated that it was only in cases determined by international law that international law granted an injured State the faculty of resorting to countermeasures. One of them, however, suggested that the proposed text be merged with article 11 into a single provision, setting forth the conditions failing which countermeasures could not be resorted to. Others found that the Special Rapporteur's text was too abstract, lacked precision and left unanswered the question of who would determine proportionality and on the basis of what criteria. Concern was expressed that the proposed provision could give rise to greater problems than those it was set out to solve and could make it possible for a State, on the pretext of obtaining reparation for a wrongful act, to use countermeasures to commit even greater crimes.

209. Other comments included the remark that the expression "not to be disproportionate" was preferable to the wording "not be out of proportion", the observation that the phrase "out of proportion" was vague, the suggestion that the principle be couched in negative terms so as to limit the element of subjectivity and the remark that the references to the "gravity" and "the effects" of the act could be eliminated and the corresponding points dealt with in the commentary.

(iv) Article 14

210. A number of representatives stressed the importance of the article. It was said in particular that the provision, which enshrined a threshold of permissiveness in contemporary international law, was the most important of the regime of countermeasures and that there should be no doubt or controversy as to its scope and content as otherwise its purpose of prohibition would be defeated. The approach reflected in the text proposed by the Special Rapporteur met with the approval of a number of delegations, but none the less attracted a number of comments. Observations relating to the article as a whole focused on (i) its structure; (ii) its placement; and (iii) the exhaustive or non-exhaustive character of the list of prohibited countermeasures contained in it.

211. As regards the first point, the approach reflected in the article was viewed as too analytical and therefore entailing a risk of undesirable a contrario interpretations, a remark which was made in particular in relation to paragraph 1 (a) and paragraph 1 (b) (iii) (see paras. 215 and 222 below). Another remark was that the five kinds of prohibited countermeasures dealt with in the article did not have the same degree of intensity, the prohibition contained in paragraph 1 (a) being of a more serious nature than those contained in paragraph 1 (b). The question was therefore asked whether those five categories should be in the same article and whether it was absolutely essential to have all of them.

212. As regards the second point, it was suggested that the article be placed immediately after article 11, so as to alleviate the concerns of those who wished to see the Commission begin by drafting rules establishing safeguards against possible abuses of recourse to countermeasures.

213. On the third point, some representatives held the view that the list of prohibited measures should not be given an exhaustive character, which would allow for, in the words of one of those representatives, a possible evolution of the category of prohibited countermeasures. Other representatives insisted that the list be an exhaustive one.

214. Some representatives suggested that the list contained in article 14 be supplemented. Concern was expressed in particular that the existing list did not include countermeasures contrary to obligations arising from multilateral conventions on the protection of the environment designed to safeguard the environment as part of the common heritage of humanity. Further elements which were mentioned as deserving consideration for possible inclusion in the article concerned treaties establishing boundaries and those containing termination or suspension clauses which were envisaged as countermeasures.

215. Paragraph 1 (a) was supported by all the representatives who commented on it, although its relationship with paragraph 1 (b) (iii) was viewed as calling for further clarification (see para. 222 below). One representative, referring to the bracketed phrase, expressed preference for a general mention of the Charter of the United Nations.

216. There was also a wide measure of agreement on the prohibition, in paragraph 1 (b) (i), of countermeasures violating fundamental human rights. Some representatives however felt that the phrase "fundamental human rights" lacked precision. One of them said that if the intention was to safeguard the "core" of human rights, it was better to specify the rights constituting that core or to define the threshold beyond which countermeasures could be allowed. Another representative, while sympathizing with the idea that probably not all the human rights embodied in existing or future international instruments were necessarily exempt from countermeasures, freedom of movement being a very convincing example, felt that a more precise line of demarcation should be drawn between absolutely protected human rights and others that might legitimately become the object of countermeasures, for instance by identifying those rights from which no derogation was permissible under the relevant international human rights instruments.

217. Among the categories of human rights to be expressly protected, one representative singled out the rights of persons against whom reprisals were prohibited under the 1949 Conventions. Another representative referred to mass expulsions of foreigners. He stressed that, although a universal prohibition in that area was taboo, several regional instruments, in particular Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, the Pact of San José of 22 November 1969 and the African Charter on Human and Peoples' Rights, expressly prohibited mass expulsions of foreigners except in the case of a threat to independence or security provided for by the first two texts. Still another representative raised the question whether property rights should be considered as fundamental human rights and, as such, protected absolutely against countermeasures.

218. While agreeing that any self-help measures which States would take against so-called offending States could not include measures against the States or their nationals in violation of principles relating to the protection of human rights and the treatment of foreign nationals, one representative took the view that responses to violations of human rights should be governed by the applicable international conventions and treaty regimes and should not be brought within the purview of the proposed countermeasures regime.

219. Referring to paragraph 231 of the Commission's report, one representative deemed unrealistic the general principle that countermeasures should essentially affect relations between States and have a minimum impact on individuals. In his opinion, State responsibility was an example of collective responsibility, and it was not really possible to avoid the consequences of countermeasures for individuals.

220. Paragraph 1 (b) (ii) was described as unclear. More specifically, a number of representatives wondered what was meant by "conduct which ... is of serious prejudice to the normal operation of bilateral or multilateral diplomacy". Some held the view that it was not diplomatic operations as such that should be protected but the inviolability of diplomatic personnel and

premises, notwithstanding the Special Rapporteur's apparent inclination to consider that diplomatic inviolability or immunity might become the object of countermeasures provided that the human rights of diplomats were not thereby infringed.

221. The Special Rapporteur's text was furthermore criticized as too sweeping. One representative said in particular that the norms of diplomatic law could not be placed on the same level as peremptory norms or those relating to the protection of fundamental human rights. He considered it difficult to accept that the prohibition on countermeasures should be equally absolute in such cases. In particular, the prohibition on recourse to reciprocal measures in the framework of diplomatic law did not seem to be justified. As international practice showed, recourse to countermeasures in that sphere, while considerably limited, was not entirely prohibited. In the same vein, other representatives pointed out that the breach or suspension of diplomatic relations was a countermeasure often employed by States and should not be prohibited even though it did seriously affect the normal operation of bilateral diplomacy.

222. The representatives who commented on paragraph 1 (b) (iii) agreed that countermeasures contrary to a peremptory norm of international law should be ruled out. The remark was however made that the provision in question read jointly with paragraph 1 (a), which prohibited countermeasures involving the threat or use of force, created the impression that the principle of non-use of force, a jus cogens rule par excellence, did not form part of the peremptory norms of international law. It was therefore suggested that the wording of the subparagraph be reviewed.

223. In this context some representatives recalled that a difference of opinion existed in relation to the concept of jus cogens. It was accordingly suggested that the current text of paragraph 1 (b) (iii) be replaced by "is contrary to the basic rules of international law". The other possibility, namely dispensing with the subparagraph, was viewed as objectionable by several representatives even though the idea contained in the subparagraph was partly covered by other subparagraphs. It was remarked in this connection that the concept of jus cogens, because it varied over time, would ensure that the instrument being prepared would automatically reflect any changes in international legal thinking.

224. Paragraph 1 (b) (iv), was described as flowing logically from the very definition of countermeasures which could be applied only to the wrongdoing State and as providing a useful guarantee to third States. The view was however expressed that the proposed text contained sweeping formulations whose unreasonable effects were well described in paragraph 243 of the Commission's report.

225. As regards paragraph 2 of article 14, there was no disagreement with the view, reflected in paragraph 245 of the Commission's report, that extreme measures of political or economic coercion could have consequences as serious

as those arising from the threat or use of armed force and should therefore be prohibited.

226. On the other hand, the question whether the prohibition in Article 2, paragraph 4, of the Charter encompassed measures of political or economic coercion of the type referred to in paragraph 2 of article 14 gave rise to divergent views. Some representatives answered it in the affirmative. Most of the delegations which commented on the issue, however, agreed that the proposed text raised a problem of principle in so far as it directly assimilated measures of political or economic coercion, the aim of which, in the current context, would be to compel a State to comply with the law, to the threat or use of force as defined by the Charter. It thus constituted an interpretation of the Charter, an exercise from which the Commission should refrain. Those representatives felt it more judicious not to address that problem on the basis of one of the principles of the Charter.

227. A few representatives expressed support for the third of the alternative solutions mentioned in paragraph 247 of the Commission's report.

228. Some representatives commented on the content of the concept of "measures of political or economic coercion". One of them suggested the inclusion in paragraph 2 of article 14 of a reference to the complete interruption of economic relations and communications, which led to the political and economic destabilization of the State so affected, and which therefore could be decided only by the Security Council under Chapter VII of the Charter. Another representative pointed out that a strict delimitation should be made between countermeasures stricto sensu and economic and political measures which did not affect rights or obligations under international law, and that States should not resort to countermeasures when only their interests were infringed and not their rights. He further remarked that the use of economic instruments as a strategy and as a countermeasure was strictly governed by several international bilateral and multilateral agreements and by self-contained regimes.

229. Drafting comments on paragraph 2 of article 14 included (i) the remark that the adjective "extreme" was unnecessary and even tautologous since any measure of political or economic coercion that jeopardized the territorial integrity or political independence of a State was, of necessity, extreme; and (ii) the suggestion that paragraph 2 be merged with paragraph 1 (a) into a single provision reading as follows:

> "An injured State shall not resort, by way of countermeasure, to the threat or use of force or to political or economic coercion which endangers the territorial integrity or political independence or sovereignty of the wrongdoing State."

(d) The question of countermeasures in the context of articles 2, 4 and 5 of Part Two adopted by the International Law Commission at previous sessions of the Commission

(i) The question of self-contained regimes

230. Several representatives felt that the ILC did not have to concern itself with this question. Some said that they saw no merit in reopening the debate on articles already adopted, the formulation of which was sufficiently broad to allow for each case to be determined on its own merits. The remark was also made that the question whether States parties to a treaty that contained special rules containing the consequences of the violation of their substantive obligations could or could not, in certain circumstances, simultaneously or as a last resort, have recourse to countermeasures under general international law concerned with the interpretation of treaties, a matter which was not within the competence of the Commission, or at least not within the framework of its current study, and which could result in a different response in each case. Reference was made in this context to the treaties instituting the European Economic Community which, apart from being of a highly original nature, included a court of justice with jurisdiction to decide in the matter.

231. Other representatives felt that the question of self-contained regimes could not be brushed aside on the ground that it was one of treaty interpretation and that it deserved further reflection, in the light of the tendency, in the area of State responsibility, to establish different regimes for different types of responsibility.

232. As for the consequences flowing from the establishment, by way of a treaty, of a self-contained regime, various views were expressed. Some representatives felt that in such a case "external" unilateral measures could only be resorted to in exceptional circumstances and that the provisions of the treaty should be treated as lex specialis and prevail over the general regime applicable under general international law. Along the same lines, one representative said that when in the context of a treaty States stipulated the consequences of any violation of that regime it should be understood that those States thus expressly excluded any other measures under any other systems and that, if their intentions were not clear, the presumption should be in favour of the exclusion rather than the inclusion of external measures.

233. Other representatives endorsed the Special Rapporteur's position that the injured State could always fall back on the remedies available under general international law. One representative said in particular that he saw no reason why an injured State, unable to obtain the cessation and reparation of an internationally wrongful act by the means provided for in a self-contained regime, should be precluded from resorting to countermeasures authorized under general international law and that, once amicable settlement procedures had been exhausted, nothing should prevent the injured State from applying countermeasures if the other conditions laid down by the general regime were met. This principle, one representative observed, should prevail in the

process of interaction between the universal legal system and regional systems, the more so as it was rare for a regional system to be able to completely replace a universal system, particularly on the question of State responsibility.

(ii) Relationship between the draft under elaboration and the Charter of the United Nations

234. With reference to the question raised by the Special Rapporteur of the implications of article 4 of Part Two as regards countermeasures, some delegations expressed the view that the Security Council had the power to indicate whether in any given case it believed countermeasures to be disproportionate and to request a State to delay the taking of countermeasures.

235. Others, while recognizing that the decisions or recommendations of the Security Council were bound to affect the right of the injured State to resort to countermeasures, felt that the Commission did not have to concern itself with this issue. It was pointed out in this context that the Charter, under its Article 103, prevailed in any event over other international treaties. Attention was also drawn to the extreme difficulty, if not the impossibility, of devising a formula that would apply in all cases.

236. On the more general question of the relationship between a set of draft articles on State responsibility and the Charter, some representatives supported the view that the draft articles should be subordinate both to the provisions of, and to the procedures provided for in, the Charter to meet all contingencies arising from threats to, or acts actually affecting, the maintenance of international peace and security, and in particular to any recommendations or decisions adopted by the Security Council in the discharge of its functions with respect to dispute settlement and collective security. Those representatives therefore favoured the deletion of the words "as appropriate" in article 4.

237. Other representatives expressed doubts as to the advisability of including in the draft a norm like the one contained in article 4. One of them viewed the norm in question as going beyond the confines of State responsibility and raising issues related to the settlement of disputes, the distinction between legal and political disputes and the competence of the Security Council and its relationship with other organs of the United Nations, including the International Court of Justice. In his opinion, the Commission should carefully examine the proposition that the legal consequences of an internationally wrongful act should be subject to Chapter VII of the Charter. Another representative observed that the power of decision of the Security Council was strictly confined to measures aimed at restoring international peace and security under Chapter VII of the Charter and that the Council was not empowered to impose on States settlements or settlement procedures, on which it could only make recommendations. A third representative took a similar position, adding that Article 40 of the Charter under which the Council could invite the parties concerned to comply with the interim measures

it deemed necessary or advisable to order, brought out the difference between definitive and interim measures. In the view of that same representative, the need for article 4 was open to question in the light of Article 103 of the Charter.

238. Some representatives warned against reopening the debate on an article already adopted.

(iii) The question of differently injured States

239. Some representatives questioned the need for the new article 5 bis proposed by the Special Rapporteur and the advisability of reopening issues which in their view were already settled by article 5. One of them felt that in any event the question raised by the Special Rapporteur could be deferred to a later stage. Other representatives agreed that the Special Rapporteur had raised genuine problems and that his proposed new article 5 bis deserved to be carefully considered, particularly as the concept of obligations erga omnes had not yet been completely defined.

240. Several representatives warned against assimilating the question of a plurality of injured States to the question of the infringement of erga omnes obligations. It was noted in this connection that the former question did not arise solely with regard to erga omnes obligations, which were part of jus cogens and the breach of which pertained to the area of international crimes. It also arose in connection with any regime of multilateral obligations - which qualified it for consideration in the context of international delicts. The remark was made in this connection that it often happened that wrongful acts directed against a given State also injured third States, given the interdependence that characterized the modern world.

241. On the specific question of the right of differently injured States to resort to countermeasures, reservations were expressed on the Special Rapporteur's apparent inclination, as reflected in his proposed article 5 bis, to grant to each injured State the right to resort to countermeasures. The remark was made in this connection that while, in many cases prompted by considerations which were more ideological than legal, States had claimed such a right, setting themselves up as the defenders not only of their own rights but of international law, the locus standi of injured States had been treated in a rather restrictive way by international tribunals, including the International Court of Justice. Mention was made in particular of the case concerning Military and Paramilitary Activities in and against Nicaragua, in which the Court had clearly stated that there existed a difference in legal status between the actual victim of aggression and other States, which, in a somewhat artificial sense, could be said to be legally affected. Elaborating on this point, one representative said that in the above case the Court had accepted the notion of a "legally affected State" and thus rejected the claim of certain States to be conducting a would-be "actio popularis" on behalf of the international community without having received a specific mandate for that purpose.

242. As regards the nature and scope of countermeasures allowed for each category of injured State, some representatives stressed that account should be taken of the extent of the damage, as well as of the purpose of the countermeasure. The remark was made in this connection that the assessment of what constituted a proportional response was made even more complicated by the fact that the State applying the countermeasures had to take into account the measures taken by other injured States. While sharing the view that the injury caused by the violation of an erga omnes obligation or of a norm binding several States at the multilateral level could vary from one State to another, one representative asked whether, before authorizing a plurality of injured States to react individually, it would not be advisable to encourage them to envisage a collective reaction or to consult among themselves on the countermeasures they proposed to apply, so that their common objective - the cessation and reparation of the internationally wrongful act - might be attained more efficaciously.

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

1. General comments

(a) Concerns underlying the topic and general orientation of the work thereon

243. Some representatives stressed that the topic was of great significance both currently and for the future because it involved the establishment of a global legal regime which would effectively protect man and the environment from the rapidly accelerating negative consequences of development, above all in the scientific and technological fields, which were threatening the very foundations of life on Earth. The Commission's work was considered to have confirmed the importance of consolidating the efforts of the community of nations on the basis of international law, in order to confront the challenge posed by the realities of the nuclear age, which had intertwined the fates of all States and peoples. The remark was made that transboundary harm principally resulted from malfunctions in seemingly harmless activities carried out in a source State, or from activities in a source State which were acknowledged to be harmful, and that the two main aspects to be considered in the codification and progressive development of the applicable international law in such cases related to the measures that must be taken to prevent or reduce the possibility of the occurrence of transboundary harm, and the liability which would ensue where transboundary harm had occurred.

244. A number of representatives stressed that the Commission was faced with a complex and relatively new topic within which the elements of lex lata were not sufficiently developed and that some important legal concepts such as strict liability, fault and State responsibility seemed to overlap to a certain degree. At the same time the remark was made that the factual and legal issues involved had already been aired more than once in the Commission during the last 13 years of its consideration of the topic, and that it was

high time that decisions should be made and the results submitted to the Sixth Committee.

245. Referring to fundamental issues on which there was some agreement, one representative considered it generally accepted that industrial development and technology must not be over-encumbered, and that there might well be cases in which transboundary advantage also accrued from potentially harmful activities. Similarly, he went on to say, there was general agreement that the victims of transboundary harm should not be left without adequate compensation. The comment was further made that some general consensus had already been reached on certain issues relevant to the topic and incorporated in many international agreements which addressed the question of liability either directly or indirectly. The hope was expressed that the Commission could assist global or regional efforts by providing a document which would contain the basic elements to be included in a legal framework. Such a document would make a much-needed contribution to the progressive development of international law in this area. One representative, however, viewed the existence of a number of regional agreements on liability for various types of activities as casting doubt on the need for a framework convention on the topic.

246. Some representatives expressed disappointment that after 13 years the Commission should have not only failed to achieve the desired results, but also changed position from the understanding it appeared to have reached at its previous session, with the result that old uncertainties seemed to have been revived and the climate of indecision which had in the past prevented the development of the topic threatened to return. They found it discouraging that the Commission at the current stage of its work should still be debating the title of the topic, the nature of the instrument to be prepared and the interrelationship between preventive measures and reparation and the legal force to be given to each set of norms, etc. The remark was made that in its previous report the Commission had already established a clear basis for the elaboration of draft articles and it seemed possible to go forward with the drafting process without the hindrance of renewed debates on essential questions.

247. One representative observed that the Commission should reconsider whether a common code on liability would be desirable, or even necessary. Basing himself on State practice, he noted that there was so far a preference to deal with hazardous nuclear activities within the framework of a convention on liability for damage caused by nuclear activities and that activities concerning environmental pollution, and more specifically the ozone layer, had similarly been considered to be better dealt with in a separate convention. For these reasons, he discouraged the Commission from expanding the scope of the topic so as to include therein specialized regimes, such as that of nuclear liability, which were negotiated separately by States, or with activities which were otherwise regulated by existing norms and conventions, and also from considering certain issues which were currently being dealt with by States in the fields of biodiversity and climate change.

248. Some representatives urged the Commission to accelerate the pace of its work on the topic so as to complete its consideration before the term of its current members expired.

(b) Elements relevant to further work on the topic

249. A number of representatives referred to the United Nations Conference on Environment and Development, which had offered the international community an opportunity to reaffirm its commitment to the protection of the environment. In their opinion, the policies endorsed at that Conference should be viewed by the Commission as the starting-point. Mention was made in particular of principle 2 of the Rio Declaration, in accordance with which States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. The unanimous adoption of the Rio Declaration, it was remarked, had set the stage for the progressive development of international law regarding transboundary environmental issues.

250. Some representatives stressed that, on the basis of the Rio Declaration, the Sixth Committee was in a position to give the Commission more specific guidance in respect of further work on the topic and the elements to be included in a legal instrument. In their opinion such a document should include: (i) encourage States to enact and implement environmental legislation and to regulate potentially harmful activities in order to eliminate the risk of harm or reduce it to a minimum; (ii) urge States to develop national and international law regarding civil liability as a complement to State liability and to provide for non-discriminatory provisions on adequate compensation to innocent victims, as well as restoration of the damaged environment; (iii) note that States were under an obligation to cooperate in an expeditious and more determined manner in further developing international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction (on the lines of principle 13 of the Rio Declaration); and (iv) note that States and peoples were expected to cooperate in good faith and in the spirit of partnership in fulfilling the principles embodied in the Rio Declaration (as in principle 27 of the Rio Declaration).

251. The same representatives further stressed that the legal instrument on the topic should also (i) recommend that States establish procedures for environmental impact assessment, and apply that control instrument to all proposed activities which might have an adverse transboundary impact on the environment of other States; (ii) encourage States to develop procedures for prior and timely notification to potentially affected States, as well as procedures for consultation at an early stage and in good faith with those States; (iii) underline the importance of immediate notification to States of any emergency that might produce sudden harmful effects on the environment of those States; (iv) recommend that States accept liability for adverse effects of environmental damage caused by activities within their jurisdiction, thereby providing a means of compensating innocent victims and of restoring the environment of the other State; (v) encourage States to adopt domestic

measures to provide for effective and non-discriminatory access to judicial and administrative proceedings, including redress and remedy; and (vi) stress, on the lines of principle 26 of the Rio Declaration, that States were to resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.

252. One representative further referred to the schematic outline adopted by the Commission, in which the principle of sic utere tuo ut alienum non laedas and the idea that the innocent victim should not be left to bear the burden of his loss were established as the guiding principles. According to him, it followed from those principles that the topic covered lawful activities and included a requirement to take measures to prevent damage. Similarly, the principle protecting the innocent victim necessarily implied compensation for loss that was not due to fault. In the light of the above, he found it surprising that some members of the Commission should express concern about the absence of a clear-cut division between the topic under consideration and that of State responsibility. In his opinion, a regime of strict liability was appropriate in this context and rejection of such a regime would constitute rejection also of the principle protecting the innocent victim. Strict liability, he further remarked, meant liability that arose other than from fault and did not imply full compensation for harm regardless of the circumstances or exclude the factors mentioned in paragraph 289 of the Commission's 1992 report; on the contrary, the compensation measures must emerge from negotiations between the parties in which those factors and perhaps others would be taken into consideration.

253. Another representative referred to the 1988 report of the Commission 10/ in which three principles were recommended to guide the work on this topic, namely: (i) the draft articles must ensure that each State had as much freedom of choice within its territory as was compatible with the rights and interests of other States; (ii) the protection of such rights and interests required the adoption of measures of prevention; and (iii) in so far as was consistent with those two principles, the innocent victim should not be left to bear his loss or injury. In the representative's view, those principles struck a good balance between the rights and corresponding obligations of States and should remain the foundation for the Commission's work.

254. Still another representative referred to what he considered to be one of the primary principles of the topic, namely that innocent victims should be adequately compensated, which dictated that the Commission should provide, to the extent possible and in the least costly manner, for the expeditious presentation and consideration of claims. It appeared to him that from that standpoint there was much to be said for greater recourse to the advisory jurisdiction of the International Court of Justice and additional insurance arrangements. The principal objective was in his view the speedy and adequate coverage of conceivable damage, rather than the determination of culpability.

10/ Official Records of the General Assembly, Forty-third Session, Supplement No. 10 (A/43/10).

While useful international legislation in that regard had already been concluded under the auspices of the International Maritime Organization in the aftermath of the Torrey Canyon and Amoco Cadiz incidents, much work on questions relating to the insurance and reinsurance of risks of catastrophic damage remained to be done, and it would be appropriate for the Commission to devote further consideration to those issues in due course.

255. Other suggestions were made in connection with the further examination of the topic, including the remark that the Commission should proceed on the basis of known concepts of tort law, where a close nexus between the source and the effect provided the basis for liability. Depending on the needs of the international community and the consensus available, exceptions could be made to the standard theory of liability by indicating expressly the circumstances and reasons for such deviations. It was also said that the idea of a civilized dialogue should underpin the basis of the topic, thereby making it possible to maintain a balance of interests among all the parties involved, and that the Commission had already identified the important components of such a dialogue, which included the requirement that States should assess potential transboundary harm, the regulation of activities capable of causing harm, the requirements of notification and information, prior consultation, alternatives to an activity with harmful effects and procedures for the peaceful settlement of disputes.

256. Some representatives regarded as too simplistic the notion that a State was to be held liable for transboundary effects of activities undertaken in its territory. They insisted that the Commission take into account factors such as the stage of economic development of the States involved, the importance of the activity to the economic development of the State of origin and the existence of possible alternatives. It was stressed in this context that special attention should be paid to the situation of developing States where most of the activities with transboundary harmful consequences were carried out by multinational corporations. The comment was made that since those States usually lacked the necessary scientific and technological know-how and the financial means to control or regulate the activities of multinational corporations, it was important to envisage in the future instrument on the topic the possibility of transferring resources, particularly financial resources, to financially weaker and developing States in order to enable them to organize their economic plans and their practices in an environmentally friendly manner.

257. The relationship between the topic under consideration and that of State responsibility was also mentioned as an element to be borne in mind. The hope was expressed that the distinction between the two topics would become clearer as the work progressed. It was noted that some of the conceptual problems involved were due to an overlap with State responsibility and that by expediting its work on State responsibility the Commission would in fact facilitate progress on the current topic.

(c) Comments on the liability and prevention aspects

258. Some representatives took the view that liability was not premised on the wrongfulness of the act causing the damage. In support of this position reference was made to principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration, under which it was unnecessary, in determining the question of liability, to establish that the act causing the damage was wrongful. For the representatives in question there was no theoretical difficulty with a legal regime recognizing that, even if certain types of harm might not be the result of an unlawful act, compensation might still be required by law, as was the case in relation to the nationalization of property. In this context one representative, while supporting the idea of introducing a regime of international liability based essentially on the occurrence of transboundary harm resulting from a dangerous activity, warned that a regime of objective liability should not go so far as to impose on the State of origin a primary obligation of reparation, and that liability should be invoked only when the author of the harm suffered did not comply with its duty to make reparation.

259. Some representatives commented on the hypothesis put forward by the Special Rapporteur in paragraph 18 of his eighth report (A/CN.4/443), to the effect that significant transboundary harm caused by activities with harmful effects was, in principle, prohibited by international law, and that an activity of that type could exist only if there was some form of prior consent of the affected States. The remark was made in this context that in the course of its work on the topic the Commission must reach a conclusion on the issue of whether international law prohibited in principle activities that caused significant transboundary harm. If such a prohibition were to be found to exist, the matter should be dealt with under the topic of State responsibility and not separately. Also in connection with the possible overlap between the topic under consideration and State responsibility, it was suggested that the articles on the prevention of transboundary harm be drafted in terms of recommendations, on the understanding that the State's fundamental obligations with regard to the control of hazardous activities carried out within its jurisdiction, as well as with regard to the requirements of notification, information and consultation with affected States or potentially affected States would be spelt out concisely and clearly.

260. The remark was further made that the Special Rapporteur's hypothesis referred to above, which entailed a transition from the concept of liability to that of responsibility for wrongful acts and made prior consent merely a circumstance precluding wrongfulness within the meaning of article 29 of Part One of the draft articles on State responsibility, would lead to more problems in that reparation for harm caused by an activity involving risk which was carried out without the prior consent of the affected State would in consequence fall under the rules of State responsibility for wrongful acts. The harm itself, however, might arise even when prior consent had been given: in such a case the question of compensation would no longer be subject to the rules on State responsibility, but would fall within the purview of liability. As an alternative it was suggested that the obligation to compensate for harm

caused by an activity involving risk be based on the principle of equity, namely the principle that the innocent victim should not be left to bear the loss.

261. Several representatives suggested that the Commission should make a distinction between activities carried out by private operators and those by States and should determine whether such a distinction made any difference in their corresponding obligation to make reparation in case of transboundary harm - an approach which, it was stated, was consistent with principle 21 of the Stockholm Declaration and principle 13 of the Rio Declaration. In their view, while the State had some important functions to perform through its legislative, executive and judicial bodies in setting standards in that field, it should not be automatically held liable for damage which might occur as a result of activities undertaken within its territory. Such liability should basically lie with the operator. Where the operator or his insurance could not compensate in a reasonable manner for the damage caused, additional compensation could be provided from other funds established by contributions from the operator or the State. In this regard, reference was made to the Special Rapporteur's proposal envisaging a set of rules calling on States to take unilateral measures of prevention by adopting regulations relating to their industrial or other activities likely to cause transboundary harm, and another distinct set of rules establishing the civil liability of private operators. It was noted that this approach deviated from the mandate given to the Commission, but deserved attention since currently, under the conventions in force regarding liability, primary liability in the case of harm was borne by the operator.

262. The suggestion reflected in the previous paragraph was opposed by some other representatives on the ground that the application of the principle sic utere tuo ut alienum non laedas internationally represented a balance between the sovereign rights of States: on the one hand, the right of any State to engage in lawful activities in its territory without being answerable to another State; and on the other hand, the right of any State to enjoy the benefit of its amenities without their being diminished by activities, including lawful activities, of another State. The advisability of envisaging a legal regime based on the liability of the operator rather than that of the State was questioned, as was also the possibility of guaranteeing adequate compensation under all circumstances to the innocent victims through civil liability and insurance schemes, however valuable they were. It was furthermore considered inappropriate to incorporate in the topic an element of private international law which might also give rise to issues of State immunity by departing from inter-State relations.

263. As regards prevention, the remark was made that the regime of prevention should be applied only to activities which risked causing transboundary harm and not to those which, in the normal course of events, actually caused, or had already caused, transboundary harm. It was also stressed that in drafting the articles dealing with prevention the focus should be on determining minimum standards and the degree of vigilance required of States conducting activities involving risk. Further comments on the issue of prevention were

made in the context of the Special Rapporteur's proposed articles and are covered in paragraphs 264 to 271 below.

2. Comments on specific draft articles as proposed by the Special Rapporteur

264. In connection with article 1 on preventive measures, the importance of assessment and prior authorization for activities with possible transboundary harm was acknowledged. It was emphasized that authorization should be granted only after an assessment of the activity in question had been made and the operator had obtained proper insurance for the said activity. The granting of permission to conduct the activities concerned should not be viewed as an exclusively internal matter.

265. In one representative's view, the provisions on authorization and assessment were self-evident and in keeping with State practice. The fact was that the environment, life and property of the citizens of the State of origin were the first to be affected and that States normally permitted activities involving risk only with their prior authorization and set standards for assessing the potential socio-economic and environmental impacts. According to that representative the need for article 1 was therefore questionable. Another representative felt that it was not superfluous to remind States that the occurrence of transboundary harm resulting from dangerous activities carried out under their jurisdiction or control might entail their liability, which was a corollary of sovereignty.

266. As regards the drafting of article 1, the suggestion was made to remove any impression that the article authorized interference in the internal affairs of States, and to clarify the purpose of the article, which was that due diligence should be observed by the wrongdoing State.

267. Some representatives endorsed the principle of notification and information embodied in article 2 as fundamental to the draft articles and consistent with the requirements of the internal law of their respective States. The involvement of international organizations in determining the impact of harmful activities was also viewed as a positive idea, consistent with the Convention on Biological Diversity of 5 June 1992. It was suggested that article 2 be couched in mandatory terms.

268. Other representatives found article 2 impractical. One of them observed that if an activity had a risk of significant transboundary harm it amounted to a wrongful act and the State of origin should refrain from conducting it anyway. He found it unreasonable to expect a State to refrain from undertaking lawful activities because its assessment of those activities revealed possible transboundary harm, particularly in cases where such activities were considered essential to the development of that State and where there was no alternative. Another representative noted that in practice, with respect to certain types of activities, the State of origin would make a point of declaring certain areas situated beyond the jurisdiction

of States to be off limits for a specific period of time in order to avoid injurious consequences. The remark was also made that the principles of notification, consultation, negotiation and settlement of disputes concerning an environmentally "dangerous" activity had not been convincingly treated by the Commission. These principles, it was stated, should be discarded where they entered into conflict with other equally important concepts of international law (such as sovereign equality of States and sovereignty of States over their people, territory and natural resources) inasmuch as most of them, instead of facilitating cooperation, could easily engage States in disputes.

269. The exception provided in article 3 was considered to be justified and useful, provided States did not abuse it. One representative expressed concern that the article appeared to offer a loophole for States to escape from the obligatory preventive regime. He suggested that the concepts of "national security" and "industrial secrets" should be duly qualified and that the latter part of article 3, referring to information, should be strengthened so as to establish a proper balance between the imperatives of security and the provision of data and information pertaining to transnational harm.

270. Some representatives found the purpose of article 4 unclear. In their view, if a State envisaging activities involving risk chose not to notify its neighbours of its intention it could hardly be expected to consult the States likely to be harmed by those activities, and if the transboundary harm arising from an activity was of a purely cumulative nature it would then be not so much a matter of consultation as one requiring international cooperation and good faith.

271. Other representatives considered article 4 to be the cornerstone for preventive measures. One of them, after stating that the aim of the prior consultations provided for in articles 4, 5 and 7 should be to obtain the agreement of the affected State on a regime governing such activities, voiced disagreement with the view expressed in the Commission that the term "consultation" was very often used in cases where there was no obligation to obtain consent and with the claim that article 4 nullified article 5, concerning alternatives to an activity with harmful effects. He suggested that a second paragraph be added to article 5 to the effect that if the operator did not put forward alternatives which made the activity acceptable, the State of origin was obliged to withhold authorization. Another representative, while sympathetic to this view, observed that the suggested provision would give a virtual veto to other States over a presumably lawful activity intended to be carried out in one State. He wondered whether States were currently ready to accept such a far-reaching limitation of their sphere of action.

272. As regards article 6, one representative stated that, without seeking to attenuate the need for prevention, care must be taken to ensure that the proposed text did not lead to imposition of a systematic requirement for any State envisaging an activity involving risk to consult all States potentially affected, thereby unjustifiably conferring the right to veto dangerous

activities undertaken in the State of origin on any State claiming to be exposed to risk, and conferral of such a right was found unwarranted.

273. The same reservation, it was noted, applied to article 7, which was intended to grant a potentially affected State the right to request consultations or even negotiations with the State of origin. Also criticizing the article, one representative remarked that the obligation set forth in the last part of the text and the reference to article 2 were of little value and that it would be preferable to incorporate the question of initiative by the affected States into article 6, instead of devoting a separate provision to it. Another suggestion was made to delete the requirement in the last sentence, as it might produce an effect contrary to what was intended.

274. Article 8 on settlement of disputes was considered by some representatives to be a useful provision which helped the position of those favouring mandatory articles on the topic. At the same time it was noted that a suitable settlement procedure should preserve the right of each party to appeal unilaterally to a third party in the event of the failure of negotiations and that the decisions of the third party should, if possible, be binding.

275. Article 9 was found to serve a useful purpose in setting forth the criteria for assessment of the rules on prevention and the degree of vigilance required of States conducting activities involving risk. While the remark was made that the article, although too important to be put in the commentary, could be moved to an annex, attention was drawn to the fact that in the draft on the law on the non-navigational uses of international watercourses a similar article (article 5) was kept in the text itself. It was also noted that the article should be in the nature of guidelines allowing States to apply also additional criteria, depending on the activity undertaken or envisaged.

276. As regards the new proposed definition of risk, the observation was made that it was difficult to reach an agreement on the use of qualifying terms such as "appreciable", "substantial" and "significant" before agreement was reached on the content of the articles. In this connection, emphasis was placed on the need to distinguish between activities that posed a risk and those that had a harmful effect in their normal operation. One representative suggested that the definitions of risk and damage be simplified, keeping only the essentials and relegating the non-essentials to the commentary. Another representative found the new definitions of "risk" and "harm" too restrictive. As for the definition of "transboundary harm", one representative suggested that it be expanded to include damage to the so-called "global commons". It was also noted that the definition of damage was largely based on the one used in the draft convention on civil liability for damage resulting from environmentally dangerous activities, and constituted an excellent starting-point for the Commission's future work.

3. Comments on the relevant decisions taken by the Commission at its forty-fourth session

277. While many representatives expressed the hope that the Commission's decisions in respect of the future work contained in paragraphs 341 to 349 of its report would make it possible to achieve considerable progress on the topic, the substance of those decisions gave rise to various views.

(a) Scope of the topic

278. There was broad agreement that the topic should, as the Commission has decided, include both prevention of transboundary harm and compensation for harm caused. The remark was made that since one of the objectives of the Commission's work was to provide a legal framework for the regulation of various activities, it would be difficult to justify the absence of any rules concerning preventive measures, whether unilateral or procedural, to which States had devoted so much time and effort in the field of the environment. It was also recalled that the work on the topic had begun as an offshoot of the work on State responsibility, and that the two topics were still interlinked. As a result, the current drafting exercise had a twofold objective: on the one hand, to prevent damage and to provide reparation when damage had occurred; and on the other, to agree on a framework for guaranteeing that innocent victims, whatever legal subjects they might be, were protected from the consequences of transboundary harm, and that prompt and adequate compensation was made for damage.

279. Some representatives expressed disappointment with the view, reflected in paragraph 344 of the Commission's report, that a final decision on the scope of the topic would be premature. They noted that the topic had been under consideration in the Commission for 13 years and found it inappropriate, at the current stage, to adopt a piecemeal approach, leaving under a cloud of uncertainty the full development which it was intended to give to the articles. In their opinion, it would be difficult for the Commission to reach agreement on substantive articles, and particularly those on prevention, before it had determined what activities would be covered.

280. The Commission's decision to limit itself at the current stage to the consideration of preventive measures in respect of activities involving a risk of transboundary harm was supported by several members. Some noted that at the current juncture work on the topic was concerned, on the one hand, with questions relating to prevention - in other words, a kind of code of conduct for activities which might cause or were causing transboundary harm - and on the other, with the question of liability itself in the event of harm. Bearing in mind the need to separate the issues involved so that the Commission could deal with them one by one, these representatives approved the Commission's decision to first focus on activities involving a risk of causing transboundary harm, leaving until later consideration of activities which did in fact cause harm. Proceeding on a step-by-step basis was viewed as having other advantages, including that of making the Commission's work more productive and making it easier to reach agreement on the substance of the

articles and, if necessary, to draft different legal instruments for preventive measures and liability. The approach selected was also praised as enabling the Commission to achieve an even more precise definition of the cases in which liability for risk could be envisaged. In this context one representative noted that in the Commission's view remedial measures covered measures designed to mitigate the harm, measures intended to restore the conditions which existed prior to the occurrence of the harm, and pecuniary compensation. He took the view that the Commission should indicate more clearly the need for a distinction, with regard to the second part of the question, between the possible - and no doubt residual - liability of the State and that of the operator.

281. Some representatives, while supporting the decision referred to above, felt that the Commission should have limited the concept of activities with risk even further by including therein only those involving ultra-hazardous activities, or activities involving exceptional risk. They took the view that the Commission would have facilitated its work by narrowing the scope of the topic and that the further it strayed from a strictly circumscribed ground, the more it ran the risk of discussing, on the one hand, activities prohibited by international law, thus trespassing on the area of State responsibility, and on the other, activities which did not entail a risk of significant harm.

282. Other representatives questioned the Commission's decision to distinguish, in its treatment of preventive measures, between activities involving risk and those which caused harmful effect in their normal operation. They maintained that in practical terms the obligation of prevention did not differ greatly in the two situations and that the elaboration of a single set of rules would simplify the draft and eventually facilitate the application of the future regime of international liability. It was noted that if an activity which caused harm was to give rise to preventive obligations on the part of the State of origin, the harm must be foreseeable, and that if the harm was foreseeable then the activity was one involving risk. The likelihood or certainty of the harm should be one of the factors which triggered the preventive obligations, along with other factors such as the magnitude and reversibility of the harm. The remark was also made that once remedial measures had become necessary, the activity was to be considered not as creating a risk of causing transboundary harm, but as causing harm. Remedial measures should apply to all situations in which transboundary harm was caused, whether or not the risk of such harm being caused was known to exist.

283. One representative further observed that the topic related to two fundamentally different situations which required a different approach. In one situation, it was a question of hazardous activities which involved a risk of disastrous consequences in case of accident but did not have adverse impacts in their normal operation. By its very nature, liability in such a situation must be absolute and strict, permitting no exceptions. However, in his view, the Commission must also envisage a fundamentally different situation: transboundary and long-range impacts on the environment. In that case, the risk of accident was only one, and even a minor, aspect of the

problem. It was the normal operation of some activities that caused prejudice to the environment of other States. Moreover, that harm was not produced by a single, identifiable source, as in the case of hazardous activities; there was a multitude of sources which produced harmful effects through their accumulation. Liability therefore had two distinct functions: in the case of hazardous activities, it must cover the risk of an accident, but it must also - and that was its essential function - cover significant harm caused in the territory of other States through normal operation. Liability for risk must thus be combined with liability for a harmful activity.

284. With regard to the next stage of the work, namely the stage of elaboration of articles on the remedial measures to be taken when activities creating a risk of causing transboundary harm had caused transboundary harm, various views were expressed.

285. According to one view, it was correct to deal sequentially with the question of prevention and that of remedial measures for transboundary harm caused by activities not prohibited by international law because the two questions raised distinct problems which were not from the legal standpoint conjoined. Indeed, the former might be considered to fall outside the scope of the topic, if non-compliance with preventive rules entailed State responsibility.

286. According to another view, the wisdom of the order of priorities recommended by the Commission was questionable, bearing in mind the importance of the question of determining when a State had an obligation to provide remedy for damage. Regret was therefore expressed that the Commission should focus on the issue of prevention rather than on reparation and compensation for injury, since the issue of prevention was relevant to the core issue of liability in only a limited number of cases. With the existing order of priorities, the Commission could well lose sight of the primary objective of the topic, which was the elaboration of a regime of reparation, with appreciable harm as the primary factor triggering liability.

287. One representative also observed that, while the Commission's decision would help to confine the scope of the work to be done to a manageable size, it was likely to have certain consequences. For example, if preventive obligations were to be established, there was no reason why the normal rules of State responsibility should not apply to breaches of those obligations, in much the same way as they applied to harm caused in breach of customary international law. Likewise, if a State failed to observe an obligation to consult or notify another State but no transboundary harm actually resulted, there was still an international wrong, but with somewhat different consequences which could be dealt with under the normal rules of State responsibility.

(b) Nature of the instrument to be drafted

288. Some representatives welcomed the Commission's decision to defer a final decision on the nature of the instrument to be drafted. The remark was made that such a decision would allow the Commission to retain a flexible approach and that agreement on questions of substance would help in finding adequate solutions with regard to the legal nature of the norms to be worked out. The Commission, it was stated, should be concerned primarily with the current and future needs of the international community and with the contribution the draft articles could make to the codification of international law.

289. Other representatives questioned the wisdom of delaying the decision in question. They saw merit in determining at an early stage whether the aim was to establish obligations or recommendations. In the former case, a considerable effort would be required both to establish the scope of the obligations in question and their content and to examine their acceptability to States. In the latter case, it would be possible to be more general, and perhaps bolder, while remaining reasonable, as it would be the responsibility of States themselves to implement the proposed line of conduct, depending on the circumstances in each case.

290. Some representatives considered that in the current state of international law on the topic, the most useful and constructive approach the Commission could adopt would be to prepare something in the nature of a code of principles that might contain variants, to which States could refer when establishing specific regimes of liability in treaties. The Commission, it was stated, should direct its efforts towards developing non-binding provisions for the draft as a whole: only when a consensus among the members of the international community on the substance of such provisions seemed to be emerging would an effort to lay down binding rules have a reasonable chance of success.

291. Other representatives insisted that a binding instrument be drafted on the topic; while realizing that the development of the law concerning international liability for injurious consequences arising out of acts not prohibited by international law was fraught with difficulties, they felt that the Commission should nevertheless be able to provide the solutions required by the international community. Some of these representatives advocated a binding treaty providing for obligations even on prevention, and considered anything short of a treaty to be a futile exercise. The remark was made that nothing prevented the inclusion of primary rules in the draft articles, and that matters such as the immunity of States from jurisdiction in the courts of other States could be resolved.

292. Still other representatives, while supporting in principle the elaboration of a binding instrument, took the view that, bearing in mind the complexity and urgency of the topic, there was merit in having the Commission elaborate a "declaration", a "statement of principles", or "guidelines" at the current stage in order to facilitate consensus. The early development of such guidelines or statements of principles would assist in the further analysis of

the issue in the many forums where it was currently under consideration. Those representatives did not share the concern that the elaboration of a declaration or statement of principles could prejudice later steps that could be taken by the Commission to draft a binding instrument. They noted many important precedents in the field of international law where a codification of legal rules had begun with the establishment of a declaration of principles, a manual or a memorandum of understanding. Their concern was rather that confusing, and perhaps even contradictory rules would develop if no general guidance was soon made available.

(c) Title of the topic

293. The Commission's decision to keep things unchanged until it was prepared to make a comprehensive recommendation on the reformulation of the title of the topic was welcomed by some representatives. One representative proposed the title "International responsibility for transboundary harm". Such a straightforward title would, in his opinion, help to resolve the conceptual difficulties that had plagued the Commission over the years.

E. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

1. Programme of work of the Commission

294. A number of representatives took note with satisfaction of the planning of the Commission's activities for the current term of office of its members, which provided for the completion of the first reading of the draft articles on the law of the non-navigational uses of international watercourses and of the draft Code of Crimes against the Peace and Security of Mankind and for the completion of the first reading of the draft articles on State responsibility and also envisaged substantial progress on the topic "International liability for injurious consequences of acts not prohibited by international law".

295. Several representatives stressed the importance of making room in the current programme of work for the question of the establishment of an international criminal jurisdiction, which they viewed as a priority one. Referring to the Commission's decision to devote the first two weeks of its next session to concentrated work in the Drafting Committee on the topic of State responsibility, one delegation expressed concern that the urgency attached to the preparation of a draft statute for an international criminal court might disturb those plans.

296. The said decision of the Commission was on the other hand hailed as a wise one and the view was expressed that the two aforementioned questions should occupy an equally prominent place on the Commission's agenda and that completion of the work in both areas would be a valuable contribution to the United Nations Decade of International Law. The task, it was stated, could be completed by 1996 provided that priorities were re-examined and the work on other topics phased or even postponed, each case being judged against the

criterion of the likelihood of achieving concrete results within a reasonable period of time.

297. The decision of the Commission not to continue consideration of the second part of the topic "Relations between States and international organizations" during the term of office of its members generally met with approval, inasmuch as the topic did not seem to correspond to any pressing need on the part of States or international organizations. One representative moreover remarked that the prospects for the adoption of a further instrument in the area under consideration might give cause for concern in view of the fact that the number of ratifications of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character remained extremely limited. While welcoming a decision which would enable the Commission to concentrate all its efforts on the other topics currently before it, he remarked that the considerable work accomplished by the two Special Rapporteurs would provide ample and instructive material for States and international organizations. Another representative, while also endorsing the said decision, expressed the hope that the Commission would shortly decide to consider the question of the legal status, prerogatives and immunities of international civil servants, since the application by analogy of the Vienna Convention on Diplomatic Relations had created difficulties and had led to the commission of legal errors by ministries of foreign affairs which could have been avoided had specific norms on the matter existed.

298. As regards the topic "The law of the non-navigational uses of international watercourses", the appointment of Mr. Robert Rosenstock as Special Rapporteur was noted with satisfaction. Several representatives insisted on the importance of the topic, and the hope was expressed that the draft articles, the first reading of which had been completed in a relatively short time, thanks, in particular, to the diligence of Mr. Rosenstock's predecessor, could be adopted on second reading in 1994, as envisaged by the Commission. Attention was drawn in this context to the Commission's request for the written observations of Governments on the draft articles.

299. Commenting on the substance of the draft articles, one representative insisted on the need to maintain a proper balance between the rights and duties of watercourse States. She stressed that the draft should be limited in scope to international watercourses and should provide a clear definition of that term, rather than refer to the vague concept of "system of surface and underground waters". She further remarked that if the purpose of the draft was to enable watercourse States to enter into watercourse agreements, then its provisions should be illustrative and general. Commenting on the obligations of watercourse States under the draft, she said that the obligation to negotiate in good faith for the purpose of concluding an agreement with respect to a project which might adversely affect one or more other watercourse States should not have the effect of preventing the execution of such a project and that the obligation to cooperate in order to attain optimal utilization and adequate protection of an international watercourse should be binding on all watercourse States; as for the obligation

not to cause appreciable harm, it should apply only with regard to activities directly or indirectly carried out by them, and not to damage resulting from external factors. The same representative held the view that notification concerning planned measures with possible adverse effects, the period for reply to notification, the reply to notification or the absence thereof and the establishment of a joint management mechanism were matters which should be decided on by watercourse States themselves by means of agreements.

300. With reference to the topic "Draft Code of Crimes against the Peace and Security of Mankind", emphasis was placed on the importance of the Commission's work in view of the situation in the former Yugoslavia and the fact that there was currently no international criminal jurisdiction to try war criminals.

301. As regards the Commission's long-term programme of work, several members commended the procedure devised by the Commission to identify new topics which could be recommended to the General Assembly for inclusion in its future agenda. Some, however, struck a note of caution in this respect. Thus, the view was expressed that proposals for new subjects should be thoroughly discussed within the General Assembly. Emphasis was furthermore placed on the decisive input of Governments in the selection of new topics. Reference was also made to the Commission's current workload and to the need to take into consideration the likelihood of achieving concrete results before the end of the current term of office of the members.

302. Commenting on the general criteria which should govern the selection of topics, some representatives emphasized the need to respond to the pressing needs of the international community, to be guided by practical rather than theoretical concerns and to take into account the time factor. The remark was further made that it was important to determine in advance whether the topic was really ripe for codification and if the end-product was likely to be accepted by the international community so as to avoid asking a group of eminent international lawyers such as the members of the ILC to work intensely for more years to no purpose. One representative stressed that, if the Commission was to reclaim its role as the principal body responsible for the progressive development and codification of international law, it must be given a new impetus by the Sixth Committee and be assigned topics which transcended the traditional boundaries of international law.

303. Some representatives singled out specific topics which in their view were worthy of consideration by the Commission. One of them drew attention to the existence of a number of conventions codifying or developing international law which, although formally adopted, had not come into force; he cited as examples the Convention on Special Missions and the Convention on the Representation of States in their Relations with International Organizations of a Universal Character as well as the two Conventions on state succession. Another representative reiterated his delegation's proposal that the Commission should consider the feasibility of studying the legal aspects of the new international economic order, with a view to codifying the doctrine of permanent sovereignty over natural resources and strengthening the Charter of

Economic Rights and Duties of States - a question which in his view was at the heart of current international controversies. A third representative mentioned questions relating to the succession of States, with particular reference to international organizations and the nationality of natural and legal persons, as well as the question of the implementation of United Nations resolutions - the latter having, in his opinion, assumed still greater importance following the recent Security Council decisions, which were binding on States and should be implemented rapidly. Also referring to the question of the implementation of United Nations resolutions and the legal consequences arising out of their non-implementation, as well as to the question of the legally binding nature of Security Council resolutions, in the context of Article 25 of the Charter and of the advisory opinion of the International Court of Justice on Namibia, one representative recalled that over a period of years his delegation had requested the inclusion in the agenda of the General Assembly of an item on the implementation of United Nations resolutions, adding that this item appeared on the agenda of the current session and should be given more concrete content. The same representative noted that the consideration of the Commission's long-term programme of work provided the opportunity to include among the items to be considered in due course the question of the content of the notion of jus cogens or peremptory norms of international law, a notion which had been established in 1969 by the Vienna Convention on the Law of Treaties. He remarked that on the basis of the Commission's findings, which could be included in a report or study, and not necessarily take the form of a draft convention, the representatives of States would have the possibility to express their views, either in the Sixth Committee or through written comments, thereby helping the process of giving exact legal meaning to a principle solemnly accepted and embodied in the above-mentioned Convention. He added that in the absence of such a definition the principle could mean a great deal to some and very little to others, a phenomenon that was not conducive to the objectivity which should characterize a legal principle.

2. Working methods of the Commission

304. Several representatives welcomed the Commission's efforts to streamline its work and increase its efficiency.

(a) Drafting Committee

305. The guidelines adopted by the Commission at its last session on the composition and methods of work of the Drafting Committee, whose role was described as essential, were viewed as very opportune. One representative, however, noted that under those guidelines the working languages would be represented in the Drafting Committee "to the extent possible". He questioned this approach in view of the differences in terminology between the different languages and the consequent need to ensure that all languages were represented in the Committee.

306. The Commission's decision to devote the first two weeks of its next session to concentrated work on State responsibility in the Drafting Committee was also hailed as a wise move which would allow for decisive progress in the first reading of the draft articles on the topic.

(b) Format of the Commission's report

307. Several representatives took note with satisfaction of the guidelines adopted by the Commission for improving the preparation and content of its report. The Commission's intention to give emphasis in the summary of debates to trends of opinions rather than to a detailed recording of individual opinions was viewed as particularly commendable, as was also its intention to avoid the presentation of fragmentary results achieved in the consideration of a topic or an issue. A number of representatives considered the current year's report as particularly satisfactory, praising its brevity, professionalism, style and clarity of presentation.

(c) Pattern of meetings

308. There was no disagreement with the Commission's decision to defer consideration of the question of dividing its annual session into two parts. Some delegations, however, expressed the hope that the question would be reconsidered in a positive spirit, at the appropriate stage.

3. Contribution of the Commission to the United Nations Decade of International Law

309. Several representatives noted with satisfaction that the Commission had considered the question of its contribution to the United Nations Decade of International Law. The remark was made in this connection that, by its very nature and functions, the Commission should play a major role in the achievement of the objectives of the Decade, and was actually doing so through its normal work.

310. The idea of preparing a publication presenting an overview of the main problems of international law on the eve of the twenty-first century was endorsed by several representatives. One of them stressed, however, that budgetary considerations might be an obstacle. Another representative wondered whether the project was not overambitious and suggested that a more modest theme be chosen.

311. Interest was expressed in the idea of holding a conference on international law. Attention was also drawn to the possibility of taking better advantage of the extensive experience and knowledge of the Commission's members by encouraging them to participate in the work of national associations of international law.

312. Other comments included the remark that a study of ways and means of improving the effectiveness of international law might be of practical use to

the international community and the suggestion that, in the context of the Decade, the Commission pay special attention to its own function, which was to see to the progressive development and codification of international law, and propose firm measures to strengthen and improve that function in terms of both quality and quantity.

4. Cooperation with other legal bodies

313. Some representatives encouraged the Commission to continue an important activity which it had so far pursued with great efficiency, namely cooperation with regional legal organizations, in particular the European Committee on Legal Cooperation, the Asian-African Legal Consultative Committee and the Inter-American Juridical Committee. One of them expressed the view that there was still scope for closer cooperation with other groups, such as the Movement of Non-Aligned Countries and the Commonwealth.

5. International Law Seminar

314. A number of representatives stressed the importance of the International Law Seminar, which was described as a highly valuable institution for the training of young international lawyers, in particular from developing countries. The hope was expressed that the United Nations Decade of International Law would prompt more Governments to make a financial contribution to the Seminar so that its scope could perhaps be expanded and the number of fellowships increased.
