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## REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (1993)

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

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## INTRODUCTION

1. At its forty-eighth session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 24 September 1993, to include in the agenda of the session an item entitled "Report of the International Law Commission on the work of its forty-fifth session" 1/ (item 143) and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 17th to 28th meetings and at its 38th meeting, held from 25 October to 5 November and on 29 November 1993. 2/ At the 17th meeting, the Chairman of the Commission at its forty-fifth session, Mr. Julio Barboza, introduced the report of the Commission. At its 38th meeting, on 29 November, the Sixth Committee adopted draft resolution A/C.6/47/L.11, entitled "Report of the International Law Commission on the work of its forty-fifth session". The draft resolution was adopted by the General Assembly at its 48th plenary meeting, on 9 December 1993, as resolution 48/31.

3. By paragraph 14 of resolution 48/31, 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-eighth 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 five sections (B to F), corresponding to chapters II to VI of the report of the Commission.

## TOPICAL SUMMARY

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

5. Emphasis was placed on the role of the Commission within the context of present-day international relations. In this connection the remark was made that the period of transition the world was undergoing should restore international law to its proper place as the ultimate point of reference for regulating peaceful coexistence and cooperation among States. On the threshold of the new millennium, the Commission must play an exemplary role.

6. The quality of the work accomplished at the last session was generally recognized and the Commission was congratulated for having managed to produce an enormous amount of high-level work by means of small working groups. It was said in particular that, following a well-established tradition, the report was

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1/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10).

2/ Ibid., Sixth Committee, 17th to 28th and 38th meetings.

excellent and reflected the Commission's thorough and serious consideration of a set of complex and important topics. Among those topics, a number of representatives singled out the draft Code of Crimes against the Peace and Security of Mankind and the question of an international criminal court.

7. Commenting on the respective roles of the International Law Commission and the Sixth Committee, one representative said that the latter was called upon to provide the General Assembly with the required policy guidelines, while the detailed analysis of issues and drafting work should be left to the Commission.

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

General observations

8. Most delegations welcomed the progress made by the Commission's Working Group in drafting a statute for an international criminal tribunal. They commended the Working Group for its speed in complying with the Commission's new mandate conferred by the adoption of General Assembly resolution 47/33 of 25 November 1992 and its success in presenting a high-quality draft statute for an international criminal tribunal in a very short period of time. The draft, it was said, had been well prepared, was useful and very timely, and had given an old dream concrete form. With it, it was also said, the Commission had moved from the realm of academic debate to concrete drafting. Satisfaction was furthermore expressed at the fact that research and publications of various specialized bodies and as well as individual contributions had been used in the preparation of the draft.

9. The debate revealed two main trends as regards the idea underlying the draft statute of establishing an international criminal tribunal available on a permanent basis to the international community. According to one body of opinion, this idea deserved full support. It was pointed out that the lack of a sanctions system to be applied effectively against individuals who had perpetrated very serious international crimes was a serious shortcoming in the current international legal order. The remark was made in this connection that the goal of furthering peace and security between States and justice for individuals could be achieved only through legal instruments that were fair, effective and acceptable to all. It was therefore deemed very appropriate that the Commission should be set on a practical course which would culminate, in a reasonably near future, in the establishment of an international criminal tribunal before which persons accused of defined international crimes might be brought to trial, thereby filling a lacuna highlighted by recent events and saving the international community from the frustration of seeing appalling crimes go unpunished because of the lack of a jurisdiction to enable the trial of those accused of such crimes.

10. One representative noted that, although, since the end of the Nürnberg trials, the debate surrounding an international criminal jurisdiction had mostly taken an academic and debatable turn, from 1990 onwards the increase in brutal local conflicts involving disregard of the laws of war and humanitarian principles had aroused public opinion in many countries. He observed that

although it was true that barbarity had always existed, it was no less true that impunity for the guilty was no longer acceptable. In his view, therefore, the establishment of an international criminal jurisdiction, although it would not fully satisfy those with the most exacting consciences, was a step forward in achieving respect for the rule of law and a better lot for the victims of conflicts. He added that the work begun years before by the International Law Commission to establish an international criminal jurisdiction was yielding its first results, which proved convincingly that the difficulties in establishing an international court could be overcome.

11. Another representative noted that the concept of a permanent international criminal tribunal, despite its underlying difficulties which must be appropriately resolved, was an important one whose consideration should be continued, inasmuch as, in certain instances, egregious violations of international law might go unpunished for lack of an effective national forum for prosecution.

12. The fact that on 25 May 1993 the Security Council, by its resolution 827 (1993) of the same date, and acting under Chapter VII of the Charter of the United Nations, had decided to establish an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 was mentioned by several delegations as a precedent to be considered in evaluating the work carried out by the Commission.

13. To some delegations the establishment of the above-mentioned Tribunal had strengthened the conviction that a permanent international criminal tribunal should be established by way of an international convention. It was noted in this connection that the establishment of the ad hoc Tribunal concerning the former Yugoslavia had had a number of political implications: first, it allowed for the prosecution of international crimes which, in the absence of such a tribunal, might give rise to threats against international peace and security; secondly, the establishment of the Tribunal had underlined the urgent need for a mechanism to prevent such situations from building up; thirdly, the process of establishing the ad hoc Tribunal underscored the need for a permanent court. In this connection, the remark was made that although the bodies involved had acted with admirable efficiency and speed, the ad hoc Tribunal for the former Yugoslavia had not been able to open its proceedings for some time and that it would be a mistake to assume that emergency measures such as those contained in Security Council resolution 827 (1993) provided an answer to the underlying problem, namely the general lack of prosecution of international crimes. That lacuna, it was stated, needed to be filled by a permanent tribunal, which would not need to meet all the time but could be convened when necessary. Along the same lines, one representative stressed that although his country had been a major proponent of the above-mentioned ad hoc Tribunal in order to deal with a specific situation, it had to be recognized that the process of establishing ad hoc tribunals was time-consuming and could diminish the capacity for prompt action in such cases.

14. Somewhat different conclusions were however drawn by another representative regarding the relationship between the establishment of the ad hoc Tribunal for the former Yugoslavia and the work carried out by the Commission on the creation

of a permanent international tribunal. This representative felt that, in view of the establishment of the above-mentioned ad hoc Tribunal, consideration should be given to the appropriateness of establishing a permanent international jurisdiction as long as it was possible for the Security Council to set up a Tribunal almost immediately to deal with a particular conflict, if necessary, on the basis of the statute of the Tribunal for the former Yugoslavia or using another statute as a model. In this connection, and referring to views reflected in paragraphs 54 and 55 of the Commission's report, he found it unfair for ad hoc courts to be suspected of failing to adhere to standards of objectivity and impartiality simply because they had been a preferred tool of despotic regimes; on the contrary, such an innovative and revolutionary institution could only be successful if it met a need of the victims of crimes resulting from international conflicts and of an increasingly demanding world public opinion. He further remarked that instituting a permanent and effective international criminal jurisdiction would require several attempts, which would not always yield satisfactory results, and he therefore concluded that for the time being the debate between the advocates of a permanent jurisdiction and those of a special occasional court could not be resolved.

15. As regards the relationship between the Commission's work on the draft statute and the elaboration of a draft Code of Crimes against the Peace and Security of Mankind, some delegations called for the speedy elaboration of an international judicial system irrespective of the progress achieved on the draft Code and favoured detaching the statute of the court from the draft Code. One representative in particular insisted that work on the draft Code and on the draft statute should continue their separate ways, especially since, in his view, the current version of the draft Code was very controversial and consequently no agreement might be reached on it for a long time to come. Another representative shared the view that the elaboration of a draft statute was more urgent than the question of the draft Code of Crimes but added that, once the Code was adopted, the crimes covered therein should be placed under the proposed court's jurisdiction.

16. Other delegations considered it essential for the smooth functioning of the international criminal tribunal to complete the work on the draft Code as an indispensable additional instrument which substantially clarified the court's jurisdiction ratione materiae. It was noted in this connection that although the statute drawn up by the Commission was separate from the work on the draft Code, both projects should continue to be pursued with all speed. The remark was also made that while the establishment of the Tribunal was not dependent on the adoption of the Code, the latter's entry into force would greatly enhance the effectiveness of international criminal justice.

17. As regards the relationship between future work on the draft statute and the elaboration of the draft articles on State responsibility, emphasis was placed on the need for coordination inasmuch as crimes against the peace and security of mankind committed by individuals were often the consequence of an international crime committed by a State, so that the responsibility of individuals seemed in such cases to be a particular aspect of the responsibility of the State which had committed the international crime.

18. Commenting on the issue of the court's jurisdiction ratione personae, some representatives agreed that the court should exercise jurisdiction only over private persons and not over States, it being understood that such jurisdiction should extend not only to the actual perpetrators but also to those who ordered, tolerated or profited from such crimes.

19. Many delegations considered the Commission's draft to be a solid basis for further work. The finalization of the draft was viewed as an appropriate contribution to the United Nations Decade of International Law and the hope was expressed that the Commission would be able, in the light of written comments from Governments, to conclude its work thereon at its next session, or in any case in time for the celebration of the fiftieth anniversary of the United Nations.

20. According to another body of opinion, the idea of establishing an international criminal tribunal and/or the work carried out so far by the Commission should be approached with some circumspection.

21. Thus, one representative observed that, while the current draft provided an acceptable basis, a good criminal justice system required much more than the establishment of a tribunal.

22. Another representative, while supporting in principle the establishment of an international criminal tribunal, felt that great caution should be exercised in setting up new, untried mechanisms in the field of criminal justice. He pointed out that, since certain key issues had not yet been resolved, it would be to the benefit of all to learn from the experience of the ad hoc International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 in order to clear up some uncertainties and resolve some practical questions, including the issue of extradition.

23. Yet another representative recalled that, over the years, his country had expressed doubts and reservations both on the draft Code of Crimes against the Peace and Security of Mankind and on the establishment of an international criminal court, because it was not entirely convinced that the political will for the setting up of such a court, which currently seemed to exist, would be maintained in the long run, this in no way detracting from its conviction that the international community would be wise to maintain its resolve to work steadily for the development of norms and institutions that could contribute to a better and sane world.

24. Some delegations considered it essential to obtain the international community's support and to achieve true universality in establishing a permanent international criminal tribunal and drew attention to the difficulties involved in achieving such support and universality. One delegation, for instance, stressed that, to elicit the full support of the international community, the fundamental issues relating to the establishment of the court must be satisfactorily resolved. Another delegation, while recognizing that the Commission's work in this area represented a far-reaching effort to address an important need of the international community, remarked that in order for the future tribunal to be effective, its statute must be universal and must provide

for international crimes committed in all possible locations or circumstances and that such universality was difficult to achieve, given that relations between States were conducted on a consensual basis: while consent might be forthcoming for establishing the tribunal, endowing such a body with the requisite jurisdiction and obtaining the cooperation of States on the various aspects of due process, the absence of consent could frustrate the noble ideals which inspired the undertaking. The remark was made in this context that the will of States had to be evaluated realistically, bearing in mind, for instance, that although genocide was universally recognized as an international crime, more than 50 States were not yet parties to the relevant convention, with a number of the States parties having formulated reservations.

25. In the view of yet another delegation, the establishment of an international criminal court involved complex issues and also had political dimensions and connotations, and this should encourage the Commission to carefully examine the justification and need for and the feasibility of such a court.

26. Some representatives focused their criticisms on the handling of the issue by the Commission. One of them, after indicating that the establishment of an international criminal court with its supporting organs and other infrastructure, including expenses during trial, involved huge financial resources which might constitute an extra burden on the scarce resources of developing States, expressed serious reservations about the hasty manner in which the Commission was proceeding. He added that no real progress could be made without developing substantive criminal law, precisely defining international crimes and prescribing penalties for various international crimes.

27. Another representative doubted whether the Working Group's draft would lead to the establishment of a tribunal that would satisfy the need of the international community for international criminal jurisdiction, bearing in mind a number of significant problems, including in particular the question of the law to be applied and the conferment of jurisdiction. He noted that, while it was a truism that the main function of a court was to apply legal norms, a problem arose when the norms to be applied did not exist or existed only in an imperfect form. He observed in this connection that, while it could be argued that international crimes had been defined by international treaties or by international law, the definitions and penalties provided by those sources were not as a general rule sufficiently precise to allow a court to abide by the principle of nullum crimen, nulla poena sine lege. After expressing the view that the problems posed by the provisions of the draft statute in relation to the definition of crimes that should fall within the jurisdiction of the court arose from the insufficient attention paid to the fundamental distinction between judiciary law and substantive law, he remarked that well-defined substantive provisions were the indispensable basis for the functioning of the court and that the definitions of international crimes currently in existence were insufficient. He expressed concern that the current situation had been caused in part by the General Assembly which, in its wish to respond quickly to urgent requests for the establishment of an international jurisdiction, had overlooked the fact that no such substantive law existed. He recalled in this connection that the Commission had been working for some time on the needed substantive law, namely the Code of Crimes against the Peace and Security of

Mankind, which would provide the necessary basis for the establishment of the court, adding however that the text adopted by the Commission on first reading was far from satisfactory.

28. Also referring to the distinction between substantive and procedural law, one representative shared the view that, for the sake of the proper administration of justice, it would be preferable to have a Code of Crimes against the Peace and Security of Mankind defining clearly the serious crimes that the tribunal would be mandated to punish: such a code would constitute the substantive law on which the procedural law, the draft statute of the tribunal in the current case, would be based. Noting that the Commission's draft statute constituted both substantive and procedural law in the sense that it contained provisions defining crimes and the applicable law and provisions relating to the establishment and organization of the tribunal, the representative in question viewed this approach as inconsistent with the principle nullum crimen sine lege, according to which substantive law had to precede procedural law.

29. Another representative, after recalling that the idea of establishing an international criminal jurisdiction had arisen in connection with the efforts to draft the Code of Crimes against the Peace and Security of Mankind, expressed serious doubts regarding the need for a tribunal. She noted that, unfortunately, work on the drafting of the Code had been delayed over and over again, while the idea was now being put forward that the draft statute for the international criminal tribunal could be adopted immediately and that its acceptance was completely unrelated to the adoption of the draft Code. She referred to the various technical, economic and even political difficulties that had to be resolved before an international criminal tribunal could be set up, adding that the required broad consensus on the part of States Members of the United Nations did not appear to exist. She furthermore remarked that in addition to the controversial aspects of the draft statute, there were others that required clarification, including the relationship between national laws and international law, and the approach to extradition and the status of the tribunal with respect to the United Nations, an issue which called for further study in the light of its potential legal implications for the Organization.

30. The consensual basis of the draft statute gave rise to objections on the part of one representative, who expressed surprise at the idea of establishing a tribunal whose operation would be dependent on the good will of States and whose freedom could be hampered by those same States and by the Security Council. He found it unacceptable to envisage a court set up under a statute which would create obligations only for the States parties to it; in his opinion, the court should be a means of upholding international public order, which was why its constituent instrument should have an objective character and erga omnes effects. He added that the draft statute lacked principles capable of guiding the international community in the establishment of a new world order and criticized its narrow scope and lack of vision of the future. He therefore suggested that the Commission should reconsider the draft statute and introduce a new text which would better reflect the aspirations of the international community.

31. Several of the delegations referred to above did not feel that the draft statute must necessarily be completed in 1994. In their view, the Commission

should bear in mind that the complexity and sensitivity of the subject demanded a detailed examination.

Part 1 of the draft statute (Establishment and composition of the tribunal) (articles 1 to 21)

32. Regarding the method whereby the proposed tribunal would be established, some delegations favoured a multilateral convention open to all States. This procedure, it was said, would turn the consent of States into the driving force of the arrangement and would ensure wide acceptance of the convention, which was a prerequisite for the effective functioning of the tribunal. It was also pointed out that a consensual basis for the tribunal would prevent any future questioning of its jurisdiction by reference to real or apparent inadequacies of its establishment. Some delegations took the view that the proposed convention should be adopted within the framework or under the auspices of the United Nations.

33. Also supporting the establishment of the tribunal by means of a multilateral convention, one representative pointed to constitutional difficulties if any other approach was taken. He remarked that although the Security Council, as part of its peacemaking powers, had established an ad hoc International Tribunal for the former Yugoslavia, it was difficult to conceive of the United Nations having the competence to establish a permanent jurisdiction of a universal character. He therefore disagreed with those members of the Working Group who believed that Articles 22 and 29 of the Charter, on the establishment of "subsidiary organs", or the joint implementation of Articles 10 and 24 of the Charter, provided a sufficient legal basis for the General Assembly, the Security Council, or both, to establish a permanent tribunal.

34. On the other hand, attention was drawn to the problems to which the establishment of an international criminal tribunal by means of a multilateral convention could give rise. The remark was made that the tribunal might never have a universal character if it were established under a treaty which only States respecting international and humanitarian law and States whose impeccable past or present provided a guarantee that they would adhere to the values of justice would readily ratify and to which States that had recently been the subject of legal proceedings and States located in areas of conflict would not easily accede. Concern was expressed that there was thus a risk of forming a "good States club" under a treaty and leaving the tribunal little to judge.

35. One representative, while agreeing that in the light of the court's proposed jurisdiction ratione materiae and its permanent character, the most appropriate form for the statute would be a multilateral convention, pointed out that the fact that the court would be established on that basis would not in any way exclude the possibility that ad hoc courts could be established by a decision of the Security Council, when the appropriate conditions for doing so existed. He added that resort to ad hoc courts would always be a possibility, since it was unlikely that all States would become parties to the statute of a permanent court.

36. The relationship of the proposed tribunal to the United Nations and the two alternatives contained under article 2 of the draft statute were commented upon by a number of delegations.

37. The need for a close link between the proposed tribunal and the United Nations was recognized on several grounds: in the first place because, given its limited structure, the tribunal would have to use the administrative infrastructure of the United Nations; and secondly because the tribunal's activities would be closely linked to those of the peace-keeping and peacemaking organs, since it would be dealing with violations of the law of war and of humanitarian law. Emphasis was therefore placed on the desirability of providing for functional and organic links between the tribunal and the principal United Nations agencies, so that both might exercise complementary activities aimed at achieving a single threefold objective: the prevention of conflicts, respect for humanitarian law and the restoration of peace. It was also noted that the tribunal must be closely linked to the United Nations in order to benefit from the universal character of the Organization. The remark was made in this connection that the method of appointing members of the International Tribunal for the former Yugoslavia, for example, was very appropriate as far as representativeness was concerned: since the members of that Tribunal were proposed by the Security Council and elected by the General Assembly, they undoubtedly represented the international community in all its diversity.

38. Views differed however on whether the tribunal should become an organ of the United Nations (first bracketed paragraph of article 2) or have some other form of link with the Organization (second bracketed paragraph of article 2). It was stressed that a decision in this connection was essential, particularly as regards all matters not (yet) regulated by the draft statute, such as the funding of the tribunal, the recruitment of the staff, etc.

39. Delegations holding the opinion that the proposed tribunal should be a judicial organ of the United Nations stressed that such an arrangement was necessary to enhance the tribunal's legitimacy, moral authority, credibility and universality and to demonstrate the indivisibility of international law and order and would in no way affect the independence or autonomy of the tribunal as long as it was accepted that the United Nations represented the common will of the international community. It was suggested that the Statute of the International Court of Justice provided a good example for the election of judges, their status, the automatic acceptance of the Court's Statute by all Members of the United Nations and the modalities for instituting proceedings.

40. The same delegations took the view that making the proposed tribunal a judicial organ of the United Nations was fully compatible with the Charter of the United Nations. It was noted in this connection that Article 92 of the Charter described the International Court of Justice as the principal judicial organ of the United Nations, the qualifying word "principal" indicating that other judicial organs were not necessarily precluded, and that the court could therefore be established under Article 7, paragraph 2, of the Charter as a subsidiary organ. The remark was also made that Article 22 of the Charter specifically empowered the General Assembly to establish such subsidiary organs as it deemed necessary for the performance of its functions and that Article 29

gave the same power to the Security Council. In the view of those delegations, therefore, it was legally possible to establish the tribunal as a subsidiary organ of the United Nations without any need to amend the Charter.

41. In this connection, one representative suggested that an appropriate means of establishing the tribunal as a judicial organ of the United Nations, without amending the Charter, was that used in setting up the United Nations Conference on Trade and Development and the International Law Commission, namely by a resolution adopted by the General Assembly. While conceding that, to avoid disagreement, one could if necessary think in terms of an instrument of the United Nations, rather than an actual organ, he insisted that the tribunal should be more closely linked with the United Nations than were the specialized agencies and that it should form an integral part of the Organization.

42. A number of delegations, however, felt that there were serious obstacles to making the proposed tribunal into an organ of the United Nations.

43. At the legal level, it was pointed out that if the tribunal were to be established by an international treaty, it would have its own legal personality and therefore could not be considered a subsidiary organ of the United Nations. Several delegations also felt that making the tribunal a judicial organ of the United Nations would necessarily entail amending the Charter. The remark was made in this connection that it did not appear clear from the text whether the proposed statute would be an integral part of the Charter: if the answer was in the affirmative, such incorporation could be possible only through a conference convened to revise the Charter; on the other hand, if the court was not going to be considered one of the principal organs of the United Nations, but a subsidiary body of one of the principal organs, other problems would emerge, in particular the problem of the adequate legal framework for the establishment and operation of the permanent judicial tribunal. The Security Council, it was noted, was empowered to establish a tribunal only when acting under Chapter VII of the Charter, in cases of actual threats to peace, breaches of the peace and acts of aggression, and could undertake such action only when the situation warranted it, but not as a preventive measure; if, on the other hand, the court was to operate as a subsidiary organ of the General Assembly, the question of an adequate legal framework would then become even more serious, given the nature of the General Assembly's resolutions.

44. At the level of propriety, some delegations stressed that in order to be totally independent the tribunal should not be a United Nations organ. In their view any impression, however mistaken, that the tribunal was subject to political influence in the exercise of its functions could undermine confidence that persons under its jurisdiction would receive a fair and impartial trial. The remark was also made that establishing the proposed tribunal as part of the United Nations organic system would raise serious problems both in terms of competencies and in terms of the functioning of the tribunal. Three alternatives were mentioned in this context. If the tribunal was to be part of the United Nations system, what kind of United Nations body would it be? If it was to be another principal organ, not only would it be necessary to amend the Charter, but the problem of the relationship between the International Court of Justice and the new tribunal would also arise. If it was to be envisaged as a subsidiary body, would it be a subsidiary body of the General Assembly or of the

Security Council? One representative, noting the difficulties which amending the Charter would entail in order to make the tribunal part of the United Nations, expressed hesitations about adopting any procedure whose efficacy or validity would be subject to the slightest doubt and which might open the tribunal's competence to challenge. The remark was made in this connection that the suggestion that the proposed tribunal should become a judicial organ of the United Nations represented more than an effort to confer upon the tribunal the necessary dignity and prestige; such a relationship between the tribunal and the United Nations might be seen as an attempt to achieve universality by making the statute automatically binding upon those Members of the Organization which, for their own reasons, chose not to become parties to the statute. Should there be a significant number of such non-parties, then the issue of the relationship in question would become literally an issue of life and death for the future tribunal.

45. Some delegations suggested alternative ways of establishing a link between the United Nations and the proposed tribunal without the latter necessarily becoming an organ of the United Nations.

46. Thus, one delegation proposed that in order to make it very clear that the tribunal was independent, the first sentence of article 2 of the draft statute should be replaced by the following wording: "Within the framework of the United Nations, there is established an International Criminal Tribunal responsible for prosecuting the crimes characterized in this Statute."

47. Another delegation suggested that the treaty by which the tribunal would be set up should be adopted by the General Assembly: the treaty in question should establish the obligations and powers of the United Nations organs that would be involved in facilitating the work of the tribunal, and agreements should be drawn up to regulate the relationship between the tribunal and the United Nations and the obligations of the latter.

48. Yet another delegation suggested that the tribunal's statute be adopted in the form of a treaty at a conference convened by the General Assembly and that, if necessary, references to the United Nations be made in the treaty's preamble.

49. A number of delegations took the view that the best way to establish the required relationship between the United Nations and the proposed tribunal was by means of a cooperation agreement under Article 57 of the Charter, which would be submitted to the General Assembly for approval and would be similar to the cooperation agreements concluded between the United Nations and its specialized agencies. This approach elicited the support of several delegations which were favourable in principle to establishing the tribunal as a judicial organ of the United Nations but were aware of the attendant difficulties. In connection with the proposal in question, it was suggested that paragraph 2 of article 4 of the draft statute be amended in order to expressly give the tribunal the legal capacity to become a party to such an agreement with the United Nations or other international organizations.

50. Expressing his perplexity vis-à-vis the problem of the relationship between the United Nations and the proposed tribunal, one representative pointed out that this issue, while of great importance, was far from simple. While he

assumed that a permanent court of general jurisdiction would have to be established by means of a treaty, he wondered how an institution owing its existence to a self-standing treaty, even one concluded under United Nations auspices, could be brought into organic relationship with the Organization. He furthermore found it difficult to see how a permanent court could have the status or the authority it needed unless it operated under the United Nations banner: while such a court could not be a subordinate organ, neither could it be given the same standing as a principal organ without amending the Charter. A cooperation agreement with the Economic and Social Council under Article 63 of the Charter did not, in his view, appear to be a solution either, as it was unclear who would contract for the court and what degree of participation in its founding treaty would be required in order to justify the United Nations label.

51. Many delegations expressed support for the approach adopted by the Commission's Working Group in article 4 of the draft statute whereby the tribunal, although a permanent institution, would not be a full-time body and would sit only when required to consider a case submitted to it. It was noted in this connection that such a solution was based on caution and flexibility and was both pragmatic and realistic since it was important to strike a balance between the need for legal and institutional certainty and the application of pragmatic and realistic criteria. The remark was also made that such a solution would keep costs down and encourage savings, thus minimizing the budgetary impact of a permanent court by providing that the tribunal should be operational only as needed. A further observation was that the court, although of a permanent nature, should be distinct from the International Court of Justice, at least in the early stage of its development, since it would probably have a light case-load.

52. A number of representatives, however, found it difficult to endorse the approach referred to above. Thus, in the view of one representative, what was being envisaged by the Working Group was a set of more or less loose, ad hoc arrangements for the prosecution of international crimes, a formula that fell short of the expectations raised concerning the establishment of an international criminal court vested with the necessary jurisdiction over certain international crimes and the persons suspected of committing those crimes. In his opinion, the desired goals of impartiality, objectivity and uniformity of jurisprudence could be attained only through a truly permanent, full-time body. It was noted in this connection that only a truly permanent organ would be in a position to ensure its authority and credibility, provide for genuine legal guarantees, foster the development of international criminal law and deter would-be international criminals.

53. In this context, one representative noted that the court would be weakened by the lack of continuity and that its diminished independence and authority might undermine its continued existence. The possibility, mentioned in the Working Group's commentary to article 10, that the president of the court might become full-time if circumstances required it, did little to redress that delegation's concerns. The view was also expressed that the use of a mechanism like the one proposed by the Working Group might be selective because it was ad hoc and might work against the interests of the smaller countries.

54. Also referring to these concerns, another representative pointed out that an international criminal tribunal should consist in a truly permanent institution, not in an embryonic structure that sat intermittently on an ad hoc basis. He remarked that recent international events had shown to what extent an international criminal court was wanting, for its mere existence would have helped defuse grave crisis situations. While recognizing that it had been possible to resort to ad hoc bodies, he viewed such bodies as palliatives that could not be relied on indefinitely. He added that a truly permanent international criminal jurisdiction would have the advantage of guaranteeing the objective, uniform and impartial application of international law by avoiding the element of chance inherent in the setting up of a jurisdiction after the occurrence of the reprehensible acts brought before it. In his view, only permanent international judges would be capable of placing themselves above political considerations and equal, independent and impartial justice could only be ensured by a truly permanent court composed of judges elected to rule, in good conscience and through the application of general and objective legal norms, upon the cases referred to them.

55. Some delegations expressed support for article 5 of the Working Group's draft statute, laying down that the tribunal shall consist of three organs, namely the court, the registry and the procuracy. They approved both of the term "tribunal" and of the institution's tripartite composition.

56. In this connection, however, one representative, while noting that the term "tribunal" had been preferred to the term "court" simply for historical reasons, by analogy with the Nürnberg Tribunal, observed that the comparison should stop there, since the jurisdiction that was to be established should be of a permanent nature, as an expression of the continuing need to prosecute and punish, at all times and in all places, crimes of particular gravity, such as war crimes or crimes against humanity. While taking the view that the force and credibility of a judicial institution depended on such permanence, he did not find it necessary for the tribunal to meet full-time; it would be enough if it met when circumstances demanded it.

57. Another representative queried the use of the word "tribunal" to characterize a system which would consist of different bodies, namely the court, the registry and the procuracy, which were supposed to be separate and impartial. After pointing out that the office of the procuracy should be absolutely independent and protected from any form of pressure or intimidation, he suggested that, in order not to undermine the credibility of such an international judicial system, the International Law Commission at its next session should consider other ways of qualifying the system. In his view, the problem was not purely semantic but had to do with the substantive issue of the functioning and competence of the court, the registry and the procuracy.

58. The view was on the other hand expressed that only an unduly formalistic approach would lead to an objection to the court and the procuracy being organs of the tribunal on the ground that their independence would be prejudiced: in order to see whether their independence was compromised, the actual powers or functions set out in the draft statute must be examined.

59. As regards the number of judges contemplated in article 5 (a), one delegation found the number of 18 excessive and suggested following the precedent of article 12 of the statute of the International Tribunal for the former Yugoslavia, which provided for 11 judges, except where that number was increased in accordance with the statute. Another delegation, however, reasoned that since most States argued in favour of the establishment of a court of first instance and a court of second instance, 18 judges would appear to be a reasonable number. The same delegation indicated that although the question warranted further study, the idea of appointing judges to sit in both the International Court of Justice and the international criminal tribunal should not be ruled out.

60. Support was expressed for article 6 of the draft statute dealing with the qualifications of judges who, it was said, should have the highest competence. The remark was also made that it was vital that the appointment process should not excite the same political rivalries as many other elections held within the United Nations, in which national prestige and regional interests prevailed over the individual merits of the candidates.

61. Article 7 on the election of judges was commended as striking the right balance between the need for flexibility and the need for continuity.

62. Some representatives however expressed reservations on the basic principle contained in the draft article, namely that judges shall be elected by the States parties to the statute. Thus one representative, while realizing that the possible options concerning election of the judges would be limited if it was decided to establish the tribunal through a treaty and while recognizing that, as the treaty would be binding only on States that were parties to it, it would be inevitable to envisage a system of nomination of judges by their respective Governments, pointed out that this system would not give the tribunal the same representativeness as that of the International Tribunal for the former Yugoslavia. While admitting that the Working Group's proposal that the States parties should elect the 18 judges of the court and leave open the discussion on the composition of the chambers showed greater concern for establishing a transparent and democratic procedure, he questioned whether such a method of appointment met all the objections raised: the proposed court would be respected only if it was composed of judges that the community of States and public opinion deemed to be their legitimate representatives and if it operated in close coordination with the Security Council; moreover, such a court must be able to act promptly and efficiently whenever international public opinion called for justice. In his view, should the judges be selected from a limited geographical and political pool and should the requirements of universality, transparency and democracy be unduly ignored, the court would fall short of expectations and even the very concept of an international criminal jurisdiction would be discredited.

63. Some delegations suggested that the judges should be elected either by the General Assembly or by the General Assembly and the Security Council, so as to enhance the judges' independence and impartiality while strengthening the ties between the United Nations and the court.

64. A number of delegations supported paragraph 5 of article 7, according to which States parties should strive to elect persons representing diverse backgrounds and experience, with due regard to representation of major legal systems. It was suggested that the text be strengthened by clearly reflecting therein the criterion of "equitable geographical representation" in order to preclude the over-representation of certain regions. A clear reflection of the said criterion, it was stated, would contribute to making the tribunal truly universal in nature, would ensure the impartiality and independence of the judges and would help prevent conflicts from arising among States. The remark was also made that the tribunal would gain nothing by excluding any particular regional group, as had unfortunately been the case with the International Tribunal for the former Yugoslavia. In this connection, one representative pointed out that the judges elected to the court should represent the principal legal cultures of the world and reflect the membership of the United Nations, bearing in mind that the various defendants might be nationals of a variety of States and that the legal culture in which they had been brought up could not remain unknown to all the judges of the court. He added that if the bench was regarded as not representative, that might be viewed in specific cases as detracting from the value of the court's decisions. It was suggested that inspiration should be drawn from article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination and that the paragraph should be drafted in such a manner as to clearly reflect the criteria of "equitable geographical representation and representation of different forms of civilization and of the major legal systems".

65. With reference to paragraph 6 of article 7, providing, inter alia, that judges hold office for a term of 12 years and are not eligible for re-election, a number of delegations viewed the proposed tenure as excessively long and entailing a risk that the court might be encumbered by judges no longer in a position to discharge their functions effectively. It was suggested to reduce the duration of the judges' mandate to nine years.

66. Some delegations supported the principle, also contained in paragraph 6, that judges should not be eligible for re-election.

67. Several delegations supported article 9 on the independence of the judges. It was stressed that judges should remain independent and hand down judgements without succumbing to the political, social and moral pressures to be expected in cases of international crimes which invariably had political overtones. It was suggested to add the word "impartial" after the word "independent" in the first sentence of the article.

68. As regards article 10 on the election and functions of the President and the Vice-Presidents of the court, the remark was made that, at the initial stages, the judges did not need to be permanently located at the seat of the tribunal, although it would be wise to maintain a full-time president who would be responsible for the due administration of the court.

69. Regarding article 11 on disqualification of judges, it was suggested that a limit be placed on the accused's right to request the disqualification of judges in order to prevent him or her from seeking to disqualify all members of the court on spurious grounds: a peremptory challenge of two judges and a challenge

of a maximum of two others for cause was viewed as reasonable. As regards paragraph 2, the remark was made that the word "feels" in the English text was inappropriate, and that the words "or for any other reason" could be dispensed with as paragraph 1 was sufficiently exhaustive of the grounds for the disqualification of a judge.

70. With respect to article 12 concerning the election and functions of the registrar, the view was expressed that the registrar, like the prosecutor, should be elected by the States parties to the statute rather than by the Bureau, in the interest of independence and impartiality. Other comments included (a) the remark that, for the smooth operation of the tribunal, the registrar (as well as the prosecutor and deputy prosecutor) should hold office for the same term as the judges; and (b) the observation that the registry (and the procuracy) should act as permanent organ(s) of the tribunal.

71. As regards article 13 on the composition, functions and powers of the procuracy, several delegations supported the approach proposed in paragraph 2 thereof according to which the prosecutor and the deputy prosecutor would be elected by a majority vote of the States parties to the statute from among candidates nominated by the States parties thereto. One delegation, however, took the view that the prosecutor and deputy prosecutor should hold office for the same term as the judges. Another delegation was of the opinion that the procuracy should act as a permanent organ of the tribunal. As for the requirement that the prosecutor and deputy prosecutor should possess the highest level of competence and experience in the conduct of investigations and prosecution of criminal cases, it was viewed as having the drawback of placing at a disadvantage those prosecutors who came from systems in which the investigation of a crime was the task of the police rather than of the prosecution.

72. Paragraph 4 of article 13, laying down that the procuracy, as a separate organ of the tribunal, shall act independently and shall not seek or receive instructions from any Government or any source, was commended as duly recognizing the need to protect the prosecutor and his staff, whose work was vital to the proper conduct of the trial, from any outside interference. In this context, the remark was made that the prosecutor should act as the representative of the international community as a whole in keeping with the idea that, in the prosecution of an international crime, one State was not taking action against another. Rather, it was the international community that was taking action against the alleged offender. One delegation expressed preference for a separate article which would deal with the prosecutor’s independence not only from the court and from Governments, but also from any other type of interference.

73. As regards article 15 on loss of office, one representative observed that, in view of the qualifications that judges must possess under article 13, paragraph 2, in order to be appointed, they would only rarely be found guilty of misconduct or in serious breach of the statute. However, he found it justifiable to retain a provision concerning loss of office, preferably modeled on Article 18 of the Statute of the International Court of Justice, by virtue of which no member of the Court could be dismissed from office unless, in the unanimous opinion of the other members, he had ceased to fulfil the required conditions.

74. Concerning paragraph 1 of the article, the view was expressed that the judges should be deprived of their office not only in the case of proven misconduct but also in the case of proven and serious breach of the statute of the court.

75. Paragraph 2 which, inter alia, provides that the prosecutor and deputy prosecutor shall be removed from office if found, in the opinion of two thirds of the court, guilty of proved misconduct or in serious breach of the statute, gave rise to reservations. Concern was expressed that such a provision could compromise the procuracy's independence and subject them to political pressure. It was suggested that no matter how cumbersome the procedure, the removal from office of either the prosecutor or the deputy prosecutor should be governed by standards similar to those governing their election and that they should therefore be removed by those who had appointed them, namely the States parties.

76. One representative, while agreeing that the procuracy should be insulated from political pressure and that paragraph 2 of article 15 appeared inconsistent with that principle, pointed out that the provision could perhaps be explained by the court's almost daily contact with the procuracy, which would allow it to better evaluate their conduct and effectiveness. In the same spirit, another representative suggested reformulating the paragraph so as to give the court the power to unanimously decide to recommend to the States parties the removal of the prosecutor from office and the appointment of his or her successor.

77. Article 17 on allowances and expenses was described as correctly recognizing that the offices concerned were not necessarily exclusive of other activities by the persons elected, provided that such activities were in no way inconsistent with their responsibilities to the tribunal.

78. Referring to articles 19 and 20, respectively entitled "Rules of the Tribunal" and "Internal rules of the Court", one representative noted a parallelism between those provisions and article 15 of the statute of the International Tribunal for the former Yugoslavia. He noted however that Security Council resolution 827 (1993) provided for States to submit comments on the rules of procedure and evidence to the judges of the International Tribunal. In his view, it would be appropriate to consider whether a similar mechanism could be created for the international criminal tribunal, which did not mean that the States themselves should draft the rules of procedure, as that could only complicate the life of the court and delay the adoption of its statute.

79. Some delegations took the view that various matters reserved by the draft statute for the "Rules of the Tribunal" under article 19, such as procedural questions, pre-trial investigations and, in particular, the rules of evidence, should be dealt with in the context of substantive law, possibly in the statute itself, rather than in the rules to be adopted by the court.

Part 2 of the draft statute (Jurisdiction and applicable law) (articles 22 to 28)

80. The importance of part 2 was generally recognized.

81. Many delegations supported the structure of article 22 enumerating the treaties which define crimes falling within the jurisdiction ratione materiae of the court, particularly since that approach was in keeping with the principle nullum crimen sine lege. It was noted that since the prospects for final adoption of the draft Code of Crimes were still remote, the approach chosen by the Working Group in referring to certain international conventions in force was fully understandable. The view was also expressed that the draft article contained an enumeration of serious crimes defined by treaty which should form the nucleus of the court's material jurisdiction. Giving priority to treaty rules which had evolved into customary international law was viewed as ensuring predictability in assessing individual criminal responsibility for serious crimes by eliminating the ambiguity that might arise from the different definitions of crimes in national legal systems.

82. Satisfaction was also expressed at the fact that the article included the anti-terrorist conventions of universal character that qualified specific terrorist acts as serious crimes and obliged the States parties to act according to the principle aut dedere aut judicare, as well as the 1949 Geneva Conventions and Additional Protocol I thereto.

83. A number of delegations suggested that the list of treaties contained in article 22 could be supplemented. Mention was made in this connection of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and of the 1988 Protocol to the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, which extended the scope of that convention to terrorist acts committed at international airports.

84. As regards Additional Protocol II to the Geneva Conventions, one representative, after observing that the two Additional Protocols, although they had not been universally accepted, had been ratified by two thirds of all States and could soon be transformed into a customary source of international humanitarian law, expressed disagreement with the Working Group's view that Protocol II should not be listed in article 22 on the ground that it contained no provision concerning grave breaches. She remarked that part II of that Protocol did contain very clear provisions concerning acts which could be characterized as serious violations of humanitarian law, and that those responsible for preparing the draft statute should bear in mind that the most brutal violations of humanitarian law and human rights constituted one of the most conspicuous features of armed conflicts which were not of an international character. Along the same lines, the view was expressed that the notion of war crimes should be extended to cover crimes committed in non-international armed conflicts and that the draft statute rightly made no distinction, unlike the draft Code, between acts to be regarded as exceptionally serious war crimes and grave breaches covered by instruments relating to international humanitarian law.

85. The term "grave breaches" was viewed as ambiguous and it was suggested that clarification be provided regarding the threshold of gravity which had to be reached for a matter to fall within the court's jurisdiction.

86. Some delegations insisted that the list of treaties contained in article 22 should not be exhaustive. In their view, States parties to the statute should be able to agree at a subsequent stage on additional crimes, including crimes defined in conventions which had yet to be drafted or which had not yet entered into force.

87. While one representative wondered whether article 22 reflected all the crimes contained in the draft Code as adopted by the Commission on first reading in 1991, another delegation expressed concern that the list contained in the said article might be too long. He suggested that a distinction be made between crimes under international law which entailed individual criminal responsibility and offences, sometimes very serious ones, which were the subject of international cooperation among States, in regard to their prevention and punishment. According to him, only the first category should fall within the jurisdiction of the international criminal court.

88. Also advocating a shorter list, another representative pointed out that while in principle the idea of defining the court's jurisdiction in terms of the conventions in force seemed a sound one, only instruments relating to crimes that outraged humanity should be considered. In his opinion, the list should only include the four Geneva Conventions of 1949 and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in view of their quasi-universality and bearing in mind that they basically covered crimes that appalled international public opinion. He did not completely agree with the inclusion in article 22 of other instruments which did not enjoy general support and, in any case, provided for international judicial cooperation arrangements that were usually sufficient to guarantee that justice would be served.

89. Some representatives insisted on the importance of the criterion of the seriousness of the crimes. One of them said that the court's jurisdiction should be limited to the most serious crimes, those which most deeply offended the conscience of the international community. Another representative pointed out that the court should clearly not deal with petty offences. It should be activated only in cases of such gravity as to require the involvement of the international community as a whole. Accordingly, either clear criteria must be established for distinguishing major offences from minor ones, or the tribunal should be empowered to make that distinction in individual cases.

90. A number of representatives were of the view that drug-related crimes, and in particular those provided for in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, should be included under article 22 rather than under article 26. They singled out, among drug-related crimes, illicit trafficking in drugs across national frontiers, the laundering of drug money and the activities of narco-terrorists, which posed grave threats to peace and security and to the integrity of States. Those delegations questioned the distinction between two strands of jurisdiction provided for in articles 22 and 26, particularly the distinction between international crimes defined as such in international conventions (article 22) and crimes under national law which gave effect to provisions of a multilateral treaty and which having regard to the terms of the treaty constituted exceptionally serious crimes (article 26, paragraph 2 (b)). The said distinction was viewed as unconvincing by one representative, who remarked that

if the tribunal was to have a dual function, the two categories of offences should be defined in a more satisfactory way and the rules and procedures to be adopted with regard to each of them should be worked out separately, and as spurious by another representative, who strongly objected to excluding from article 22 the crimes set out in the 1988 Convention. The representative in question noted that paragraph (1) of the commentary to article 22 referred to a standard that not all the crimes listed in that article met and that, moreover, paragraph (5) of the commentary gave a misdirection in proclaiming that all treaties dealing with the combating of drug-related crimes could determine the court's jurisdiction under article 26. He cautioned against commingling the different conventions, since not all contained the elements necessary for the offences to which they referred to be regarded as international crimes.

91. The same representative said that in determining whether a treaty established an international crime the question first arose whether the treaty concerned constituted the offence as a crime under international law. In this connection he noted that, unlike the Conventions on genocide and apartheid, the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation did not constitute the offences in question as international crimes and thus, in that respect, their position was the same as that of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The second question was whether the treaty concerned established that the offence was punishable under domestic law. According to the same representative, both the conventions listed in article 22 and the 1988 Convention imposed that obligation on States parties. A third question was whether there was an obligation to take the necessary measures to establish jurisdiction over the offences created by the conventions, even though they had not been committed in the territory of the State party. That aspect, in the opinion of the representative concerned, was an essential feature of an international crime, and the 1988 Convention, unlike the conventions on genocide and apartheid, met that condition. A fourth question was whether there were specific provisions requiring the prosecution of an offender present in the territory of a State party that did not extradite him. In this connection, the same representative noted that the 1988 Convention as well as the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation met that requirement. A fifth question was whether there were provisions for extradition and mutual legal assistance. While viewing this aspect as providing the least certain guide as to whether a treaty established an international crime, the representative in question noted that the 1988 Convention had the most extensive provisions in that connection.

92. He then examined whether the 1988 Convention met the criteria indicated in paragraph (2) of the commentary to article 22. Having already dealt with the second criterion (the establishment of a system of universal jurisdiction) (see para. 91 above), he focused on the first (that the crimes were themselves defined by the treaty concerned in such a way as to constitute a basic treaty law for possible direct application) and concluded that this criterion was undoubtedly met by the 1988 Convention. He stressed that there was an intrinsic and inevitable link between all those conventions aimed at the suppression of crimes and domestic law: in the first place, States parties were required to

adopt the necessary legislative measures to make the offence a crime under their domestic law, so that if they did not extradite, they could try the crime. The second link which he saw between the conventions and domestic law was that they all required States parties to take the necessary measures to establish jurisdiction in certain circumstances; only then would their national courts be in a position to try the offender, a point which article 24, paragraph 1 (a), took into account. However, in that respect also, he failed to detect any difference between the 1988 Convention and the civil aviation Conventions. He further remarked that the concept of a "basic treaty law" being applied by the court was questionable, in that it suggested that it was somehow desirable that the court should be in a position to try the offender without reference to domestic law. In his opinion, that approach was inconsistent with the scheme of the draft statute, and in particular with the provisions of its article 28, which created a unified approach to applicable law, so that the court could have recourse both to national law applied by domestic courts and to international practice. For all these reasons, the representative concerned favoured the elimination of the distinction between the two strands of jurisdiction under article 22 and article 26, paragraph 2 (b), and suggested that any reference to the 1988 Convention should find room in article 22.

93. As regards article 23 on acceptance by States of jurisdiction over crimes listed in article 22, some delegations expressed preference for the opting-in system reflected in alternative A, which was described as offering greater flexibility and better reflecting the consensual basis of the court's jurisdiction, as more effectively conveying the idea that acceptance of the statute was separate from acceptance of the court's jurisdiction and should be based on a declaration very similar to an optional declaration of recognition of compulsory jurisdiction under Article 36 of the Statute of the International Court of Justice, and as more likely to achieve the goal sought by the Commission, namely, acceptance of the court's jurisdiction by the greatest possible number of States. The initial presumption in favour of the lack of jurisdiction of the court, it was observed, would probably make alternative A appear as less inhibiting to potential States parties which would otherwise be wary of conferring broad jurisdiction on an untried institution. The remark was also made that paragraph 4 of alternative A encouraged greater participation by permitting States which were not parties to the statute to accept the jurisdiction of the court over crimes on an ad hoc basis, which would promote the use of the court even by those countries which were reluctant to become parties to the statute.

94. Other delegations favoured the opting-out system reflected in alternative B. This alternative was viewed as the one which best mitigated the optional nature of the jurisdiction of the court and most closely approximated what could be regarded as the ideal solution, namely that a State becoming a party to the statute would automatically be deemed to have accepted the court's jurisdiction over all crimes. The remark was made in this context that if States decided to create a court, then they should give it the powers and the means to play a significant role in international life as there would otherwise be no point in creating it. Also in support of alternative B, it was said that recognition of the court's jurisdiction over crimes covered by the conventions relating to crimes under international law should become the law and not the

exception, and that this alternative would render more likely the establishment of an effective jurisdiction within a reasonable time.

95. Some representatives noted that, to a greater or to a lesser extent, all alternatives contained under article 23 required a consensual basis for the court's jurisdiction. This, in their view, was not necessarily desirable. One of them observed that although provisions such as article 23 reflected political realities and took into account the considerable circumspection with which Governments approached new avenues of international adjudication, the truth was that the court would not be judging the behaviour of States but of individuals. He therefore saw no reason to perceive the tribunal as being directed against the sovereignty of States since it would be seeking to prevent individuals from escaping their responsibility for international crimes affecting the international community as a whole. Consequently, the provisions of the draft statute on not accepting the court's jurisdiction appeared to him overly circumspect and warranting a more thorough examination. The view was also expressed in this connection that the consensual basis of jurisdiction should not frustrate the very objective of establishing the court, which was to bring to justice persons who had committed crimes covered by the statute, and that a balance needed to be struck in order to make the court a realistic institution. Pursuing this line of thought, some representatives criticized the three alternatives proposed in article 23 as failing to confer on the court sufficient authority in keeping with its lofty mission. In their view, acceptance by a State of the court's statute should mean acceptance ipso facto of its jurisdiction over all crimes identified as falling within its jurisdiction and any other solution would call into question the value of the very acceptance by the State of the court's statute. Concern was also expressed that the court would not have original jurisdiction, in other words, that its jurisdiction would not be based on the instrument establishing it, but would be derived, or subject to the will of States, which could accept or reject its jurisdiction. In order to give the court what he described as "automatic" jurisdiction, one representative suggested deleting from alternative B both the words "unless it makes the declaration provided for in paragraph 2" and the whole of paragraph 2.

96. Some representatives suggested solutions combining compulsory jurisdiction and jurisdiction based on consent. One of them, while agreeing that a distinction should be made between acceptance of the statute of the tribunal and acceptance of the court's jurisdiction, which should be the subject of a separate optional instrument in order to allow States to indicate the crimes in respect of which they accepted the court's jurisdiction, pointed out that the question would not arise in the same terms if the definition of the court's jurisdiction covered only the short list comprising the four Geneva Conventions and the Convention on genocide. Another representative indicated that the court's jurisdiction should be compulsory in respect of serious and fundamental crimes in which mankind as a whole was considered the victim, as in the case of genocide, whereas in all other cases its jurisdiction should be optional. A third representative identified aggression, genocide or serious violations of human rights or of international humanitarian law as crimes over which the jurisdiction of the court could be compulsory. A fourth representative singled out the crimes referred to in paragraph 2 (a) of article 26 (which, in his view included crimes against humanity and those relating to discrimination against certain population groups on grounds of race, ethnic characteristics, religion,

etc.) as crimes in respect of which the act of becoming party to the statute should entail acceptance of the court's jurisdiction.

97. Article 24 was supported by some delegations in its current form. The solution provided by the article to the problem of which States had to consent in order to establish the jurisdiction of the court was described as acceptable and the remark was made that since most of the conventions listed under article 22 were based on the principle of universal jurisdiction, it was logical that the sole criterion needed to establish the court's jurisdiction in respect of a particular crime referred to in article 22 was that its jurisdiction should be accepted by a State which, under the relevant treaty, was authorized to try the suspect before its own courts. Requiring the consent of more than one State to establish the court's jurisdiction would, it was stated, considerably limit its role, without justification. The point was also made that the language of paragraph 1 (b) of article 24, in making explicit reference to the Convention on genocide, should dispel any doubts raised by the preceding subparagraph.

98. Some representatives felt however that the article was not entirely satisfactory. One of them recalled that, as regards the determination of the jurisdiction of the court over individuals under article 22, the Special Rapporteur had provided in his report that such jurisdiction would depend on the consent of two States: the State in which the crime had been committed and the State of which the perpetrator of the crime was presumed to be a national. He further recalled that the debate had revealed the fear of some members that the efficiency of the court would thereby be considerably impaired. After pointing out that various States were involved (the State in whose territory the crime had been committed, the State of which the perpetrator of the crime was presumed to be a national and the State of which the victims of the crime were nationals) and that two contradictory interests had to be reconciled (the need to avoid a situation whereby a State would oppose its own jurisdiction to that of the court with the sole aim of protecting one of its nationals, and the need to ensure that some States were not deprived of the possibility of exercising their jurisdiction under existing conventions), he observed that the current version of article 24 only partly reflected those concerns and should be carefully considered in the light of the solutions chosen in the case of the International Tribunal for the former Yugoslavia.

99. Another representative pointed out that, under the current proposal, many States which had a legitimate interest in a particular case might have no role in deciding whether that case should be tried by the international court or by national courts. Without suggesting that all such States must give their consent or otherwise accept the jurisdiction of the court over the particular crime, he insisted that further review of the issue was warranted, considering that certain cases might be initiated by the Security Council.

100. Also arguing in favour of a reconsideration of the text, one representative, after observing that the article mainly made reference to consent to jurisdiction by the State on whose territory the suspect was found, took the view that in order to ensure a fair prosecution and trial it was essential that such jurisdiction should receive the consent of both the State of which the suspect was a national and the State in which the alleged offence had been committed.

101. One representative suggested that article 24 should be placed at the beginning of Part 2 so as to cover all the crimes referred to in the statute and should simply provide that the court shall have jurisdiction over such crimes when such jurisdiction was conferred on the court by any State which had jurisdiction to try the perpetrator of the crime before its own courts.

102. Referring to paragraph 1 (a) of the article, one representative pointed out that the commentary reproduced the actual text of that provision, with the addition of the word "normally". In his view, that meant that it was not sufficient for a State to be a party to one of the treaties set out in article 22: it must have taken the necessary steps to establish jurisdiction over the offence in the circumstances set out in the relevant treaty so that it could try the offender. The meaning of the word "normally" seemed to him to be unclear.

103. Regarding paragraph 2, concern was expressed that the current text might give undue weight to nationality. In this connection, one representative noted that the double condition provided for the acceptance of the court's jurisdiction seemed to weaken the effectiveness of the judicial system in cases where either of the States concerned refused to agree to its jurisdiction. Another representative pointed out that the jurisdiction of the court would be limited if it depended on the acceptance of the State in which the crime had been committed or of the State of which the suspect was a national and that the proposed approach would furthermore be inadequate in cases where the suspect had dual nationality. He added however that the fact that a State accepted the jurisdiction of the court over some of the crimes characterized meant that the State was waiving jurisdiction ratione personae so that the linkage of the court's jurisdiction to the State's acceptance was not necessary, even though the suspect might be a national of that State.

104. Some delegations were of the view that paragraph 2 of article 24 should be moved to another article, perhaps article 29, which stated the conditions to be fulfilled in order to bring a case before the court in the form of a complaint.

105. As regards article 25, a number of delegations agreed in principle that the Security Council should be entitled to refer cases to the court, in view of its primary responsibility in the maintenance of international peace and security. Depending on the outcome of the drafting of the rules on jurisdiction, it was stated, the Security Council might well play a central role in identifying situations that might entail legal action by the court. It was noted in this connection that many of the crimes listed under article 22 were associated in some way with international peace and security and that empowering the Council to refer cases to the court would ensure a satisfactory relationship of mutual respect between the two organs. The remark was also made that with the proviso that the Council would not normally refer to the court complaints against specific individuals, it was entirely appropriate that the Council should have the prerogative of referring particular matters to the court, leaving it to the latter to decide whether prosecution should be instituted.

106. Some among those delegations cautioned that the prerogative in question should be limited to cases involving a threat to international peace and security, or to cases involving situations of aggression.

107. Some felt furthermore that more careful consideration should be given to the nature and scope of the said prerogative. One representative, for instance, pointed out that if such a prerogative were granted to the Council, its permanent members should be prohibited from using the veto when it was being exercised, so as to prevent any selective referrals. Another representative suggested that the article should more clearly reflect the idea contained in paragraph (2) of the commentary, namely, that the Security Council would not normally be expected to refer "a case" in the sense of a complaint against named individuals, but would more usually refer to the tribunal a situation of aggression, leaving it to the tribunal's own prosecutor to investigate and indict named individuals.

108. Several delegations suggested that consideration be given to the possibility of empowering the General Assembly to refer certain cases to the court. The remark was made in this connection that the General Assembly was representative of the world community and had a wider spectrum of functions than the Council, ranging from questions concerning the respect of international peace and security to matters regarding respect for human rights. The extension to the Assembly of the prerogative under consideration was viewed as particularly justified bearing in mind the type of offences to be tried by the court, such as genocide, and as most useful in the event that the Security Council was blocked by a veto. The view was also expressed that conferring such a power on the Assembly would be consistent with the main trend in the restructuring of the United Nations to meet the development of the past decade: in the new world order, the newly found effectiveness of the Security Council raised the question of the balance of powers in the Organization.

109. Other comments on the part of delegations generally supporting the article included: (a) the remark that the phrase "cases referred to in articles 22 or 26, paragraph (2) (a)" should be amended by using the language of article 29; and (b) the suggestion that the substance of the article should be included in article 29 inasmuch as the exercise by the Security Council of the right to refer cases was comparable and parallel to the exercise by a State of the right to lodge a complaint.

110. On the other hand, serious reservations were also raised with regard to article 25. Thus one representative said that the right it conferred on the Security Council might introduce an excessively political element. After pointing out that the establishment of a permanent tribunal should, ipso facto, make ad hoc tribunals unnecessary, he remarked that, if the designation of States parties enabled to bring a complaint was as wide as provided for in draft article 29, then it was unlikely that the Security Council would need either to set up an ad hoc tribunal or to act under draft article 22. Several delegations stressed that article 25 constituted a serious breach of the principle of jurisdiction by consent on which the whole draft statute was supposed to be based. Concern was also expressed that it might raise the possibility of the Security Council referring cases involving individuals to the court and the question was asked to what extent prosecutorial independence could be maintained if the Council could exercise its power under the Charter to refer cases to the court. One representative in particular pointed out that a tribunal as important as the one proposed must be based on the principle of voluntary acceptance by States of its jurisdiction. She observed that, although

that principle appeared to be guaranteed in the text of the articles at the beginning of the draft, it was contradicted by article 25, and the question arose as to what legal basis there was for conferring upon the Council the powers of a prosecutor. After stating that article 25 was in line with the recent trend of the Council to go beyond the mandate entrusted to it under the Charter, she remarked that, although the Council held the primary responsibility for the maintenance of peace, it was not the only body in the United Nations system which held that responsibility, nor did all the acts covered by the draft statute relate to the maintenance of peace. In her view, it would be counter-productive to concentrate so much power in the Council, especially in view of the fact that it was one of the bodies that was least representative of the overall membership of the United Nations. The same representative stressed that since the proposed international criminal tribunal would be judging individuals and not States, it was hard to understand what role might be played in such cases by an organ which was empowered under the Charter to consider and decide on questions having to do with the behaviour of States as such, but not with the acts of individuals, particularly when the problems being dealt with did not affect international peace and security.

111. In connection with article 26 and, more specifically, paragraph 1 thereof, the remark was made that the paragraph seemed to stipulate that, with regard to the crimes contemplated in paragraph 2, the special consent of States for the court to have jurisdiction over them was not meant to be made in general terms pro futuro but only in relation to a specific crime committed by specified persons. The question was asked why the expression of consent had been so limited in connection with these crimes and what had led to the adoption of such different solutions under article 23 with regard to crimes contemplated in article 22 and in article 26 with regard to the crimes therein referred to. A further comment on paragraph 1 was that the expression "categories of persons" needed clarification.

112. Some delegations welcomed the inclusion in article 26 of paragraph 2 (a) which extended the court's jurisdiction to "crimes under general international law" not covered by article 22. This paragraph was viewed as necessary in order to ensure that those who might have committed serious crimes universally condemned in the international community such as aggression, which was not defined by treaty, or genocide in the case of States not parties to the Convention on genocide or the 1949 Geneva Conventions, were not beyond the reach of the law. It was said in this connection that it would be hard to justify the exclusion of such crimes from the court's jurisdiction, as such an exclusion would constitute a step backwards for positive international law and an unfortunate lacuna in the statute, and that, despite the difficulty of defining the customary rules of international law, it was preferable to retain the reference to them in the draft, since to omit it would be tantamount to denying the possibility that State practice might in the future produce customary rules for the defence of the international community. The proposed definition of the concept of "crime under international law" was also welcomed. It was pointed out in this connection that although that concept might be considered somewhat imprecise, such crimes could only be tried where they were recognized by the international community as possessing a fundamental character. One representative interpreted the above-mentioned concept as including crimes

against humanity and those relating to discrimination against certain groups of population on grounds of race, ethnic characteristics, religion, etc.

113. Other delegations expressed reservations concerning paragraph 2 (a) on the ground that it might give rise to concerns over the proper application of the principle of nullum crimen sine lege since it was arguable whether the crimes envisaged by the paragraph were defined with the necessary precision so that the court could never be accused of fashioning the law to fit the case. One representative in particular viewed the addition of "crimes under general international law" to the court's jurisdiction as patently unsatisfactory. In his view, the Commission would need to isolate those crimes which were universally recognized as being suitable for international jurisdiction. Another representative expressed concern that the paragraph might lend itself to different interpretations since the category of "crimes under international law" was not sufficiently well defined or widely accepted to form the basis for the jurisdiction of an international criminal court. The view was also expressed that it would be preferable for the court to have jurisdiction only over matters relating to non-compliance with international conventions, without including customary international law, since criminal penalties could only be justified when a written law approved by a parliament existed, and the idea of allowing the Security Council to submit to the court certain cases involving violations of customary international law, however interesting, raised problems that should be given further consideration.

114. Other comments on paragraph 2 (a) included: (a) the remark that, since the concept of "crime under international law" was ambiguous and difficult for courts to determine, it should be made clear that the provision referred in fact to certain offences defined in the draft Code of Crimes against the Peace and Security of Mankind and that, once the draft Code came into force, its provisions should fall within the court's jurisdiction ratione materiae; and (b) the observation that it was necessary to refer, as did the commentary to the article, to the notion of crimes having their basis in customary international law in order to settle a problem of jurisdiction.

115. As regards paragraph 2 (b) of article 26, according to which the court would also have jurisdiction over crimes under national law, such as drug-related crimes, "which give effect to provisions of a multilateral treaty ... aimed at the suppression of such crimes and which having regard to the terms of the treaty constitute exceptionally serious crimes", one representative pointed out that for the court to have jurisdiction under this paragraph, first there must be an international treaty which defined what was meant by an exceptionally serious crime; secondly, a State must have incorporated that crime into its domestic legislation in order to give effect to the treaty; and thirdly, the definition in the domestic legislation must be brought back into international law so that the crime could be tried and punished. He explained that the reason for shifting back and forth between the two types of legislation became clear by reference to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: it had been deemed impossible to incorporate the crimes defined in that Convention directly into the list contained in article 22, because the instrument had not yet entered into force. In addition to that technically correct reason, he went on to say, the argument that drug-related crimes were

not sufficiently defined in the 1988 Convention for it to be regarded as treaty law under the jurisdiction of the court might also have determined the Commission's position.

116. In the view of some delegations, the paragraph should be considered in more detail. One representative in particular pointed out that under the current text the court would have the competence to deal with drug-related crimes only if the multilateral treaty had become part of the national law or if the treaty itself was based on the principle aut dedere aut judicare.

117. One delegation, although recognizing that offences were normally considered to have an international character when they involved the violation of standards vital to the interest of the international community, cautioned that it might be tantamount to usurpation of the role of domestic courts if jurisdiction were given to the international court over crimes which could be punished in domestic courts, backed by an extensive network of extradition arrangements.

118. In this context, some delegations doubted whether drug-related crimes would be more effectively prosecuted by an international court than by national courts. One of them in particular took the view that the time was not yet ripe for the acceptance of international jurisdiction over the crimes referred to in the paragraph, in particular drug-related crimes, as the question arose of the extent to which the system based on the principle aut dedere aut judicare laid down for those crimes already afforded sufficient scope for tackling them effectively. Along the same lines, another delegation, while aware of the urgent need to suppress drug trafficking and to intensify international cooperation in that regard, observed that crimes arising out of drug trafficking could not be put on the same footing as the crime of genocide and the most horrendous violations of the law of war and humanitarian law.

119. Paragraph 3 of article 26 was viewed as requiring further consideration.

120. Article 27 gave rise to objections on the part of some delegations. It was in particular viewed as being in contradiction with the principle of the independence of the judiciary. The remark was made in this connection that the Security Council was a political body, whereas the court must act on the basis of purely legal criteria.

121. In this context, one representative observed that the role assigned by the International Law Commission to the Security Council in determining the jurisdiction ratione materiae of the court lacked a proper judicial basis. After noting that criminal judicial bodies applied instruments of general scope which defined the offences they were to try, this being the essence of the principle of nullum crimen sine lege, he pointed out that there was no instrument of that kind which defined aggression and required States or empowered the Security Council unilaterally to define aggression as a criminal act. In his view, it was not possible that in criminal proceedings a statement made by the Security Council with other purposes in mind could be considered applicable law. He expressed concern that, through provisions like article 27, the International Law Commission had intended that the Security Council should become, without amendment of the Charter, an immense centre of international

power, authorized to legislate and having the functions of a department of public prosecution.

122. Other negative comments on the article included: (a) the remark that instances in which the Security Council deemed it necessary and appropriate to make a determination of aggression were very rare; and (b) the observation that the article failed to deal with either the problems of legal principle or the political repercussions of prosecuting offences involving aggression.

123. Other representatives took the view that, although the approach reflected in article 27 was far from ideal, it was the most realistic one in view of current conditions. There was, it was stated, no entirely satisfactory solution to the problem of the respective jurisdictions of the Security Council exercising an essentially political function, and an international tribunal associated with the United Nations exercising a judicial function. Some representatives furthermore drew attention to lacunae in the article. One of them observed that under the current text it might not be possible to bring an accused person to trial in cases where the alleged criminal action was related to aggression and the situation had not been considered by the Security Council. He suggested that the draft statute would be improved if such a loophole could be closed. Attention was also drawn to situations of aggression in which the Security Council might be paralysed by the veto. It was suggested that in such cases the court should have direct jurisdiction so that it could deal with the case. Such a solution was viewed as all the more appropriate as there would otherwise be two categories of individuals, one of which, through the protection afforded by the veto, would be beyond the tribunal's jurisdiction.

124. Drafting comments included: (a) the remark that the current wording was vague and could be replaced by the formulation used for the establishment of the Nürnberg Tribunal; and (b) the observation that the expression "crime directly related to a crime of aggression" was unclear and likely to raise doubts.

125. As regards article 28 on applicable law, there was general agreement that the court should apply its statute as well as applicable treaties. It was noted in this connection that the codification of substantive law, at least with regard to crimes falling within the court's jurisdiction, must advance in step with the elaboration of the statute and the rules of procedure.

126. Some delegations supported the intention underlying the reference to "rules and principles of general international law" contained in the second part of subparagraph (b) of the article. One of them said that general international law should also play a role in the work of the court, especially in situations where international conventions to which the great majority of States were parties were not directly applicable. He recalled that, as the International Court of Justice had confirmed in several judgments, customary international law continued to exist and to apply, separately from international treaty law, even where the two categories of law had an identical content. Another representative pointed out that if the general rules and principles of international law were not included in the law to be applied by the court, crimes as serious as aggression might become exempt from the inevitability of punishment.

127. The expression "rules and principles of general international law" gave rise however to different interpretations. While it was viewed by one representative as insufficiently precise and failing to appropriately convey the idea that customary law was also included in the law to be applied, it was construed by others as encompassing customary international law and therefore, inasmuch as customary international law was not specific enough to form part of international criminal law, inconsistent with the principle nullum crimen sine lege.

128. Several delegations favourably commented on subparagraph (c) of the article. One representative observed in this connection that international law was frequently silent on matters such as penalties, defences and extenuating circumstances and that even the definition of crimes under treaties was not always sufficiently clear; he pointed out that if no provision for those matters was made in the statute, it would be necessary to refer to domestic law in order to cover them. Along the same lines, one representative observed that although when there was a contradiction between national and international law the latter should prevail without question and although defining an act or failure to act as a crime with regard to international law must be independent of national law, that certainly did not mean that national law was irrelevant: all States had a common pool of law in regard to both the protection of fundamental rights and criminal procedure. Thus, he concluded, although international law provided an adequate basis for the exercise of jurisdiction ratione materiae, related questions, including standard penalties, required resort to national practice. Several delegations supported this approach, particularly as far as penalties were concerned. Recourse to national law was viewed as all the more necessary as the draft Code of Crimes against the Peace and Security of Mankind was still far from final adoption and entry into force.

129. On the other hand, subparagraph (c) gave rise to serious reservations. Specifically, the view was expressed that both the crimes which constituted the subject-matter jurisdiction of the court and the penalties to be applied should be clearly spelt out in the Draft Code of Crimes against the Peace and Security of Mankind in order to guarantee the principle of equality and the principle "nulla poena sine lege". Domestic laws, it was stated, should not serve, even indirectly, as a basis for the above-mentioned purposes.

130. Some delegations suggested supplementing the list contained in article 28. The following elements were mentioned: the court's own case-law; the case-law of other courts of similar jurisdiction such as the Nürnberg Tribunal and the International Tribunal for the former Yugoslavia; "considerations of humanity", invoked by the International Court of Justice in the Corfu Channel case; and decisions of international organizations.

Other parts of the draft statute

131. Parts 3, 4 and 5 of the draft were viewed by some representatives as rightly detailed and providing the necessary procedures for the pursuance of a case from the initial complaint through the mechanism for invoking the tribunal, the investigation, the commencement of the prosecution and the trial until the appeal and review. Satisfaction was also expressed in general terms with parts 3 to 7, which were described as containing the necessary provisions to

make the system work - even though at first sight they might seem to be concerned more with mechanics than with legal principles - and as setting forth the practical means through which the rights of the accused to a fair trial might be respected, particularly in articles 30, 33, 38 to 46 and 64.

Part 3 of the draft statute (Investigation and commencement of prosecution) (articles 29 to 35)

132. As regards article 29, different views were expressed as to which States should be authorized to bring a complaint. Some representatives held that a universal mechanism not limited to States parties to the statute was more consistent with the international community's interest in ensuring that international crimes wherever they occurred did not go unpunished for want of jurisdiction. In this connection, it was suggested that all States should have the power to inform the prosecutor of alleged crimes within the tribunal's competence to enable the prosecutor to form an opinion on the feasibility and desirability of prosecuting the alleged crimes.

133. Other representatives felt it preferable to limit the right to bring a complaint to States with jurisdiction over a particular crime and having accepted the jurisdiction of the court with regard to that crime. The view was expressed in this context that a more liberal system might dissuade some States from accepting the court's jurisdiction out of fear of possible abuses by States which had not themselves accepted the court's jurisdiction. The conditions for bringing a complaint set forth in article 29 were considered to be fully justified by one representative but were viewed by others as calling for further elaboration. In particular, it was suggested that the issues relating to the acceptance of the court's jurisdiction by the State of the perpetrator's nationality or by the State where the alleged offence was committed, currently dealt with in article 24, paragraph 2, and article 26, paragraph 3, should be included in article 29 as conditions to be fulfilled in order to bring a complaint. A similar suggestion was made with regard to the conditions for the referral by the Security Council of a class of potential cases in a situation of aggression under article 25.

134. Different views were also expressed as to whether the Security Council should be authorized to bring matters to the attention of the court as provided in article 29. Some representatives, noting the Security Council's primary responsibility for the maintenance of international peace and security as well as its contribution to the establishment of the International Tribunal for the former Yugoslavia, favoured providing the Council with such a right. They found it inappropriate to allow for the initiation of investigations only in response to complaints from States and argued in favour of creating the equivalent of a public right of action in the name of the international community.

135. Other representatives questioned the necessity of envisaging such a role for the Security Council, particularly in the light of the wide spectrum of States parties entitled to bring a complaint under article 29, which, it was additionally pointed out, would obviate the need for future ad hoc tribunals. Some representatives observed that the Security Council might refer to the court specific cases concerning individuals rather than situations and expressed concern that this possibility was not expressly ruled out in articles 22 and 29.

136. There were also suggestions for expanding the scope of article 29 to provide a role for the General Assembly, the Secretary-General as well as international organizations, particularly those concerned with human rights. As regards international organizations, the view was expressed that the reasons for denying to individuals, and reserving to States, the right of referral to the tribunal did not explain why the door of the tribunal should be closed to international organizations.

137. More detailed views on the right of the Security Council to bring a complaint and on the suggestion to extend to the General Assembly the right to bring complaints are summarized in the context of article 25 (see paras. 105-110 above).

138. With reference to article 30, one representative described investigation as an essential element of the statute, bearing in mind that the major function of the court would often consist in investigating criminal acts and not in punishing the guilty and that a methodical, scrupulous and impartial investigation would therefore be more important than the resulting punishment in giving satisfaction to the victims and to public opinion. For these reasons he regretted the absence in the statute of an investigation organ independent of the judicial organ as in the inquisitorial system, adding however that the lacuna could be filled to some extent by an energetic and active procuracy directed by an independent prosecutor.

139. The view was on the other hand expressed that the investigation of the crime should be conducted by the tribunal, as envisaged in the statute, and that the investigation of highly complex cases could, if necessary, be referred to a special commission. Although recognizing that the proposal to create an independent organ of investigation was a reasonable one, one representative expressed concerns of a financial nature.

140. As to the procedures to be followed during an investigation, one representative suggested that the crime be investigated under the local laws of States. He pointed out, however, that since States had different methods and procedures for investigation and trial under their legislation, they would have to adopt the measures necessary to accommodate the proposed international criminal tribunal. He also argued in favour of the adoption by the court of a code of criminal procedure covering, inter alia, matters relating to investigation.

141. With reference to the role of the prosecutor in conducting the investigation and prosecution, one representative queried the advisability of entrusting the prosecutor with both the investigation and the prosecution. Another representative, while having no major difficulty with the organization of the procuracy as proposed in the draft statute, expressed concern that giving the prosecutor the right to open an investigation on his or her own initiative might pose some problems with regard to the principle of the independence of the investigative branch in relation to the prosecution and trial branches. On the other hand, the proposal that the prosecutor should not be authorized to initiate investigations ex officio or on the basis of information obtained, even if it subsequently turned out that the court had no jurisdiction, gave rise to reservations on the part of one representative, who expressed preference for the

solution adopted in the case of the International Tribunal for the former Yugoslavia (article 18).

142. As regards the failure to initiate an investigation referred in paragraph 1 in fine of the article, one representative welcomed the provision granting the complainant State the right to appeal against a decision by the prosecutor not to take action on a complaint. Another representative endorsed the clause allowing for a review of the prosecutor's decisions in certain cases for reasons of public interest. He pointed out that, given the types of offences with which the court would be dealing, the prosecutor should not be left the final decision in initiating prosecution.

143. As for the indictment, some representatives agreed that it should be prepared by the prosecutor rather than by the State bringing the claim as a means of ensuring the court's neutrality and impartiality.

144. Some representatives welcomed paragraph 4 of the article concerning the rights of a suspected person.

145. With reference to article 31, one representative remarked that the commentary seemed to imply that the court had almost unlimited latitude in the matter of detention. He felt that there was a need at least to establish a mechanism permitting the detainee to request his release on bail while awaiting trial.

146. As regards article 33, one representative suggested that the articles dealing with the situation following the affirmation of the indictment contemplated in article 32 should be harmonized. He questioned the need for a separate phase of notification of the indictment to the accused person. He also expressed concern about a possible overlap between articles 33 and 63: while article 33 required the States responsible for the notification of the indictment to arrest the accused in certain circumstances, article 63 also dealt with the arrest of an accused person. In his opinion, the formulation used in article 63 - "any State on whose territory the accused person may be found" - was the correct one, and the provisions of article 33 should be adjusted accordingly.

147. In connection with paragraph 4 of the article, one representative wondered what would happen if a State not party to the statute did not respect the court's request. After stating that there were no data available for answering that question, which also related directly to the issue of sovereign immunity, he suggested that the Commission should take up the question of protection and maintenance of that immunity as a means of promoting broader acceptance of the draft statute.

148. As regards article 35, one representative stressed that, pending trial, the procedural standards set forth in article 14 of the 1966 International Covenant on Civil and Political Rights should be observed.

149. In connection with the possibility of release on bail contemplated in paragraph 1 of the article, some representatives remarked that the institution

of bail was not compatible with many important legal systems and should therefore not be contemplated in the statute.

150. As regards paragraph 2 of the article, one representative held that the pre-trial detention facilities should be part of the court's system rather than being provided by the State of the seat. In his view, the court should also be responsible for the detention regime.

Part 4 of the draft statute (The trial) (articles 36 to 54)

151. One representative observed that part 4 was based (as was also part 5) on the fundamental principles of criminal law, namely, the principles of legality, equality before the court, the administration of a fair trial and the protection of the rights of the accused. Also referring to part 4 in general, another representative cautioned that great care should be taken to ensure that the detailed and specific provisions contained therein were harmonized with the general rules in other parts of the statute. He made the same observation in relation to parts 5, 6 and 7.

152. As regards article 36, the remark was made that the flexibility of the proposed text constituted a fair response to the concern of some small States that trial and imprisonment of big drug barons in their territories might pose a threat to their security.

153. In connection with paragraph 2 of the article, one representative pointed out that it was important to allow the court to meet in a place other than its permanent seat and, if it so desired, in the place where the crime had been committed.

154. With respect to article 37, the proposed establishment of trial chambers was favourably commented upon. On the question of the selection of judges to serve on those chambers, emphasis was placed on the need to apply objective criteria, which could be elaborated in the rules of the court, so as to ensure transparency and judicial impartiality. One representative suggested that the selection be open to challenge by the parties.

155. As regards paragraph 4, the view was expressed that the trial should be conducted before a chamber of five judges in which neither the complainant State nor the State of which the accused was a national would be represented. According to another opinion, the Commission should explore the possibility of allowing for the States concerned to have their own national judges in the chamber which would hear the case.

156. With reference to paragraph 1 of article 38, the view was expressed that challenges to the court's jurisdiction should be settled by the court itself. It was also argued however that a chamber of the tribunal should be responsible for settling the matter. More specifically, one representative remarked that in cases where the tribunal's jurisdiction was challenged by the accused, the decision on that important question should be taken not by the Bureau but by a chamber established at the pre-trial stage. A further view was that a pre-trial challenge by the accused as to jurisdiction should be heard by the court's Bureau.

157. Various views were expressed as to which States should have the right to raise jurisdictional challenges. One representative suggested that this right be granted to all States parties to the statute and not just to those which had a direct interest in the matter, because the issue was of general interest to the international community as a whole. The remark was however made that, in practice, jurisdiction might only be challenged by States with a direct interest in the case, although all States parties should have the right to do so. Another representative felt it preferable to restrict to States with a direct interest in a case the right to challenge the court's jurisdiction and suggested that article 38 should be re-examined at a later stage. In this regard, one representative insisted that a distinction be made between a situation involving an international crime characterized as such by a treaty and all other situations: in the first case, any State party would have the right to challenge the competence of the tribunal; in other cases, only States having a direct interest in the matter would have that right.

158. The right of the accused to challenge the court's jurisdiction as envisaged in paragraph 2 of the article was favourably commented upon. Referring to the question posed by the Commission in paragraph (6) (b) of the commentary, namely whether the statute should contemplate the possibility of pre-trial challenges by the accused as to jurisdiction and/or sufficiency of the indictment, one representative, while agreeing that the accused should have the right to challenge the court's jurisdiction prior to the trial, particularly as it was possible that no State wished to make such a challenge, felt that there should be no pre-trial challenge by the accused as to the sufficiency of the indictment. He recalled that there were clear procedures in that connection: the complaint was referred to the tribunal by a State, and the indictment was laid by the prosecutorial organ and affirmed by the Bureau or some other body acting as an indictment chamber. Another representative, also arguing in favour of a procedure whereby the accused would be entitled to challenge the jurisdiction of the tribunal before proceedings began, suggested that as soon as the court had determined that a prima facie case against the accused existed, the latter be allowed to challenge the court's jurisdiction within a relatively short space of time. A further remark was that the rejection of the concept "mala captus bene judicatus" should lead to a broad approach concerning the possibility of challenging the court's jurisdiction.

159. In the context of article 40, emphasis was placed on the need to respect the fair trial principle and the rights of the defence from the outset of and throughout proceedings. It was stressed that any criminal system must ensure that accused persons received a fair trial and that adherence to the highest standards of protection of the rights of accused persons was crucial in an age when publicity and public opinion could play a major role in determining the perception of events. Articles 40 to 45, which were intended to ensure respect for those rights, met with a favourable response. It was also noted that the principle of fair trial required the establishment of flexible mechanisms which would both facilitate the task of the court in the discharge of its duties as well in observing the guarantees for a fair trial recognized under different legal systems.

160. Article 40 however also gave rise to reservations. It was viewed as dealing with the issue of fair trial in a rather general way and as calling for

a more systematic and extensive consideration, in the light of a number of international treaties which established machinery for the protection of the accused and for the purposes of ensuring a fair trial (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the Convention against Torture), and bearing in mind the jurisprudence resulting from the application of those instruments.

161. Article 41 was generally welcomed by representatives as embodying a fundamental legal safeguard recognized under different legal systems and by article 41 of the International Covenant on Civil and Political Rights.

162. With reference to subparagraph (a) of the article, according to which an accused shall not be held guilty "in the case of a prosecution under article 22, unless the treaty concerned was in force [and its provisions had been made applicable in respect of the accused]", some representatives favoured the retention of the bracketed phrase on the ground that a treaty did not directly create any obligations for individuals that the requirement in the phrase in question was therefore indispensable. The remark was also made that article 41 should be read in conjunction with article 24, paragraph 1 (a), which established the court's jurisdiction in respect of a crime referred to in article 22 through the express acceptance, under article 23, of any State which had jurisdiction, under the relevant treaty, to try a person suspected of that crime before its own courts. The approach taken by the statute was viewed as consistent with the requirement contained in most of the conventions identified in article 22 that States parties should adopt the necessary measures to establish jurisdiction over the offence; what criminalized the offence was not the treaty itself but the implementation by a State party of its treaty obligation to adopt those measures.

163. Other representatives favoured the deletion of the bracketed phrase. Concern was expressed that, otherwise, a State might, by deciding not to make the treaty offence an offence under its domestic criminal law, provide a legal loophole, which would enable the accused to avoid being tried either by a domestic court or by the international court.

164. In connection with article 42, the remark was made that since criminal law involved the curtailment of an individual's right to personal freedom, care should be taken to establish rules that would ensure justice and fairness in the treatment of all such persons.

165. Article 43 was recognized as embodying a fundamental guarantee.

166. Article 44 was also endorsed as consistent with the international guarantees of a fair trial and as duly reflecting the fact that the accused had human rights which had to be safeguarded and respected, despite the seriousness of the crimes committed.

167. The remark was made, however, that further study was needed to make the statute consistent with the basic principles of criminal law, including the protection of the rights of the accused. As regards the role of national law in this area, it was pointed out that all States had a common pool of law with respect to both the protection of fundamental rights and criminal procedure. At

the same time, one representative observed that certain rules in the statute should be more specific in order to safeguard the rights of the accused at the national level.

168. The right provided for in paragraph 1 (b) was viewed as insufficiently regulated inasmuch as the draft statute, although it contained provisions governing the right of the suspect to legal assistance, said nothing about the status of the defence counsel.

169. Paragraph 1 (d), dealing with the right of the accused to examine or have examined the prosecution witnesses, was considered useful for the establishment of the truth and the proper administration of justice.

170. Paragraph 1 (h) was extensively commented upon. A number of representatives took the view that trials in absentia should be possible under the circumstances contemplated in the draft article. The remark was made in this connection that the right of the accused to be present at his trial should not allow him, or the authorities with jurisdiction over him, to prevent the trial from being held; otherwise, many suspects would find the means to remove themselves from the court's jurisdiction and their absence could paralyse the proceedings, which would deprive victims of even the right to make the charges public and the right to have the truth established. It was also noted that the total prohibition of trials in absentia would merely ensure the impunity of a criminal who might take refuge in a State not party to the statute of the court. The view was also expressed that trials in absentia were sometimes justified in the interest of the international community (notwithstanding the principle set out in article 14 of the International Covenant on Civil and Political Rights that everyone charged with a criminal offence should be entitled to be tried in his presence) and that a judgement in absentia, even if it could not be enforced, had the advantage of restricting the accused person's freedom of movement and giving moral comfort to the victims and his relatives. It was also stressed that the proposed text was balanced in that it excluded proceedings in absentia in principle, but allowed them if the court concluded that the absence of the accused was deliberate.

171. Some of the representatives supporting the paragraph called for certain additional guarantees. It was suggested, for instance, that if the accused appeared before the court after having been sentenced in absentia, a subsequent trial should be held in his presence, in order to safeguard his right to present a defence. The Commission was furthermore invited to provide additional guarantees and procedural safeguards and to consider what should be done in a situation where an accused person was held in custody but refused to participate in the proceedings.

172. Some other representatives, although not ruling out the possibility of trials in absentia in certain cases, took a cautious approach to the issue. Attention was drawn in particular to the political as well as legal difficulties that such trials might entail. It was suggested that trials in absentia be allowed only in exceptional circumstances, such as where an accused person had absconded after the commencement of his trial or had behaved in such a way that he had to be removed from the court.

173. Still other representatives rejected the possibility of holding trials in absentia. They observed that such trials raised serious questions regarding impartiality and respect for the fundamental rights of the accused and that the strict principles underlying criminal law, as well as the fact that many legal instruments such as the International Covenant on Civil and Political Rights upheld the right of the accused to be present during judgement, necessarily cast doubt on the validity of any provision laying down the possibility of trials in absentia. It was also said that any sentence emanating from such trials, being unenforceable, would give the impression of a purely declamatory justice, the court thus becoming a mere "paper tiger". Several of these delegations therefore suggested that the latter part of paragraph 1 (h) be deleted.

174. Article 45 was generally welcomed as embodying a fundamental principle of criminal law recognized in paragraph 7 of article 14 of the International Covenant on Civil and Political Rights. Reservations were however expressed on some aspects of the proposed text. Thus, concern was raised that paragraph 2 (a) actually derogated from the fundamental principle of non bis in idem. It was noted in this connection that the application of the principle should depend not so much on how a particular act was characterized as on whether the act itself was the subject of renewed proceedings.

175. Paragraph 2 (b) also gave rise to objections on the ground that it rendered meaningless the principle of res judicata.

176. Article 46 was viewed as acceptable in principle although some suggestions were made with a view to improving the text. Thus, some representatives felt it necessary to go somewhat further in connection with the protection of victims and of witnesses testifying before the court and to incorporate certain fundamental and guiding principles concerning the safeguard of the rights of victims contained in General Assembly resolution 40/34 of 29 November 1985, entitled "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power". The remark was also made that the protection of the accused, victims and witnesses should be the responsibility of the court and the prosecutor rather than of the chamber.

177. Some representatives invited the Commission’s Working Group to direct its attention to the diverse means whereby States parties might give effect to the provisions of article 47 as well as to those of articles 4, 48 and 52, paragraph 2. In their view, the question of the effectiveness of the court’s work and of the enforcement of its orders might pose constitutional problems for some States.

178. As regards article 48, attention was drawn to the need for an international criminal jurisdiction to have its rules of evidence and the proposed text was described as adequately covering the basic elements of such rules in this context. Mention was made of the possibility of including in the rules referred to in article 19 more detailed provisions or evidence. With reference to paragraph 2, one representative suggested that the court should have the possibility of prosecuting cases of perjury rather than being dependent on States parties to prosecute and try them.

179. Article 48 on the other hand gave rise to objections of principle. Thus, one representative said that the rules governing evidence were far too complex to be addressed in the statute. He observed that such rules differed from country to country and that it would be difficult to find a common denominator on such matters as confession, the presentation of evidence by electronic means and perjury.

180. Article 50 was viewed as defective by one representative, who suggested requiring the presence of an uneven number of judges at each phase of the trial.

181. With respect to article 51, comments focused on the last sentence of paragraph 2 according to which the judgement of the court shall be the sole judgement or opinion issued. Several representatives suggested allowing for the inclusion of dissenting opinions of individual judges in the court's judgement. They observed that judges should have the right in question as a matter of conscience, that the said right formed part of international legal practice and that the practice of dissenting opinions added to the transparency of the proceedings. One representative suggested allowing for dissenting opinions on important points of law, especially those relating to appeals. Another representative contemplated written dissenting opinions on the facts and on points of law, which would follow the full and reasoned statement of the court's findings and conclusions contained in the judgement. One representative took the view that separate opinions should also be allowed.

182. Article 53 was extensively commented upon. Paragraph 1 was found generally acceptable. Several representatives noted with satisfaction that the death penalty was excluded from the range of possible penalties. One representative suggested that life imprisonment should also be ruled out and replaced by a maximum term of imprisonment. Another representative felt that the contemplated range of penalties was extremely broad, as evidenced by the expression "a fine of any amount". In his opinion, the rules contained in the paragraph were too vague to meet fully the requirements of the principle nulla poena sine lege.

183. Paragraph 2 was supported by some representatives. It was pointed out in that context that under article 28, "rules of national law" were a "subsidiary source", and that the reference to national law in the current context was all the more appropriate as most of the international treaties and agreements listed in article 22 did not contain provisions relating to penalties. Some representatives suggested replacing the word "may" by "shall", bearing in mind article 15 of the International Covenant on Civil and Political Rights which prohibits the imposition of a penalty heavier than the one that was applicable at the time when the criminal offence was committed. In this connection, one representative suggested adding the following sentence at the end of paragraph 2: "In no case may a penalty involving imprisonment of greater duration than that specified in any of the law referred to in subparagraphs (a), (b) and (c) or a fine exceeding that specified in any such law be imposed on the accused."

184. Other representatives expressed reservations on paragraph 2 on the ground that a system of penalties like the one therein envisaged which relied on national laws could easily lead to an undesirable situation under which individuals who had committed the same type of international crime could be

subject to different penalties. In their opinion, the best way to ensure uniformity in the penalty system was for the Commission to complete its work on the draft Code of Crimes against the Peace and Security of Mankind which, by precisely defining international crimes and the applicable penalties, would constitute the applicable law in the matter. One representative drew attention in this context to the need to observe the principle nulla poena sine lege.

185. As regards paragraph 4, the solutions contemplated therein were described as "innovative and practical". It was suggested that if a person was prosecuted under the court's statute for illicit trafficking in drugs or for laundering of drug money, the assets confiscated should be made available to help in the fight against those offences, to rehabilitate drug addicts or to help farmers in the planting of alternative crops.

186. Some representatives took the view that the court should have competence not only to apply penalties of a criminal nature but also to pronounce upon the injurious consequences of the crimes committed and award to victims compensation for civil damages. The matter was viewed as calling for in-depth examination since small States would have difficulty in meeting the costs of two proceedings, one for the criminal conviction and the other to obtain damages for injury.

Part 5 of the draft statute (Appeal and review) (articles 55 to 57)

187. As regards article 55, the principle embodied in paragraph 1 was generally endorsed. The remark was made in this context that the right to appeal to a higher instance was recognized in the International Covenant on Civil and Political Rights.

188. With reference to the bracketed phrase at the beginning of paragraph 1, several representatives felt that the prosecutor should be entitled to appeal decisions of the court, particularly as this would ensure respect for the principle of the equality of the parties and guarantee that the acquittal of an accused person was not legally flawed or based on an error of fact. Some felt, however, that the prosecution should be granted the right in question only in specific circumstances (material error of law, emergence of a new fact not known at the time of the trial, disproportion between the sentence and the crime committed, etc.).

189. Other comments on the part of representatives supporting article 55 included: (a) the remark that in order to avoid abuse the grounds for appeal should be confined to "errors of law and errors of procedure"; and (b) the observation that the statute, in accordance with the International Covenants on Human Rights, might also have to provide for domestic recourse against arbitrary arrest made under national law for the purpose of bringing the accused person before the court.

190. Other representatives objected to the contents of article 55. In their opinion, the court's decisions should be final, as were the judgments of the International Court of Justice.

191. The basic approach reflected in article 56 was endorsed by some representatives. Mention was made in this context of "a separate appeals chamber", "an appeals chamber distinct from the trial chamber" and "a separate appeals chamber as provided for in the statute of the International Tribunal for the former Yugoslavia".

192. Comments on the composition of the appeals chamber included: (a) the remark that the chamber should be composed of judges other than those who had made the decision that was being reviewed; (b) the observation that an appeal could be heard by all the judges of the court except for those who had participated in the original trial; and (c) the suggestion that the number of judges comprising the appeals chamber should be twice that of the judges hearing the case in the court chamber.

193. Article 56 however gave rise to reservations on the part of other representatives, who felt that appeals should be handled by a separate and independent body. The remark was made in this connection that under the proposed system the judges invited to hear the appeal would come from the same body of judges that tried the case, which might lead to accusations that they were reluctant to overturn sentences handed down by their colleagues. Along the same lines, concern was expressed that the draft article made no provision for a true appeal to a separate group of judges and the suggestion was made to provide for a higher and lower court, as did national systems, and to lay down different criteria for the appointment of judges depending on whether they belonged to the trial chamber or the appeals chamber.

194. With respect to article 57, the view was expressed that the reopening of a case should be allowed only where it was subsequently discovered that a key witness had perjured himself or where new facts had been uncovered which could not have been discovered before or where a new witness had come forward.

Part 6 of the draft statute (International cooperation and judicial assistance) (articles 58 to 64)

195. Comments on part 6 in general included, in addition to a general expression of support, first, the remark that this part of the draft imposed on States parties to the future statute significant obligations in a number of key provisions; and secondly, the observation that, while consent might be forthcoming for establishing the tribunal, it might be difficult to obtain the cooperation of States on the various aspects involved in a criminal process.

196. Article 58 was endorsed by some representatives, who pointed out that the effective functioning of the international tribunal would be dependent on the cooperation and assistance of both States parties and States not parties to the statute. One representative recommended that, when dealing with international cooperation on judicial matters, the Commission should bear in mind the various statements reflecting changing international legal thinking on the subject.

197. Concern was however expressed that article 58 was one of those provisions which attributed to the proposed court a kind of primacy that some States might be reluctant to recognize to the court.

198. With reference to article 59, some representatives pointed out that, while States parties to the statute would have a special responsibility to cooperate with the court, States non-parties should not be absolved from rendering forms of assistance that would ensure that the law was upheld. In this connection, it was suggested that the article be amended so as to allow the court to call on the assistance of non-parties. However, one delegation observed that it was important to determine how best to relate the statute to non-parties without minimizing the impediments that might be contained in their respective national laws and constitutions. After pointing out that article 59 graphically illustrated the difficult task of reconciling the aim of universality with consent, given the basic tenet of treaty law that agreements or treaties did not bind third parties, he remarked that the proposed text "encouraged" cooperation by non-parties on the basis of, inter alia, comity, ad hoc arrangements, or agreement between the State and the court on such matters as arrest, detention and the surrender of persons. He cautioned that comity had found no place in the relevant provisions of the Vienna Convention on the Law of Treaties which dealt with rules regarding treaties and third States, adding that a reference to ad hoc arrangements or agreements with the court begged the question of why consent to participate in the statute and acceptance of the court's jurisdiction had not been forthcoming in the first place.

199. As regards article 62, the remark was made that the proposed text, like articles 63 and 33, set too low the threshold of consent concerning the relationship between the court and States which had not accepted its jurisdiction or which were not parties to its statute, an approach which could create a risk of exceeding the bounds of jurisdiction by consent.

200. Article 63 was supported by some representatives. One of them emphasized its importance as a deterrent to the commission of crimes subject to the tribunal's jurisdiction. In his view, a request for surrender from the court should be given priority over an extradition request. Another representative observed that by specifically consenting to the court's jurisdiction, States which had ipso facto agreed to the tribunal hearing the case had therefore relinquished the right not to hand over the accused person to the court.

201. The article however gave rise to some reservations inasmuch as it raised a series of basic issues which impinged on both the law of treaties and the law of extradition. In this connection, one representative stressed that the purposes of extradition treaties should not be thwarted. He wondered whether a request for the surrender of an accused person to the court should really take precedence over a properly formulated request for extradition under a treaty, as the draft article seemed to provide. In his view, the provisions of article 63 concerning the immediate arrest and surrender of the accused person might be inconsistent with the requirement for a judicial hearing, which in many countries was a constitutional issue.

202. Another representative cautioned that the acceptability of article 63 would have to be tested against article 41 of the Vienna Convention on the Law of Treaties. He asked whether States parties to the statute which were also parties to an aut dedere aut judicare treaty could be obliged to surrender a person to the court at the request of: (a) a State party to the treaty which was also a party to the statute and (b) a State party to the treaty which was

not a party to the statute. In his view, in situation (a) the State party to the statute could surrender the accused to the court, thus complying with its obligations under the treaty by application of paragraph 4 of article 63; in situation (b), however, the result would be totally different, since the State party to the statute could not surrender the accused to the court but would have to fulfil its treaty obligation to surrender him to the State that was a party to the treaty. In more general terms, another representative warned that provisions such as article 63 which touched upon the relationship between the court and States which had not accepted its jurisdiction risked exceeding the bounds of jurisdiction by consent on which the statute was supposed to be based.

203. Two other points were raised in connection with article 63. One of them concerned the extradition of nationals; the remark was made in this context that since extradition of nationals was prohibited in some countries, the proposed text might not be universally acceptable. The other point concerned the relationship between article 25 and article 63. In this connection, one representative observed that some States might question the wisdom of undertaking an obligation under article 63 to surrender a person to the court when the Security Council could adopt a decision calling for the surrender of that person to another body or to a State.

204. As regards article 64, doubts were expressed on paragraph 2: there was, it was stated, no reason why the court should not be able to use evidence assembled for case A in a case against B.

Part 7 of the draft statute (Enforcement of sentences) (articles 65 to 67)

205. Article 66 was viewed by some representatives as imprecise. One representative suggested providing for more detailed arrangements in relation to the execution of sentences in national penal establishments and to incorporating in the text elements of the statute of the International Tribunal for the former Yugoslavia. The remark was further made that it was not clear how fines or confiscation orders were to be executed, particularly in cases where the convicted person was unwilling or unable to pay or to hand over goods declared forfeit.

206. Other comments on the article included: (a) the remark that acceptance by a State to carry out the penalty should not extinguish the competence of the sentencing court to enforce it and that, in any event, the enforcement of a sentence should be subject to the supervision of the court; and (b) the observation that States should not have the duty of imprisonment inflicted on them, but rather should be able to offer facilities for imprisonment where possible.

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

### 1. General observations

207. Several representatives insisted on the importance and relevance of the topic in present-day international relations. One of them said that his country had been made aware of the potential risk of transporting, through water close to its territory, extremely dangerous materials such as plutonium. Another referred to the tragic consequences of the Chernobyl disaster. Emphasis was placed on the need to regulate activities causing transboundary harm to the environment. It was said in this connection that the protection of the world environment, which involved all peoples, could be guaranteed only if a limit were imposed on activities harmful to the environment, especially when they had transboundary effects. The remark was also made that accidents frequently occurred in the course of normal activity carried out by an individual, a company or a State without anyone being at fault and resulted in damage to the property of an innocent person in a neighbouring State and that it would clearly be unfair to leave the innocent neighbour to suffer financial loss alone.

208. The topic was therefore viewed as worthy of serious consideration and as offering the Commission an opportunity to do innovative work and to contribute to the codification and progressive development of international law.

209. Some delegations drew attention to the complexity of the topic, which was described as relatively new and one which raised controversial theoretical questions, in particular that of the demarcation between primary and secondary rules. One representative observed that the difficulty in defining, first, the obligation to prevent or minimize the risk of transboundary harm and, secondly, liability in the event of actual harm, lay in the fact that the elements in question had not been sufficiently substantiated in positive law and that State practice in that field was still limited. He referred in this context to the United Nations Conference on Environment and Development which had permitted the international community to reaffirm its desire to protect the environment and to adopt principles such as the principle contained in the Rio Declaration on Environment and Development whereby States should ensure that activities carried out within their jurisdiction or under their control did not cause harm to other States or to the global commons.

210. A number of representatives noted with satisfaction that the Commission had made progress on the topic at its forty-fifth session. One of them welcomed the positive outcome of the efforts made at the forty-fourth session by the working group established to examine the general issues relating to the scope of the topic and the approach to be taken in studying it. The Commission was congratulated for bringing coherence and clarity to its handling of the topic and the measure of agreement revealed by the debate was viewed as an encouraging sign.

211. Other representatives however observed that after 14 years of work, the progress was still modest and that discussion was still going on on such basic issues as the scope of the topic and its relationship with the topic of State responsibility. Commenting on the reasons for the slow pace of work, one

representative said that the topic had become bogged down largely for two reasons: overambition and conceptual indiscipline. Another representative said that the topic had not received full attention at the forty-fifth session because emphasis had been placed on the draft statute of an international criminal court and on State responsibility. He suggested in this connection that, at any given session, the Commission should, instead of dividing its time and attention between all the topics on its agenda, focus on some only, in order to achieve tangible results. In his view, the relevant chapter of the Commission was not very substantial and it would have been better to present a more fully developed product. Yet another representative attributed the slow pace of work to the relatively low rank of priority given to the topic by the Commission and to the time-consuming proceedings of the Drafting Committee. One representative however observed that the Drafting Committee had concluded the first reading of draft articles 1, 2, 11, 12 and 14 and had submitted them to the Commission, without commentary.

212. While the view was expressed that the ninth report of the Special Rapporteur had considerably facilitated the work of the Commission, and that the draft articles proposed in that report provided a good basis for further elaboration, the remark was also made that a number of clarifications and improvements were required and that many aspects were still clouded in ambiguity. One representative said in this connection that, given the priority attached to economic development on national agendas around the world and to the efforts of many countries to deregulate their economy and to attract investment, it was essential that States should know the prescribed limits on their rights and duties in that area as signposts for their own domestic legislation and in order to craft satisfactory legal relationships with other Governments and operators. In his view, one of the crucial tests that might be applied to the Commission's ongoing effort was that of clarity, with regard not only to rights and duties, but also to the interrelated concepts of risk, harm and prevention.

### 2. The general orientation of the Commission's work

#### (a) The decisions taken in 1992

213. A number of representatives commented on the Commission's decision to consider prevention first and to proceed to the question of remedial measures (i.e., those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused) only after work on prevention had been completed.

214. Some representatives supported that decision which, it was stated, reflected a practical and effective approach and would contribute substantially to advancing the work on the topic. One representative remarked in this connection that the Commission would have the benefit of the discussions held in other forums and of solutions adopted in existing treaties and that preventive measures promoted the development of the law. Another representative noted that prevention and mitigation of harm were indispensable components of the topic and that their selection for priority consideration was in conformity with a similar tendency in current international environmental law. One of those representatives remarked, additionally, that the work on prevention might lead to the conclusion that there was no need to formulate rules on liability.

215. Other representatives expressed concern that, as a result of this narrow focus, the Commission might fail to deal with other, in their view more important, questions relating to remedial measures, including compensation in the case of damage. It was recalled in this context that the goal of the work was to elaborate a draft instrument which would not only prevent damage but also provide prompt and adequate reparation in case of damage, thereby protecting innocent victims. In this perspective, the Commission's decision was viewed as likely to cause undesirable delays, harmful above all to the innocent victims of transboundary harm who had a moral right to compensation, and emphasis was placed on the need to deal simultaneously with prevention and remedial measures for the benefit of those victims. Along the same lines, one representative insisted that the Commission should devote much of its time to the issue of compensation and objected to prevention taking precedence over other matters. From a legal perspective, he went on to say, the work on remedial measures would be more important than the work on preventive measures.

216. Still other representatives, while finding merit in the Commission's decision to proceed in stages and to establish priorities, pointed out that the question of reparation would have to be addressed and that the articles on prevention were far from exhausting the subject. Concern was expressed in this connection that the Commission should continue to think that it was too early to reach a final decision on the components of the topic. The opinion of the Commission reflected in paragraph 109 of its report that once the articles on preventive measures had been fully developed the conclusion might be reached that it was unnecessary to proceed to the second phase of the work, namely the formulation of rules on compensation, gave rise to objections. One representative in particular deemed it regrettable that the Commission should apparently be unaware of the fact that, no matter what precautionary and preventive measures were taken, accidents would inevitably occur. He rejected the primacy of the notion of prevention and reaffirmed the need for the obligation of reparation which, in his view, lay at the heart of the topic and would have to be dealt with if an effective draft convention was to be elaborated. Such a convention should, inter alia, as one representative put it, bring together into one chapter on prevention all the obligations provided for in the instrument dealing with prevention and include a chapter on liability which would also reflect the definitive trend in that area.

217. The decision of the Commission to distinguish between activities involving a risk of causing transboundary harm and activities causing transboundary harm was also criticized. One representative noted that although the Special Rapporteur had, with extreme patience, tried to accommodate the distinction in question, he had been only partly successful since an activity involving risk might at any given moment actually cause harm. By way of illustration, the representative in question referred to article 14 as proposed by the Special Rapporteur, which referred to the obligation "to contain and minimize harm" and provided for "the use of compulsory insurance or other financial guarantees enabling provision to be made for compensation". The Special Rapporteur, he concluded, had been asked the impossible, namely, to divide and isolate what could not be divided or isolated. Along the same lines, another representative queried the wisdom of the Commission's decision to treat separately activities involving risk and harmful activities: in his opinion, the obligation of prevention did not seem to differ perceptibly in the two situations, as

prevention entailed not only avoiding damage but also minimizing its effects. He added that the establishment of a single set of rules covering prevention would simplify the draft and facilitate the application of a regime of international liability.

(b) The question of prevention

218. Comments focused on (1) the identification of activities involving risk; (2) the concept of prevention; (3) the content of the relevant obligations; and (4) the nature of those obligations.

219. As regards point (1), it was noted that some Commission members wished to have a detailed designation of activities involving risk so that special rules could be established for each category, bearing in mind that it was not possible to cover all categories of activities under a single regime.

220. Some representatives viewed this approach and the idea of categorizing activities according to their degree of risk as worthy of interest and as having the advantage of clarifying the concept of hazardous activity and making it possible to identify the activities or substances which should not be regulated. They at the same time drew attention to the difficulties involved in the preparation of an exhaustive list of hazardous activities and the elaboration of an effective classification system. It was stressed in this connection that the rapid development of modern science and technology made it almost impossible to predict what hazardous activities might appear in the future and that the Commission would be in danger of going beyond its mandate if it sought to develop a specific list of activities which might be incorporated in a draft convention. Reference was made in this context to the inclusion of subjects such as dangerous genetically altered micro-organisms, which would introduce policy debates going well beyond the scope of legal draft articles.

221. In the view of those representatives, the Commission was mandated to establish general rules and should, instead of embarking on the elaboration of a comprehensive set of specific prevention measures, bear in mind that various specific instruments dealing with different activities and situations already existed and that nothing prevented the establishment of preventive measures in specific fields by way of ad hoc technical instruments which evolved in step with scientific and technological progress.

222. The representatives in question warned that an attempt to deal with all contingencies could lead to an indecipherable mosaic of rules. In their opinion, covering all activities involving "appreciable risk" made the topic virtually unmanageable and extended potential liability far beyond that currently recognized by international law or any existing convention. The said representatives at the same time insisted on the need to identify precisely the scope of application of the proposed measures. Some among them urged the Commission to focus its attention on ultra-hazardous activities. Emphasis was placed in this context on the need to adjust the definitions of "risk", "harm" and "transboundary harm" in the light of the Commission’s decision to limit itself to activities involving a risk of causing transboundary harm.

223. Other representatives expressed concern at the tendency within the Commission to raise the threshold at which acts by individuals and States might become actionable under the draft under elaboration. In their opinion, that trend had the effect of placing an unacceptably high burden upon the victims of transboundary pollution and other acts with injurious consequences. They furthermore cautioned against attempting to establish major principles of law or trying to draw comprehensive lists of potentially dangerous substances or activities, which served no useful purpose, particularly as dangerous activities and substances could move in space or change in nature. The Commission was invited to focus instead on the setting up of a relatively simple legal mechanism which would make it possible to assess the distribution of the economic loss resulting from harm, following the example of the common-law system which had confined itself to establishing such a mechanism without going so far as to list the chemical substances which made an activity dangerous or describing every kind of activity in order to indicate a solution for each individual case.

224. As regards point (2), the remark was made that the concept of prevention encompassed prevention ex ante, aimed at preventing the occurrence of an accident, and prevention ex post, aimed at containing or reducing the extent and scope of harm once it had occurred. It was suggested to adopt a differentiated approach to those two notions, following the example of the United Nations Convention on the Law of the Sea which mentioned the need, when dealing with the protection of the marine environment, to prevent, reduce and control pollution of that environment.

225. Some representatives felt that provisions relating to the minimization of harm once it had occurred appeared to pertain more to remedial measures than to prevention and should therefore be left for a later stage. One of them indicated that, in his understanding, prevention ex post had to do with preventing definitive harm after the accident and that reference should be made to harmful effects rather than to harm, inasmuch as harmful effects could be controlled and reduced, whereas harm was definitive and any measure taken to deal with it fell within the sphere of reparation.

226. With respect to point (3), namely, the content of the relevant obligations, it was noted that the Commission envisaged the establishment of an obligation to enact laws and administrative regulations and to enforce them, in order to ensure that those carrying out the activities in question used the best available technology so as to prevent appreciable transboundary harm or minimize the risk of such harm - which meant that, in respect of hazardous activities carried out within the jurisdiction of a State, the State's fundamental obligation would be to assess the risks involved, regulate the activities, devise solutions and notify and provide information. One representative stressed that anything beyond those obligations would be incompatible with the sovereign right of a State to conduct lawful activities in its national territory without the need for the prior approval of another State and that the due diligence of the State of origin would be the determining factor. In his view, proper evaluation by the State of origin of the planned activities with a view to preventing, controlling, reducing and mitigating the risk of harmful effects was amply sufficient, particularly as the same State, whose environment and peoples would be the first to be harmed by a hazardous activity, had a

primary interest in requiring prior authorization. While agreeing that the State of origin must fulfil the obligation of prevention, the representative insisted that in no case should there be a suspension of the activities concerned or any veto by the potentially affected State. He furthermore raised questions as to the usefulness of introducing formal consultations, remarking that it would not be reasonable to expect States of origin to refrain from lawful activities on the ground that an assessment of those activities had pointed to the possibility of transboundary harm, particularly in cases where those activities were considered to be fundamental to the development of the country. In his opinion, it would surely be excessive for the relevant provision to compel the State of origin to consult with all States which might be affected, since that would in practice give those States a veto. What was needed, he concluded, was cooperation based on good faith and undertaken in a spirit of good-neighbourliness.

227. As for point (4), i.e., the nature of the preventive obligations, one representative noted that the Special Rapporteur, in defining preventive measures which attempted to ensure that activities under the jurisdiction or control of a State were carried out in such a way as to minimize the probability of an accident with transboundary effect, had intended to indicate, through the use of the word "attempt", that the purpose of the obligation was not to prevent the occurrence of any harm but to compel the State to take legislative and administrative steps in order to minimize the risk of accidents. He viewed the Special Rapporteur’s approach as illogical - inasmuch as the purpose of minimizing the risk of accident was to prevent the occurrence of any harm - and as reflecting an unduly restrictive approach to prevention. Other representatives supported the "due diligence" concept and the Special Rapporteur’s view that provisions on due diligence did not embody an obligation of result in the sense of article 23 of part one of the draft articles on State responsibility, with one of them cautioning that the obligation of prevention should not be confused with the obligation to prevent the occurrence of harm, lest the entire problem be shifted to the area of responsibility for wrongful acts. One representative however said that the answer to the question whether preventive obligations were obligations of means or obligations of result depended at lest partially on the final form the future instrument would take: obligations of means would be most appropriate in the context of model rules while obligations of result fitted into the context of a convention.

228. Other comments on the issue of prevention included the remark that prevention could not be dealt with in the abstract and that different categories of principles might be relevant for different types of activities.

(c) The liability aspect

229. It was noted that the Special Rapporteur was proposing a regime of State liability in the event of non-compliance with obligations relating to due diligence or procedural obligations, and another regime of civil liability of the operator in the event that the State had complied with its duties but the activity had still resulted in transboundary harm, the latter regime excluding, in principle, State liability.

230. Some representatives expressed reservations about the proposition that a State which complied with its obligation to exercise due diligence should not be liable if transboundary harm occurred. One of them said that the activities of private entities could create inescapable obligations for the State of which they were nationals and that a regime of strict liability was best suited to creating a balance of interests between the States concerned and the protection of victims of acts with injurious consequences. Another emphasized that the principle sic utere tuo ut alienum non laedas applied in the situation under consideration and should be the foundation of the convention. He pointed out that if it was accepted that there was no fault on the part of the innocent victim or operator of an activity, it was, for practical and pragmatic reasons, highly acceptable for the State in whose territory the operator was situated to take responsibility for the damage.

231. Other representatives took the view that the regime to be established should not necessarily exclude "liability without fault" on the part of the State in whose territory transboundary harm originated and that an obligation of reparation could be imposed even when no violation of the rules on prevention had taken place. Some among them, however, insisted on the exceptional or residuary character of such liability. Thus, one representative said that reparation should only be required of the State of origin of transboundary harm after unsuccessful recourse to the mechanisms for repairing damage in the context of private law liability. Another, after expressing reservations about introducing the concept of strict liability for every type of activity, as that would impose excessive burdens on the State of origin, suggested that at least some types of activities, such as those which were ultra-hazardous, should entail liability regardless of due diligence if transboundary harm occurred.

232. Still other representatives questioned the existence of a consensus with regard to the obligation to make reparation, even as a residuary obligation, and insisted on the "polluter pays" principle and on the liability of operators. One of them took the view that the Commission, as evidenced by articles 12, 13, 14 and 16 as proposed by the Special Rapporteur, had not yet freed itself sufficiently from the original emphasis on State liability, as opposed to liability in general. He pointed out that a State might not be able to control the activities of private operators for a number of reasons, including the human rights and freedoms of the juridical and natural persons involved and the need to keep the State separate from the other entities engaged in production and services, and that under such circumstances a State was not in a position to impose excessive restrictions on the activities of private entities. He insisted on the need to make a careful distinction between the role of the State and that of the operator. In his view, the operator had primary and more elaborate responsibilities (including submission of technical data for the project, determination of the risk level involved, supplying of information on proposed measures to deal with risk, or provision of insurance coverage to meet possible claims for compensation), whereas States were responsible for prescribing standards, enacting the necessary laws and regulations and monitoring implementation of community goals embodied by such laws and regulations and might also, in cases where an activity that either was proposed or was already being conducted was identified as entailing a risk of causing substantial or significant transboundary harm, refuse to grant permission for the activity to be conducted or might require the discontinuance of the activity

if there were not enough safeguards to prevent damage or if adequate insurance to meet possible claims for compensation was lacking. He agreed, however, that innocent victims must be adequately and expeditiously compensated for any injury suffered as a result of transboundary activity and invited the Commission to explore all possible means of developing a suitable liability regime for innocent victims, which might include details on States' responsibility for protecting the environment and to also consider the possibility of developing, as had been done in the field of nuclear energy, alternative sources of funding which could be used when provisions made by the operators were not adequate to meet reasonable demands for compensation.

233. As regards the determination of the actual amount of compensation, attention was drawn to the need to bear in mind the disparity of resources between States of origin, States victims of transboundary harm and various operators and the fact the subject principally involved relations between States. Concern was expressed that by leaving open the possibility of deciding the actual amount of compensation in negotiations held in good faith, the Commission was ignoring the fact that in order for the negotiations to be meaningful the parties should be equals or near equals.

### 3. Other elements relevant to the elaboration of draft provisions under the topic

#### (a) The special situation of developing countries

234. Several representatives stressed that developing countries, because of their backward scientific, technological, economic and social conditions, would have difficulty in meeting the onerous preventive obligations contemplated in the draft articles. They therefore insisted that provisions taking into account those countries' lack of financial and technical resources be incorporated into the draft. The Special Rapporteur's suggestion that some general forms of wording should be included in the chapter on principles to take account of the situation of developing countries was accordingly noted with appreciation and viewed as in keeping with the principles laid down in the Rio Declaration on Environment and Development.

235. Some members shared the view reflected in paragraph 135 of the Commission's report that the Special Rapporteur's proposal did not go far enough and that the need of developing countries for preferential treatment should also be reflected in the articles on prevention.

236. Others, while agreeing that an unduly general provision would be difficult to implement in practice, cautioned against an overly specific approach, bearing in mind that the Commission was called upon to formulate generally applicable rules. The question of the transfer of technology was singled out as especially important by two representatives: one of them said that provisions should be formulated to encourage and promote such transfer from developed to developing countries. Another said that care should be taken to ensure that any regime concerned with international liability did not create new restrictions on the transfer of resources and technologies to the developing countries.

237. Some representatives took the view that it was only after the choice between model rules or a convention had been made that the Commission could consider the possibility of special arrangements for developing countries, an issue which was described as premature despite the numerous interesting suggestions made in that regard.

(b) The relationship between the topic under consideration and that of State responsibility

238. It was recalled that during the Commission's discussion the question of the relationship between the topic of international liability and that of State responsibility had been raised: some Commission members believed the two topics to be far from distinct, reasoning that if States were under the obligation to regulate activities from the perspective of prevention only, failure to comply would give rise to issues related to State responsibility, while others considered the two topics as distinct. One delegation favoured the latter view, pointing out that the topic of international liability included not only the role of the State in regulating activities likely to cause transboundary harm but also the need to make the operators involved in such activities accountable for any damage that might occur. Another representative took the opposite stand, stressing that if a series of articles on preventive measures was formulated as a set of primary rules, then failure to implement such measures or to exercise "due diligence" with respect to the rules constituted a wrongful act under international law and involved State responsibility.

(c) The form to be given to the outcome of the Commission's work

239. Several representatives favoured the elaboration of a legally binding instrument or a framework convention so as to avoid all ambiguity with regard to the nature of international liability. Some of them however felt that it would be useful, as an interim measure, to formulate guidelines or statements of principle which would clarify things and facilitate the successful completion of the convention. It was suggested that the declaration should: (a) reaffirm the responsibility of States for ensuring that activities under their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction; (b) encourage them to enact and implement environmental legislation; and (c) remind them of the principles embodied in the Rio Declaration concerning international partnership and cooperation in good faith.

240. One representative objected to the idea of elaborating a framework convention. He found it regrettable that the revised articles contained in the Special Rapporteur's ninth report went beyond the concept of general principles by imposing detailed obligations regarding the assessment of the impact of activities, consultations, negotiations and dispute settlement procedures.

(d) The question of dispute settlement procedures

241. Several delegations felt that this issue should be discussed at a later stage. Some favoured the inclusion of a provision on the matter, with one of them endorsing the opinion reflected in paragraph 189 of the Commission's report that "any dispute settlement procedure should have a technical inquiry

commission as an essential component". In this connection, the view was expressed that two aspects should be considered, i.e., one relating to disputes arising out of the interpretation and application of the future instrument and another concerning consultation. The second aspect, which was narrow in scope, was viewed as very important and it was suggested to provide for a verification procedure of a purely advisory nature to deal with disagreements which might arise with regard to the facts, as in the case where the activity in question was not considered as entailing risk at the level dealt with in the draft or where there were differences of opinion as to the harmfulness of the substances used.

242. One representative on the other hand said that at the current stage he did not see the need for a provision dealing with dispute settlement procedures. He suggested that the matter could be reviewed after the principal orientations and the final form of the draft articles had been determined and added that the scope of such a provision was unclear inasmuch as, in case of refusal by a State to honour its prevention obligations, the issue would move into the realm of State responsibility.

(e) The question of global commons

243. It was noted that the question of global commons was a source of concern for several delegations and the view was expressed that the matter should be taken up again by the Commission. Mention was made in this connection of the possibility of extending the obligation of prevention, albeit without liability, with regard to the global commons or at least of stating, in the chapter on principles, the general concept that the global commons must not be harmed. Such a statement was viewed as useful as a first step towards establishing the principle that it was unlawful to harm the global commons, even though it might be difficult in practice to enforce the prohibition, and the remainder of the draft did not provide for such enforcement.

### 4. Comments on the articles proposed by the Special Rapporteur

244. The set of articles prepared by the Special Rapporteur in his ninth report met with the approval of several representatives. They were described as consistent with State practice and its most recent development, as reflected in the documents of the Rio Conference on Environment and Development, and as setting forth legal obligations which were provided for in a number of recent instruments and were beginning to be viewed as standard, for example as regards prior authorization, transboundary impact assessment, notification and information, exchange of information and prior consultation.

245. Some representatives took the view that, subject to further elaboration and improvement, draft articles 11 to 20 bis provided a sound basis for future work.

246. Other representatives felt that the articles needed to be revised. One of them remarked that, as a result of the deletion from articles previously submitted by the Special Rapporteur of all activities causing transboundary harm, articles 11 to 20 bis appeared to be somewhat incoherent and incomplete, and that a combination of elements of the general provisions and the principles

contained in previous versions with elements of the new provisions would have produced a homogeneous whole. He further pointed out that the Special Rapporteur had dealt only with the technical articles without providing an overall picture of the obligation of prevention and accordingly called for a reformulation of the draft articles.

247. Other comments included the remark that the articles did not necessarily follow a logical order.

248. Commenting on draft articles 11, 12, 13 and 14 jointly, one representative noted that those provisions had been derived from article 1 as formulated in the Special Rapporteur's previous report. While agreeing in principle that the State of origin should have a controlling function, he questioned the appropriateness of providing for detailed regulations and insisted on the need to avoid giving credence to the argument that the legal regime of prevention was interfering with national jurisdiction. He added that it was also unclear whether the essential element of the process of State control was "prior authorization", as mentioned in draft article 11, or "transboundary impact assessment", as referred to in article 12.

249. Article 11 (Prior authorization) was supported by some representatives who objected to its elimination inasmuch as it set forth one of the basic means of implementing the principle of prevention and placed an obligation on both the State and operators. One of those representatives however suggested that the article might more logically appear after the provisions relating to notification and assessment. He further observed that the issue of prior authorization gave rise to a number of problems, including those relating to periodic renewal, withdrawal of authorization and new authorizations. Another of those representatives proposed that the word "major" be replaced by a more moderate word.

250. The article was viewed by other representatives as somewhat problematic. One of them said that it called for further reflection in order to determine its legal basis and scope, since the legal nature of the obligation of the State of origin to seek prior authorization depended upon the existence or absence of such a treaty obligation. He remarked that where a treaty provision required prior authorization to be obtained for activities liable to cause significant harm, non-performance would constitute a breach of that obligation and would thus entail the responsibility of the wrongdoing State; on the other hand, where there was no such treaty obligation, then the principle of cooperation might be more appropriate. He further insisted on the need to clarify whether prior authorization would, ipso jure, deprive the injured State of the right to invoke the liability of the State of origin. In his view, prior authorization should not adversely affect the sovereign rights of any State, and should be based on the principle of the balance of interests; at the current stage, prior authorization should be considered within the framework of the principle of cooperation and good-neighbourliness. Another representative viewed this article as, at best, stating an obvious point and, at worst, creating several difficulties in terms of implementation. He pointed out that it was often difficult for a State to determine that a particular activity had an inherent risk of causing transboundary harm and that the State should not be held responsible for every activity conducted on its territory, whether or not it had

granted prior authorization. Although recognizing that the trend in international agreements was to require States to adopt legislation on basic issues in order to ensure that specific obligations were carried out, he observed that enacting such laws and monitoring the various activities being carried out in the State required financial and other resources that might not be available to all States. Thus, he concluded, appropriate assistance, including financial aid, should be accorded to the developing countries to enable them to discharge their obligations in that regard.

251. With reference to article 12 (Transboundary impact assessment), mention was made of the possibility of incorporating in the proposed text a detailed list of questions which had to be answered during the assessment. This idea was viewed as laudable but not very realistic. Another remark was that the article should be considered in the light of the rights and obligations contemplated in article 11. Agreement was expressed with the Special Rapporteur's view that cooperation was an essential part of the obligations under articles 11 and 12. Other comments included the observation that the phrase "territorial State" should be clarified and the remark that the article should be reworded to emphasize that the territorial State should take an active part in the impact assessment procedure.

252. Article 13 (Pre-existing activities) gave rise to several criticisms. One representative said that it contained ambiguities, for instance with regard to the legal consequences of the issuance of a warning and the continuation of activities involving risk. Another representative expressed concern that the proposed provision might induce States to modify pre-existing legal relationships or even, in some circumstances, to enact legislation that disregarded the principle of non-retroactivity. A third representative said that the article demonstrated how an excessive emphasis on State liability could give rise to distorted priorities. He observed that, according to the proposed text, even when a State had ascertained that an activity involving risk was being carried out without authorization under its jurisdiction or control, there was no restriction on an operator who had failed to seek prior authorization for that activity, even when he was required to do so; moreover, that activity could continue, on the understanding that the State would be liable for any transboundary harm caused. In his opinion, the article should set forth the reverse proposition: the operator should be required to cease the activity involving risk and seek the necessary authorization and, in the meantime, if damage did occur, the operator, and not the State, should be liable.

253. Article 14 (Performance of activities) was viewed by several representatives as essential and as, in the words of the Special Rapporteur, the core of the provisions on prevention. Some of those representatives insisted on the appropriateness of focusing on prevention ex ante, leaving mitigation of harm after its occurrence to future discussions of remedial measures.

254. One representative, however, criticized the proposed text for, on the one hand, failing to incorporate the element of "due diligence" and, on the other hand, reflecting a narrow approach to the concept of prevention.

255. As regards the second sentence, the remark was made that the obligations relating to compensation and compulsory insurance should be regarded as

innovations from the standpoint of the progressive development of international law, since compensation, in accordance with the existing law, presupposed a breach of an obligation entailing responsibility. The word "encourage" at the beginning of that sentence was furthermore viewed as infelicitous.

256. General comments on article 15 (Notification and information) included (a) the observation that its subject-matter raised sensitive issues which merited careful consideration; (b) a warning that the issue of international liability was being overregulated; and (c) the remark that the proposed text should, like articles 16 and 18, be considered on the basis of the principle of cooperation and due regard for the balance of interests.

257. On subparagraph (a), one representative took the view that there was no need for the State of origin to notify in every case the other State or States likely to be affected by a proposed activity which would be carried out on its territory and which might involve a risk of transboundary harm. He suggested (a) that operators, and foreign operators in particular, might be required under certain circumstances to notify those States; (b) that the obligation to notify other States should be limited to those cases where the potential risk involved substantial or significant harm; and (c) that the possibility of providing information to other States on request might also be considered. Another representative, also referring to the question whether the assessment should be transmitted to other States, pointed out that an assessment made by the operator might contain confidential technical data and could not be made available to a third party, whereas a State's assessment would be focused on ascertaining the extent to which the proposed activity conformed to the regulations and could certainly be sent to a third party. He agreed with the Special Rapporteur that information and notification should be provided "as soon as possible", a phrase which should, in his view, be included in the article.

258. Subparagraph (b) was viewed as calling for re-drafting since international organizations could only operate in terms of their constituent instruments. Reservations were furthermore expressed about imposing any obligation in that area but interest was voiced in having the question considered with regard to organizations responsible for areas not subject to State jurisdiction.

259. Subparagraph (d) gave rise to reservations. The remark was made that the decision on whether the populations involved should be informed was the responsibility of each State concerned. Objections were also raised as regards public participation in the decision-making process.

260. Article 17 (National security and industrial secrets) generally met with a favourable response. Some representatives however insisted on the need to review the drafting in order to ensure a proper balance between the need for security and the provision of information pertaining to transnational hazards. To that end, it was suggested to qualify the concepts of "national security" and "industrial secrets" and to strengthen the latter part of the article. Another suggestion was to insert the phrase "and in a spirit of good-neighbourliness" after the words "in good faith".

261. Article 18 (Prior consultation) was negatively commented upon by several representatives. Among those who favoured its deletion, one pointed out that it

might give rise to difficulties in circumstances where States disagreed as to the level of risk of transboundary harm. He observed that while the articles did not give States the right to veto plans of other States, the mere obligation to consult inevitably entailed a limitation on the freedom of choice enjoyed by every State in the exercise of its permanent sovereignty over its natural resources. While noting that the Special Rapporteur had suggested that the problem be solved by relying on the general obligation of States to settle their disputes peacefully as provided for under the Charter of the United Nations, or requesting the opinion of a neutral expert, he observed that the value of those proposals had not been demonstrated.

262. Other representatives, while recognizing the importance of the principle underlying the article, recommended starting from the premise that consultations should be based upon mutuality and reciprocity and should never give rise to suspicion of interference or high-handedness. They therefore favoured a more flexible wording which would ensure the protection of the interests of potentially affected States without imposing excessive obligations on the State of origin since the activities in question were not prohibited by international law. The requirement that States should arrive at "mutually acceptable solutions" in particular was viewed as too stringent and idealistic and likely to lead, in reality, to an impasse. The purpose of consultation, it was remarked, was not to achieve a solution acceptable to all, but to exchange views during the consultation process so that a country would not engage in hazardous activities without prudent consideration of the consequences.

263. Article 19 (Right of the State presumed to be affected) was supported by some representatives. One of them described it as entirely consistent with the rest of the articles but warned against any formulation which might serve as a pretext for continual interference in the industrial policy of States. In this connection one representative insisted on the need to maintain a proper balance between the interests of the States concerned.

264. Other comments included the remark that the expression "State presumed to be affected" should be replaced by "State likely to be affected" and the observation that the requirement in the last sentence that the State of origin should pay compensation for the cost of the study might impede the consultations that were necessary to usher in a preventive regime.

265. Article 20 (Factors involved in a balance of interests) was generally considered as useful although one representative felt that it would benefit from further elaboration and another noted that some of the factors listed were not legal stricto sensu.

266. Article 20 bis (Non-transference of risk or harm) was viewed by one representative as requiring careful scrutiny to determine whether it belonged in the proposed set of articles, but praised by another as correctly reflecting the generally recognized principles embodied in several international instruments, including the Stockholm Declaration of the United Nations Conference on the Human Environment, the Rio Declaration on Environment and Development and the United Nations Convention on the Law of the Sea.

## D. STATE RESPONSIBILITY

### 1. General observations

267. Several representatives stressed the importance of the topic, which a few of them described as being at the very centre of international law. It was recalled that at the most recent meeting of legal advisers of the Council of Europe, the codification of State responsibility had been proposed as a goal to be achieved by the end of the century, an accomplishment that would be a crowning achievement of the United Nations Decade of International Law as well. The complexity of the topic was also emphasized and attention was drawn to the political obstacles relating, on the one hand, to the distinction made in article 19 of Part One of the draft articles and the criminal responsibility of the State and, on the other hand, to the conditions that had to be imposed on recourse to countermeasures.

268. The progress made by the Commission on the topic had been generally noted with satisfaction. In view of that progress, it seemed likely that the first reading of the draft articles would be completed by 1996. One representative recalled in that connection that although the Commission had adopted only five articles in Part Two between 1980, when Part One of the draft had been completed, and 1992, it had at its most recent session adopted six articles and a new paragraph to article 1 of Part Two. In addition, the Commission's drafting committee had prepared four articles on the procedural consequences of internationally wrongful acts, and the Commission itself had begun to study the question of the settlement of disputes and had held an exchange of views on a very preliminary report on the legal consequences of crimes.

269. Concern was however also expressed over what was termed the slow pace of the work being carried out by the Commission on the topic and the view was expressed that a breakthrough in that work would be most welcome.

270. Some delegations indicated that they would prefer to abstain, at this stage, from commenting on questions on which the Commission had not yet prepared draft articles, such as the settlement of disputes and the consequences of international crimes. One delegation deemed it appropriate to postpone its comments until the project had progressed further and it could evaluate all of its elements. Another delegation stated that it was in something of a quandary as to what sort of comment might be of real help to the Commission in the completion of its work. Nevertheless, it hoped that a complete draft would be presented to Member States as soon as possible in order for the entire exercise to be brought to fruition by the end of the Decade.

271. Other general comments included: (a) the remark that when the time came for Governments to assess the draft articles as a whole, the commentaries would play a major role, and that an effort should be made to review the commentaries prepared up to now, with a view to focusing them more on the effect of each individual article than on historical antecedents; and (b) the observation that it should not be forgotten that the question of State responsibility had repercussions for the topics of the draft Code of Crimes against the Peace and Security of Mankind and international liability for injurious consequences arising out of acts not prohibited by international law.

272. The debate on the topic "State responsibility" focused on: (a) the articles of Part Two of the draft adopted at the forty-fifth session and at previous sessions of the Commission; (b) the question of countermeasures; (c) the question of the inclusion in the draft of a third part on the settlement of disputes; and (d) the implications of the distinction between crimes and delicts as regards the consequences of internationally wrongful acts. These four aspects are dealt with below.

### 2. Comments on provisions of Part Two of the draft articles on State responsibility adopted at the forty-fifth session or at previous sessions of the Commission

273. Referring to the articles on the substantive consequences of internationally wrongful acts adopted by the Commission at its forty-fifth session which, it was noted, did not exhaust the question since they concerned only ordinary breaches of international law as opposed to international crimes, a number of representatives endorsed in general terms the approach taken by the Commission. The articles in question were viewed as a valuable contribution to the codification and progressive development of the law of State responsibility and an adequate reflection of doctrine and practice. While recognizing the importance of the articles in question, some representatives observed that they did not raise as complex problems as would arise in the area of countermeasures.

274. One representative, however, took the view that the draft articles adopted in 1993 on cessation, reparation, restitution in kind, compensation, satisfaction and non-repetition brought home how especially difficult it was to be overly prescriptive in this field. He stressed that the international law of remedies was piecemeal and undeveloped, which was due no doubt to the current infrequency of recourse to arbitral or judicial settlement over disputes the nature or extent of which was itself in dispute, and the fact that many of the authorities culled by the Special Rapporteur were somewhat old and might not provide up-to-date guidance. In his view, to attempt a prescriptive table of remedies confronted one with issues of definition, and especially of the delimitation of the availability of one remedy against another, which it might not be necessary to confront in this context. He added that he had sympathy for an approach based on a listing of the types of remedy which might be claimed by an injured State (or awarded by a tribunal) rather than seeking to state each of them in terms of an express entitlement of the injured State; such an approach would still leave room for the inclusion of further language clarifying and defining the nature of particular remedies, drawing on the material embodied in the draft articles under consideration and their extremely full commentaries.

#### Article 1, paragraph 2

275. Satisfaction was expressed with the inclusion in article 1 of a second paragraph which stated explicitly that the legal consequences arising from an internationally wrongful act were without prejudice to the continued duty of the State that had committed the act to perform the obligation it had breached. Thus, it was stated, article 1 made explicit a principle established in the doctrine and practice of most States: the new obligations of the wrongdoing State were of a secondary nature and did not replace its primary obligations.

276. Some delegations, however, reserved their position on the provision in question, which was viewed as unclear and difficult to reconcile with article 7, which imposed on the State that had committed an internationally wrongful act the secondary obligation of making restitution in kind. The view was expressed that that paragraph called in question the logic of the distinction between primary international rules and secondary international rules, which the Commission had felicitously followed until then, and that its actual effect was to enable the primary rule to survive a violation and enter the domain reserved by definition for secondary rules and obligations. It was also suggested that the adopted text should be redrafted in order to accommodate all cases.

277. Lastly, it was suggested that the commentary should note that where the breach was a completed act and compensation had been paid, there was no obligation of performance since that would amount to double compensation.

Article 6 (Cessation of wrongful conduct)

278. The distinction established by the Commission between the obligations of reparation, set forth in articles 7 to 10, which were put in motion by virtue of an entitlement of the injured State, and obligations incumbent on the wrongdoing State irrespective of the attitude of the injured State - which included, in addition to the continued obligation to comply with the violated obligation set forth in paragraph 2 of article 1, the obligation to cease any violation of a continuing character dealt with in article 6 - generally met with approval. It was viewed as fully justified and in keeping with a well established practice. While endorsing the distinction made by the Commission, some delegations remarked that cessation was applicable not only in isolation but also in conjunction with one or more forms of reparation, particularly restitution in kind.

279. Article 6 was also generally well received. It was described as unobjectionable and solidly anchored in current international practice and as usefully preserving the physical conditions allowing effective reparation in the form of restitution in kind, which would be highly improbable if the State committing the wrongful acts were allowed to continue towards its objective. The Commission’s decision to include the article despite the divergence of views on whether a "cessation" was a primary or secondary obligation was regarded as fully justified on pragmatic grounds, as the example in paragraph 10 of the commentary indicated. It was also pointed out, in support of the article, that it protected the interests of both the injured State and the international community in the reliance on the rule of law and in the safeguarding of the legal order as a whole.

280. Other comments included: (a) the remark that the article usefully stipulated that the cessation of wrongful conduct should be considered without prejudice to the responsibility already incurred by the State in question; (b) the observation that the absence of a provision relating to final judgements of national supreme courts called for a number of reservations; (c) the remark that the proposed text did not clearly distinguish between cessation of wrongful conduct and restitution; and (d) the remark that the commentary could have merely stated that the article embodied a common practice to which international tribunals often had recourse.

Article 6 bis (Reparation)

281. Some general observations were made on the concept of reparation. With reference to the divergence of views on whether the right to claim reparation should be limited to directly injured States or extend to all injured States, the view was expressed that the former approach would prevail - failing which the responsibility of the wrongdoing State would be unreasonably extended, and the rule of proportionality would not be observed - and that efforts must be made to distinguish clearly between "direct" and "indirect" damage.

282. The remark was also made that, while the purpose of reparation was undoubtedly to eliminate all the consequences of the wrongful act, the question arose whether it entailed an obligation to re-establish the situation which would probably have existed if that act had not been committed, or to restore the status quo ante, and that this question should be further studied in the light of the views of Governments.

283. Lastly, it was noted that reparation should not be punitive in any way, in conformity with the principle of the sovereign equality of States.

284. With specific reference to article 6 bis, agreement was generally expressed with the Commission's decision to devote to "reparation" in a generic sense, encompassing all the measures that should be taken to wipe out, as far as possible, all the consequences of the internationally wrongful act, a separate article to be read in conjunction with subsequent articles specifying the forms which reparation was likely to take. This approach was viewed as consistent with international legal practice and, in particular, with the Chorzów Factory case, inasmuch as the forms of reparation set forth in the subsequent articles, if combined, could wipe out all the consequences of the wrongful act as completely as possible and thus effect restitutio in integrum. The remark was made in this context that restitution in kind, combined, for example, with lucrum cessans, could wipe out the damage caused through failure to comply with the primary obligation by re-establishing the pre-existing situation and also providing compensation for the loss of profits suffered in the meantime by the injured State.

285. Paragraph 1 of the article, which gave expression to the approach reflected in the previous paragraph, was generally approved. The explicit statement that the various types of reparation could be obtained "singly or in combination" was viewed as particularly useful. One representative asked whether the forms of reparation listed in paragraph 1 should include guarantees of non-repetition. He preferred to consider such guarantees, which, unlike other consequences, were in the future rather than in the past and the present, as an independent and separate entitlement of the injured State, for it would be difficult to see them as part of the "wiping out" of the consequences of a wrongful act. Another representative remarked, however, that assurances and guarantees of non-repetition constituted a way of stepping back in time, or in other words, establishing a trust that had been broken through the wrongful act.

286. With regard to paragraph 2, several delegations welcomed the recognition in it of the need to take account of the negligence or the wilful act or omission of the injured State or national of that State which had contributed to the

damage. In this context, it was suggested to examine further the possibility that the conduct of other States would affect compensation. Some delegations noted, however, that the paragraph reintroduced the notion of fault lato sensu in the reparation stage. One of them expressed reservations about that; another, finding that none of the difficulties which had led the Commission to abandon the element of fault in Part One of its draft was discussed in the report, failed to understand why what was inappropriate in Part One should be appropriate in Part Two.

287. Divergent views were also expressed as to whether it was justified to state under article 6 bis the principle set out in paragraph 2, thereby extending its application to all forms of reparation. Some representatives answered this question in the affirmative. Others, however, believed that the factors referred to in paragraph 2 should be taken into account in the determination of pecuniary compensation or the choice of a particular form of satisfaction, but that they were not applicable to other forms of reparation. Accordingly, it was suggested that paragraph 2 should be transferred to article 8, and that a reference to article 10 should be included therein.

288. One representative took the view that circumstances might affect a State's obligation to make reparation which, for reasons of equity, might not be provided in full. He noted that paragraph 2 of article 6 did not make explicit mention of such circumstances even though paragraph (8) of the commentary referred to equitable considerations and to cases in which the financial resources of the author State were limited.

289. Other comments on paragraph 2 included the remark that it should be made clear that the second subparagraph referred to a national of the claimant State and not the respondent State, so as to avoid the possibility that the claimant State could institute proceedings on behalf of any citizen of the respondent State, in violation of the sovereignty of the latter.

290. Paragraph 3 met with the approval of several delegations. It was viewed as belonging in a general article on reparation, as consonant with article 27 of the 1969 Vienna Convention on the Law of Treaties and as following logically from article 4 of Part One according to which the provisions of internal law had no bearing on the characterization of the State's conduct as an internationally wrongful act.

291. Other delegations, however, expressed reservations on paragraph 3, which, it was noted, had elicited objections in the Commission. One of these delegations associated itself with the view that claims for reparation could be rejected if they conflicted with the national law of Contracting States, and it proposed that a paragraph should be added providing for exhaustion of all domestic recourses before an action could be brought before an international organ. Another delegation noted that one pertinent case was not addressed in the commentary, namely, the final judgement of a supreme court. In a State based on the rule of law, where courts were totally independent, there was sometimes no legal remedy available for rescinding a judgement of a supreme court; the author State could only offer substitutes (like a pardon in criminal cases or compensation in civil cases). This delegation suggested that, in order to avoid forcing an author State into a violation of article 6 bis, provision

should be made for that situation; it was doubtful whether it was covered by article 7 (c). A third delegation stated that paragraph (12) of the commentary referred to provisions of conventional law permitting contracting States to reject a claim for reparation if it conflicted with their constitutional law or to limit claims for reparation. In that delegation's view, paragraph 3 of article 6 bis should reflect reality more accurately by making a distinction between constitutional law and other provisions of the domestic law of the author State, bearing in mind that the significance of constitutional norms in all systems justified the elaboration of a special system under which the criteria used to determine reparation should be adapted to the particular circumstances involved.

292. One delegation took exception to what it termed polemical and irrelevant remarks which were both legally and factually inaccurate.

293. With reference to the proposal to transfer to article 6 bis some of the provisions of article 7, one representative observed that, in the Commission, the prevailing opinion had been that subparagraphs (a) to (d) of article 7 were only appropriate in the context of restitution in kind. While recognizing that it could be argued, from a theoretical point of view, that subparagraph (b) was not solely applicable in the context of restitution, the representative pointed out that in practice it was difficult to imagine any form of reparation other than restitution which might give rise to that sort of breach.

Article 7 (Restitution in kind)

294. Several delegations noted that restitution in kind was the primary (or the most typical or logical) form of reparation. One of them stressed that there was no inconsistency in recognizing that attribute of restitution in kind, while at the same time acknowledging that compensation was the most commonly used form of reparation.

295. The view was on the other hand expressed that making restitution in kind - a form of reparation that was inherently rare - the norm, and making the more usual remedy of compensation a subsidiary remedy, might involve a process of analysis that was too rigid.

296. The remark was made that the definition of restitution in kind contained in article 7 co-existed in international practice with another definition according to which restitution should aim at re-establishing the situation which would have existed if the wrongful act had not been committed. While recognizing that this second definition was more attractive, some representatives stressed that in most cases it would be very difficult, if not impossible, to determine how, if the wrongful act had not occurred, the situation would have evolved and what it would be at the time of reparation. The approach taken by the Commission, which was that restitution should aim at re-establishing the situation that had existed when the wrongful act had been committed, was deemed more practical and consistent with the logic of a system in which different forms of reparation could be combined and any damage not covered by restitution in kind should be repaired by compensation.

297. The exceptions to restitution in kind contained in article 7, subparagraphs (a) and (b), did not give rise to objections, although one representative observed, with regard to subparagraph (b), that it was doubtful whether a situation could arise in which restitution would involve the breach of a peremptory norm of international law, unless the performance of the original obligation would also have entailed such a breach.

298. The exception contained in subparagraph (c) did, however, elicit reservations. It was noted that the proposed text placed the States involved on an equal footing and would thus be unfairly favourable to the State having committed the wrongful act. The remark was also made that the current wording lacked precise definitions and thus required value judgements, and that such an approach was tolerable only in the context of a third-party procedure; as neither the present law of reservations nor the Genocide Opinion of the International Court of Justice would prevent a party to the future convention from excluding Part Three (Settlement of disputes) when ratifying or adhering, subparagraph (c) should be reformulated in a way that might be applied between States in the absence of third-party intervention.

299. Subparagraph (d) gave rise to a number of criticisms. It was said to allow an unfortunate degree of relativism in the determination of the circumstances warranting restitution in kind; that it was of more retrospective than current relevance; that it could be interpreted in various ways; that the terms "political independence" and "economic stability" were of a political rather than legal nature; and that, in practice, the application of the exception in question would depend greatly on whether parties to the future instrument had available a viable dispute settlement procedure.

300. One representative remarked, moreover, that it was doubtful whether restitution in kind would seriously jeopardize the political independence or economic stability of the State which had committed the wrongful act, unless the same would have applied to the original obligation. In some cases, the problem would not be eliminated - especially where it involved a threat to the economic stability of a State - if restitution in kind was converted into compensation.

301. Other comments on article 7 included: (a) the remark that the obstacle mentioned in paragraph (9) of the commentary, namely the treaty obligations of the State that had committed the wrongful act, should be included in the draft article, taking into account the 1969 Vienna Convention on the Law of Treaties; and (b) the observation that the distinction made in paragraph (17) of the commentary between lawful and unlawful nationalizations had originated in restitution in kind and that that mode of reparation was too unusual to justify the risk of confusion and errors inherent in the said distinction.

Article 8 (Compensation)

302. The issue of compensation was viewed by a number of representatives as an important one which concerned the most commonly used and most adequate form of reparation. It was at the same time described as a subsidiary question since the right to compensation existed only when the damage was not made good by restitution in kind.

303. General comments on the article proposed by the Commission included: (a) the remark that the wording should be further clarified, as the question was too important to be left to the discretion of the States concerned or of a third party; and (b) the observation that the current text disregarded the practice followed since the end of the Second World War, namely, the conclusion of bilateral agreements through diplomatic negotiations, under which States undertook to pay compensation for any damages by means of an overall fixed amount to be determined by mutual agreement - a practice which should be encouraged.

304. As regards paragraph 1, divergent views were expressed on the treatment by the Commission of the requirements of a causal link between the wrongful act and the damage. Some delegations agreed with the Commission that, in view of the diversity of situations, it served no useful purpose to insert a qualifying adjective in the requirement relating to a causal link; such criteria could only be applied on an ad hoc basis, where the discretionary power of arbitrators or the diplomatic abilities of negotiators played a decisive role, especially whenever the causal chain between the unlawful act and the injury was particularly long and linked to other factors.

305. Other delegations suggested, however, that the more extensive comments provided in paragraphs 6 to 13 of the commentary should be included in the text of the article itself, so as to specify the nature of the causal link.

306. The relevant commentaries were described as judicious by one representative, but gave rise to reservations on the part of another, who believed that the suggestion that compensation should not be limited to damage directly or proximately caused by the wrongful act, and that if there were concomitant causes, damages should be payable only in proportion to the amount of injury attributable to the wrongful act and its effect, seemed to be a radical departure from the settled rule and to be lacking in practicality, inasmuch as an event might have an endless stream of consequences and there was no objective way of determining what proportion of each consequence was caused by other factors. In that representative's view, it would be better to limit compensation to directly or proximately caused damage, thus making it clear that compensation should not be given where the consequence was remote or an independent intervening factor had also contributed to the damage.

307. Also with regard to paragraph 1, it was stressed that pecuniary compensation could only be demanded by the directly injured State, within the meaning of article 5.

308. With regard to paragraph 2, comments related to (a) the expression "economically assessable damage", and (b) the question of interests and lost profit.

309. Concerning the first point, the view was expressed that, while the expression "any economically assessable damage" included moral damage, the fact remained that compensation for moral damage was exceedingly rare and that such damage was all but impossible to quantify. The remark was also made that the dichotomy established in articles 8 and 10 between economically assessable damage and moral (political) damage was debatable in view of international

practice. Lastly, one representative noted that article 8 avoided mentioning pecuniary compensation, although paragraph 16 of the commentary referred to compensation as consisting "in the payment of a sum of money". If money was to be the measure of damage, as had been recognized since Grotius, that did not mean that compensation must take the form of money; money could be replaced by goods, or even services of corresponding value, if that would serve the interests of the States concerned.

310. With regard to the second point, several representatives stressed the complexity of the issue and the lack of agreement in international practice as to whether compensation should be paid for lucrum cessans or as to the nature of the interest and the method of calculating it. Some expressed the view that, in the absence of any well-established practice, it might be preferable to substitute for the reference to interests and loss of profits - notions which, one representative observed, were not permissible under Islamic law - an indication that compensation should take into consideration any pertinent circumstances.

311. Other representatives took note of the difficulties which the Commission had encountered, and approved the rather broad terms used in paragraph 2, while stressing that the approach taken by the Commission highlighted the need to introduce into the articles on State responsibility effective provisions on compulsory third-party dispute settlement procedures linked to the application of the future convention. Some of these representatives, however, suggested replacing the words "may include" by the word "includes".

312. The expression "where appropriate" was deemed acceptable by some delegations in that compensation for loss of profits was less widely accepted in the literature and in practice than payment of interest. However, this same expression gave rise to categorical objections on the part of one delegation, which stressed that when compensation for the injured party required the payment of interest, lost profit or both, it must be paid by the State having committed the wrongful act; while it was clear that the payment of double compensation was never justified, the inclusion of the words "where appropriate" in article 8 might give the opposite impression.

Article 10 (Satisfaction)

313. It was noted that, while traditionally, restitution in kind covered injury in general (sometimes referred to as legal injury) and compensation covered "material injury" ("damage" or, in the Commission's words, "economically assessable damage"), satisfaction covered moral injury or damage - consisting, traditionally, of an offence to the honour, dignity or prestige of a State. Some delegations considered that the Commission had been well advised to devote a separate article to a form of reparation which, by covering certain types of non-material damage, made it possible to provide full restitution, and which had both a preventive and an afflictive function. While these delegations supported the proposed text, one of them believed that it would be advisable to stipulate that the injured State was entitled to both compensation and satisfaction, while others observed that, although satisfaction was supported by international jurisprudence and diplomatic practice, it was rather an exceptional remedy. The

view was expressed that the proposed text relied on relatively few modern precedents and should be reviewed.

314. With regard to paragraph 1, it was said that, in establishing that the injured State was entitled to obtain satisfaction "if and to the extent necessary to provide full reparation", the Commission had admitted that moral damage was no longer the exclusive element justifying satisfaction. The question arose whether, in thus departing from the traditional concept of satisfaction, the Commission might be opening the door to a very large spectrum of claims concerning damages which up to then would have been repaired through restitution or compensation.

315. Paragraph 2, containing a non-exhaustive list of forms of satisfaction, was deemed satisfactory by several delegations, some of which suggested, however, that court decisions declaring the wrongfulness of the act committed by the wrongdoing State should be added to the proposed list. It was stressed, in this connection, that the mere fact of winning a case, or, in other words, obtaining an international ruling that one is right, frequently offered full satisfaction to the applicant.

316. Subparagraphs (b) and (c) of paragraph 2 gave rise to various comments. One representative questioned the need to distinguish between nominal damages (subparagraph (b)) and damages reflecting the gravity of the infringement (subparagraph (c)) since the only example cited for the latter situation was the Rainbow Warrior case. Some representatives went further, criticizing the subparagraphs in question. One of them stated that to provide for monetary compensation of immaterial damage and for punitive damages constituted an innovation which could hardly be called progressive development of law since the courts had always refused to award such damages. 3/ The Rainbow Warrior case, which was the only precedent invoked in the commentary, could not alone have transformed customary international law, especially as it had very particular aspects. Another representative suggested that subparagraph (c) should be deleted, as it could give rise to interference in the internal affairs of States and could be misused to exert leverage on developing countries that did not possess the financial capabilities to defend themselves in international proceedings.

317. The same comment was made in relation to subparagraph (d). Other critical remarks concerning the subparagraph included: (a) the observation that a State based on the rule of law could not, in good faith, accept an obligation to punish officials or private parties for serious misconduct or criminal conduct, since it was up to independent courts to decide whether anyone should be punished; and (b) the remark that, while it was certainly true that a State could incur liability because it had not punished officials guilty of serious misconduct, the precedents on that point, which were very rare and from another era, did not mean that a State could be required, by a third party or otherwise, to punish those responsible.

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3/ A similar criticism was addressed by another representative to subparagraph (c) only.

318. Support was on the other hand expressed for subparagraph (d) on the ground that it was based firmly in the literature and represented a logical link between the field of international responsibility of States and the field of individual criminal responsibility.

319. Paragraph 3 was deemed satisfactory by several delegations. One representative believed, however, that it should encourage even greater respect for the sovereignty of the State which had committed the wrongful act by prohibiting not only demands for satisfaction that might impair the dignity of the wrongdoing State but also demands which constituted interference in the internal affairs of that State.

Article 10 bis (Assurances and guarantees of non-repetition)

320. Some representatives expressed support for this draft article which, in their view, usefully supplemented the set of remedies available to a State which was injured by an internationally wrongful act. One of them emphasized the importance of the words "where appropriate". Another deemed it desirable to indicate in the commentary the most appropriate remedies of that kind, taking into account State practice.

321. Other representatives believed that the text proposed by the Commission was too vague. They pointed to the absence of any indication of the kind of guarantees that could be requested or how claims could be presented, and noted further that the choice of measures to be taken remained with the wrongdoing State. In their view, the obligation to provide guarantees should be subject to a real risk of repetition and serious injury.

322. Still other representatives queried the need for the article, which was described by one of them as having more of a political than a legal basis. Thus, one representative noted that what it prescribed seemed to be covered already by article 1, paragraph 2, since the effective performance of the author State's obligation "to perform the obligation it had breached" included the adaptation of laws or administrative measures if they had been instrumental in causing the breach. In his view, a similar effect was achieved by article 6. It seemed incongruous to request a State to give "assurances or guarantees" that it would in future fulfil an obligation which it was already bound in law to fulfil. Another representative expressed the fear that the application of the article might lead to humiliating demands on the State that had committed an internationally wrongful act. In his view, an apology offered in application of paragraph 2 (a) of article 10 would contain, at least implicitly, assurances of non-repetition. A third representative said that if the article was not to be deleted, it should be redrafted by omitting guarantees of non-repetition and giving the wrongdoing State the right to determine the kind of assurances required by the situation.

323. It was suggested that footnote 261, referring to cases which had arisen in a previous era, should be deleted.

Other observations

324. Some representatives pointed out that the articles adopted at the previous session did not provide any answer to the question of whether and to what extent the injured State had the right to choose the form of reparation it wished to obtain - in particular with regard to restitution in kind and compensation, which might give rise to practical problems. They expressed the hope that the Commission would consider that question before finalizing its work on Part Two of the draft articles. One of them stressed that excessive demands might lead to aggravation of a dispute rather than to its resolution; there again, a dispute settlement procedure relating to the interpretation and application of the articles might be of value.

325. Referring to some articles of Part Two adopted at previous sessions, one representative suggested that the Commission should review articles 2 and 4; he wondered whether it was legally appropriate to determine the consequences of an internationally wrongful act pursuant to the provisions of the draft articles on State responsibility while otherwise applying the provisions and procedures outlined in the Charter of the United Nations. The same representative, referring to article 5, proposed that the expression "injured State" should be replaced by "claimant State", since a State could be described as injured only if an independent judicial mechanism so decided. He also proposed that infringement of the rights in rem acquired by prescription should be added to article 5 (2). With regard to subparagraphs (b) and (c) of article 5 (2), he suggested that they should be confined to rights arising from judicial decrees or arbitration awards, as subjecting a State to other proceedings might constitute double jeopardy. Lastly, he expressed the view that the right to commence proceedings should be restricted to the State claiming a particular injury and, accordingly, he invited the Commission to delete the second part of paragraph 2 (c), as well as paragraph 2 (e) (iii), which gave any State the right to sponsor claims dealing with human rights and fundamental freedoms. It was not clear how a State could suffer injuries from another State by reason of the latter's violation of the rights established in that area; the same comment applied to article 5 (2) (f).

3. The question of countermeasures

326. A number of representatives pointed out that this question was a complex and problematic one.

327. Some stressed that, in an essentially decentralized society such as the contemporary international community, countermeasures played a role which could not be ignored or denied inasmuch as they constituted an individual response to a wrongful act in the absence of collective, timely and organized action. Along the same lines, it was said that countermeasures could be regarded as a means of redress in certain circumstances, in the absence of an effective system of dispute settlement.

328. Other representatives expressed reservations or objections with regard to the inclusion in the draft of provisions dealing with countermeasures. Doubts were expressed on the advisability of providing, in the context of a

codification exercise, for a legal regime for countermeasures which, it was remarked, were unilateral and could not be sanctioned or legitimized a priori by the international community. It was also observed that, because countermeasures tended to be available only to powerful States, justifying them would often amount to justifying might over right. Concern was expressed in this connection that countermeasures might be used in the promotion of self-interest or special interest by a State which claimed at the same time to be acting on behalf of the international community in defence of international law. The remark was further made that resort to countermeasures by an injured State might raise the stakes in a dispute and that it was difficult to see how a reaction to a wrongful act could appropriately be the perpetration of another wrongful act as a result of the inability of the international community to establish a system to ensure respect for international law.

329. A number of representatives insisted on the need for the Commission to look at guarantees or legal checks and balances against the abuse of unilateral measures by powerful States and to make every effort to strengthen them. Countermeasures, it was said, must be applied with great caution and restraint and be strictly regulated in order to prevent them from becoming a purely political instrument to be used only by those States which were in a position to implement such measures in order to obtain justice. Stress was laid, in this context, on the need to elaborate articles which would meet with the widest possible acceptance.

330. While some representatives indicated that they would defer their comments on the relevant draft articles elaborated by the Drafting Committee, others offered specific comments on the elements to be included in such draft articles. Several stressed that countermeasures should be aimed at restitution, not punishment. It was said in this connection that countermeasures must be limited to the purpose of inducing the wrongdoing State to comply with its obligations under draft articles 6 to 10 bis relating to the consequences of wrongdoing.

331. Some delegations further commented on the conditions of resort to peaceful settlement procedures. One of them indicated that countermeasures should be admissible only when all means of peaceful settlement had been exhausted. Another delegation supported the realistic approach suggested by the Special Rapporteur in article 12 (1) (a), which required the injured State to resort to peaceful means for the settlement of disputes, in accordance with Article 33 of the Charter, before resorting to countermeasures in order to remedy the illegal situation. This delegation recalled that that approach was already well-grounded in general international law and corresponded to the overall obligation of States to fulfil their international responsibilities in good faith and to cooperate with each other in order to meet them. A third delegation stressed that third-party dispute settlement procedures in the field of State responsibility were a sine qua non, indispensable for the protection of militarily weaker States.

332. One representative also mentioned compliance with time-limits as one of the conditions for the legitimacy of countermeasures.

333. With regard to the form which countermeasures were likely to take, some representatives stressed the need for especially strict rules concerning the use

of force. One of them recalled that one of the most important achievements of the contemporary international community had been its ability to bring force under the rule of law and that the basic structure in which the use of force was defined by international law as an internationally wrongful act, an act of self-defence or a sanction under Chapter VII of the Charter should not be altered in any way that might give rise to inequality and arbitrary action. The use of force, he went on to say, should not be unilaterally qualified by a State or a group of States, even if they were acting in good faith. In this context, some delegations referred to the question of determining the extent to which it was admissible to resort to force in response to an international crime, bearing in mind the distinction between crimes and delicts made in article 19 of Part One of the draft articles. The views expressed in this connection are reflected in section 4 below.

334. Commenting on the placement of the provisions concerning countermeasures (which he preferred to call "sanctions"), one representative pointed out that international sanctions were a compulsory means of dispute settlement intended to compel the wrongdoing State to fulfil obligations arising from its responsibility. Accordingly, the relevant articles should not be contained in Part Two of the draft articles, which concerned the content, forms and degree of responsibility, but in Part Three, which dealt with the implementation of international responsibility and dispute settlement procedures.

### 4. The question of the inclusion in the draft articles of provisions on the settlement of disputes

#### (a) General observations

335. A number of representatives answered affirmatively the general question whether the future convention should include suitable procedures for the settlement of disputes. Emphasis was placed on the need to overcome the substantial conceptual and practical difficulties which the establishment of such procedures had come up against if an effective mechanism guaranteeing the international legal order was to be established, and the Commission was urged to make good use of the United Nations Decade of International Law in elaborating minimum dispute settlement provisions, thus strengthening the obligation on the part of States to settle their disputes by peaceful means.

336. Other representatives questioned the wisdom of dealing at the current stage with the question of dispute settlement procedures. Attention was drawn to the importance and complexity of the issue and to the need to reflect further on such essential questions as the scope of the proposed system and its relation to other areas of international law. The remark was also made that the inclusion in the draft of a dispute settlement system pre-supposed that the Commission's work would take the form of a treaty and that it was still too early to predict the final form of the draft articles.

337. Among the representatives who expressed readiness to accept the inclusion in the draft of provisions on the settlement of disputes, two trends were discernible. According to one view, the Commission should, in order to ensure the development of jus gentium, as provided for in the Charter, seek to go

beyond existing rules, mechanisms and institutions: it should innovate. It was pointed out, in this connection, that a diplomatic conference convened for the purpose of considering a draft resulting from the work on responsibility would not depart from the substantive rules contained in the text just because the text contained provisions for the peaceful settlement of disputes which were considered too progressive: if necessary, it would delete or amend such provisions.

338. According to another view, a general dispute settlement regime under a code on State responsibility would have far-reaching effects, inasmuch as State responsibility formed one of the basic underpinnings of the whole system of international law, and to query the appropriateness of turning the project into a general treaty on the peaceful settlement of disputes was neither cowardice nor pessimism.

339. Similarly, views differed on the nature of the procedures to be envisaged.

340. One body of opinion supported in general terms third-party settlement procedures. In this connection the remark was made that if, in the past, the Commission had justified its caution by referring to the reservations of some States vis-à-vis third-party settlement procedures, as well as its concern not to jeopardize the adoption of the substantive rules contained in its draft articles, the international situation had changed with the end of the cold war and the strengthening of the principle of the rule of law.

341. While some of the representatives concerned favoured third-party settlement procedures with binding effects (with one of them pointing out that although several conventions drafted on the basis of work done by the Commission had provided either for an optional jurisdictional procedure or for compulsory conciliation, neither approach was satisfactory, especially in an area with such great potential for disputes as that of the law of the international responsibility of States), other representatives expressed preference for compulsory third-party settlement procedures, with one of them insisting on the need to keep within the basic rules of international law in order not to compromise the possibility of universal adherence to the future convention, and another suggesting that the applicability of such procedures be limited to certain parts of the draft, following the model of the 1969 Convention on the Law of Treaties.

342. According to another trend, the history of States' adherence to compulsory third-party settlement did not give grounds for any optimism in spite of the increased use of the International Court of Justice and the willingness of States to submit more disputes to third parties. The remark was made in this context that declarations of acceptance of the compulsory jurisdiction of the Court were usually accompanied with substantive reservations. Thus, it was concluded, the Commission was well advised to proceed with caution and deliberation in such a complicated area, at the risk of finding the entire set of draft articles on State responsibility rejected, inasmuch as States were not likely to welcome a single regime of compulsory dispute settlement for all types of problems irrespective of their nature, their significance for the countries concerned and the long-term repercussions.

343. According to a third body of opinion, it was crucial to strike an appropriate balance between what was desirable and what was possible and to work out a regime which, while ensuring that the effectiveness of the future convention was not diminished by the lack of appropriate dispute settlement procedures, would have the required degree of flexibility and would encourage States to settle their disputes expeditiously and by peaceful means.

344. With regard to the attributes which a dispute settlement procedure designed along these lines should have, several representatives emphasized the principle of free choice. It was said in this connection that at the time of becoming parties to a treaty, States should be given the opportunity to declare whether they agreed to be bound by any dispute settlement provisions and should be accorded the right to withdraw or modify such a declaration. Along the same lines, emphasis was placed on the need to include an "opt in - opt out" clause and on the desirability of allowing for the possibility of formulating reservations to Part Three - which meant that Parts One and Two of the draft should be formulated in such a way that their application was not dependent on a third-party settlement procedure.

345. Some representatives felt that a second attribute of the future dispute settlement regime should be simplicity. One representative proposed in this connection that a minimum dispute settlement mechanism should be elaborated, on the understanding that States would be free to agree to more extensive or supplementary mechanisms, including through bilateral treaties or acceptance of the compulsory jurisdiction of the International Court of Justice. The remark was made, in this connection, that, since 1958, the codification conventions had mostly provided for jurisdiction of the International Court of Justice in the form of optional protocols to the substantive conventions, and that there was no reason to change such tried and tested practices. It was accordingly suggested to provide that all disputes arising out of the future convention on State responsibility should be settled amicably by negotiation, failing which both parties might agree to have recourse to arbitration or adjudication by the International Court of Justice, whose jurisdiction would be mainly consensual except in respect of breaches of principles of jus cogens. Along the same lines, the creation of entirely new dispute settlement mechanisms was deemed inadvisable, and it was recommended that the Commission should give preference to the various permanent and ad hoc mechanisms which had already been developed. Providing for recourse to the basic existing mechanisms - conciliation, arbitration and recourse to the International Court of Justice - would be acceptable, as long as States had the option of determining the type of mechanisms they accepted and for which types of disputes.

346. Other comments made in this context included the remark that the regime under consideration should not be too costly and the observation that it would be pragmatic to provide guidelines and to leave the determination of appropriate mechanisms to the diplomatic conference which would adopt the future convention.

(b) The Special Rapporteur's proposals; scope of the proposed regime

347. Several representatives felt that the scope of the proposed regime was unclear and the question was asked whether the intention was to cover only disputes arising from the adoption of countermeasures, or also disputes arising

before the adoption of countermeasures, or to encompass the totality of the disputes which might arise from the future convention.

348. A number of representatives took the view that the Special Rapporteur had clearly and rightly focused on resort to countermeasures as the triggering factor for the setting in motion of the proposed dispute settlement procedures. In their view, it was legitimate and essential to combine the basic provisions relating to countermeasures with a particularly strict dispute settlement regime concerning the lawfulness of recourse to such measures, with a view to making them more compatible with the rule of law and minimizing their adverse effects. It was recalled in this connection that countermeasures constituted a derogation from international law and should be subject to extremely tight control, so that de facto inequality between States would not be heightened by de jure inequality.

349. Other representatives questioned the wisdom of the Special Rapporteur's approach and insisted on the need to cover all disputes arising out of the future convention. One of them, after pointing out that, as confirmed by the debate, the Commission, in dealing with countermeasures, was inevitably venturing beyond the scope of the topic of State responsibility, and recalling the concerns expressed previously on this subject by his delegation, stressed that an approach which established too close a link between dispute settlement procedures and countermeasures addressed only one part of the problem inasmuch as many members of the Commission were of the view that the provisions governing the peaceful settlement of disputes must also provide for the interpretation of all articles of the future convention. He furthermore remarked that, by emphasizing disputes arising from recourse to countermeasures, the draft provisions gave the impression that countermeasures were the root cause of the dispute and not the consequence of the original internationally wrongful act and that such a shift of presumptions, from the wrongdoing State to the injured State, was contrary to the general economy of the proposed system. He observed finally that such an approach might produce the opposite effect to that sought, in that a State might adopt countermeasures with the sole aim of forcing another State into third-party conciliation.

350. Another representative stressed that establishing mechanisms that would be triggered only after resort to countermeasures and whose sole purpose was to determine lawfulness did nothing to resolve the basic problem, for it was impossible to judge the lawfulness of a countermeasure without addressing the object and origin of the dispute. Furthermore, the proposed system did not provide for the reparation of the damage, even though that was an essential aspect of international responsibility; if, before they could address the question of reparation, the States concerned had to wait until the lawfulness of the countermeasures had been established and the conduct that had motivated them had been judged unlawful, then, rather than inspiring confidence, the system might only prolong disputes. This representative therefore insisted that the settlement mechanism should provide for a comprehensive solution of the problem.

351. While sharing this view, some representatives believed that it might be useful to establish separate regimes for the settlement of disputes relating to countermeasures and to other types of disputes. In this connection, one representative proposed to deal in Part Three of the draft with disputes arising

from the articles on responsibility and exclude disputes involving countermeasures. He advised against including in that part - and this was traditional in the Commission's conventions - complex settlement procedures with many steps, including a compulsory procedure, in view of the fact that responsibility accounted for a large part of international law, and of the principle of the free choice of methods, set out in Article 33 of the Charter of the United Nations. However, he did not exclude the possibility of elaborating an optional protocol which would contain more complex and rigorous procedures. As for the provisions concerning the settlement of disputes involving countermeasures, he suggested that they be put straight into Part Two.

352. The idea of dissociating the provisions concerning the lawfulness of countermeasures from the more general provisions which would apply in the standard way to disputes arising from the interpretation of the future convention was viewed by some representatives as worthy of further study but gave rise to reservations on the part of one delegation, which warned that the dispute settlement procedure relating to countermeasures should not be too far removed from the general procedure applicable in cases of disputes concerning the interpretation or application of the provisions of the future convention.

353. Some delegations commented on the relationship between the system proposed by the Special Rapporteur and the substantive provisions of the draft defining the obligations of a State intending to resort to countermeasures.

354. It was remarked that article 12 as proposed by the Special Rapporteur made the lawful resort to countermeasures conditional upon the exhaustion of all amicable settlement procedures available and that the Special Rapporteur had given an unduly loose interpretation of that provision by stating in his fifth report that it merely referred to settlement means rather than prescribing them. While noting that such an interpretation permitted the Special Rapporteur to justify a highly restrictive system of dispute settlement, some delegations cautioned against placing too much reliance on dispute settlement procedures as an ex post corrective to substantive provisions, and believed that care should be taken to provide an equilibrium between ex post and ex ante limitations. In this connection, some representatives spoke in favour of strengthening the obligation of the State taking countermeasures to propose settlement procedures. One delegation suggested that such a State be required to offer credible means of peaceful settlement of disputes before embarking on countermeasures, it being understood that the other State could accept the offer, or make a counter-offer, as long as it was equally credible and sincere. He remarked that testing the legality of countermeasures through a binding third-party dispute settlement procedure would not mean much if the system allowed the initiation of countermeasures without preconditions. Attention was, however, drawn to the fact that countermeasures were the means by which a State could bring about the cessation of a wrongful act, or the conclusion of an agreement to resolve a dispute peacefully, and that placing excessive burdens on the injured State would only strengthen the position of the wrongdoing State.

355. Several delegations referred to the distinction made by the Special Rapporteur between the "theoretically ideal" solution to the problem and the "more realistic approach". Some refused to consider unattainable the idea of imposing on States the obligation to exhaust given, directly prescribed third-

party settlement procedures with binding effects before any resort to unilateral reactions. In their view, the delays inherent in such a procedure would be far less prejudicial than a violation of the law by way of countermeasures. One of them stressed that, owing to the change in States' attitudes towards compulsory settlement procedures, such procedures might become the norm in a few years, and that if the second alternative proposed by the Special Rapporteur attracted more support, it might be possible to have a two-part procedure, a part geared to contemporary realities, and a more progressive part, in the form of optional provisions.

356. Other delegations, while recognizing that the ideal solution would have been to subject the whole of the law of responsibility and, indirectly, the evaluation of compliance with all substantive rules, to an international arbitral or judicial body, believed, like the Special Rapporteur, that it was preferable to settle for a system in which the State resorting to unilateral measures would only be subject to control by a judiciary body, and the exhaustion of existing procedures would be a parallel obligation, and not a prerequisite for lawful recourse to countermeasures. In support of this system, it was stated: (a) that it spared the injured State the long wait which the "ideal solution" involved; (b) that it provided that State with redress in the form of countermeasures; (c) that it had the advantage of urging the author of the violation into third-party settlement procedures if it wished to avoid the countermeasures; and (d) that the possibility of judicial review should prevent abuses.

357. As regards the content of the system proposed by the Special Rapporteur, a number of representatives agreed that compulsory third-party settlement procedures should be provided for. It was emphasized, in this connection, that the divergent views concerning these procedures were becoming less pronounced.

358. The suggested three-tier system involving conciliation, arbitration and resort to the International Court of Justice was approved in principle by the representatives in question, one of whom described it as perfectly consistent with the provisions of Article 33 of the Charter. It was at the same time viewed by some of those representatives as capable of improvement. Thus regret was expressed that it should make no room for negotiation. The idea of conciliation being followed by two successive jurisdictional channels also elicited reservations, and it was deemed preferable that, if conciliation failed, the more diligent party should be able either to initiate unilaterally an arbitration procedure, or to take the matter to the International Court of Justice, if the two parties had accepted the Court's jurisdiction. It was also suggested that the proposed system should be streamlined through the application of the experience gained in implementing the European Convention for the Peaceful Settlement of Disputes, which also had a complex structure.

359. Other representatives observed that third-party settlement procedures stood little chance to meet with general agreement. Referring to the argument that, whatever the contemporary character of the international community, the Commission must work in a pioneering spirit, they observed that no effective work could be accomplished in the area of the progressive development and codification of international law without taking the realities of the world into account. One of them furthermore pointed out that any dispute settlement system

in respect of State responsibility would affect both primary and secondary obligations regardless of the subject-matter, so that, for instance, the legality of armed attack, assistance to insurgents and counter-insurgents and the suspension of treaties would come within the purview of the dispute settlement regime. In his view, it was unlikely that States would willingly resort to compulsory third-party means to settle such questions. Along the same lines, another representative expressed disagreement with the Special Rapporteur's view on the merits of compulsory third-party settlement of disputes. He remarked that no single means of dispute settlement could be inherently better than others if there was no willing acceptance of such a method by all the parties involved and that some of the disputes which were likely to involve countermeasures might not be amenable to ready resolution by arbitration or other forms of third-party legal settlement of disputes. He added that, when concessions had to be made by the parties involved, they were often made in a bilateral and a face-to-face context, and that imposed solutions were inevitably flawed, particularly if there was no appreciation of the interests and considerations of all the parties involved. In his opinion, conflict resolution was more likely to be durable if it was voluntary.

360. The proposed system was further criticized as being at variance with a number of principles or rules of international law. It was in particular viewed by a number of representatives as contrary to the principle of free choice of means set forth in Article 33 of the Charter. Concern was also voiced that it might override any other system agreed by the parties under existing bilateral and multilateral agreements. Doubts were moreover expressed on its compatibility with the rules concerning the jurisdiction of the ICJ. In this context the remark was made that the report of the Special Rapporteur merely touched upon such fundamental questions as how to reconcile the proposed mechanism with the principle that the Court's jurisdiction must be based on the free consent of States, and how to reconcile the mechanism with the reservations made by some States in their declarations of acceptance of the compulsory jurisdiction of the Court.

361. The proposed system was finally found by several representatives to be impractical, cumbersome and costly.

362. Some delegations commented on <u>specific aspects of the system proposed by the Special Rapporteur</u>.

363. As regards <u>conciliation</u>, one member warned against overestimating the readiness of States to accept compulsory conciliation. He recalled that this particular procedure was provided for in the Convention on conciliation and arbitration recently elaborated in the framework of the Conference on Security and Cooperation in Europe (CSCE) and that the Convention was yet to be ratified by some States, although it embodied a number of compromises concerning, for instance, respect for other existing procedures or the optional nature of certain provisions.

364. Several delegations noted that the draft articles on conciliation provided for the adoption by the Commission of mandatory interim measures and for the cessation of measures taken by either party against the other. One of these delegations believed that it was sensible to grant such powers to the

Commission, inasmuch as that would allow an impartial third party to terminate immediately countermeasures that were prima facie unfounded, and thus to prevent harm which, in the last analysis, might eventually be found to be unlawful. The prevailing view was, however, that States would be reluctant to endow the conciliation commission with such broad powers. One delegation further emphasized, on the one hand, that to grant to the wrongdoing State the right to demand that interim measures should be taken against the countermeasures of the injured State would be to violate the principle of ex injuria jus non oritur and, on the other hand, that interim measures with binding effect deviated from the normal concept of conciliation, which was intended to convince, not to order.

365. Other comments on conciliation included (a) the remark that under the established practice, outstanding commissioners were to be appointed by the Secretary-General, not by the President of the General Assembly as envisaged in article 1 of the annex, and (b) the observation that the conciliation commission should have fewer members than the five proposed.

366. With respect to arbitration, it was noted that while, under article 3, either party was entitled, failing an agreed settlement, to submit the dispute to an arbitral tribunal, article 3 of the annex gave the parties a period of three months in which to draw up a special agreement (para. 6), and authorized either party to bring the dispute before the tribunal only upon the expiry of that period (para. 8). Questions were raised regarding the purpose of this rule, which would probably only delay the procedure. Emphasis was placed on the need for the proceedings to be as brief as possible, in order to prevent the wrongdoing State from unduly prolonging the wrongful situation and evading countermeasures.

### 5. The implications of the distinction between crimes and delicts as regards the consequences of internationally wrongful acts

367. Several delegations supported the Special Rapporteur's view that the consequences of the international crimes of States should be treated differently from those of delicts. The valuable preparatory work reflected in chapter II of the fifth report met with praise, even though it was noted that further reflection was needed on the various issues which are addressed below.

368. With regard to the so-called substantive consequences of international crimes, it was stressed that the material and political responsibility of States for international crimes should take the form of reparation and satisfaction of an extraordinary character, and that the criteria for assessing the damage inflicted upon an injured State and the extent of the responsibility of the wrongdoing State should be defined.

369. With regard to the so-called procedural consequences, comments focused, on the one hand, on the role of the United Nations and, on the other hand, on the use of force in response to a crime committed by a State, two questions which, in the view of several representatives, touched upon the most fundamental

questions of international law, and should therefore be approached with the greatest prudence.

370. On the first point, it was said that measures in response to a crime could only be implemented by an institutional system, i.e., the United Nations and its various organs, including the International Court of Justice. More specifically, the view was expressed that the competence to react to an international crime, particularly aggression, ceased to belong to a particular State - the victim State - and became universal and that, in such cases, intervention by the Security Council should be mandatory and be the key feature of a responsible regime. Along the same lines, the remark was made that the draft should include provisions concerning sanctions applied by States collectively through international organizations; that would be in conformity with contemporary international practice and would follow the logic of draft article 19 of Part One. In this context, one representative observed that a distinction should be made between international crimes and delicts, even though the two types of wrongful conduct could take place simultaneously. Combating aggression was essentially the task of the Security Council, and combination of the Council's powers and the judicial assessment of the facts constituting aggression should be avoided, since such a regime would not be effective and, more important, might establish a "mutual subordination" between the Security Council and the judicial body, which might be the International Court of Justice.

371. On the second point, the view was expressed that the use of force by the injured State or States should be admissible only in so far as it fell within the confines of Article 51 of the Charter, in other words when the international crime constituted an act of aggression and that, de lege lata, no coercive measures could be lawfully taken other than the international measures envisaged in Chapter VII of the Charter. One representative furthermore remarked that, de lege lata, the Security Council could apply sanctions that would include the use of force against the perpetrator of an international crime (as defined in article 19) other than an act of aggression, by interpreting the concept of "threat to the peace" envisaged in Article 39 of the Charter in a non-formal sense. While noting that the Security Council had recently resorted to such an interpretation, for example, in the cases of the former Yugoslavia and of Somalia, he warned against the risk of opening the door to a broad interpretation that could lead to abuse, a risk that should be weighed all the more carefully as it was extremely difficult, both politically and juridically, to determine the legality of the Security Council's actions. In his opinion, consideration might be given, de lege ferenda, to the possibility of authorizing the Security Council to adopt sanctions, including the use of force, should it determine that an international crime under the terms of article 19 had been committed, even though such a solution would entail amending the Charter in areas which were extremely sensitive from the political standpoint.

372. In addition to the above comments on the use of force in response to a crime and the role of the United Nations in this area, the observation was made that the obligation of States not to assist the wrongdoing State and the principle of non-recognition by other States of the outcome of wrongful acts were established rules of customary international law.

373. While noting the progress made with respect to the issue of crimes and their consequences, one delegation expressed concern that work should have begun on Part Three of the draft concerning the settlement of disputes before the question of the consequences of crimes, which belonged in Part Two of the draft, had been considered. The remark was made that a substantial part of what was to be found in Chapter II of the Special Rapporteur's fifth report was taken up with the controversial issues of criminal liability of States and the concept of fault, which brought the debate back to an article already agreed upon by the Commission, namely article 19, the reopening of which might well be ill-advised. The same delegation accordingly invited the Commission to retain what was in the draft articles and to formulate the link between crimes and their consequences and the reactions of the organized international community.

374. As appears from the previous paragraphs, a number of representatives accepted the premise that a distinction should be made between the consequences of international crimes and those of delicts and endorsed the concept of international crime. 4/ That concept however gave rise to objections on the part of some other representatives. The Commission was urged not to take for granted, let alone develop, a notion as controversial as that of crimes and to reassess the advisability of retaining that notion, bearing in mind all its implications, in particular the enormous problems it would create in the area of reparation by, inter alia, unduly denigrating the consequences of erga omnes obligations. Those representatives reiterated their objections to the notion of attributing responsibility for international crimes of States and to the introduction of that notion in article 19. One of them urged the Commission to reconsider the wisdom of that provision which he described as devoid of support in State practice (as evidenced by the fact that many of the examples cited were completely out of date) and as conceptually wrong. He warned that if the Commission did not abandon the chimera of "international crimes of States", it would be unlikely to complete its work on Part Two and its first reading of the entire draft on State responsibility during the current term of its members, and that if it insisted on the notion of "crimes of States", and disregarded the important work being done in the field of the criminal responsibility of individuals, the results of its work would be accepted by far fewer States.

375. Chapter II of the Special Rapporteur's fifth report was furthermore criticized on the ground that consideration of notions such as self-defence and the competence of the Security Council went far beyond the Commission's mandate. The remark was made in this connection that even if the Commission's conclusions were to be adopted by some States in a future convention, such a convention could not reduce the powers of the organs of the United Nations, which had been established under the Charter. By opening the debate on such questions, it was stated, the Commission would be disregarding its own decisions, such as its decision not to consider primary rules.

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4/ One of the representatives invited the Commission to re-examine the notion of international crime in the light of recent developments in the theory and practice of international law and to envisage the possibility of adding to the list of crimes against humanity contained in article 19 grave violations of the right to self-determination and massive violations of human rights.

376. One delegation felt it premature to comment on chapter II of the fifth report inasmuch as it had not been examined by the Commission and addressed extremely complex issues giving rise to opinions difficult to reconcile.

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

### 1. General observations

377. Several representatives underscored the importance and interest of the topic from the economic, ecological, legal and political points of view. Emphasis was placed on its implications for the national economies and livelihoods of the populations of many States where agriculture played an essential role and where the availability of fresh water was vital to many domestic activities. The relevance of the topic to ecological balance and environment protection was stressed, as were also its practical implications from the standpoint of the equitable non-navigational uses of international watercourses and the maintenance of good-neighbourly relations between bordering States. Some representatives referred in this context to the efforts of their respective Governments to promote cooperation among riparian States.

378. At the same time, attention was drawn to the complexities of the subject. The remark was made in this context that since international watercourses, each different in terms of hydrographic, geological, geographical and climatic factors, involved the fundamental interests of and even contradictions between the States concerned, it was difficult to develop a set of legal norms regulating non-navigational uses of international watercourses which would be acceptable to all.

379. While acknowledging those difficulties, representatives generally agreed that urgent action was required. One of them observed that, while it was a commonplace that rivers, like air, knew no boundaries, the industrial era had in the long run destroyed the illusion that those resources were inexhaustible. The hope was therefore expressed that the Commission would spare no effort to complete the draft articles in order to promote further cooperation among riparian States.

380. Many representatives applauded the progress made thus far by the Commission. They welcomed the completion on first reading of a set of draft articles and the fact that at the last session the Drafting Committee had adopted articles 1 to 6 and 8 to 10. The first report of the new Special Rapporteur was praised as demonstrating that he had a full grasp of the subject and a good understanding of the way in which the second reading of the draft articles should be conducted. The Special Rapporteur’s opinion that only "fine tuning" was needed also met with approval. With reference to the view reflected in the Commission’s report that a deep overhaul of the articles appeared to be advisable, the remark was made that most States had accepted the text adopted by the Commission in 1991 and that the time for an overhaul was long past. Several representatives encouraged the Commission to complete the second reading at its next session.

381. Some representatives commented on the general orientation of the Commission's work. Attention was drawn to the need to achieve a fair balance between upstream States and downstream States. While the view was expressed that the lower riparian States were always at a disadvantage relative to the upper ones, and that any rules governing the use of international watercourses must be fair, balanced and based on the principles of equitable utilization, conservation and protection by all watercourse States, emphasis also was placed on the principle of the sovereign right of a watercourse State to optimal utilization of the water under its territorial jurisdiction and on the need to avoid making it difficult or impossible to use international watercourses. In this context, one representative said that his country believed in the regional unity of watercourses, which meant that every watercourse State was entitled to have watercourses situated in its territory remain unchanged, that no State could exercise absolute sovereignty over the part of the watercourse situated in its territory and that every State had the right to use that part as it saw fit, provided that it did not prejudice the rights of other States to make similar use of the watercourse. He supported the Commission's integrated approach aimed at striking a balance between the interests and sovereignty of riparian States and their right to utilize natural resources situated within their boundaries.

382. Several representatives also insisted on the obligation of watercourse States to cooperate with each other in resolving issues related to the adverse effects that might arise from the use of watercourses.

383. Cooperation was viewed by one representative as particularly relevant in dealing with environmental issues. In this context it was said that, in addressing those issues, the Commission should avoid elaborating water use restrictions which might be contrary to the interests of groups that were dependent on such waters, and should give due regard to three principles: State sovereignty over natural resources, the sovereign equality of States, and respect for the territorial integrity of States. Also referring to environmental concerns, another representative said that the Commission's work must be considered in the light of recent developments, such as the conclusion in 1991 of the Convention on Environmental Impact Assessment in a Transboundary Context, the signing in 1992 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes; and the 1992 United Nations Conference on Environment and Development.

384. Other comments on the general orientation of the work on the topic included: (a) the remark that the approach to the development, management and use of international watercourses should be an integrated one as provided in paragraph 18.8 of Agenda 21, which stated that water was an integral part of the ecosystem and constituted a natural resource and a social and economic good whose quality and quantity determined its use; and (b) the observation that conservation and management were essential and that the idea of setting up river-basin institutions for the dissemination of information, the facilitation of consultations between watercourse States, the preparation of prevention plans and cooperation in coping with and eliminating hazards was worthy of support.

2. The final form which the draft articles should take

385. Some representatives cautioned against taking a hasty decision in this respect. They observed that the position of Governments on an issue which touched upon their vital interests would depend on the extent to which the end product of the Commission's work was acceptable to them: if they viewed the final text as satisfactory, they would favour a binding instrument; if not, they would prefer model rules. Time should therefore be allowed for a careful analysis of the draft articles.

386. Other representatives found it surprising that the issue should still be viewed as requiring discussion and that the Special Rapporteur should have suggested a preliminary exchange of views thereon. It was recalled in this connection that the matter had been debated on several occasions and that the Commission's working hypothesis on the framework agreement approach had not given rise to objections in either the Commission or the General Assembly or in the comments of Governments. Thus, it was stated, there was no utility in re-opening the debate on that point.

387. Most of the representatives who addressed the issue felt that the draft should take the form of a framework convention, some of them on the condition that it met the conditions for widespread acceptance. In support of the framework agreement approach, it was said that such an instrument would provide guiding principles for future negotiations and fill a gap in respect of watercourses for which no binding agreement existed, and that a legally binding instrument could play a more important role in international law and would give States greater security. The remark was also made that the draft articles under consideration had all the qualities and characteristics of a framework agreement.

388. While supporting the framework agreement approach, some representatives warned that the diversity of problems facing watercourse States and the need to take account of political and security aspects and of the specific relations between the watercourse States concerned would make it very difficult to elaborate a convention specifying the rights and duties of States in detail.

389. A few representatives observed that, while a framework convention would have the advantage of being a legally binding instrument, it would also risk being ratified by only a small number of States, as had already occurred in the case of some other codification conventions. One of them remarked that the real function of a framework convention once it entered into force could also be questioned: in situations concerning international watercourses regulated by multilateral treaties between the States concerned, a new framework convention could be applied only to issues not regulated by those instruments; moreover, it would be applied only between the States which had become parties to it. He concluded that a framework convention would not play a more significant role than model rules, at least as far as its material provisions were concerned. Concern was also expressed that ratification by an insufficient number of States could undermine the authority of the rules embodied in the instrument. Model rules, on the other hand, were viewed as likely to have a significant moral and political influence on the behaviour of States, as they were simpler and faster

to adopt and allowed for the inclusion of more specific provisions answering some urgent problems arising in the field.

390. One representative took the view that the two solutions proposed were not mutually exclusive and that a middle ground could be found. He stressed that while the articles of a general nature belonged in a framework convention, all the problems connected with the utilization of international watercourses could not be solved in one convention, as a number of special circumstances had to be taken into account. Among those circumstances, he singled out (a) the fact that some rivers were the subject of specific agreements and others were not; (b) the new situation created by the breaking up of States; and (c) the demands that might be created by technological progress. The Commission, he went on to say, could never hope to cover every particular case and special agreements would always be needed, but it could provide model rules which could then be adapted for use in future conventions.

### 3. The question of the inclusion of dispute settlement procedures in the draft articles

391. Most of the representatives who addressed this issue favoured the inclusion in the draft of dispute settlement provisions. Such provisions, it was stated, would significantly enhance the value of the future instrument and would solve one of the main objectives of the legal regulation of the non-navigational uses of international watercourses, which was to prevent disputes and to ensure, when disputes did arise, their settlement by exclusively peaceful means. Some of them stressed that in the light of the growing needs of populations and the consistently diminishing water supply, disputes over the use of international watercourses were likely to proliferate and that the international community should therefore establish a mechanism capable of settling such disputes at the technical level.

392. Several representatives emphasized that the dispute settlement procedures should be adapted to the particular nature of each watercourse, with one of them insisting that the system should accordingly be very flexible. Some representatives said that the dispute settlement procedures should provide for compulsory fact-finding mechanisms. A few also favoured mandatory conciliation. One took the view that neither the optional jurisdiction approach nor the mandatory conciliation approach was satisfactory. In his view, ample room should be allowed for means already accepted by the States parties to the dispute, but if such means did not exist, were not used or were ineffective, a compulsory jurisdictional procedure involving either arbitration or resort to the International Court of Justice should be envisaged inasmuch as what was at issue was the interpretation or application of a legal instrument.

393. Other representatives however struck a note of caution as regards the inclusion in the draft of dispute settlement procedures, taking into account the nature of disputes over the use of international watercourses and the fact that the relevant procedures could not be the same as those concerning the interpretation and application of international conventions in general. Some felt that only after the work on the articles under consideration had been completed and a decision arrived at on the final form of the Commission's work

could the need for articles on dispute settlement be meaningfully assessed. Others stressed that dispute settlement provisions should not be mandatory so as to preserve the principle of free choice of means embodied in Article 33 of the Charter of the United Nations. The remark was also made that, given the variety of international watercourses that existed, there might be a need for different procedures for different cases.

### 4. The question of unrelated confined groundwaters

394. The Commission's decision to request the Special Rapporteur to undertake a study in order to determine the feasibility of incorporating the topic of unrelated confined groundwaters into the topic was endorsed by some representatives, one of whom noted that most hydrologists would support a unified approach that would treat those waters in the same way as an above-ground lake. He added that it did not seem particularly efficient to do in two steps what could be done in one, namely, prepare one draft excluding unrelated confined groundwaters and then another applying the same principles to such confined groundwaters.

395. While some representatives held that, in view of the critical importance of the question to a number of countries, the matter should be left pending until the feasibility study had been completed, most of the representatives who addressed the issue felt that it would be inappropriate to include unrelated confined groundwaters in the concept of a watercourse system. A number of them pointed out that such groundwaters did not fit the criterion provided in article 2 (b) under which a watercourse was defined as a system of waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus: "confined groundwaters", it was observed, did not form part of a unitary whole and had no physical relationship with "surface waters". The remark was also made that any hasty attempt to include "unrelated confined groundwater" within the topic, at a time when the general acceptability of the draft articles was still in doubt, would only further complicate the issue and give rise to more controversy.

396. Some of the representatives concerned did not deny that international confined groundwaters might be in need of regulation and expressed readiness to consider any proposal aimed at treating the question as a separate topic to be included in the Commission's future programme of work. Reference was made in this connection to the decision taken by the Commission with respect to succession in matters of treaties. Also in support of a separate treatment of the question, it was stated that the law relating to groundwaters bore a close relationship to that governing the exploitation of natural resources. One representative said that the Commission should complete its second reading of the draft articles without adding a new topic to its agenda at such a late stage.

## 5. Comments on specific articles

397. Some representatives referred in general to the written comments of their Governments circulated in document A/CN.4/447 and Add.1-3. Others announced that written comments would be submitted in due course.

Article 1 (Scope of the present articles)

398. With respect to paragraph 1, the view was expressed that the text should be reworded to encompass the use of confined groundwaters, inasmuch as they constituted part of a unitary whole. Support was furthermore expressed for the amendment which sought to insert the word "management" before the word "conservation"; such an amendment, it was stated, would be in line with the integrated approach to water resources management and protection of the environment as recognized by the United Nations Conference on Environment and Development. The term "international watercourses" was viewed as having the same meaning as "transboundary waters" from the legal point of view and the remark was made that the latter phrase should not be substituted for the former as there was little justification for changing a decision arrived at following exhaustive discussion by the Commission.

399. As for paragraph 2, it was considered as a potential source of confusion and in need of redrafting. One representative observed that any conflict between navigational and non-navigational uses of international watercourses should be viewed in the context of managing multiple use.

Article 2 (Use of terms)

400. The approach to the definition of an "international watercourse" in subparagraphs (a) and (b) was viewed as a potential source of confusion.

401. Comments otherwise focused on (1) the phrase "flowing into a common terminus" in subparagraph (b); and (2) the question whether unrelated confined groundwaters should be included in the scope of the topic.

402. On point (1), the prevailing view was that the phrase should be retained in order to keep the scope of the articles within reasonable limits and avoid the possibility that two different drainage basins connected by a canal might be treated as a single watercourse. One representative, while agreeing that the retention of the phrase would enhance the general acceptability of the draft, observed that since opinions differed on the issue, a cautious approach was needed.

403. On point (2), the divergence of views reflected in paragraphs 394 and 395 above also manifested itself in this context.

404. Other comments included (1) the remark that article 2 (a) should preferably highlight the "physical natural relationship" between the parts of a watercourse that were situated in different countries, a concept which would help to determine the regime applicable to seasonal or artificially connected watercourses, and (2) the observation that the definition of pollution should,

as proposed by the Special Rapporteur, be moved from article 21, paragraph 1, to article 2.

Article 3 (Watercourse agreements)

405. The relationship between paragraph 1 of article 3 and article 1 was queried by one representative, who noted that article 1 gave the impression that the rules should be applied unconditionally, whereas paragraph 1 of article 3 made the application of the rules subject to the conclusion of special agreements between the watercourse States. That same representative invited the Commission to remove the ambiguity and make it clear that the future instrument would be applicable even in the absence of special agreements. Also in relation to paragraph 1, it was suggested to insert the words "bilateral or multilateral" before "agreements".

406. As regards paragraph 2, comments focused on the possible replacement of the word "appreciable" by "significant". 5/

407. Some representatives supported that amendment. One of them stated that the latter term was less esoteric than the former but pointed out that if the term "significant" was used in article 3, then it should also be used in article 4, paragraph 2, articles 7 and 12, article 18, paragraph 1, and article 21, paragraph 2. Another of those representatives observed that the proposed change was in line with recent developments in environmental law and in keeping with the need to establish a uniform and legally recognizable standard of harm as opposed to a merely objective threshold and would make the draft articles more acceptable to States.

408. Other representatives expressed preference for the existing text.

409. Some representatives considered it useful to specify that the future instrument would not affect existing international watercourse agreements unless the States parties to such agreements decided otherwise. Some insisted on the intended residual character of the future framework convention, one of them adding that the rule of interpretation whereby the general did not derogate from the specific should also be relevant and that a presumption of precedence should therefore be in favour of specific agreements, pre-existing or otherwise.

410. As for the Special Rapporteur's suggestion that States should indicate their understanding of the situation in relation to existing agreements at the time of ratification, one representative recalled that it had been unacceptable to most members of the Commission, who had felt that the matter should be left to be governed by the law of treaties, a position which his delegation endorsed.

Article 4 (Parties to watercourse agreements)

411. Some representatives endorsed the article in its existing form.

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5/ The question of the replacement of "appreciable" by "significant" was also addressed in the context of other articles, in particular article 7 (see paras. 427 and 428 below).

412. Reservations were however expressed by other delegations with regard to paragraph 2 of the article. One of them suggested that the word "appreciable" should be deleted from the paragraph. In his view, a watercourse State need not have suffered "appreciable" harm to be entitled to participate in the negotiation of any agreement on the matter; the very existence of harm was enough to entitle the injured State to participate in negotiations, at least as an observer, and to demand damages if applicable. The same representative suggested that the word "appreciable" should be deleted in every article in which it appeared, since the Special Rapporteur's proposal to replace it by "significant" would create more problems than it would solve. 6/

413. The view was also expressed that paragraph 2 was unduly favourable to third States, whose rights were already protected in other draft articles. It was suggested that the existing text should be replaced by another one allowing a third State the possibility, rather than the right, to become a party to the treaty, and making the accession of the third State subject to certain terms and conditions to be agreed upon between that State and the States parties to the agreement or those participating in the use or the specific programme. Reference was made in this connection to the wording proposed by a Government in its written observations (A/CN.4/447/Add.1, pp. 2-3).

Article 5 (Equitable and reasonable utilization and participation) 7/

414. The view was expressed that article 5 should concentrate on the principle of equitable and reasonable use following the model of article IV of the 1966 Helsinki Rules which, it was stated, set forth the rights of watercourse States more positively. It was accordingly suggested to delete paragraph 2, inasmuch as the obligation to participate in an equitable manner was nothing more than the duty to cooperate, which was elaborated in greater detail in article 8.

415. According to another opinion, however, there was a need to elaborate on the principle of equitable and reasonable use and to maintain a balance between the principles reflected in the Helsinki Rules concerning the right to an equitable and reasonable share and the opposing principle known as the "Harmon Doctrine", which supported the unqualified right of a State to utilize and dispose of the watercourse within its territory.

416. Comments otherwise focused on the phrase "equitable and reasonable utilization" and on the phrase "optimal utilization".

417. On the first point, one representative expressed the view that the entitlement of a State to the equitable and reasonable utilization of an international watercourse was subordinate to the State's obligations to promote the optimal utilization of the watercourse, and the consequent benefits, in a manner consistent with adequate protection of the watercourse. He observed that in practice, optimal utilization generally meant that States relied on their own

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6/ See note 5 above.

7/ Comments on the relationship between article 5 and article 7 are reflected under the latter article.

capabilities and resources to maximize benefits, subject to the requirements of economy and the need to protect the watercourse and to avoid causing significant harm to other co-riparian States. In that connection, he stressed that equitable utilization did not mean equal utilization and further remarked that the criterion of reasonable utilization should contribute to achieving a balance between the needs and interests of the various watercourse States. Another representative stated that in fleshing out the still ill-defined concept of "equitable and reasonable utilization", a balance must be struck between the sovereign rights of a State and the community of interests. Being aware, however, that the diversity of circumstances defied any attempt at formulating a cure-all definition, he suggested that the matter should be left to specific agreements, in view of the provisions of paragraph 1 of article 6.

418. As for the phrase "optimal utilization", it was viewed as calling for clarification and it was suggested that the following explanatory text should be inserted as a possible paragraph 3:

> "'Optimal utilization' of waters does not mean ascertaining the maximum or most efficient utilization from the technological standpoint or the most valuable utilization from the monetary standpoint, nor does it mean that the State capable of making the most efficient use of the watercourse in terms of economy or waste reduction or in any other respect should have a greater claim to the use of the watercourse; rather, it means obtaining the maximum benefits possible for all watercourse States and achieving the highest degree of satisfaction of all their needs while at the same time reducing to a minimum the harm to or unfulfilled needs of each of them."

Article 6 (Factors relevant to equitable and reasonable utilization)

419. Some delegations supported the existing text, with one of them stressing the importance of the reference in paragraph 1 (d) to the concept of "existing uses", which represented for some States a major factor in measuring significant or substantial harm and had to be reconciled with development needs. The view was however expressed that the list of factors to be taken into account should be expanded to include factors relating to the volume or length of a watercourse. It was also suggested that provision should be made for the already existing agreements regarding the existing and potential uses of the watercourse.

420. One representative underscored the usefulness of paragraph 2, pointing out that, pending specific agreements, a balance of interests might be achieved through the consultations provided for in that paragraph and that consultations could also serve as a connecting joint in the articulation of articles 5 and 7. He added however that under no circumstances should the process of consultation give rise to anything akin to a veto barring utilization.

Article 7 (Obligation not to cause appreciable harm)

421. Comments focused on (1) the relationship between this article and article 5, and (2) the possible replacement of the phrase "appreciable harm" by "significant harm".

422. On the first point, some representatives expressed satisfaction with the existing relationship between articles 5 and 7 and cautioned against any redraft which would alter that relationship and thereby upset the balance of the draft. It was recalled in this context that while articles 5 and 7 were related to each other, each of them had its own significance in terms of scope and application: whereas article 5 enabled States to participate in a variety of ways in the optimal utilization of watercourses, article 7 imposed on States an obligation not to cause appreciable harm to other watercourse States in their utilization of a watercourse. 8/

423. Other representatives took the view that there was some ambiguity in the relationship between the "equitable and reasonable utilization" of article 5 and the "obligation not to cause appreciable harm" of article 7. Emphasis was also placed on the need to determine whether appreciable harm constituted a breach of the principle of equitable and reasonable utilization; whether the right to equitable and reasonable utilization was subordinate to the obligation not to cause appreciable harm (or, as one representative put it, whether the latter obligation was superior to the principle of equitable and reasonable utilization, whatever the proportion of the benefits of reasonable utilization compared to the extent of harm); and whether the relationship between the two articles achieved a balance between the use of watercourses and environmental protection.

424. Some among those representatives favoured - or expressed interest in - the deletion of article 7. The article was viewed as undermining the principle of equitable and reasonable use and allowing a State, in violation of international law, to veto another State's use of, or plans for the use of, a watercourse. Indeed, one representative observed, the emphasis on the obligation not to cause appreciable harm would give priority to existing uses over potential activities, whereas the relationship between current activities and proposed activities should be approached from the standpoint of the principle of equitable and reasonable utilization. In the view of those representatives, the deletion of article 7 would not affect the obligation not to cause harm. In this connection, one representative said that article 5, together with article 6, implied the content of article 7. Another representative pointed out that, under article 6, paragraph 1 (c) and (d), the effects of the use or uses of the watercourse in one watercourse State on other watercourse States, as well as the existing and potential uses of the watercourse, were among the factors that had to be taken into account in determining equitable and reasonable utilization, thus excluding activities causing significant pollution. Another representative said he could endorse the deletion of article 7 if it was combined with a clear record leaving no doubt that the deletion was solely because the question of harm was an indispensable component of the notion of "equitable".

425. The same representatives said that, short of deleting article 7, the solution to the problem would be to envisage the obligation not to cause harm within the context of the principle of equitable and reasonable utilization,

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8/ The views the representatives in question expressed on the redraft of article 7 proposed by the Special Rapporteur are reflected in paragraph 426 below.

thereby making "equitable and reasonable" the sole criterion States had to meet when utilizing an international watercourse. In this perspective, the redraft of article 7 proposed by the Special Rapporteur was viewed as striking an appropriate balance between the interests of the upstream States and those of the downstream States and as worthy of careful consideration. More specifically, one representative said that, at a time when needs for finite resources were increasing rapidly it was crucial to demand the equitable and optimal utilization of those resources and that a simplistic identification of one key element of "equitable" should not be allowed to distort the entire regime of the draft. He warned that if draft article 7 was left as it was, it might have the effect, inter alia, of giving an undue advantage to the prior-in-time user and should therefore be amended to avoid running the risk of cancelling the effect of article 5. He described the proposal put forward by the Special Rapporteur in his first report as one plausible way to avoid allowing article 7 to destroy the function of article 5.

426. Other representatives said they could neither agree to the deletion of article 7 nor support the Special Rapporteur's proposed reformulation of the article, the effect of which was, in the words of one of those representatives, to exempt States, when using an international watercourse in an equitable and reasonable manner, from the obligation not to cause significant harm to other watercourse States, except in cases of pollution. Some pointed out that while equitable and reasonable utilization was an appealing concept in hydrology and in water resource management, the question arose whether it was precise enough for legal purposes. They found it difficult to imagine that a State would have to suffer harm because a watercourse of which it was riparian was being used in the territory of another State in a manner which that other State considered to be "equitable and reasonable". They found it unwise to reduce, as did the Special Rapporteur's suggestion, the obligation not to cause appreciable harm contained in article 7 to a mere obligation to exercise due diligence. The remark was also made that allowing the use of an international watercourse to cause harm as long as it did not reach a certain level sidestepped the issue posed by the cumulative effect of instances of damage that individually were not "appreciable".

427. As for the second point mentioned in paragraph 421 above, namely the possible replacement of the word "appreciable" by "significant", it was also raised, as already indicated, in the context of articles 3 and 4 (see paras. 406 and 412 above). Some representatives expressed reservations on the proposed change, which, in the words of one of them, went further than the necessary distinction between inconsequential harm that could not even be measured, on the one hand, and consequential harm, on the other. Emphasis was placed on the need to take into consideration the legal effects of the change and the question whether it might raise the threshold of control of the free use of international watercourses. One representative considered it essential that the threshold should not be raised above the meaning of the Spanish term "daño sensible", which was used in many conventions, including some to which his country was a party. He insisted that the English word "significant" should not be translated as "importante" and that the term "daño sensible" be retained in the Spanish version. Attention was furthermore drawn to the possible implications of the proposed change with respect to the question of international liability.

428. Other representatives supported the replacement of "appreciable" by "significant". The latter term was described as extremely ambiguous while the former was viewed as expressing a qualitative standard, which would preclude the possibility of a watercourse State paralysing another State by alleging that it was causing harm which, even though minimal, would still be appreciable.

Articles 8 (General obligation to cooperate), 9 (Regular exchange of data and information) and 10 (Relationship between uses)

429. Those articles did not give rise to any objection. One representative said that article 9 was prescriptive in nature. He noted that article 10 reaffirmed the need to balance the various uses of a watercourse while attempting to reconcile any conflicts that might arise from such use. Also in relation to article 10, another representative stressed that special attention should be given to the equitable utilization, protection and preservation of water resources by all watercourse States.

Article 17 (Consultations and negotiations concerning planned measures)

430. It was suggested that a new paragraph be added, reading as follows:

> "Consultations and negotiations shall be conducted in the presence of an international observer whenever any watercourse State deems it necessary."

Proposal for a new article

431. It was proposed that a new article 33 should be added, reading as follows:

> "Waters are equal in value to land, and any person who exceeds the equitable and reasonable share of utilization of an international watercourse agreed upon between the watercourse States shall incur the appropriate penalties provided for in the Charter of the United Nations in the same manner as a person who encroaches on another's land by force."

## F. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

### 1. Programme of work of the Commission

432. The intentions of the Commission as regards its programme of work for the current term of office of its members generally met with approval. The remark was made in particular that by expressing readiness to complete by 1994 the draft statute of an international criminal court, the Commission had demonstrated not only that it considered this issue to be a priority one, but also that it was capable of adapting its working methods and focusing its resources in response to the international community's particular needs. The Commission was on the other hand invited to strike a balance between its work on the draft statute for an international criminal tribunal, whose completion was expected by 1994, and its consideration of the draft Code of Crimes against the Peace and Security of Mankind, which would not be completed until 1996, although

it had already been adopted on first reading in 1991. The Commission, it was said, should complete the second reading of both drafts by 1995.

433. As regards the long-term programme of work, the Commission's decision to include in its agenda the topics "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons" was generally endorsed. Those two topics were viewed as having the merit of precision, responding to clear, current needs of the international community and offering the Commission an opportunity to make a direct contribution, on a realistic time-scale, to the formation and development of State practice. The Commission was accordingly invited to undertake work on them as soon as possible.

434. The view was on the other hand expressed that it was most important to focus immediate efforts on topics which were already being considered and to identify for the future new topics on which a consensus could be reached and which could guide the Commission's work in the right direction.

435. The topic "State succession and its impact on the nationality of natural and legal persons" was described as a neglected one from the standpoint of positive law despite the abundance of relevant State practice. It was viewed by several representatives as calling for special attention in the light of recent political developments and because State practice in the area of State succession was undergoing a rapid and spectacular transformation. In this context, the remark was made that many States of Central and Eastern Europe and Central Asia which had emerged from the breakup of existing State structures in recent years had inherited old - or acquired new - minorities problems which, from their potential to threaten stability and peace, posed a challenge for the international community as a whole. While the problem did not derive wholly from nationality, with its attendant civil and political rights, an important part of it derived therefrom; clarification of the nationality issue could thus play a worthwhile role in the development of techniques and practices for dealing effectively with situations that affected directly the lives of millions of people. Also in support of the selection of the above-mentioned topic, reference was made to the recent tendency to place emphasis on ethnic origin rather than domicile in granting nationality.

436. As regards the general orientation of the work, the remark was made that the topic was situated on the boundary between international obligations and national discretion. In this connection, the Commission was invited to take into account the right of successor States to adopt their own legislation on nationality, while ensuring that it did not impose on States stricter standards than those generally accepted. It was also emphasized that quite some years had passed since the Commission had identified the three topics of State succession in 1963, during which time there had been striking developments in international human rights law, matters which could and should be taken into account. Also referring to the work already accomplished in the area of State succession, one representative pointed out that the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts had not been ratified by a sufficient number of States and had remained without effect; the international community should therefore resume its codification efforts in that field. This

same representative added that, on several occasions, his country had proposed the reconsideration of certain conventions on the codification and development of international law which, having failed to gain general acceptance, had never entered into force. Finally, emphasis was placed on the need to take due account of the practice of States as regards the impact of State succession on nationality, and readiness was expressed to communicate to the Commission all necessary information on recent national experience in this field.

437. With regard to the form which the outcome of the work should take, it was suggested to formulate guidelines and uniform minimum requirements for new States in the process of drafting law in that field. The remark was also made that it would be preferable to envisage a statement of principles, rather than a convention, to be adopted by the General Assembly, particularly in view of the history of conventional international law in that area. Lastly, the opinion was expressed that the Commission might, as a first step, elaborate a report which, without being overly prescriptive, could pave the way for further work at the Sixth Committee's request.

438. With reference to the topic "The law and practice relating to reservations to treaties", several representatives noted that the 1969 and 1986 Conventions on the law of treaties, although setting out some principles in that regard, left many issues unresolved. They expressed gratification at the Commission's decision to fill a legal vacuum and to clarify the ambiguous aspects of the validity of "reservations" as compared with "interpretations". Work in the area of reservations to treaties was viewed as particularly useful as States were actually confronted with problems not dealt with in the 1969 Vienna Convention and as practice appeared to develop in directions which were not in keeping with the rules set forth in the said Convention. It was pointed out in this connection that misunderstandings tended to be greater among national legislatures when called upon to exercise their constitutional function of approving the ratification of treaties. Also in support of the choice made by the Commission, attention was drawn to the steady increase in the number of reservations formulated in respect of instruments on human rights. In some cases, it was said, those reservations negated the very meaning of the ratification of a treaty by States.

439. At the same time, emphasis was placed on the complexity of the topic. Concern was expressed in particular that work in this area might call into question certain articles of such important instruments as the Vienna Convention on the Law of Treaties. In reply, one representative pointed out that the Commission had no intention of challenging articles 19 to 23 or article 2 of the said Convention; its purpose was merely to clarify the regime established by these articles, particularly its application to practical cases, in a way that preserved the sanctity and consensual basis of treaty obligations while allowing within that framework the degree of controlled flexibility desired by the International Court of Justice and the General Assembly.

440. On the general orientation of the work, the questions listed by the Commission in paragraph 428 of the report seemed to be the right ones, although the Commission should perhaps add an examination of the criteria by which the compatibility of a reservation with the object and purpose of a treaty was to be judged, and the legal effects of an "objection" by one contracting State to a

reservation formulated by another State party which it found to be incompatible with the object and purpose of the treaty. The words "validity of reservations" used in paragraph 428 of the report were, however, viewed as perplexing by one representative, who pointed out that those words could be interpreted as presupposing the possibility that a declaration conditioning the consent of an adhering State to be bound by a treaty might by some means be held to be a nullity. The same representative noted that article 2 (d) of the Vienna Convention, by referring to a reservation not only as a "unilateral" statement which "purported" to achieve an exclusion or modification of treaty terms, but even more so articles 19 et seq., in their careful references to "formulation" of reservations, made it plain that any such statement was ipso facto a "reservation", but that its legal effect remained to be determined by the rules which followed. That emerged with great clarity from the Commission's commentary on articles 17 to 29 of the 1962 draft and explained why, in the usage of the Vienna Convention, even the cases expressly prohibited, or those incompatible with the object and purpose of a treaty, were referred to in article 19 as "reservations", and why article 21 referred to a reservation "established" with regard to another party.

441. As regards the form which the outcome of the work on the topic should take, it was suggested that a statement of principles should be envisaged, analogous to the general comments of the Human Rights Committee on particular articles of the International Covenant on Civil and Political Rights.

442. Some representatives referred to the decision of the Commission to request the Special Rapporteur on the topic "The law of the non-navigational uses of international watercourses" to undertake a study in order to determine the feasibility of incorporating into his topic the question of unrelated confined groundwaters. The views expressed in this connection are reflected in paragraphs 394 to 396 above.

443. As regards the long-term orientation of the work of the Commission, the remark was made that, in view of the innovative spirit demonstrated in the report on the forty-fifth session, especially with regard to the wide variety of forms in which the Commission might embody its work, new items should be included in its work programme from 1997 onwards, and that, in the definition of these items, the success achieved in the work on the two topics referred to in paragraphs 435 to 441 above should be taken into account. The identification of such items was a joint undertaking of the Commission and Governments, and must meet the criteria summarized in paragraph 429 of the report.

### 2. Other matters

444. As regards the contribution of the Commission to the United Nations Decade of International Law, the idea of issuing a publication containing a number of studies to be prepared by members of the Commission met with approval.

445. Appreciation was expressed to the Office of Legal Affairs for the efforts made and the results achieved in the implementation of its publication programme, which encompassed a number of documents essential to the work of lawyers and to the progressive development of international law.

446. Some representatives noted that the Commission had deferred action on certain sets of draft articles because they lacked commentaries. The hope was expressed that such deferral would not establish itself as a practice of the Commission, thus delaying its work further, and the Commission was invited to reconsider how the commentaries should be treated for all the topics on its agenda.

447. Emphasis was placed on the need to enhance the teaching, study and wider dissemination of international law. In this context, the International Law Commission was encouraged to maintain its cooperation with other bodies, including the Asian-African Legal Consultative Committee.

448. Attention was also drawn to the importance of the International Law Seminar, which was described as an institution that deserved the full support of Member States. Appreciation was expressed to those States whose financial contribution had helped make the twenty-ninth session of the Seminar possible and the hope was voiced that other States would join in ensuring the smooth operation of the next session of the Seminar.

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