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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SEVENTH SESSION (1985)

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

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INTRODUCTION

1. At its fortieth session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 20 September 1985, to include in the agenda of the session an item entitled "Report of the International Law Commission on the work of its thirty-seventh session" 1/ (item 138) and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 23rd to 36th, 46th and 47th meetings, held between 28 October and 12 November and on 25 and 26 November 1985. 2/ At its 47th meeting, on 26 November, it adopted by consensus draft resolution A/C.6/40/L.19, entitled "Report of the International Law Commission", which it recommended to the General Assembly for adoption.

3. The General Assembly, at its 112th plenary meeting, on 11 December 1985, adopted resolution 40/75 as recommended by the Sixth Committee. By paragraph 9 of the resolution, the Assembly requested the Secretary-General, inter alia, to prepare and distribute a topical summary of the debate held on the Commission's report at the fortieth session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of that debate.

4. The Sixth Committee decided to consider item 138 (Report of the International Law Commission on the work of its thirty-seventh session) together with item 133 (Draft Code of Offences against the Peace and Security of Mankind), on the understanding that delegations wishing to make a separate statement on item 133 should do so towards the end of the period allocated to the two items. Thus, part B (Draft Code of Offences against the Peace and Security of Mankind) of the present topical summary has been prepared taking into account the views expressed in the Sixth Committee during its consideration of items 138 and 133. 3/

TOPICAL SUMMARY

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

5. A number of representatives congratulated the International Law Commission on the work it had accomplished at its thirty-seventh session. Satisfaction was expressed at the progress made by the Commission on some topics. While regret was registered that the Commission had had to postpone its study on certain topics, it was noted that work would continue on such topics in the future.

6. It was said that international law played a paramount role in the prevention of nuclear war, the strengthening of international security and the development of co-operation among all States, and was thus a tangible expression of the purposes and principles of the United Nations Charter. As its Preamble clearly stated, one of the most important conditions for the fulfilment of the Charter was respect for the obligations arising from treaties and other sources of international law. In

the present context of rising international tension, the progressive development and codification of international law were of the greatest importance, as they were an effective means of formulating and updating norms and applying the norms and principles of international law to the urgent issues of the day. Concerted action should make it possible to enhance the effectiveness of the legal instruments most likely to help prevent conflicts and threats to peace. Relations between States should be regulated through the progressive development and codification of international law. The Commission was an active participant in that complex process, making a consistent and substantial contribution; its activities were therefore followed with great attention by member States.

7. The Commission was considered to be performing a vital task in codifying the existing law and progressively developing new norms of conduct. The efforts of the United Nations in the past 40 years relating to the codification of international law had surpassed all previous endeavours. In the course of its 37 years of existence, the International Law Commission had prepared a great number of important legal instruments, which had won broad support and become rules of contemporary international law. It was essential for the members of the Commission to overcome conflicting national interests and accommodate differences in scholarly opinion on the basis of international realities, if it was to discharge its task of establishing a legal order which would serve world peace and prosperity. It was through such efforts to achieve consensus that the Commission had made such an important contribution.

8. Currently, it was said, the Commission had before it about 10 questions, the legal settlement of which would contribute to the strengthening of international security and the development of co-operation among States. The hope was expressed that the Commission would continue to conform to the requirements of international reality, developing a body of international law which contributed to the building of a better world.

9. The unique part played by the International Law Commission in the development of international law was highlighted by certain representatives. It was said that the Commission had never sacrificed universality to speed in producing drafts and, although it was detached from political considerations, it fully appreciated the political implications of its work. The Commission's influence was much broader than the specific drafts prepared. For example, through the Vienna Convention on the Law of Treaties, the Commission influenced every treaty being negotiated; in addition, it provided assistance in interpreting that Convention. Another example was the pioneering groundwork, research, analysis and synthesis carried out by the Commission for the Conferences on the Law of the Sea.

10. It was also said that the work of the International Law Commission had been substantially successful, both through the excellence of its membership and through its modus operandi. By that was meant not only the internal working methods of the Commission but the external consultative procedures which had ensured the essential involvement of States. Through the reports submitted to the Sixth Committee, the debates on those reports and the written comments from Governments, the Commission's work had never become over-academic at the expense of the recognition of political realities, which was why the content of the conventions finally

adopted by States on the basis of the drafts proposed by the International Law Commission retained a very large proportion of those drafts.

11. A number of representatives emphasized the importance of the debates held in the Sixth Committee on the annual reports of the Commission. It was recalled that the function of the debate in the Sixth Committee was to give the Commission clear-cut answers to questions bearing on politically sensitive issues and political guidance on specific issues on which the Commission occasionally found itself in a deadlock. On the occasion of the fortieth anniversary of the founding of the United Nations, the Commission and the Sixth Committee could take pride in the role they had played in fostering co-operation and coexistence within the framework of international legal order but they also bore responsibility for continuing and improving their own performance. It must always be remembered that the only alternative to international anarchy and violence was international law.

12. As to the manner in which the Commission's report was considered by the Sixth Committee, one representative said that, despite the crucial importance of the report of the Commission, the manner in which the Committee was dealing with that item was unfortunately not constructive. A succession of learned statements was being delivered but few of those present appeared to be listening attentively, and even the statements by the most outstanding members of the legal profession were often lost. He wished to urge the Committee to consider better ways of dealing with the item on the report of the Commission. At the conclusion of the Committee's debate on the Commission's report, the Chairman of the Sixth Committee highlighted that one significant aspect of the valuable dialogue between the two bodies related to the structure of the Commission's reports. He himself thought that there was scope for improvement but that the traditional approach should not be eschewed entirely. There was no denying the growing difficulty of following all the Commission's debates in depth and better procedures must be sought.

13. Further to the question of the relationship between Governments and the Commission in the process of the codification of international law and its progressive development, one representative commented that the Commission might consider establishing a mechanism to enable representatives of States Members of the United Nations to participate, perhaps as observers, in public meetings of the Commission. As a way of ensuring that the number of interventions did not impede the Commission's work, it could be arranged that observers would have the right to speak only if the Commission so decided and only under strict conditions. This would still enable representatives of Member States to fulfil their role as representatives of sovereign States more effectively than if they attended such meetings as mere spectators. The participation of States in the Commission's public meetings on that basis could be equated, for example, with the participation of representatives of the various regional legal committees whose observers were invited to take the floor when the Commission considered it necessary.

14. Certain representatives noted that while the systematic work of the Commission and the Sixth Committee had profoundly changed the features of international law since the Second World War, the world had become more complex and the pace of the Commission's work had slowed. New problems, often of a more specific nature and concerned with the implementation of the law, had appeared and had considerably complicated the task of codification bodies.

15. The view was expressed that the progress made in drawing up substantive rules could not conceal the inadequacy of the rules governing implementation and of the machinery for the settlement of disputes.

16. In that connection, the view was expressed that the persistence of the many ills that now characterized the world and international relations was basically the result of a lack of political will to overcome them. The present time was not conducive to the rule of law in international relations, and the fortieth anniversary of the United Nations was a timely opportunity to reflect on past achievements and especially on what remained to be done. Furthermore, it was said that the main problem facing the international community was not the lack of widely accepted or recognized international norms but the failure or unwillingness of States to comply with them. That malaise could be eradicated only through universal recognition and observance of international law.

17. Particular attention was drawn by certain representatives to the need to examine ways to foster adherence to multilateral treaties, with particular reference to international instruments elaborated on the basis of Commission drafts. One representative was of the view that the Commission should be given the means to continue following a topic once a convention thereon had been drafted, with a view to promoting adherence to such conventions and ensuring that they achieved their full effect. On the other hand, the view was expressed that even if the number of ratifications of codification conventions were still disappointing, many States which had not ratified the conventions nevertheless applied them.

18. The point was made by one representative that there was a direct relationship between the effectiveness of the United Nations and the level of participation of its Member States in multilateral treaties. His country was concerned about the low level of political will of Member States when they were expected at the international level to make legal commitments concerning their conduct. A study of the 78 international treaties of which the Secretary-General was the depository revealed that, at the end of 1984, 83 per cent had not been accepted by half of the States Members of the United Nations, and that only three treaties had been accepted by three quarters of them. There were new important treaties, some of which had not entered into force, that had been accepted by less than 5 per cent of the Members of the Organization. Moreover, in many cases, numerous reservations had been expressed. The international community in particular must be urged to take steps so that the most extensive and ambitious convention ever negotiated in the United Nations, which was drafted during the longest diplomatic conference ever held, namely, the United Nations Convention on the Law of the Sea, might enter into force. The only major subject covered in international instruments that had been accepted by more than one third of the Members of the United Nations was the subject of human rights. However, the importance of this fact was relative, since Member States had generally lacked the political will to give individuals access to effective international procedures to defend their rights. Only four of the nine major multilateral instruments of the United Nations on that subject provided mechanisms to establish certain international safeguards, and while there were many States parties to those international instruments, only a few had accepted the optional safeguard provisions. In the case of the International Convention on the Elimination of All Forms of Racial Discrimination, only 9 per cent of the States

Members of the United Nations had accepted the competence of the Committee established therein, and 31 States parties had rejected the jurisdiction of the International Court of Justice. Only one third of the Members of the Organization had ratified or acceded to the Convention on the Elimination of All Forms of Discrimination against Women, even though it did not establish procedures for real protection and almost half of the States parties had expressed reservations concerning the competence of the International Court of Justice. The Optional Protocol of the International Convenant on Civil and Political Rights had been accepted by only 31 States, so that the mechanism that it established benefited only 6.5 per cent of mankind. In many cases, States did not ratify or accede to international instruments for reasons other than their content and the States' willingness to make legal commitments. In those situations, the Secretary-General could play an important role of providing technical assistance and should therefore be asked to set up a programme designed to foster the acceptance of multilateral treaties. He suggested in particular that, based on a study carried out by the Secretary-General, the Organization could draft measures to promote broader acceptance of multilateral treaties concluded under the auspices of the United Nations.

19. Another representative also referred to the question of acceptance of codification conventions. He said that although the work of the Commission again deserved praise, the serious difficulties which had plagued the codification process for some years, even though they did not originate in the Commission, could not be ignored. On several occasions, the weak record of ratifications of and accessions to existing codification conventions had been deplored by the Sixth Committee, the Commission and the legal community. In fact, only the 1961 Vienna Convention on Diplomatic Relations and, to a lesser extent, the 1963 Vienna Convention on Consular Relations, had attracted a sufficiently large number of ratifications to justify the claim that they established general international law. Other conventions, which were also intended to supersede uncertain customary law or a variety of treaties, had in reality only increased the complexity of the material they were intended to govern by adding a competing source of norms to those already existing, thereby defeating the purpose of the codification progress, which was to establish certainty and clarity. Numerous reasons had been advanced in explanation of that state of affairs, one of which merited attention in the current context. It seemed that the appetite of the international community for new international conventions, manifesting itself in the deliberative bodies of the United Nations, exceeded by far that community's capacity to digest the resulting conventions in a speedy process of ratification or accession. Such "indigestion" had been attributed to various causes, such as administrative inertia, overburdened national legislators or simply disinterested States. All those causes were difficult to influence, and in all probability would not change in the foreseeable future.

20. This representative went on to note that there remained the fact of "overfeeding", and the General Assembly bore a certain amount of responsibility for it, especially in relation to the work of the Commission. The Commission had from time to time reviewed its work and had established a plan of work which had been discussed in and approved by the General Assembly; but then the General Assembly added new topics to the Commission's list, some even with high priority. As a

result, the Commission's agenda was overcrowded and that body was in a quandary. Considering all topics at one session made it difficult to achieve progress on any of them; concentrating on only a few might lead to the criticism that it disregarded instructions from the General Assembly. Such problems could be solved only by the General Assembly. Since it did not seem feasible to extend the Commission's sessions if its membership was to include professionals with major occupations, the General Assembly must refrain from "inventing" new topics and must review the priorities for the existing ones.

21. In connection with the question of "new topics", one representative believed that the Sixth Committee should bear in mind the constraints on and capabilities of the Commission. Issues should not be referred to it simply because they could not be resolved in political forums; rather, its agenda must comprise items on which progress was possible. Although the Commission was subjected to the controversy inherent in the development of international law, its function was to provide acceptable formulations of legal principle by accommodating the interests of the international community as a whole - a formidable task - and full confidence was expressed in the Commission's capabilities.

22. It was remarked that the report of the Commission reflected in large measure the recent changes in the membership of the Commission. The enlargement of the Commission had, it was said, enabled it better to fulfil the requirements of article 8 of its statute by ensuring that the world's main legal systems were represented. Congratulations were extended to the four new members of the Commission who had been elected during its twenty-seventh session.

23. One representative noted that, following the death of Mr. Quentin-Baxter, there had been a diminution of the representation in the Commission of the common-law legal system. There were notable imbalances in the composition of the Commission, whether looked at in terms of legal systems, forms of civilization or geographical distribution. There was, for example, no Nordic member and no member from Oceania, that vast region comprising many States with special interest in the law of the sea. Further, only 4 members represented the Islamic tradition of law and 6 the common-law system, whereas there were 19 from States with a mainly civil-law tradition. He hoped that the General Assembly would have in mind the redress of such imbalances.

24. Another representative recalled that, since 1947, the Commission had always had as one of its members an expert from the Nordic countries. However, the seat vacated by the appointment of Mr. Evensen to the International Court of Justice had not been filled by a person from the Nordic countries, although they accounted for an important part of the legal systems of the world. In addition, the total population of those countries should merit at least one seat on the Commission. In the regular elections to the Commission during the forty-first session of the General Assembly, due consideration should be given to the common interest in having a Nordic member on the Commission.

25. Certain representatives, noting that the fortieth anniversary of the United Nations offered an opportunity to reflect on the past and future of the Organization, recalled the useful role played by the International Court of Justice

and stressed the need to strengthen its position and its contribution to the reaffirmation and development of international law. One representative stated that it was regrettable that one of the permanent members of the Security Council had recently decided to terminate its acceptance of the Court's compulsory jurisdiction and that another permanent member of the Security Council was one of those which had not accepted that compulsory jurisdiction. Those observations were especially important as the documents generated by the International Law Commission all dealt with how to resolve conflicts between States. The need to strengthen the Court's position was, therefore, obvious and his delegation invited all Member States which had not yet done so to accept the compulsory jurisdiction of the Court.

26. Another representative recalled that on the occasion of the twenty-fifth anniversary of the Organization, the General Assembly had adopted resolution 2723 (XXV) of 15 December 1970, entitled "Review of the role of the International Court of Justice", which, with a view to finding ways of increasing the Court's effectiveness, had requested the Secretary-General to prepare a report. This was followed by resolution 3232 (XXIX) of 14 December 1974 in which the General Assembly had invited the States which had not yet done so to accept the Court's jurisdiction and to make use of it in a greater number of cases. In the 11 years that had elapsed since that last resolution, it could not be said that a significant number of new States had accepted its jurisdiction. Although, during that period, States from different regions had participated in cases, among them the developing countries, different special agreements had to be utilized to submit legal disputes to the Court and special chambers had been established to settle specific cases. Yet it had to be recognized that the Court was being underutilized. He warned that those States which refrained from accepting the jurisdiction of the Court, with the expectation that at some time they would be able to impose their positions on opposing parties, were giving up the possibility of obtaining satisfaction for damages suffered at the hands of other States and at the same time of strengthening the international tribunal.

27. He said that of the 159 States Members of the United Nations, only 44, in addition to two others which were not members, had made the declaration accepting the Court's compulsory jurisdiction, in accordance with Article 36 of its Statute. This represented approximately 27 per cent of the Members of the United Nations. Of the 15 members of the Security Council, only six had made the declaration by which they accepted the Court's compulsory jurisdiction and of these only two were permanent members, one of which would unfortunately soon stop accepting the Court's jurisdiction. On the other hand, his delegation welcomed Senegal's declaration recognizing the Court's jurisdiction. To make matters worse, of the 46 States mentioned, only 19 had accepted the Court's compulsory jurisdiction without any reservation whatsoever. As a result, only 11 per cent of the 159 States Members of the United Nations had unconditionally accepted the compulsory jurisdiction of the International Court of Justice. Such acceptance should be permanent and compulsory for all States, without any exceptions or conditions. He suggested that, based on a study carried out by the Secretary-General, the Organization could determine ways of encouraging States which had not yet done so to accept without reservation the jurisdiction of the International Court of Justice.

28. The same representative was also disturbed by the fact that the publications of the International Court of Justice, one of the main consultative sources of international law, were not available to a wide range of officials, including diplomats, or to students and experts in international law in Latin America. The reason was that, pursuant to Article 39 of the Statute of the Court, the latter's official languages were French and English. Thus, the texts of judgments and advisory opinions handed down by the Court, which were a highly important source of international case-law, appeared exclusively in those languages. After an exhaustive search in various libraries, including the library of the Court itself, only three volumes in Spanish of international law cases could be traced, many important cases and the corresponding judgments, and many advisory opinions handed down by the Court, were missing from them. His delegation, therefore, put it to the Sixth Committee that the fortieth anniversary of the United Nations was a suitable occasion to recommend that the General Assembly should request the Secretary-General to study the feasibility of publishing in Spanish at least the texts of the Court's judgments and advisory opinions. The limited scope of the proposal would in no way require an amendment to Article 39 of the Statute of the Court. Mr. Nagendra Singh, the President of the International Court of Justice, had keenly endorsed the proposal and had given an assurance of his firm support, since it would help to broaden considerably the dissemination of the important work carried out by one of the Organization's main bodies.

29. The desirability of publishing in Spanish the texts of the Court's judgments and advisory opinions was noted by certain representatives. It was, moreover suggested that the Court and the Secretary-General carry out a feasibility study on the publication in all the Organization's official languages, including Arabic, of the texts of the International Court of Justice.

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

1. General observations

30. A number of representatives considered it important and urgent that a code of offences against the peace and security of mankind be elaborated at the present time. A code of offences against the peace and security of mankind would, it was said, make a major contribution to the maintenance of international peace and security and have a positive effect on the codification and progressive development of international law. Some representatives considered such a code necessary because of the failure of collective security as envisaged by Chapter VII of the United Nations Charter. The current spread of violence and nuclear weapons were, it was felt, additional reasons why there was urgent need for a code. The concept of preventing offences against the peace and security of mankind, lay at the very basis of the Charter of the United Nations. The continuation of the Commission's work on the topic was of particular urgency and importance in the light of, it was said, the many instances of violations of elementary norms of international law, acts of violence, threats, and coercion.

31. A number of representatives were of the view that the 1954 draft Code of Offences against the Peace and Security of Mankind adopted by the International Law Commission constituted an acceptable basis for continuation of work on the topic. Though it was noted that since then, there had been changes and considerable progress in international law. Such changes would need to be taken into account in the preparation of the Code. The present trend, it was said, was not towards direct military aggression but rather towards indirect aggression and interference in internal affairs of States. Such interference was manifested primarily in the form of economic aggression and internal subversion. It was suggested that the Commission, in its elaboration of the Code, should take into consideration the various international legal instruments dealing with crimes against the peace and security of mankind, that had been adopted by international bodies since 1954 and reflected the changes that had occurred since that time.

32. The Commission had, in the view of several representatives, made encouraging progress. A number of representatives expressed general agreement with the approach chosen by the Special Rapporteur, Mr. Doudou Thiam. The point was made that the draft articles proposed by the Special Rapporteur would serve as a useful basis for delimiting the scope of the Code.

33. The outline for the Code proposed by the Special Rapporteur provided, it was said, a clear picture of its structure and content and would facilitate the work of the Commission. They commended the Special Rapporteur on his treatment of the topic.

34. The view was expressed by one representative that the Commission had not in fact made substantial progress on the topic. Some issues settled at earlier sessions of the Commission seemed to have been reopened and the further the discussions proceeded, the more problematic they seemed to become.

35. It was, in the opinion of another representative, still doubtful whether the Commission should be requested to work on the Code. Such a task was thought to be more political than legal in nature, exceedingly difficult and of questionable value. Moreover, in his view, work on the Code had been undertaken too hastily and without a real set of criteria for identifying the offences, which was essential if concrete results were to be achieved. Notwithstanding the need for a more detailed analysis of the issues raised by the draft articles, there had, it seemed, been a too hasty reference of matters to the Drafting Committee.

36. One representative expressed doubts as to the practicability of elaborating a code. Though it may be possible to prepare a list of offences, it would be difficult for the international community to agree on corresponding penalties and on jurisdiction over offenders, which would involve creation of an international criminal court - a matter that was, in his view, hardly conceivable in the light of the differences between legal systems. At best, the final instrument, like the 1954 draft, would be incomplete and would never be finalized. The Commission after two years was still, he stated, awaiting replies from Governments as to whether its mandate included preparation of the statute of a competent international jurisdiction over individuals and whether the jurisdiction should extend to States.

37. The view was expressed by one representative that the content of the Code should be limited to the parameters set by its title. Any effort to make the Code all encompassing would make its adoption no more than a remote possibility.

38. One representative recalled that the Commission had, at earlier sessions, stated that it was its intention to proceed by stages in its work on the Code, endeavouring in the first instance to identify serious breaches of international law which could be considered to constitute international offences, and then deciding which among those offences should be regarded as offences against the peace and security of mankind. However, the Commission seemed to have abandoned such a course and to be engaged currently in an abstract study of the concept of offences against the peace and security of mankind, and in an attempt to prepare a precise definition of acts constituting such offences.

2. Scope of the draft Code of Offences: rationae personae

39. A number of representatives concurred with the view that the Code of Offences should be limited at this stage to the question of the criminal responsibility of individuals, setting aside, at least for the time being and without prejudice, the question of the criminal responsibility of States. This, it was noted, was the course followed by the Special Rapporteur and was in accordance with the view of the Commission. Some representatives, however, considered that a code of offences would be effective and comprehensive only if it were to also cover the question of the criminal responsibility of States, and particularly so, in the case of such crimes as aggression, annexation of territory, genocide and racial discrimination, where the responsibility of individuals was inseparable from the responsibility of States. A failure to provide for the criminal responsibility of States would, they stated, deprive the Code of much of its meaning. If the Code were to be limited in scope to the responsibility of private individuals and entities, its purpose would not be achieved. The criminal responsibility of States, in their view, had to be included within the scope of the Code if all aspects were to be covered. If not, the Code would have little chance of practical implementation since the great majority of offences against the peace and security of mankind could only be committed by States.

40. The point was made that it was difficult to understand how the question of the criminal responsibility of States for offences under the draft Code would be left to the draft articles on State responsibility, as seems to have been suggested in paragraph 54 of the report of the Commission. To do so, would diminish the importance of the question of the criminal responsibility of States.

41. The view was expressed by some representatives that any act that constituted an offence against the peace and security of mankind would have to be so grave that it could only be committed by or with the assistance of a State. Such an act, it was said, could not be committed with the limited capacity available to individuals. As a minimum, a State should at least be required to provide explanations for the conduct of its nationals, particularly, its officials or authorities of the State. It was, it was said, generally accepted in contemporary international law that a State incurred responsibility for acts contrary to

international law committed by its executive or administrative agents or officers. The point was made that in terms of the definition of aggression only States were capable of committing aggression.

42. The view was expressed by some representatives, however, that private individuals could commit offences against the peace and security of mankind, for instance, the recruitment, training and dispatch of mercenaries to another State for subversive activities. It was also true, it was said, that some multinational corporations and organized criminal groups had the means to endanger the stability of States, particularly weaker States.

43. Some representatives, while supporting inclusion of the question of the criminal responsibility of States within the scope of the Code, were of the view that, given the progressive development of international law in article 19 of Part One of the draft articles on State responsibility, the question of the criminal responsibility of States under the Code should be left in abeyance until it was seen how much progress was possible, in dealing with the responsibility of States for international crimes under article 19.

44. The view was expressed by one representative that the State was the primary subject of international law, and recognition of individuals as subjects of international law was limited. A code of offences against the peace and security of mankind which referred only to the responsibility of individuals would not be effective in practice. The Nürnberg Tribunal was an isolated example which should be viewed in its historical context. The Judgement of the Tribunal and the punishment of individuals had been possible only because of the defeat of the State on whose behalf those crimes had been committed during the Second World War.

45. The view was also expressed that in holding States responsible for offences against the peace and security of mankind, the weight of responsibility should be proportional to the importance of the rule breached. Rules of law were not of equal importance to the international community. Genocide, for instance, could not be penalized in the same manner as non-fulfilment of reciprocal treatment obligations in trade.

46. The point was made by some representatives that, though States could not be punished in the same manner as individuals, they could be made liable for damage caused by individuals acting on their behalf. The term "liability" might, they said, be used in place of "responsibility" and in this way it could be shown that a State could be liable for such damage.

47. The point was made by one representative, in connection with international criminal responsibility, that according to existing concepts of international law, States had political and material responsibility while criminal responsibility devolved upon the individuals who committed the crimes.

48. Some representatives considered that the concept of the criminal responsibility of States was without substance, since such a category of responsibility was unknown in contemporary international law. They were of the view that only individuals could incur international criminal responsibility and

that all matters pertaining to the responsibility of States should be regulated by the draft articles on State responsibility particularly, by Part Two of the draft articles. Such international crimes as aggression, genocide and apartheid, though in accordance with State policy, were always committed by individuals who might or might not be officials of the State.

49. The point was made by some representatives that the concept of the criminal responsibility of States ran counter to the principle of the sovereignty of States.

50. The concept of the criminal responsibility of States was also unrealistic, as was reflected in the principle par in pasem non habet imperium. A State was not subject to foreign jurisdiction and the universally recognized principle of the sovereign equality of States could not be undermined. The view was expressed, however, that should the Code of Offences only be concerned with problems of the individual responsibility, States, relieved of all responsibility for such crimes, would fail to adopt the legislation necessary for the prevention of such crimes.

51. The concept of the criminal responsibility of States, in the view of one representative, presented difficulties that could jeopardize future work on the Code of Offences. Thus, the Commission's decision to limit the scope of the Code, rationae personae, at the present stage, to offences committed by individuals seemed advisable and a limitation of the scope of a topic was, he said, a technique usually adopted by the Commission in the initial stages of its work.

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

52. The point was also made that in order not to weaken the effectiveness of the Code, the "minimum content" approach should be followed, as proposed by the Special Rapporteur.

53. A number of representatives considered that the Code should deal only with the most serious offences against the peace and security of mankind and that to do otherwise would diminish the importance of the Code and keep it from fulfilling its main purpose. The notion of "seriousness" was, in their view, an objective criterion which would serve as a useful guide in determining which offences should be covered by the Code.

54. Some representatives, however, were of the view that the criterion of "seriousness" was too vague and required further elaboration.

55. The point was made by some representatives that the Code should only cover crimes that were in fact directed against the peace and security of mankind and considered by most nations to be of such atrocity as to justify international punishment. Such acts, it was said, should be described with the precision essential in criminal legislation.

56. Some representatives were of the view that an approach which combined the criterion of extreme seriousness with the criterion of breach of essential international obligations would meet desired objectives, provided offences were identified on a strictly selective basis.

57. The elaboration of a general definition to supplement the list of specific offences was, in the opinion of some representatives, advisable. Such a definition should be based on general criteria relating to the increased public danger which such offences represented, as well as on the general awareness of their harmful effect.

58. The point was also made by some representatives that the concept of the peace and security of mankind should be regarded as a single and unified concept and should be carefully defined. They were of the view that the proposals made by the Special Rapporteur in paragraph 6 of his report provided a practical approach to the problem.

59. The view was expressed that the Code should both provide a clear definition of the concept of offences against the peace and security of mankind, and include a list of such offences in accordance with criteria established in article 19 of Part One of the draft articles on State responsibility. Such an approach, it was said, would ensure close co-ordination between the Code and the articles on State responsibility and would also ensure that all existing or new forms of international crimes were encompassed in the light of contemporary international practice.

60. Another representative considered that the definition of an offence against the peace and security of mankind should be short and based on article 19 of Part One of the draft articles on State responsibility. The definition should contain three elements: (a) occurrence of a violation of an international obligation relating to international peace and security; (b) the basic nature of that obligation; and (c) recognition by the international community as a whole that the violation of such a basic obligation constituted an offence against the peace and security of mankind.

61. The point was made that the offences to be covered by the Code seemed to fall into three broad categories (offences against peace; war crimes; and crimes against humanity); and that a criterion, which involved a common denominator, should be established to determine which offences should be covered by the Code. A question to be then determined, it was said, was whether apartheid, declared a "crime against humanity" in General Assembly resolution 39/19 of 23 November 1984, and "drug trafficking", declared a "crime against humanity" in General Assembly resolution 39/141 of 14 December 1984, should be included in the list of offences against the peace and security of mankind.

4. Methodology for preparation of the draft Code of Offences

62. A number of representatives referred in their statements to the question whether work on the draft Code should begin with an elaboration of general principles or whether, before general principles were elaborated, specific offences should be identified and considered.

63. Some representatives were of the view that the Commission should initially concentrate on identifying crimes that should be covered before formulating any

general principles in the draft Code. Such a method, it was said, was consistent with the pragmatic, empirical and inductive approach which the topic required and general principles could be formulated at a later stage.

64. Some representatives were of the view that work on the draft Code should begin with the elaboration of general principles. This, it was said, would help overcome the difficulties that would be involved when defining criminal acts in which political factors were involved. Such principles, as noted in paragraph 47 of the report of the Commission, concerned the principles of nullum crimen sine lege, non-reciprocity, applicability of jus cogens with its non-temporal element, the concept of complicity and the requirement of a concursus plurium ad delictum referred to in paragraph 49 of the report.

65. The point was made that the validity of the seven general principles formulated by the Commission at its second session in 1950 must be reconsidered in the light of developments since 1950. The suggestion was made that the Commission should give priority to consideration of the non-applicability of statutory limitation to offences against the peace and security of mankind. The view was expressed that the general principles should be based on those which were formulated for the Nürnberg and Tokyo trials but be supplemented in the light of later developments in international law and practice.

66. As to the preparation of the list of offences, some representatives endorsed the view, expressed by the Special Rapporteur, that it would be appropriate to take as a point of departure the list of offences drawn up by the Commission in 1954 which should, however, be appropriately supplemented. The view was expressed that a distinction should be drawn between, on the one hand, acts that were offences in treaty or customary international law and, on the other, acts that had been recognized as offences in non-binding instruments. The scope of the topic should be limited, it was said, to the former category of offences. The observation was made that the Code should contain a clause for its review every 5 to 10 years.

67. Some representatives expressed agreement with the distinction made by the Commission between international crimes, i.e. crimes which were international in nature, and offences which, by their nature, threatened the very foundations of contemporary civilization. One representative stated that the connection made in the report of the Commission between war crimes and crimes against humanity should be re-examined. War crimes might be crimes against humanity but the reverse may not be true, as in apartheid.

68. One representative stated that, while believing in the unity of the concept of offences against the peace and security of mankind, he was in favour of the primacy given by the Special Rapporteur to offences against international peace.

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

(a) Comments on possible offences proposed for inclusion by the Special Rapporteur in his report

69. The possible offences, for inclusion in the Code of Offences, considered in the present section (a) are the offences proposed by the Special Rapporteur in his third report (A/CN.4/387 and Corr.1 and 2 (Spanish only)) submitted to the Commission at its thirty-seventh session. The Special Rapporteur noted that he would, in subsequent reports to the Commission, consider such other offences as war crimes and crimes against humanity.

70. Aggression. Several representatives were of the view that aggression, as the most serious international crime, should be treated as such in the Code. The Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX) on 14 December 1974 should be incorporated, it was said, in the Code. A mere cross-reference to a General Assembly resolution was considered insufficient in a legal instrument of the nature of the Code.

71. The point was made by some representatives that though the Definition of Aggression adopted by the General Assembly was not perfect, it would be unwise to modify the definition. While a number of provisions in the definition would not, it was said, be appropriate within the framework of the Code, such provisions were, nevertheless, an integral part of the package deal that had led to consensus on the definition. Thus, care should be taken to reflect the required substance of the definition in the Code without infringing the underlying consensus.

72. Some representatives, agreeing with the inclusion of aggression as an offence in the Code, cautioned against incorporating the resolution on the Definition of Aggression as a whole in the Code. The resolution, it was said, was intended for a political and not a judicial body. The point was made that under the resolution the Security Council had to determine which acts other than those enumerated in the resolution constituted aggression. The Commission, it was said, should adopt a similar approach and exercise a similar degree of caution, since it was inconceivable that an act not regarded as aggression by the Security Council should be characterized as such in a Code intended for the use of national and international judicial authorities.

73. The view was expressed by one representative that the Code should not reproduce the Definition of Aggression because that Definition was not intended to be used for a legal purpose. It was noted in that connection that, notwithstanding the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX) and despite Article 2, paragraph 4, of the United Nations Charter, the Security Council had been reluctant, when force had been used by States, to draw appropriate conclusions and take necessary action. This had contributed to a crisis of confidence in the United Nations. Thus, the Code should, it was said, simply make reference to the resolution in question without reproducing its text in full. The Definition of Aggression also contained elements of an evidentiary nature which would not be appropriate for inclusion in the Code.

74. The point was made by another representative that attempts to use resolution 3314 (XXIX) as a basis for legal action reflected a lack of understanding not only of the nature, object and purpose of the resolution but also of the process of elaborating legal norms.

75. The view was expressed that, should General Assembly resolution 3314 (XXIX) not be included in the Code, the relevant elements of the resolution, namely, the definition of aggression and the provisions relating to the consequences of aggression, should be included.

76. Threat of aggression. A number of representatives were of the opinion that threat of aggression was an offence of such seriousness that it should be covered by the Code. The view was expressed by one representative that the threat of aggression, like the threat of the use of force which was prohibited by Article 2, paragraph 4, of the Charter, was used as a means of exerting pressure, and that this could endanger international peace and security.

77. One representative stated that precision was required in defining the threat of aggression in view of the possibility that it could be military, political or economic in nature. The existence of a threat of aggression could, in his view, be established without difficulty on the basis of evidence of mobilization, demonstration of force and statements of political leaders. Such acts should, however, be characterized as indirect and not equated to direct aggression.

78. Some representatives, however, expressed reservations with respect to the inclusion of the threat of aggression in the Code. An action interpreted as a hostile gesture by some might, they pointed out, be regarded by others as an act of self-defence, and inclusion in the Code of notions of such vagueness would lead to chaos and only exacerbate controversy.

79. Preparation of aggression. A number of representatives were of the view that preparation of aggression should be an offence under the Code. It was a necessary stage prior to an act of aggression, and the planning and preparation of a war of aggression had been condemned by the Nürnberg Tribunal and was also included in the Commission's 1954 draft. One representative did not share the view expressed by some that the preparation of a war of aggression was punishable only when aggression had effectively taken place, in which case preparation amounted to aggression itself. In his view, not to include the offence in the future Code would be a step back from the Judgement of the Nürnberg Tribunal, because persons who had contributed to the preparation of a war of aggression but who had not participated in the decision to carry it out would remain unpunished.

80. One representative stated that if the offence of preparation of aggression were to be covered in the Code, the offence and its constituent elements should be further clarified.

81. Some representatives were of the view that the concept of preparation of aggression should be considered together with the concept of threat of aggression.

82. Some representatives did not consider that preparation of aggression should be included in the Code. To do so, in the opinion of one representative, would be to introduce into the Code subjective elements which might detract from the objectives of the Code. The concept of "preparation of aggression" might not, it was also said, be legally justifiable and could provide a strong State with a ready pretext for military action against a weak State.

83. The view was expressed by one representative that to declare preparation of aggression an offence would be fraught with difficulty, given the maintenance by most States of a defence capacity equally capable of aggression. The Code, in his view, should concentrate on acts which actually threatened peace.

84. Intervention in the internal or external affairs of another State. A number of representatives were of the view that the Code should cover, as an offence, intervention in the internal or external affairs of a State. The point was made that acts constituting such intervention should be specified and that mere general reference would be inadequate. Acts constituting intervention in the internal or external affairs of a State should be covered, it was said, on the basis of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. One representative stated that the Commission should adopt an objective, and not a subjective approach to ensure that the formulation of the offence in the Code was not interpreted to the disadvantage of smaller States.

85. Some representatives considered that the notion of intervention was too vague and imprecise to be considered an offence against the peace and security of mankind and was best left out of the Code. One representative stated that serious forms of intervention would be covered by the concept of aggression and that less serious forms of intervention ought to be left out of the Code.

86. The view was expressed by one representative that rather than employing the term "intervention", the acts amounting to unacceptable intervention should be specified.

87. Terrorism. Several representatives expressed the view that the phenomenon of terrorism was one of the most urgent and serious problems currently facing mankind and that it should be included in the Code as one of the offences against the peace and security of mankind. Some representatives agreed with the Commission that the 1937 Convention for the Prevention and Punishment of Terrorism could serve as a starting point but that new manifestations of terrorism, such as the hijacking of aircraft and violence directed against persons enjoying special protection such as diplomatic and consular agents, should also be covered.

88. The view was expressed by one representative that for purposes of the Code the focus should be on State-sponsored terrorism. Another representative was of the view that a distinction ought to be made between acts of terrorism by individuals and acts of terrorism supported by a State. Some representatives stated that terrorism in all its forms, wherever and by whomsoever, was an offence against the peace and security of mankind and ought to be covered by the Code.

89. One representative stated that terrorism might prove an elusive concept and such manifestations as taking of hostages or attacks on internationally protected persons might be more amenable to codification in a penal instrument. Another representative considered that an enumerative list of terrorist acts might not be the advisable course in view of their constantly changing nature.

90. Another representative stated that, in the formulation of provisions on terrorism as an offence against the peace and security of mankind, the right of peoples under colonial domination fighting for their self-determination should not be prejudiced, given the tendency on the part of some States to regard genuine freedom fighters as terrorists.

91. Violation by the authorities of a State of the provisions or a treaty designed to ensure international peace and security. One representative stated that he did not object to the inclusion in the Code of the offence dealt with under the heading of "violations of the obligations assumed under certain treaties" but that, in his view, it might be more suitably included in a more general category.

92. Another representative stated that the inclusion of such an offence in the Code, among other offences, would make the Code too comprehensive and detailed.

93. Forcible establishment or maintenance of colonial domination. The point was made by a number of representatives that the forcible establishment or maintenance of colonial domination should be covered by the Code. Colonialism was not, they stated, a phenomenon of the past but still existed in many parts of the world, an obvious example being Namibia. The General Assembly had terminated South Africa's mandate and the International Court of Justice had ruled on the illegality of its continued occupation. Such forcible establishment or maintenance of colonial domination was contrary to the right of peoples to self-determination enshrined in the United Nations Charter and other international instruments.

94. One representative considered that the forcible establishment or maintenance of colonial domination constituted in fact a permanent aggression.

95. The view was expressed by one representative that the forcible establishment or maintenance of colonial domination should be included in the Code since the United Nations was still seized with the problem of implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

96. Some representatives stated that the concept of forcible establishment or maintenance of colonial domination could be given a convincing legal meaning only if it was combined with the right of peoples to self-determination in accordance with General Assembly resolution 1514 (XV) of 12 December 1960. There would be no offence against the peace and security of mankind, they said, unless it was established that there was a denial of the right of peoples to self-determination.

97. Another representative stated that though the forcible establishment or maintenance of colonial domination should undoubtedly constitute an offence under the Code, the particular provisions to be included in the Code, particularly with reference to the determination of responsibility, the identification of the acts to be punished and the individuals involved, would require careful consideration.

98. Mercenarism. A number of representatives were of the view that the Code of Offences should include a provision on mercenarism. Acts of mercenaries had, they stated, a destabilizing influence on the sovereignty, political independence and territorial integrity of States. Notwithstanding its mention in the 1974 Definition of Aggression and work of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the question of mercenaries should be dealt with, it was said, in the Code of Offences to enhance the effectiveness of the Code in the preservation of peace and security.

99. Some representatives were of the view that consideration should be given by the Commission to the interrelationship between treatment of the subject of mercenaries in the Convention under preparation in the Ad Hoc Committee and its treatment in the Code of Offences. The point was made by one representative that the text to be included in the Code of Offences should be based on the work of the Ad Hoc Committee.

100. Some representatives were not convinced that mercenarism should be included in the Code of Offences as a separate offence.

101. The point was made by one representative that if the individual criminal responsibility of mercenaries was not to be covered by the Code, the question of the organization, equipment, training and use by a State or its authorities of mercenaries should be dealt with in the context of offences such as aggression or intervention, perhaps as an element that could aggravate the offences and entail a heavier penalty.

102. Economic aggression. A number of representatives were of the view that economic aggression was an act of sufficient seriousness to be included in the Code. It was, in their view, one of the most serious problems facing developing States and had serious implications for their sovereignty and political independence, could threaten the stability of a Government or the very life of a people and was contrary to international peace and security.

103. The point was made by some representatives that economic aggression undermined the principle of permanent sovereignty of States over their natural resources and the principle of the economic independence of States. One representative considered that the Commission should endeavour to identify all aspects of economic aggression.

104. Some representatives considered that the concept of economic aggression was too vague for inclusion as an offence in the Code. The suggestion was made that the concept of economic aggression could more properly be included under intervention in the internal or external affairs of another State.

105. One representative, while agreeing that economic aggression should be included as an offence in the Code, stated that in the formulation of a provision on economic aggression care should be taken not to impede diplomatic negotiations. It was possible, it was said, that in the course of such negotiations it could properly be stated that failure could lead to a deterioration in economic relations.

(b) Comments on other possible offences for inclusion

106. Several representatives considered that apartheid should be included in the Code of Offences. Its inclusion was clearly necessary, it was said, in a Code that intended to cover crimes against humanity. The policy of apartheid, in the view of a number of representatives, constituted one of the greatest threats to international peace and security.

107. Some representatives expressed the view that they thought it inconceivable that a code of offences against the peace and security of mankind should remain silent on the problem of the use of nuclear weapons. The Code, it was said, should begin its list of offences with the use or threat of use of nuclear weapons, and stipulate that such use or threat of use constituted the gravest crime against the peace and security of mankind. The point was made that nuclear war had been defined as the gravest of all crimes in many international legal instruments, including the Declaration on the Prevention of Nuclear Catastrophe in General Assembly resolution 36/100 of 9 December 1981. The explicit prohibition in the Code of the use of nuclear weapons would, it was said, be a significant step towards erecting a legal barrier to nuclear war. Some representatives considered that a first use of nuclear weapons should be prohibited in the Code. Some representatives expressed the view that use of other weapons of mass destruction should also be included as an offence in the Code.

108. The view was expressed by some representatives that in the interests of preserving the credibility and authority of the Commission, the Commission should refrain from pronouncing itself on the question of the use of nuclear weapons. To achieve any progress in the exceptionally delicate and difficult field to be covered by the Code of Offences, the Commission should, they said, eschew the political aspects and adopt a strictly juridical approach.

109. Some representatives were of the view that genocide should be covered as an offence in the Code.

110. Some representatives considered that acts causing serious damage to the environment should also be covered in the Code.

6. Question of implementation of the draft Code of Offences

111. Some representatives stated that the question of the implementation of the Code of Offences must be addressed if the Code was to establish effective international criminal law. It was necessary, it was said, to agree on a universal jurisdiction and to establish an international court for implementation of the Code. If this were not done, the Code would, it was said by one representative, be nothing more than an instrument applied unilaterally by victors in future wars.

112. The view was expressed by one representative that past experience in the punishment of war criminals showed that the vast majority had been tried by national courts of States on whose territory the crimes had been committed. Only the principal war criminals had been tried by international courts established for

the purpose. Such an approach should, he said, be retained for the Code of Offences against the Peace and Security of Mankind and establishment of a permanent international criminal tribunal should not be regarded as a realistic alternative.

113. Some representatives considered it inadequate to leave implementation of the Code exclusively to national courts. They were of the view that though jurisdiction over offences under the Code should, in principle, be entrusted to national courts, establishment of an ad hoc international court should not be excluded.

114. One representative considered that to ensure punishment of those guilty of offences under the Code, the Code should provide for non-applicability of statutory limitation and for the prosecution and extradition of offenders.

115. The view was expressed by some representatives that the Code should include provisions on co-operation among States in conformity with the United Nations Charter for prevention of offences against the peace and security of mankind, and on the punishment of those guilty of the offence.

7. Comments on draft articles

116. The proposals made by the Special Rapporteur, in his third report submitted to the Commission at its thirty-seventh session, with respect to draft articles were as follows: Part I (Scope of the present articles) which contained draft article 1; Part II (Persons covered by the present articles) which contained two alternatives for draft article 2; Part III (Definition of an offence against the peace and security of mankind) which contained two alternatives for draft article 3; Part IV (General principles) was left pending; and Part V (Acts constituting an offence against the peace and security of mankind) which contained two alternatives for draft article 4.

117. A number of observations were made by representatives on specific aspects of the proposed draft articles.

Part I (Scope of the present articles): article 1

118. The point was made, with reference to draft article 1, that the two concepts of "peace" and "security" should be viewed as organically linked. Some representatives stated in that connection that in certain cases the "security" of peoples and of mankind as a whole could be threatened without "peace" being jeopardized.

Part II (Persons covered by the present articles): article 2

119. Some representatives made the point that draft article 2 should have the aim of covering situations in which the State, through its authorities, committed an offence against the peace and security of mankind, and situations in which individuals or groups of individuals engaged in criminal acts resulting, because of their seriousness, in genocide, war crimes and crimes against humanity.

120. The suggestion was made by one representative that the expression "persons" rather than "individuals" or "authorities" should be used in draft article 2, whether or not the offenders acted as authorities of a State or as private individuals.

121. Comments were made on the provisions of the two alternative formulations that had been proposed for draft article 2.

122. One representative considered that neither of the alternatives of draft article 2 was clear having regard to the nature of the problem to be resolved. A more careful study of the matter, he said, was required. Another representative was of the view that the Commission should cover in the draft Code both individuals and State authorities in the most appropriate manner.

123. First alternative. Several representatives expressed preference for the first alternative of draft article 2 which, they noted, referred only to "individuals" and did not make a distinction between private persons and authorities of a State. This, they said, would enable all offences to be covered regardless of the status of their authors.

124. The point was also mad[illegible] private individuals or groups of individuals who were not "State authorities" could commit crimes, such as genocide, against the peace and security of mankind.

125. Some representatives expressed satisfaction that the Commission had referred the first alternative of draft article 2 to the Drafting Committee.

126. Some representatives considered it important to maintain a clear distinction between, on the one hand, issues of State responsibility which were the proper concern of the draft articles on State responsibility and, on the other, issues of the criminal responsibility of the individual, whether acting on his own behalf or as agent of the State, which properly came under the Code of Offences. This, they said, was unsatisfactorily shown in the second alternative of draft article 2.

127. The objective sought to be achieved would be to ensure that any individual, or group of individuals, or indeed any State through its authorities, responsible for the commission of an offence against the peace and security of mankind, would not be free of responsibility because the Code was not sufficiently comprehensive. A comprehensive Code would also serve as a deterrent against those having the intention to commit offences against the peace and security of mankind.

128. If the Commission chose the first alternative in draft article 2, the text, it was stated, should be accompanied by a commentary to the effect that the expression "individuals" covered also those who were agents or authorities of a State.

129. Second alternative. Some representatives expressed preference for the second alternative of draft article 2. The Code should, they said, be limited to the most serious offences and it would be desirable to limit its application to individuals who represented State authority.

130. One representative stated that while he preferred the second alternative of draft article 2, its provisions should be modified to read: "Individuals who, in exercising State authority, commit an offence against the peace and security of mankind are liable to punishment".

Part III (Definition of an offence against the peace and security of mankind): article 3

131. Some representatives stated that they had serious reservations with respect to the two alternatives in draft article 3. As the draft Code should contain a description of the relevant offences, a general definition of such an offence did not seem necessary.

132. One representative expressed the view that ever since the Nürnberg Tribunal had delivered its Judgement, the concept of "offences against the peace and security of mankind" had been understood to mean a certain category of offences committed by individuals, and that it would be wrong to give a different interpretation to that concept, particularly in linking offences against the peace and security of mankind with article 19 of Part One of the draft articles on State responsibility. For those reasons, he said, both the first and second alternatives were unacceptable, because in both cases offences against the peace and security of mankind were equated with offences committed by States.

133. The view was expressed by another representative that there were shortcomings in both alternatives of draft article 3. The first alternative, he said, was an imprudent departure from the 1954 approach and consisted of an enumeration of vague generalities, making no provision for the fact that the act should be recognized as a crime by the international community as a whole. The second version was, in his view, too vague.

134. One representative considered that the current language of draft article 1 made it necessary to provide a general definition of an offence against the peace and security of mankind, as had tentatively been done in draft article 3. However, he said, he was not convinced that either alternative of the draft article was necessary. If Part II, "Persons covered by the present articles", was properly formulated, there would be no need for a general definition and the scope of the Code ratione materiae, he stated, could be defined simply by stating that the articles applied only to the offences set forth in Part II.

135. First alternative. The first alternative of draft article 3 contained, in the view of a number of representatives, elements that were of great importance to the fundamental interests of the international community. The first alternative, they said, contained the elements that the Commission had recognized as being of the greatest importance for safeguarding the fundamental interests of the international community. The first alternative was also, it was said, more precise than the second one and was thus preferable.

136. Some representatives, noting that the first alternative was closely linked to article 19 of Part One of the draft articles on State responsibility, considered that it augured well for comprehensive future work on the topic.

137. One representative was of the view that the elaboration of a specific list of punishable acts would be preferable, and considered that the provisions of the first alternative of draft article 3 might serve either as a basis for the elaboration of such a list of punishable offences or as a general provision to be supplemented by specific criteria for determining the seriousness of a breach and the essential importance of the obligation in question.

138. One representative expressed the view that the first alternative consisted mainly of an enumeration of offences and did not specify the characteristics that were common to such offences, and considered the expression "serious breach" too vague. There was also, he said, a certain degree of overlap, particularly where subparagraphs (c) and (d) were concerned.

139. Second alternative. One representative expressed preference for the second alternative of draft article 3. He was of the view that there should, in the first alternative, be a general definition of an offence against the peace and security of mankind, which would be supplemented by a list of specific offences. Such a general definition, he said, should be based on the criterion of the increased public danger resulting from such offences and general awareness of their harmful effects.

140. Some representatives considered the second alternative of draft article 3 too vague. The concept of "internationally wrongful act recognized as such by the international community as a whole" was considered too imprecise to be included in a definition of offences.

141. One representative stated that the second alternative of draft article 3 was a transposition of the text of draft article 19 of Part One of the draft articles on State responsibility, with respect to which he had the most serious reservations and which, he said, was concerned with States and not individuals and was, thus, not acceptable.

142. Another representative made the point that the second alternative of draft article 3 sought to establish a link between an international offence and a breach of the rule of a peremptory norm of international law (as defined in article 53 of the Vienna Convention on the Law of Treaties), but that it was not in fact the offences but the peremptory norms that were recognized by the international community as a whole. He suggested, therefore, that the second alternative of draft article 3 be revised to read as follows: "Any internationally wrongful act resulting from a breach of an international obligation of essential importance for the safeguarding of fundamental interests of mankind and recognized as such by the international community is an offence against the peace and security of mankind", and that the first alternative of draft article 3 should then follow setting out examples of such breaches of obligation.

143. Another representative stated that in view of the divergence of views in the Commission, an open-ended definition should be adopted, providing criteria to determine whether or not a particular act constituted an offence under the Code, followed by an enumeration of important internationally wrongful acts.

144. Finally, it was stated that if a general definition was to be included, the second alternative of draft article 3 could be used, provided it was made clear that the serious offences recognized by the international community as crimes against the peace and security were solely the offences covered by the draft Code of Offences.

Part V (Acts constituting an offence against the peace and security of mankind): article 4, section A

145. Several representatives stated that they favoured the first alternative of section A proposed by the Special Rapporteur for draft article 4, which reproduced the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX). The incorporation of such a definition in the Code was, in their view, indispensable. A mere reference to the resolution, as suggested in the second alternative, would not suffice.

146. Some representatives, however, wondered whether the political nature of the Definition of Aggression, in the resolution, should not be re-examined with a juridical perspective in mind with a view to modifying it for the purposes of the Code.

147. It was stressed by some representatives, however, that draft article 4, section A, derived from General Assembly resolution 3314 (XXIX) and attempts to use that resolution as a basis for legal action reflected a lack of understanding not only of the nature, object and purpose of the resolution itself, but also of the process of elaborating legal norms.

C. STATE RESPONSIBILITY

1. General observations

148. The great importance they attached to the topic of State responsibility was emphasized by representatives. A document setting out the international responsibility of States would, it was said, be a major contribution to the codification and progressive development of international law, and to the strengthening of the international legal order. The topic, in the view of some representatives, was one of the most important on the agenda of the International Law Commission. The point was made that State responsibility had gained important practical significance since the Commission had, in Part One of the draft articles, enlarged the scope of traditional international law by including in those articles the matter of State responsibility for such illegal acts as aggression, colonial domination and racism.

149. Some representatives considered that an instrument covering the whole issue of State responsibility would also enable States to regulate or deal with individual cases of responsibility through further and more specific agreements.

150. Some representatives expressed the wish, in view of the considerable importance they attached to the topic, to see work thereon proceed at a faster

pace. They were of the view that with the submission, last year, of the draft articles of Part Two substantial progress had been made, and that substantive discussion of those draft articles should now take place. The subject was admittedly of great complexity; but it was their hope that the Commission could proceed further. Perhaps considerbly more time should be devoted to the topic, it was said, at the Commission's future sessions if progress was to be made. The hope was expressed that work on all the draft articles concerning State responsibility would be brought to a conclusion in the near future.

151. Appreciation was expressed for the valuable contributions made by the Special Rapporteur, Mr. Willem Riphagen.

152. Some representatives were of the view that the work of the Commission should proceed on the basis of the draft articles proposed for Part Two which, in their view, had already been accepted by an overwhelming majority of States as a basis for discussion, in so far as its basic structure and, in particular, the distinction made therein between the legal consequences of international delicts and of international crimes were concerned.

153. One representative proposed that the Commission establish a tentative timetable of work for the topic. Another representative was of the view that the Commission should continue its work expeditiously with the aim of arriving at a text of a draft convention which, even if not ratified, would still influence the conduct of States and constitute a reference text for international courts and tribunals.

154. The view was expressed by one representative that the purpose of the draft articles on State responsibility was that of determining: what constituted internationally wrongful acts; the liability and legal consequences for such acts; and the measures which countries affected by such acts might take in response. It was important for its practical application, it was said, that the international legal instrument on State responsibility be clear and as uncomplicated and as comprehensive as possible. The principal purpose of the draft articles should be of a preventive character; in other words, it should ensure that an internationally wrongful act is not committed and that, if committed, the response of the injured State is kept within proper legal bounds. The draft articles, in the view of these delegations, should be oriented towards the requirements of international practice, which needed the clearest possible guidelines.

155. Some representatives, while considering the draft articles of Part Two and their commentaries as representing a concrete achievement in the progressive development of international law and its codification, expressed the view that there were certain questions raised in the draft articles which required careful handling. Since article 19 of Part One had already confirmed the concept and content of international crimes, it was only logical that Part Two of the draft articles set out their legal consequences. Further, because of the serious harm to international peace and security brought about by international crimes, in particular, by the crime of aggression, the provisions on the consequences of international crimes should focus on the ergo omnes nature of the crime and on its consequences, which differ from the consequences of internationally wrongful acts

of a general nature. Otherwise, the distinction between international crimes and internationally wrongful acts of a general nature would be without any practical significance.

156. One representative hoped that further consideration would be given to such issues as: the treatment of international crime and jus cogens; the identification of the injured States in the case of breach of obligations under multilateral conventions and the nature and scope of countermeasures; and the relationship between countermeasures and procedures for dispute settlement. The Commission, if necessary, should review the definition of "international crime" as laid down in Part One of the draft articles.

157. Some representatives referred to the relationship between State responsibility and the draft Code of Offences against the Peace and Security of Mankind. They were of the view that the subject of State responsibility could not be completely divorced from that of the draft Code of Offences. Article 19 of Part One of the draft articles on State responsibility provided for international crimes and this raised the question of the scope, ratione personae, of the draft Code of Offences against the Peace and Security of Mankind. The point was made that the Commission should deal with the question of international crimes committed by States under the topic of State responsibility, whose scope was wider than that of the draft Code of Offences against the Peace and Security of Mankind.

158. Some representatives were of the view that consideration of the legal consequences of international crimes should also have regard to the relationship between the present topic and other topics, such as the draft Code of Offences against the Peace and Security of Mankind and international legal practice relating to the treatment of international crimes.

159. One representative did not share the concern that the relationship that exists between this topic and that of the draft Code of Offences against the Peace and Security of Mankind would be a bar to treating the subject of State responsibility exhaustively.

2. Comments on draft articles

(a) Articles of Part Two provisionally adopted by the Commission

Article 5

Observations on article 5 as a whole

160. A number of representatives noted with satisfaction the provisional adoption by the Commission of draft article 5 on the definition of an "injured State", which, it was said, was an article of considerable significance.

161. Some representatives considered the provisions of draft article 5 comprehensive and adequate in their coverage of the variety of situations in which injury to a State could arise.

162. The point was made that the provisions of the draft article should allow for the possibility of an extension of the categories of injured States.

163. Some representatives considered that further precision in the definition of an "injured State" was necessary. States would not be equally affected, it was said, by the same wrongful act and differentiation between States "directly injured" and States "indirectly injured" was necessary. If such a differentiation was not made, States may overreact to injuries and there may be unjustified countermeasures. Internationally wrongful acts differed and entailed different legal consequences.

164. One representative considered the scope of the definition of "injured State" to have been broadened to the point where even an unrelated State could interpret the provisions of draft article 5 in its favour and take action as an injured State. The point was made that entitlement to take countermeasures should vary according to the nature of the particular injury sustained. It was thought, for example, that the measures envisaged in paragraph 2 of draft article 6 or those in draft article 7 would not appear appropriate to an indirectly injured State.

165. The view was expressed by one representative that it was necessary to make an adequate distinction between directly injured States, on the one hand, and, on the other, States that are affected by a wrongful act merely by virtue of their being party to a treaty or members of the community of States. Such a distinction was necessary both in view of State practice which, it was said, did not justify the present approach in draft article 5 and because indiscriminate conferment of "injured State" status could result in any State being able to maintain that it was entitled to take countermeasures. Such a possibility, it was said, increased considerably in the case of breach of a multilateral treaty, or in case of an international crime when any State would be an "injured State".

166. The suggestion was made that the Commission should give further thought to simplifying draft article 5 with a view to arriving at a definition of "injured State" that would serve as a practical tool in identifying who would be entitled to exercise the rights arising under Part One of the draft articles.

Observations on particular provisions of article 5

Paragraph 2

167. The view was expressed by one representative that paragraph 2 of draft article 5 seemed to be rendered less than useful by over-complication. One representative considered the enumeration in paragraph 2 of acts constituting infringement of rights to be somewhat arbitrary. The enumeration, he said, could not be exhaustive and it would be simpler to include wrongful acts in two categories, those arising out of bilateral treaties and those arising out of multilateral treaties.

168. Subparagraph (a). One representative noted that a breach of bilateral customary law was not presently covered in subparagraph (a) of paragraph 2 and it was a point which should be covered.

169. Subparagraph (b) to (d). The view was expressed by one representative that subparagraphs (b) to (d) of paragraph 2 gave excessive emphasis to sources and details which, in turn, raised questions that could not be resolved in a Convention on State Responsibility. The cases sought to be covered in subparagraphs (b) to (d) (judgement or other binding dispute settlement, decision of an international court or tribunal, binding decision of an international organization and a treaty provision for a third State) could, in his view, be dealt with under bilateral or multilateral agreements. Accordingly, deletion of subparagraphs (b) to (d) seemed advisable. There was, in his view, no reason for a Convention on State responsibility to provide an exhaustive list of all possible legal sources.

170. Subparagraph (e). One representative expressed agreement with the new language of subparagraph (e) (iii) of paragraph 2 which, in his view, recognized that fundamental human rights, aside from being protected by treaty, were, or at least could be, a subject of customary international law.

171. The point was made by one representative that paragraph 2 subparagraph (e) (iii) which, he said, arbitrarily included special rules among the general rules would be unacceptable to a number of countries, and should either be reconsidered further or omitted from Part Two of the draft article.

172. Subparagraphs (e) and (f). Some representatives were unable to agree with the provisions of subparagraphs (e) (iii) and (f) of paragraph 2. The reference in these provisions to primary rules that arose out of Covenants on human rights could, they said, prove inconsistent with such primary rules. Also, owing to the complex nature of their provisions on obligations, it was typical for such Covenants on human rights to provide for special arrangements and procedures concerning responsibility and implementation. Such arrangements and procedures would, they said, be preserved through the reservations made in articles 2 and 3 of the draft articles on State responsibility, already provisionally adopted by the Commission. It was impossible to make the provisions retroactive or etablish them in abstract terms in the Convention on State responsibility, or to read these provisions into existing legal relationships with the use of a general definition of the injured State.

173. Subparagraph (f). One representative, referring to the provisions of subparagraph (f) of paragraph 2 ("if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto"), questioned whether it should be left to States parties to a multilateral treaty to decide what should be deemed to be in the "collective interest". It seemed to him that the concept of the "common heritage of mankind" would, for example, also be an example of a collective interest.

Paragraph 2, subparagraph (f), and paragraph 3

174. A number of representatives referred to the distinction they felt should be made in the draft articles between the position of a State directly injured and the position of another State that was not directly affected. The point was made by

one representative that a problem arose from the fact that in the present draft of article 5 the status of "injured State" was rightly accorded to States directly affected by the wrongful act (paragraph 1 and paragraph 2, subparagraph (e) (ii)), but was also granted in just the same way to States not directly affected (paragraph 2, subparagraph (f) and paragraph 3). It was, he said, necessary to make an adequate distinction between those two categories, both in view of State practice, which hardly justified the approach taken in draft article 5 in its present form, and because the indiscriminate conferring of "injured State" status might result in any State being able to claim that it was entitled to take countermeasures. He felt that States that were not specifically and directly affected by the wrongful act should not fall into the category of "injured State", and that the range of possible actions should be adjusted accordingly. This applied in particular to paragraph 3 of draft article 5 concerning an international crime.

Paragraph 3

175. One representative expressed the view that the final forulation to be given to the provisions of paragraph 3 of draft article 5 (in addition, "injured State" means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States) should be determined in light of the final text of the draft Code of Offences against the Peace and Security of Mankind.

176. One representative considered that the value of the present formulation of paragraph 3 lay in the fact that it implied that all other States were entitled individually to respond to an international crime, such as the crime of mercenarism, as if their individual rights had been infringed by the commission of the international crime. Thus, obligations under paragraph 3 would become the responsibility of the international community, which could collectively censure and react to the perpetration of an international crime.

177. The point was made by some representatives that, in the event of an international crime, the intention of paragraph 3 could be understood to mean that all States would be able to exercise the rights arising under draft articles 6 to 9. They stated that it was not clear, however, whether, and to what extent, these rights were to be restricted by the provisions of draft articles 14 and 15. The bracketed language in paragraph 3 ("in the context of ... articles 14 and 15"), they said, did not clarify this point entirely. One representative thought that the bracketed language in paragraph 3 clarified the point and was therefore necessary.

178. The view was expressed by some representatives that further thought was necessary on the question of the relationship between the rights of States not directly affected by an international crime and the possibilities for taking collective measures in response to international crimes under the United Nations Charter (as stated in paragraph 3 of draft article 14). It was clear, they said, that whenever questions relating to the maintenance of international peace and security were concerned the procedures of the Charter of the United Nations would be applied. They expressed hope that this point would clearly be made in the draft articles.

179. One representative did not consider the references to international crimes in paragraph 3 to be well-founded. Were such a notion to be included, he said, the bracketed language would be a useful contribution in making explicit the point that "all other States" did not have the right to free recourse to all of the remedies provided for in draft articles 6 to 9.

180. The point was made by one representative that the criticism voiced as to the reference in the text to the sources of the obligation breached by the internationally wrongful act was amply answered by paragraph (4) of the commentary. Furthermore, the addition of subparagraph (c) in paragraph 2 filled a gap. Furthermore, the words in square brackets in paragraph 3, when read in the light of paragraphs (26) to (28) of the commentary, indicated the Commission's conviction that the legal consequences of international crime might require further elaboration. Consequently, he said, there was no longer any doubt that restrictng the work of the Commission in Part Two to the traditional fields of State responsibility in Part Two would create an unacceptable inconsistency with Part One of the draft articles.

Article 6

181. The view was expressed by one representative that an attempt should be made to formulate draft article 6 as exhaustively as possible, as certainty was required. The suggestion that the expression "inter alia" be included in the chapeau of paragraph 1 of draft article 6 could, it was said, raise difficulties, as such an inclusion could legitimize any requirement made by an injured State of an author State. If the expression "inter alia" was to be used, some controlling element such as the words "in accordance with international law" should also, it was said, be included in the text.

182. Some representatives expressed the view with respect to the words "may require" in paragraphs 1 and 2 of draft article 6 that such words did not fully convey the seriousness that should be associated with internationally wrongful acts. They were of the view that draft article 6 should emphasize the obligation of the author State and in addition set out the options available to the injured State. One representative considered that the phrase "the injured State may require the State which has committed an internationally wrongful act ..." clearly implied that the author State was under an obligation to carry out the measures required of it under the article. The suggestion was made that the words "shall be entitled to" should replace the words "may require" in order to bring out more forcefully the rights of the injured State.

183. One representative considered draft article 6 unnecessarily detailed. He expressed preference for a more all-embracing remedy for an injured State, accompanied by some formulation regarding implementation and jurisdiction.

184. One representative was of the view that the provisions of draft article 6 should be explicit on the point that the draft article was intended to regulate in general terms the rights to reparation of States injured by internationally wrongful acts. The draft article was, it was said, acceptable in its important

points but some modification and clarification were thought necessary: deletion of the words "to release and return the persons and objects held through such act" in subparagraph 1 (a); deletion of subparagraph 1 (b); and the implementation of subparagraph 1 (c) did not seem feasible not only because it was materially impossible but also because it was legally impossible to do so, as demonstrated by multilateral conventions on the settlement of disputes. It was suggested that once this point had been taken care of, draft article 7 would become redundant.

185. It was suggested that it would perhaps be preferable to state clearly that the injured State was entitled to require the State that had committed the wrongful act to apologize and to punish those responsible or provide other forms of satisfaction in paragraph 1 (d) of draft article 6.

186. With reference to paragraph 2 of draft article 6, the view was expressed by some representatives that compensation in lieu of restitution should not be limited to monetary compensation but should include compensation in kind. The point was made that only a State that had incurred damage should be entitled to make a claim for compensation. The point was made that a formulation on the question of the claim for compensation should be as flexible as possible, and that the expression "appropriate damages" would perhaps serve such a purpose.

187. The view was expressed by one representative that the formulation in paragraph 2 of draft article 6 fell far short of the standards established in the judgement of the Permanent Court of International Justice in the Factoryat Chozow Case (PCIJ (No. 17, p. 47)). It was suggested that article XII of the 1972 Convention on International Liability for Damage Caused by Space Objects, which provides that compensation will be determined "in accordance with international law and the principles of justice and equity" should serve as a model. The provisions of article XII were, it was said, negotiated by States representing all ideologies and interest groups and had been accepted by a large number of States.

188. One representative noted that no article dealing with "satisfaction" for an internationally wrongful act that had not caused material damage had been proposed. He expressed agreement with the Special Rapporteur's comment in footnote 38 to paragraph (11) of the commentary on draft article 6, that the International Court of Justice in its Judgment in the Corfu Channel Case (ICJ Reports, 1949, p. 36) held that a declaration of a violation of international law was in itself appropriate satisfaction. Such a solution, however, in his opinion, was available only if an international judicial body made such a declaration and not all cases of international responsibility were submitted to an international judicial body. Thus, a provision on "satisfaction" should be included in the draft articles.

Article 7

189. Some representatives expressed the view that inclusion in the draft articles of a separate provision on the treatment of aliens was unnecessary, as a general provision, it was said, could cover all cases.

190. One representative considered inclusion of a provision giving special protection to aliens unacceptable as such an inclusion could create unnecessary problems for inter-State relations.

191. One representative was of the view that draft article 7 recalled the régime of capitulations, and wondered exactly what was meant in draft article 7 by the treatment of aliens. Classical international law, he said, recognized the notion of a "degree of minimum civilization" but such a notion was subjective. The same applied to the concept of the general obligation of vigilance, presumably incumbent upon States, which was based on the definition given by the arbitrator Max Huber. Even though European law did not recognize the validity of the Calvo clause, it was acknowledged that it was confirmation of the rule on exhaustion of internal recourse. If the intention of draft article 7 was to sanction such a rule such an intention could be supported. What actually mattered, however, was the denial of justice, but this was already covered in other instruments. Thus, in his view, draft article 7 should be omitted.

192. One representative did not see the need for a special provision on the position of aliens, since that situation could be covered in draft article 6, particularly in its paragraph 2. The provision also came close, he said, to a statement of a primary rule of State responsibility, with which the Commission was not concerned at this stage of its work. He stated that the question of the treatment of aliens was rather a controversial one.

193. As to the statement of the obligation of the author State in draft article 7, one representative was of the view that it should begin by clearly stating that "the author State has the obligation to take the following measures".

194. The point was made by one representative that draft article 7 began with the words "If the internationally wrongful act is a breach of an international obligation ...". However, an internationally wrongful act could, he said, stand on its own as an injurious act.

Articles 8 and 9

195. The view was expressed by one representative that the distinction between draft article 8 (which concerned measures an injured State would be entitled to take by way of reciprocity) and draft article 9 (which concerned measures an injured State would be entitled to take by way of reprisal) seemed very slight and that it would be preferable if the provisions of the draft articles were combined.

196. The view was also expressed, however, by another representative that there was sufficient ground for a clear distinction being maintained between reciprocity in draft article 8 (which concerned obligations of the injured State corresponding to or directly connected with the obligation breached by the author State) and reprisal in draft article 9 (which concerned obligations of the injured State unconnected with the obligation breached).

197. One representative considered that dealing with reciprocity and reprisal in separate articles was not objectionable but that it was important to fully clarify the concept of reprisal.

198. The observation was made by one representative that, with the exception of certain emergency situations, countermeasures in the form of reciprocity or reprisal should follow submission of a claim for reparation; and that entitlement to countermeasures should cease once reparation is made. Countermeasures may be taken, it was said, to cause an author State to cease a wrongful act or to abide by an agreed reparation agreement or dispute settlement procedure, or to preclude further damage to the injured State in the meanwhile.

199. The view was expressed by one representative that in formulating provisions on countermeasures, constant consideration should be given to their proportionality with reference to the gravity of the internationally wrongful act. The principle of reciprocity, it was also said, should serve as a basic regulator of the extent of countermeasures, in view of cases of disproportion between the gravity of a wrongful act and actions presented as reprisals.

Article 8

200. The point was made by one representative that there was no basis for depriving an injured State of its right to reciprocal treatment with respect to the matters ("obligations of a receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff"; and "obligations of any State by virtue of a peremptory norm of general international law") mentioned in draft article 12. The principle of reciprocity was, it was said, a pillar of international relations and an expression of the equal sovereignty of States. The fact that one State's treatment of another State constituted an internationally wrongful act should be further justification for, rather than a bar to, reciprocal treatment. If such were not the case, a State responsible for a wrongful act would be in a more favourable position than the injured State. A wrongful act should not shield the author State from reciprocal treatment.

Article 9

201. The point was made by some representatives that the principle of "proportionality" referred to in paragraph 2 of draft article 9 was reasonable and necessary.

202. The view was expressed that the word "manifestly disproportional" in paragraph 2 of draft article 9 seemed too vague for practical application. An alternative formulation, it was said, may be a provision to the effect that exercise of a right of reprisal should be commensurate with the seriousness of the internationally wrongful acts.

203. The point was made by one representative that the doctrine of reprisal should be treated with caution. The law of armed conflict, it was said, had taken steps

to prohibit most reprisals. There was considerable merit in the draft article proposed by one member of the Commission in paragraph 131 of the report of the Commission.

204. The view was expressed by another representative that reprisals involving armed force or affecting the territorial integrity or political independence of a State were prohibited in international law and this should be expressly reflected in draft article 9.

205. One representative observed that reprisals are regulated by international customary law and that it would be useful if customary rules were clarified and reaffirmed. Such reaffirmation should include the norm expressed in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970) that "States have a duty to refrain from acts of reprisal involving the use of force". This principle, it was said, also derived from article 2, paragraph 4, of the Charter of the United Nations but may need clarification. The further principle that reprisals involving the threat of force were also prohibited, a principle not explicitly stated in the 1970 Declaration, should also, it was said, be reaffirmed.

Article 10

206. The point was made by one representative, with reference to the provisions of paragraph 1 of draft article 10 (which provide that "no measure in application of article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in article 6"), that a procedure for the peaceful settlement of a dispute could be time-consuming and not always effective. Thus, it would be advisable to provide in paragraph 1 of draft article 10 that a dispute settlement procedure should not only be available but effective.

207. Another representative considered that draft article 10 should be reformulated to preclude prolongation of an internationally wrongful act by an author State on the pretext that procedures for settlement of the dispute should first be exhausted, before a "measure in application of article 9 may be taken by the injured State". There was also the need, it was said, to prevent exertion of pressure against another State, especially small and medium-sized States, in the name of determining the responsibility.

208. One representative was of the view that the provisions of draft article 10 needed careful examination. It seemed to him that existence of a particular avenue for settlement of a dispute ought not to preclude an appropriate countermeasure on the part of an injured State. While it was true that there were countermeasures that were acceptable in all cases and some that were not acceptable in a particular context, existence of a dispute settlement procedure should not rule out all countermeasures.

209. The view was expressed by one representative that while the "suspensive" effect of draft article 10 was justifiable, clarifications were necessary in the draft article. There appeared to be some discrepancy between the text of draft article 10 and its purposes as described in the commentary to the draft article. Paragraph 1 of the draft article was not sufficiently clear with respect to the degree of automatic availability of a third party dispute settlement procedure, or with respect to its binding result. The words "ensure the performance of the obligations mentioned in article 6" did not, for instance, necessarily convey the notion of a binding result. The words "international procedures for peaceful settlement of the dispute", in the plural, also used in draft article 10, may conceal delaying alternatives. The greatest possible precision was necessary with respect to the conditions suspending countermeasures, otherwise open to the injured State. This would also promote wider acceptance of arbitration or judicial settlement on the part of States and protect a weaker party from unduly harsh countermeasures. The possibilities of recourse to obigatory conciliation procedures, he said, should be more adequately reflected in the text of draft article 10.

210. The view was expressed by one representative that in its present form, draft article 10 was too restrictive in favour of the author State. If the draft article was to be acceptable, provision should be made for effective machinery for the settlement of disputes. The point was made that in exercising a right to reprisals, an injured State must act in accordance with the principles of proportionality and must fulfil its obligations under the Charter of the United Nations relating to the prohibition of the use of force.

Article 11

211. The view was expressed by one representative, with reference to paragraph 2 of draft article 11 (which provides that "the injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act, if the multilateral treaty imposing the obligations provides for a procedure of collective decisions for the purpose of enforcement of the obligations imposed by [the multilateral treaty]), that greater precision should be given in paragraph 2 to the extent to which a "procedure of collective decisions for the purpose of enforcement of the obligations" under a multilateral treaty should be effective to entail suspension of an injured State's entitlement to take individual countermeasures in response to an internationally wrongful act.

212. One representative expressed reservations with respect to the inclusion of paragraph 2 in draft article 11. It seemed to him that its provisions went too far, in the present state of international relations, in fettering the rights of an injured State to have recourse to countermeasures in response to an internationally wrongful act.

Article 12

213. Some representatives were of the view that the provision on jus cogens in paragraph (b) of draft article 12 was necessary to make it clear that obligations might not be suspended if they had the status of peremptory norms of general international law. The concept of jus cogens, it was said, was now established in international law. The commentary of the Special Rapporteur on this question was considered fully convincing.

214. One representative did not consider satisfactory the idea that the concept of jus cogens had a role to play in the law of State responsibility and saw no need, as a matter of law, for the inclusion of a reference to it in Part Two of the draft articles. The inclusion of such a concept, he said, would only add confusion to an already difficult text. He stated that he would much prefer paragraph 12 (b) to be deleted, if not draft article 12 as a whole.

215. The suggestion was made by one representative that the chapeau of draft article 12 ("Articles 8 and 9 do not apply to the suspension of the performance of the obligations:") should be reconsidered with a view to omitting the reference in the chapeau to draft article 8 on reciprocity. The chapeau of draft article 12 would then refer only to draft article 9 on reprisals.

Articles 14 and 15

216. One representative, while saying that he was flexible in matters of drafting and detail, strongly favoured retention of the substance of draft articles 14 and 15 and urged the Commission to move forward in safeguarding international public policy in this area.

217. Some representatives were of the opinion that draft articles 14 and 15 seemed to present the legal consequences of international crimes too concisely. The point was made that it was timely and realistic for the draft articles to list the specific legal consequences of international crimes. This should include, for the State directly affected, it was said, the consequences referred to in draft article 6 et seq. without the procedural restrictions usually imposed in case of delict, while in the case of every other State there should be the right to demand cessation of the wrongful act and provision of restitution and safeguards against repetition of the wrongful act. There would also be the universal criminal responsibility of individuals. The principle that States could not, in the case of international crimes, invoke State immunity should also, it was said, be included in the draft articles. The observation was made that it should be explicitly provided that, on the basis of existing agreements, all States should join in appropriate countermeasures and in measures determined by the United Nations Security Council.

218. The view was expressed by one representative that draft articles 14 and 15 did not give clear answers to questions relating to the content, form and scope of State responsibility for international crimes, because they failed to define specific types and categories of such crimes. The point was made that the

provisions of draft article 14 stated in general terms that "an international crime entails all the legal consequences of an internationally wrongful act" but did not define the categories of such crimes. The provisions of draft article 15 stated that "an act of aggression entailed all the legal consequences of an international crime" without indicating that the Charter of the United Nations prohibited acts of aggression and provided for specific measures if there was an act of aggression. Such international crimes as aggression, the policy of racial discrimination, genocide, apartheid, colonialism, use of mercenaries, international terrorism, propaganda, preparation for nuclear war, militarization of outer space, use of force against the territorial integrity or political independence of States, and other offences against the peace and security of mankind should, it was said, be included in the category of international crimes entailing the responsibility of States.

219. One representative considered that the provisions of draft articles 14 and 15 constituted an important link between the draft Code of Offences against the Peace and Security of Mankind, on the one hand, and State responsibility on the other. The provisions of draft articles 14 and 15 would also, it was said, be a milestone in the development of international law. They would discourage States from resorting to international crimes or assisting other States, overtly or covertly, in commission of international crimes.

220. The view was expressed by one representative that reference to the criminal responsibility of States would only cause confusion and blur the distinction between the draft Code of Offences against the Peace and Security of Mankind, on the one hand, and State Responsibility, on the other, and would obstruct efforts to determine the legal consequences of international crimes.

Article 14

Observations on article 14 as a whole

221. Some representatives noted that the provisions of draft article 14 dealing with the legal consequences of an international crime were a logical corollary to recognition of the concept of international crime in article 19 of Part One of the draft articles.

222. Some representatives were of the view that the provisions of draft article 14 should be examined in connection with article 19 of Part One of the draft articles. A satisfactory answer to the question of the legal consequences of an international crime would be found, it was said, if broad consensus was reached on acts which constituted international crimes. The view was expressed that the Commission should postpone inclusion of any article on the legal consequences of State responsibility for an international crime until a consensus was arrived on the scope of the primary obligation.

223. The point was made by one representative that a distinction should be drawn between international delicts and international crimes and that there should be a non-exhaustive subcategorization of international crimes with emphasis on human

rights aspects. When the three parts of the draft articles were considered as a whole, such matters, it was said, could be resolved.

224. The view was expressed by one representative that given the distinction made in article 19 between international delicts and international crimes, it was to be expected that both types of illicit acts would entail different legal consequences. The point was made that draft article 14, in the case of international crimes, seemed to be limited to an enumeration of obligations of a negative and passive nature. It was hard to conceive that State obligations should be limited solely to not recognizing aggression, the policy of apartheid, or the practice of slavery or genocide as legal and not rendering assistance to the author State. Protection of the basic interests of the international community required specific obligations on States and collective reprobation and réaction. The provisions of draft article 14 did not reflect such an approach adequately. It seemed advisable to include an additional subparagraph in paragraph 1 of draft article 14 which would require prosecution of perpetrators of international crimes.

Observations on particular provisions of article 14

225. Paragraph 1. Some representatives were of the view that the expression "the applicable rules accepted by the international community as a whole" in paragraph 1 of draft article 14 was unclear, and felt that a formulation which had a recognized meaning should be found. The view was expressed by one representative that in their present form the provisions of draft article 14 did not deal with the relationship between State responsibility and individual responsibility. The point was made, in this connection, that mention should be made of the duty of States to co-operate in the prosecution and punishment of perpetrators of international crimes.

226. Some representatives were of the view that in paragraph 1 of draft article 14 the expression "the applicable rules accepted by the international community as a whole" was too vague, and should be replaced by the expression "the applicable rules of international law". One representative did not, however, see any significant difference between the two expressions. The point was made that the expression "the applicable rules accepted by the international community as a whole" derived from the definition of an international crime in article 19 of Part One of the draft articles, and that the commentary to article 19 made it clear that the words "as a whole" did not mean unanimous recognition by all members of the international community but referred rather to the essential components of that community.

227. As noted above, in the observations made on draft article 14 as a whole, the view was expressed that paragraph 1 of draft article 14 should be redrafted after a decision had been taken on article 19 of Part One of the draft articles.

228. Paragraph 2. The view was expressed by one representative that paragraph 2 of draft article 14 was logical and necessary. Another representative considered the paragraph would strengthen the minimum obligation of solidarity, if it were to provide for more active duties on the part of every other State, such as trial and punishment of perpetrators of international crimes.

229. The doubt was expressed that the obligations of States currently extended to, or should be extended to that under paragraph 1 (c) of the article, since such an obligation might be excessively burdensome.

230. Paragraph 3. The view was expressed by one representative that the requirement, in paragraph 3 of draft article 14, subjecting the provisions of paragraph 3 to the provisions of the Charter of the United Nations would place a State directly affected by an international crime in a worse position than a victim of an international delict. It was hoped that this was not the intention in paragraph 3.

231. The point was made that determination of the international wrongfulness of an act could not be left to the provisions and procedures of the United Nations Charter as proposed in paragraph 3. The United Nations was required to take necessary measures in accordance with Chapter VII of the Charter in case of a threat to the peace, breach of the peace or act of aggression. However, Chapter VII did not cover all aspects of the international responsibility of States. A comprehensive formulation of the legal consequences of an internationally wrongful act was necessary.

Article 15

232. Some representatives considered that draft article 15 (which provided that "an act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter") was correctly included in the draft articles as a separate article as aggression constituted the gravest and most dangerous crime. The point was made that such separate treatment would tend to deter acts of aggression.

233. Some representatives were of the view that having regard to the gravity of aggression the provisions of draft article 15 in their present form seemed incomplete.

234. The suggestion was made by one representative that the following should be included in the legal consequences of aggression: individual and collective self-defence; entitlement of the victim State of aggression to suspend all bilateral treaties (except those relating to a state of war) concluded with the aggressor State; and internment of the citizens and confiscation of the property and assets of the aggressor State. The point was made that caution was necessary in dealing with the subject of self-defence as there were divergencies of view with respect to the invocation of self-defence.

235. The suggestion was made that appropriate reference should be made to non-recognition of the consequences of aggression and that an aggressor should not obtain advantage from the aggression.

Article 16

236. One representative questioned the wisdom of including, in subparagraph (c) of draft article 16, a reference to "belligerent reprisals". International law, he stated, banned such reprisals, and the provisions of the draft articles should not prejudge any question that may arise in regard to belligerent reprisals.

(b) Comments on Part Three: "Implementation (mise en oeuvre)" of international responsibility and the settlement of disputes

237. A number of representatives expressed agreement with the outline, proposed by the Special Rapporteur, for a possible Part Three of the draft articles.

238. The view was expressed by some representatives that appropriate implementation machinery, including a compulsory dispute settlement procedure applicable to the interpretation and application of the provisions of Parts One and Two, was essential for the acceptability of the draft articles.

239. An effective and impartial third-party adjudication would, in the view of some representatives, be essential and not only promote the rule of law among nations but also safeguard the interests of small and weak States.

240. Some representatives were of the view that a negotiated settlement of disputes, rather than a procedure involving a unilateral decision by one party to submit a dispute to a third party for decision, should be the course followed in the draft articles.

241. The point was made by some representatives that caution should be exercised in the elaboration of the draft articles of Part Three given the reluctance of some States to submit to compulsory third-party dispute settlement procedure.

242. The observation was made that the Commission had rightly brought out the relationship between Part Three of the draft and the situation envisaged in the Vienna Convention on the Law of Treaties with respect to invalidity, termination and suspension of operation of treaties and the new legal relationship which came into existence as a result of an internationally wrongful act. Some representatives welcomed the proposed compulsory conciliation procedure, which was similar to the one provided for in the Vienna Convention on the Law of Treaties and the United Nations Convention on the Law of the Sea. They also supported the procedure proposed for inclusion in Part Three whereby any dispute concerning the interpretation or the application of article 19 of Part One and article 14 of Part Two should be settled along the lines of articles 66 (a) of the Vienna Convention on the Law of Treaties by submitting the dispute to the International Court of Justice. Such a line of action, it was observed, was supported by the fact that Part Two of the draft articles referrred to the rules of jus cogens and the special legal consequences of international crimes.

243. Some representatives, however, found reference to the Vienna Convention on the Law of Treaties and the United Nations Convention on the Law of the Sea unconvincing. In the opinion of one representative, the reason for accession by so

few States to the Convention on the Law of Treaties lay mainly in the fact that its provisions on the settlement of disputes, particularly the possibility for one of the parties to resort unilaterally to the International Court of Justice in seeking a decision, were unacceptable to a great number of States. He therefore stated that he preferred a negotiated settlement of disputes in place of a unilateral decision of one party to submit the dispute to a third party for a decision.

244. Some representatives were of the view that care should be exercised in dealing with the invalidity, termination and suspension of the operation of treaties; and that care should also be exercised in drawing an analogy with the régime of treaties because the element of consensuality esential to treaties was not present in State responsibility.

245. The point was made by one representative that Part Three could have a bearing on the idea of an international criminal court and the draft Code of Offences against the Peace and Security of Mankind. The point was made by one representative, however, that such relationship as may exist between State responsibility and the draft Code of Offences against the Peace and Security of Mankind should not impede exhaustive treatment of the subject of State responsibility.

246. One representative expressed the view that all matters relating to the question of the determination and enforcement of State responsibility belonged to Part Three of the draft articles. These included procedures for the application of countermeasures and sanctions, and issues relating to the peaceful settlement of disputes. It would be incorrect, it was said, to reduce the peaceful settlement of disputes to compulsory third-party dispute settlement procedures. Such a limitation would encroach inadmissibly upon primary rules existing between States under a Convention on State Responsibility. The primary rules would in the process be changed and, basically, all international legal relationships would be subject to compulsory dispute settlement procedures. Such a course, in his view, should not be seriously considered in the context of a Convention on State Responsibility which was, principally, to codify existing law.

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

1. General observations

247. Several representatives expressed their satisfaction at the substantial progress made by the Commission in its work on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The efforts made by the Special Rapporteur, Mr. Alexander Yankov, to resolve difficulties had, it was said, greatly facilitated such progress.

248. Several representatives referred to the importance of the topic and the need for its codification and progressive development. The subject of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was not, it was said, adequately covered by existing international conventions. There

were differences on a number of matters relating to the treatment of the diplomatic bag, the consular bag and the question of immunity from jurisdiction. A principal objective of work on the topic was facilitating official communications between States and their missions abroad. It was important that an international convention on the topic be formulated as soon as possible to fill gaps in existing conventions and to establish a unified regime applicable to the diplomatic courier and the diplomatic bag. The need to conclude work on the topic promptly was fully borne out by recent events. It was gratifying to note that the Commission had maintained a reasonable balance between the requirement of consolidation and amplification of applicable international law and the interests of States in security and free communication. The point was also made that if satisfactory rules were elaborated and adopted in the form of an appropriate legal instrument they would enhance the effectiveness of inter-State relations and co-operation. The draft articles currently in preparation would achieve their purpose if existing rules were consolidated and matters not now provided for, in the four multilateral conventions in the field of diplomatic law, were covered.

249. Other representatives doubted the need for further codification on the topic. Amalgamating separate rules designed for separate circumstances into one rule for all circumstances was not necessarily either desirable, or describable as codification or progressive development of international law. It was to be hoped that the Commission would not devote to the topic time that could usefully be devoted to other topics. Misgivings were expressed with respect to the need for a new convention. It was not clear, it was said, that the international community was ready for the progressive development of law in this area. Of the four conventions, in the field of diplomatic law that were usually referred to, the 1961 and 1963 Conventions on Diplomatic Relations and on Consular Relations, respectively, could serve as a good basis for a progressive development of law since, in the main, State practice conformed to the Conventions. The 1969 Convention on Special Missions and the 1975 Convention on the Representation of States in Their Relations with International Organisations of a Universal Character were, however, far from being as widely accepted; and caution was necessary in drawing inferences from their provisions. The draft articles currently being developed should seek to improve rather than to broaden the corresponding provisions of such Conventions.

250. One representative noted that the Commission's work did not seem to be limited to the question of the diplomatic bag not accompanied by diplomatic courier but seemed to also cover the whole question of the status of the diplomatic courier, a question that was currently regulated by four different conventions. The Commission should, it was said, take care not to complicate the interpretation and implementation of the four Conventions and should refrain from preparing a draft convention which would cover areas regulated by the four Conventions. The Commission should, it was said, make every possible effort to simplify the draft articles. The point was made that as the status of the diplomatic courier and the diplomatic bag was governed essentially by relevant provisions of existing international instruments, the principal objective of the Commission's work should be limited to supplementing existing basic provisions. In doing so, the Commission should adhere to the requirements of functional necessity and take full account of the interests of sending, receiving and transit States. The view was expressed by

one representative that the most appropriate procedure, for a case where a State used a diplomatic courier or a case where a State used unaccompanied diplomatic bags, was the conclusion of bilateral agreements under the Conventions in force and on the basis of reciprocity.

251. The view was expressed by one representative that the purpose of the draft articles should be to consolidate the provisions of existing conventions; unify rules so as to ensure similar treatment for all diplomatic couriers; and develop further rules to cover practical problems not covered by existing conventions. Though the paramount question was that of the diplomatic bag itself, it was important to protect the courier and give him at least certain minimum guarantees. What was needed was a proper balance. His country rarely used special diplomatic couriers and was therefore somewhat circumspect with respect to the accord of excessive privileges and immunities to diplomatic couriers or other personnel. The point was also made that the topic was broad enough to include communications of international organizations and accredited national liberation movements.

252. One representative considered that what should be sought in the draft articles was an appropriate balance between a sending State's interest in the confidentiality and safety of its communications, on the one hand, and the security and other legitimate interests of receiving or transit States, on the other. The principles of the Conventions on diplomatic and consular relations, particularly the principle of absolute inviolability, should be strictly adhered to, but the legitimate interests of receiving and transit States must also be safeguarded.

253. One representative was of the view that the draft articles should be based on the following three fundamental principles: each State had the potential capacity of a sending State, a third State and a receiving State; the bag was to be used for official communications; and the inviolability of the bag was intended to maintain the confidentiality of official communications.

254. One representative noted that his delegation's central concern remained the need to control abuse of the diplomatic bag. There were no clear and easy solutions to the problem. His country favoured a cautious approach to radical changes in the rules and had found that the rules of the Vienna Convention on Diplomatic Relations, supplemented by more general rules of customary international law relating in particular to self-defence and the duty to protect human life, offered greater flexibility of response than had perhaps been thought at first. Any changes to those familiar rules should not endanger the necessary fundamental balance between security of communications and restraints on possible abuse; neither should they inhibit international practices which acted as a safeguard, in particular the practice whereby diplomatic agents and couriers entitled to personal inviolability voluntarily subjected themselves to screening or search in the interest of air transport safety.

255. One representative believed that the essence of the topic related to facilitating official communications between a State and its missions abroad. The Commission should attempt to consolidate in a single instrument existing rules of international law on the diplomatic courier and the diplomatic bag and give precision to such rules, supplementing them where necessary. His country was,

therefore, somewhat dismayed at the prospect of having to face a plurality of régimes on important provisions of the draft articles being formulated. While fully aware of the need for flexibility, his delegation did not see the need for a new international instrument that would add to the plurality of régimes which already resulted from existing conventions.

256. A number of representatives were of the view that the draft articles should do no more than provide for the immunity and inviolability necessary to ensure smooth functioning of diplomatic communications. The courier should be granted, it was said, the protection necessary for the performance of his official duties but at the same time there should be provision for the protection of the security or public order of receiving or transit States. The diplomatic courier should respect the laws and regulations of the receiving and transit States, should not interfere in the internal or external affairs of those States and should confine himself to the performance of his functions. It was appropriate that the principles of reciprocity and non-discrimination had been adopted as a basis for granting privileges and immunities to the diplomatic courier.

257. One representative welcomed the moves made to reduce the level of privileges and immunities for diplomatic couriers and to eliminate provisions which would be impractical to administer or would have no real effect. The inviolability of the courier's temporary accommodation would impose an unrealistic burden on the receiving State. His delegation opposed the granting of any immunity from jurisdiction. Couriers of his country who travelled without such immunity had never experienced difficulties in that regard. In view of the increasing number of incidents in which diplomats had relied on immunity to avoid their civil obligations, there should be no extension of the categories of persons who might be tempted to abuse immunity. Another representative noted that the Conventions on diplomatic and consular relations and the Convention on Special Missions were sufficient to provide satisfactory guarantee of the freedom of communication of States with their missions abroad. It was important, it was said, not to grant a diplomatic courier privileges and immunities which his functions did not require and which would make his status equivalent to that of a diplomat.

258. Observations made by representatives on what they believe should be the approach of the draft articles on the matter of the diplomatic bag are noted under draft article 36 below.

259. Several representatives expressed the hope that the Commission at its next session would complete its first reading of the draft articles on the current topic. Some representatives considered that the topic should be accorded priority at the Commission's next session.

2. Comments on draft articles

(a) Articles provisionally adopted by the Commission

Article 4. Freedom of official communications

260. One representative, stating that paragraph 2 of draft article 4 involved reciprocity, which was a minimum requirement, proposed that the words "as a minimum" be included in paragraph 2 immediately before the words "the same freedom and protection as is accorded by the receiving State".

261. The point was made, by the same representative, that it would be appropriate to relocate the provisions of draft article 4 closer to draft articles 13 (Facilities), 14 (Entry into the territory of the receiving State or the transit State) and 15 (Freedom of movement).

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

262. Some representatives expressed agreement with the provisions of draft article 12 as a whole and with the Commission's decision to delete the square brackets which had earlier been placed around paragraph 2 of the draft article.

263. The point was made by one representative that, as the transit State was required to accord the diplomatic courier the same privileges and immunities as the receiving State, it seemed fair that the transit State should also be entitled to make a declaration similar to that referred to in the last sentence of paragraph 1 of draft article 12. This would avoid a transit State's having to admit into its territory a person regarded as undesirable.

264. The draft article, in the view of one representative, was closely connected with subparagraph (b) of draft article 11 (End of the functions of the diplomatic courier). It might, therefore, it was said, be appropriate, in the Spanish text of paragraph 1 of draft article 12, to replace the word "comunicar" with the word "notificar". The suggestion was made that the provisions of draft article 12 did not take sufficient account of the provisions of paragraph 2 of draft article 9 (Nationality of the diplomatic courier); and that the sending State should be required to refrain from appointing a national of a receiving State as diplomatic courier or to revoke such an appointment if already made.

265. The view was expressed by one representative that draft article 12 should specify that a diplomatic courier declared persona non grata or not acceptable could complete his delivery of the diplomatic bag at its destination. The point was made that paragraph 1 of draft article 12 and paragraph 2 of draft article 21 (Duration of privileges and immunities) in conjunction with the commentary thereto could be understood to mean that, as a courier's functions could come to an end before he left the territory of a receiving State, he could for that reason be prevented from completing his mission.

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

266. One representative considered that draft article 14 should also deal with the question of the departure of a diplomatic courier. The Universal Declaration of Human Rights, provided, it was said, in its article 13, paragraph 2, that everyone had the right to leave any country, including his own, and to return to his country. Such a right would be of particular importance to a diplomatic courier who was a national of a receiving State. The point was made that should a foreign diplomatic courier be declared persona non grata or not acceptable, paragraph 2 of draft article 21 (Duration of privileges and immunities) provided that his privileges and immunities would cease on his leaving the receiving State.

Article 17. Inviolability of temporary accommodation

267. One representative did not consider it necessary to provide for the inviolability of the temporary accommodation of a diplomatic courier.

268. Another representative was of the view that the purpose of the draft articles was not to equate the status of a diplomatic courier to that of a permanently accredited diplomat, but rather to establish the extent of protection necessary to enable the courier to perform his functions and ensure inviolability of the diplomatic bag. Such protection should not exceed what was actually necessary for fulfilling the functions of the diplomatic courier. Thus, the provisions of draft article 17 on the inviolability of the temporary accommodation of the diplomatic courier were not justified. The protection afforded the diplomatic courier in other provisions of the draft articles were adequate. Also, as the temporary accommodation of a diplomatic courier was usually hotel accommodation, such provisions could give rise to legal and practical difficulties. The draft article should, it was said, be deleted.

Article 18. Immunity from jurisdiction

269. One representative, stating that the question of a diplomatic courier's immunity from jurisdiction was adequately covered by article 27 of the 1961 Convention on Diplomatic Relations, considered that draft article 18 should be deleted.

270. A number of representatives commented on particular paragraphs of draft article 18, in particular on paragraph 1.

271. Paragraph 1. A number of representatives, referring to paragraph 1 of draft article 18 (concerning the question of the immunity of the diplomatic courier from the criminal jurisdiction of the receiving or transit State) considered that its provisions offered an acceptable compromise between the view that the diplomatic courier should be accorded absolute immunity and the view that the diplomatic courier should not be accorded any immunity from such criminal jurisdiction.

272. The view was expressed by one representative that it might be necessary to include in paragraph 1 of draft article 18 a cross-reference to draft article 16 (Personal protection and inviolability) which seemed inconsistent with paragraph 1 of draft article 18. It was noted that, in the absence of the explanations in paragraph (7) of the commentary to draft article 18 as to the meaning of the expression "performed in the exercise of his functions", the expression might be understood somewhat differently and involve difficulties of interpretation. Recourse to travaux préparatoires should be, it was said, an exceptional procedure.

273. The point was made by another representative that a number of members of the Commission, as well as a number of delegations in the Sixth Committee, had been of the view that immunity from criminal jurisdiction was unnecessary in the case of a diplomatic courier since, under draft article 16 (Personal protection and inviolability), the courier would enjoy personal inviolability and would not be liable to any form of arrest or detention. Such a provision, it was said, would already limit considerably the extent to which a courier was subject to the criminal jurisdiction of a receiving or transit State. Thus, he could accept the view that the protection to be accorded a diplomatic courier under draft article 16 would be sufficient. However, to accommodate those who insisted on the need to grant the courier immunity from criminal jurisdiction, he was prepared to accept draft article 18 as currently proposed by the Commission.

274. The expression "in respect of all acts performed in the exercise of his functions", in paragraph 1, was the subject of comment by some representatives. One representative stated that he could accept paragraph 1 on the understanding that immunity did not extend to such offences as larceny, murder or assassination, the carrying of prohibited materials such as drugs, or weapons for terrorist purposes. Another representative stated that, in a spirit of compromise, his delegation would not object to the words "in respect of all acts performed in the exercise of his functions" if such a formulation proved to be generally acceptable and on the understanding that the formulation provided a minimum requirement, which may be enhanced on the basis of reciprocity in accordance with draft article 6 (Non-discrimination and reciprocity). Another representative made reference to the understanding recorded in paragraph (3) of the commentary to draft article 18 with respect to such a formulation.

275. Some representatives did not view favourably the limitation of the courier's immunity from criminal jurisdiction to acts performed in the exercise of his functions. It was important, it was said, that the diplomatic courier be granted full immunity from criminal jurisdiction. The inclusion in paragraph 1 of draft article 18 of the expression "all acts performed in the exercise of his functions" was not a compromise, as some delegations thought, but a retreat from customary practice as reflected in the 1961 Convention on Diplomatic Relations, and would give rise to problems of interpretation and application. The diplomatic courier was an official of the sending State who performed official State functions connected with the protection and transportation of the diplomatic bag. The safety of the diplomatic courier was a prerequisite for the normal exercise of his functions, and it was necessary that he enjoy the same immunity from criminal jurisdiction as enjoyed by members of the administrative and technical staff of missions and their families under the Convention on Diplomatic Relations and other

relevant multilateral conventions. Anything less than full immunity would not be in keeping with treaty practice and universally acknowledged norms of customary law. Many of the arguments against granting the courier full immunity from criminal jurisdiction were based on the possibility of abuse. However, abuse was the exception rather than the rule. It was not possible to prepare norms on the basis of exceptions or on the basis of presumptions of bad faith on the part of the sending State. The main purpose of the draft articles was protection of a State's freedom of communication with its missions abroad, not to benefit individuals. There was no reason to fear that the courier might be unnecessarily favoured as a person, especially as he was not exempt from the jurisdiction of the sending State, which could, if necessary, waive his immunity. Moreover, the courier must be assured against any pressures of which the threat of criminal proceedings would be the most serious. The 1961 Convention on Diplomatic Relations specified that immunity had no other aim than to permit the performance of the functions of diplomatic missions as representatives of States, and the immunity accorded the courier by draft article 18 corresponded to the immunity of technical and administrative personnel. The functions of the courier were as confidential as those of the latter category of personnel. The draft articles set limits to the immunities accorded by providing that States and couriers had to respect the laws of the transit or receiving State. The provisions of draft article 5 (Duty to respect the laws and regulations of the receiving State and the transit State), paragraphs 1 and 2, laid down the duties of the sending State, which consisted in ensuring that the privileges and immunities granted were not used in a manner incompatible with the purpose of the articles and the courier's obligation to comply with the laws and regulations of the receiving or transit State. In international practice, in cases where a courier was guilty of abuse, it was the sending State that had a duty to revoke the status of the diplomatic courier and to make him accountable for his acts.

276. The point was made that the formulation set out in paragraph 1 created the difficulty of determining who would be entitled to draw the distinction between acts performed in the exercise of the diplomatic courier's functions and acts not so performed.

277. The point was also made that it was clear that draft article 18 did not duplicate draft article 16. Draft article 16 spoke only of "personal inviolability" and did not specify the immunities the courier enjoyed, which were specified in draft article 18.

278. One representative considered the provisions of paragraph 1 of draft article 18 unnecessary. If the diplomatic courier enjoyed personal involiability and was not subject to any form of arrest or detention, or to any other form of restriction on his personal freedom, the exercise by a receiving or transit State of criminal jurisdiction over the courier could not impede the exercise of his functions.

279. Paragraph 2. One representative, referring to paragraph 2 of draft article 18, welcomed the fact that the commentary to the paragraph specified that purchases made by and services rendered to the diplomatic courier of a general commercial nature were not exempt from local laws and regulations, even if they were directly linked to the exercise of his official functions.

280. As to the question of who was entitled to determine whether an act of a diplomatic courier was or was not "performed in the exercise of his functions", the view was expressed that such a determination should, as far as possible, be made jointly by the receiving or transit State and the sending State. If an amicable solution could not be reached through the diplomatic channel, the determination should be left to the receiving or transit State.

281. Paragraph 4. One representative, referring to paragraph 4 of draft article 18, expressed reservations with respect to the provision which made it mandatory for the diplomatic courier to give evidence. Such a rule, he said, would create an unacceptable precedent that was likely to undermine the well-established standards laid down in the 1961 Convention on Diplomatic Relations, under which diplomatic couriers had no such obligation. A number of other issues, it was said, also remained unresolved, including the question as to who should determine which acts were of an official nature. If determination of that matter was left to the discretion of the competent organs of the receiving or transit State, the likely result would be considerable restrictions on the exercise by the sending State of its sovereign rights. His delegation therefore believed that it would be desirable to retain the original wording of paragraph 4.

282. Another representative had difficulty with the provision in paragraph 4 which required that a courier give evidence "in other cases provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag". He was of the view that once a courier was properly required to give evidence, in cases not involving the exercise of his functions, the requirement should be met in all situations and should not be departed from on the ground of delay or impediment to the delivery of the bag. The interests of the administration of justice, particularly in the field of criminal law, must override the concern for the safe and speedy delivery of the bag. The proviso in paragraph 4 ought, therefore, to be deleted.

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

283. One representative considered the provisions of the present draft article 19 an improvement over the previous two draft articles that it had replaced.

284. Another representative expressed concern that the prohibition of personal examination in draft article 19 and the requirement in draft article 22 (Waiver of immunities) that waiver of immunities must be communicated in writing could cast doubt on existing international practices which served as safeguards, in particular, the practice of diplomatic agents and couriers entitled to personal inviolability voluntarily subjecting themselves to screening or search in the interests of air travel safety.

Articles 21 to 27

285. Some representatives referring to draft articles 21 to 27 as a group, considered them acceptable.

286. One representative noted that the provisions of draft articles 24 to 26 gave expression, with greater clarity, to concepts already affirmed in existing diplomatic conventions.

287. Another representative considered that the provisions of draft articles 24 to 27 showed considerable improvement over earlier versions of the draft articles.

Article 21. Duration of privileges and immunities

288. There appeared to be general support, among representatives who made statements, for the provisions of draft article 21, though reservations were expressed by a number of representatives with respect to certain aspects of paragraph 1 of the draft article.

289. The point was made by a number of representatives that the expression "from the moment he begins to exercise his functions" did not identify the exact moment at which the diplomatic courier began to "exercise his functions", namely, whether it was the moment of appointment or the moment at which he took custody of the diplomatic bag. The question was one that should be clarified.

290. As to the moment of cessation of privileges and immunities, the point was made that the expression "normally" left the impression that there were other exceptional cases aside from the cases mentioned in the draft article.

291. A number of representatives expressed reservations with respect to the distinction made in paragraph 1 of the draft article between a regular courier and a courier ad hoc. It was true, it was said, that in making such a distinction paragraph 1 was restating what was contained in the four Vienna Conventions on diplomatic and consular law. However, there was no reason why a diplomatic courier ad hoc, if he was not resident in the receiving State, should be deprived of his privileges and immunities upon delivery of the diplomatic bag and not continue to have such privileges and immunities until his departure from the receiving State, as was the case of the regular courier. It was possible that the drafters of the Vienna Conventions had not addressed themselves to such a case. If a member of a diplomatic mission or a consular post in a receiving State had carried a diplomatic bag, it was normal that his privileges and immunities as courier should cease once he had delivered the bag. However, a diplomatic courier ad hoc may not be a member of a diplomatic mission or consular post in the receiving State. As draft article 21 would be the only provision making a distinction between a regular and an ad hoc courier, it should be revised in order to accord an ad hoc courier the same treatment as given to a regular courier.

292. The point was also made that there seemed to be some confusion between the case of a diplomatic courier proper and that of an "ad hoc" courier. A diplomatic courier was a person entrusted with making a trip or a number of trips for the purpose of transporting a diplomatic bag. An ad hoc courier, on the other hand, was not travelling merely to transport a diplomatic bag. The ad hoc courier had the status of a courier from the moment when the diplomatic bag was entrusted to him until the moment when he handed the bag over at its destination. The

functional approach of the draft articles required that the permanent diplomatic courier and the ad hoc courier be accorded the same treatment with regard to the duration of privileges and immunities. Thus, the ad hoc courier should be covered until he actually left the territory of the receiving or transit State. Also, an ad hoc courier usually left the receiving State after a short period of time.

293. The point was made by one representative (with reference to the provision in paragraph 1 of draft article 21 stating that the privileges and immunities of a diplomatic courier ad hoc shall cease on the ad hoc courier's delivery of the diplomatic bag) that difficulties might arise as paragraph 1 (1) of draft article 3 (Use of terms) stated that the expression "diplomatic courier" included a person authorized "for a special occasion as a courier ad hoc".

294. The view was expressed by one representative that the argument, that the privileges and immunities of a diplomatic courier ad hoc should cease immediately on his delivery of the bag because the protection was in fact intended for the diplomatic bag, was not convincing. Another draft article relating to the same matter, namely, draft article 18 (Immunity from jurisdiction), established an immunity from jurisdiction which had little to do with the diplomatic bag. As to the argument that the draft articles recapitulated the provisions of earlier conventions (namely, the 1961 Convention on Diplomatic Relations, the 1963 Convention on Consular Relations and the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character), it was necessary to point out, it was said, that the following possibilities needed to be provided for: first, the case of a courier ad hoc entrusted with the custody, transport and delivery of the diplomatic bag, who was solely on that particular mission and returned, thereafter, to the sending State; secondly, the case of a person who, on the occasion of a journey, was exceptionally empowered to transport a diplomatic bag and might after its delivery stay for a time in the receiving State; and, thirdly, the case of a courier ad hoc who was a resident of the receiving State and would continue to stay in the receiving State after delivery of the diplomatic bag. The provisions of paragraph 1 of draft article 21 could be acceptable in the second and third cases. However, in the first case there was no justification for ending a diplomatic courier's privileges and immunities immediately on delivery of the diplomatic bag, except where the courier ad hoc failed to leave the territory of the receiving State within a reasonable time. It was clear that a courier ad hoc would require some time to leave the receiving State and such time should be regarded as an integral part of his mission. The proposal was accordingly made by that representative that the following text be appropriately included in draft article 21:

> "Notwithstanding the foregoing paragraphs, the privileges and immunities of the diplomatic courier ad hoc shall come to an end, in the case of a courier engaging occasionally in such functions, at the moment when he has delivered to the consignee the diplomatic bag in his charge and, in the case of a courier entrusted with the specific mission of delivering a diplomatic bag as a special instance, at the moment when he leaves the territory of the receiving State."

295. One representative was in favour of the deletion of paragraph 3 of the draft article.

Article 22. Waiver of immunities

296. One representative considered that paragraphs 1 to 4 of draft article 22 were acceptable but considered paragraph 5 (which provided that a sending State shall use its best endeavours to achieve a just settlement, should it not waive its diplomatic courier's immunity in a civil action) not sufficiently clear.

297. Another representative stated that paragraphs 1 and 2 were acceptable but that paragraphs 3, 4 and 5 should be deleted.

298. One representative, noting that paragraph 4 of draft article 22 would require a separate waiver for execution of a judgement, wondered whether such a procedure would be consistent with the provisions of draft article 18 (Immunity from jurisdiction). If such a procedure was consistent with the provisions of draft article 18, he wondered whether the requirement of a separate waiver for execution of a judgement would not be an additional obstacle to a person's recovering compensation to which he was entitled.

299. The point was made that paragraph 5 of draft article 22 was a useful provision which should also be reflected in paragraph 2 of draft article 18 (Immunity from jurisdiction) which provided that immunity did not extend to actions for damages arising from accidents caused by vehicles. Such accidents were in practice frequent and it was proper that victims were protected through such a provision. Actions in cases of such accidents usually took longer than the courier's normal period of stay and States should make efforts to bring about just settlements.

Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag

300. Some representatives considered the current provisions of draft article 23 a substantial improvement over its earlier versions. There was, it was said, no question but that the captain of a ship or aircraft entrusted with a diplomatic bag was responsible for the bag. The captain, under internal arrangements, could, of course, entrust custody of the bag to a member of the crew.

301. The point was made that the words "ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry" in paragraph 1 of draft article 23, gave the provisions of the draft article more precision and flexibility. The interest that the provisions had for developing countries which sometimes could ill afford to engage the services of diplomatic couriers was referred to by some representatives.

302. The provisions of paragraph 3 of the draft article which would enable a member of a mission, consular post or delegation to have unimpeded access to the ship or aircraft to receive the bag was, it was said, of great practical value and reflected a useful and widespread practice.

303. Some representatives expressed reservations with respect to the draft article. One representative, while doubtful as to the usefulness of the draft article, felt the draft article could be maintained if such was the general wish but that, in such a case, the text of the draft article should not be more restrictive than that of the Conventions on diplomatic and consular relations. The notion of regular lines, envisaged by the Commission in paragraph (4) of its commentary on the draft article, should, therefore, not be adopted. One representative did not consider the current text of draft article 23 an improvement over earlier versions. The earlier version of the draft article which had referred to the "captain or a member of the crew" of a ship or aircraft was, in his view, preferable.

Article 24. Identification of the diplomatic bag

304. One representative who considered the provisions of draft article 24 satisfactory stated that his country had recently revised its rules on identification and handling of foreign diplomatic bags to reflect its understanding of international law and practice and to enable the official origin and endorsement of all items purporting to be diplomatic bags to be checked. He expressed agreement with the Commission's view stated in the commentary to draft article 24 that rigorous application of rules on external marking of the diplomatic bag worked in the interests of both sending and receiving States. He suggested, however, that the Commission might consider modifying the text of the draft article to include, under the words "visible external marks", an indication of destination and consignee.

305. One representative considered that paragraph 1 of draft article 24 did not give rise to any problems since it was identical with paragraph 4 of article 27 of the 1961 Convention on Diplomatic Relations. He was of the view, however, that paragraph 2 of the draft article should be redrafted to make clear that indication of destination and consignee were not the only external marks which the packages constituting the diplomatic bag should bear.

Article 25. Content of the diplomatic bag

306. One representative, expressing concurrence with the provisions of draft article 25 and noting as helpful the Commission's commentary to the draft article, stated that it was the practice of his country not to allow items to be imported or exported through the diplomatic bag if such import or export was in breach of its law. This was so in the case of arms or explosives, regardless of any claim that weapons would be necessary for official use.

307. The point was made by another representative that none of the multilateral conventions concluded in the field of diplomatic law offered a practical solution to the problem of verifying whether contents of a diplomatic bag were legally acceptable and, in all likelihood, there may be no better solution than that proposed in draft article 25.

308. The provisions of paragraph 1 of draft article 25 followed, it was noted by one representative concurring with the draft article, the wording of the relevant articles of the 1961 and 1963 Conventions on diplomatic and consular relations. The restrictive adverbs "only" and "exclusively", used in paragraph 1 of the draft article, which emphasized the official nature of the contents of the diplomatic bag, were considered essential.

309. One representative was of the view that the provisions of draft article 25 should reproduce verbatim the text of paragraph 4 of article 27 of the 1961 Convention on Diplomatic Relations.

310. Another representative was of the view that the expression "articles intended exclusively for official use", though acceptable was not entirely consistent with the concept of "official correspondence".

311. The point was made that paragraph 1 of the draft article should perhaps begin with the words "The diplomatic bag shall contain only official correspondence".

312. One representative stated that he was not convinced of the usefulness of paragraph 2 of the draft article but would be prepared to concur in the majority view.

313. Another representative suggested that paragraph 2 of the draft article should begin with the words "The sending State shall take the necessary measures ...".

Article 26. Transmission of the diplomatic bag by postal service or by any mode of transport

314. One representative, though not convinced of the usefulness of draft article 26, stated that he would be prepared to concur in the majority view.

Article 27. Facilities accorded to the diplomatic bag

315. The suggestion was made by one representative that the provisions of draft article 27 should be modified to read as follows:

> "The receiving State or, as the case may be, the transit State shall, as permitted by local circumstances, provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag."

(b) Articles proposed by the Special Rapporteur

316. One representative, referring generally to the draft articles 36 to 43 proposed by the Special Rapporteur, expressed the view that an effort must be made to eliminate the possibility of misuse of the diplomatic bag while maintaining its inviolability and taking due account of the interests of the receiving State.

Article 36. Inviolability of the diplomatic bag

317. Several representatives considered the revised provisions of draft article 36 a satisfactory formulation or a satisfactory basis for efforts to formulate an acceptable draft article. A number of representatives expressed support for the maintenance of the principle of the absolute inviolability of the diplomatic bag which they considered well established in State practice. The revised provisions of the draft article reflected, it was said, a fine balance between the interests of a sending State and the legitimate security concerns of receiving and transit States, and enabled a rapprochement between various positions. One representative stated that the draft article went a long way towards striking a balance between the interests of the sending, receiving and transit States, especially since it would be applied on the basis of reciprocity.

318. Some representatives expressed reservations with respect to the draft article. One representative was of the view that its provisions were not free from controversy. Another representative believed that the Commission should reconsider the question of the inviolability of the diplomatic bag. The adoption of a provision based on article 298 of the United Nations Convention on the Law of the Sea would, it was said, enhance the prospects for consolidating and unifying the law. The point was made that though the draft article was acceptable, its provisions may well be expanded as it was neither realistic nor desirable to provide for a régime of inviolability uniformly applicable to all official bags, whether diplomatic, consular or other.

319. The view was expressed by one representative that, given the differences of opinion on the question of the inviolability of the diplomatic bag, it seemed desirable to retain the established principle of absolute inviolability while providing for some flexibility in its application.

320. Paragraph 1. The inclusion, in paragraph 1 of draft article 36, of the expression "unless otherwise agreed by the States concerned" was the subject of differing views. One representative considered the inclusion of the expression appropriate. If there were serious doubts concerning the contents of the bag, he noted, it was only reasonable that the matter be discussed by the parties concerned with a view to reaching a reasonable compromise. Other representatives, however, considered that the expression should be deleted. The inclusion of such an expression was, it was said, a departure from the principle of inviolability, called into question a tried and tested precept of customary diplomatic law, and would have serious implications for the régime governing the diplomatic courier and the diplomatic bag under the Convention on Diplomatic Relations. Another representative considered deletion of the expression desirable because of the residual entitlement to make contrary agreements already provided for in paragraph 2 (b) of draft article 6 (Non-discrimination and reciprocity).

321. The inclusion of the words "and shall be exempt from any kind of examination directly or through electronic or other mechanical devices" in paragraph 1 of the draft article was also the subject of differing comment. Several representatives felt that the paragraph as formulated was appropriate and considered electronic examination of the diplomatic bag not permissible. The full inviolability of the

diplomatic bag was, it was said, a basic guarantee of the freedom of official communications between States and their missions, and prohibition of any kind of examination or inspection, whether direct or indirect, was of importance. Use of electronic or mechanical devices may, it was said, infringe the confidential character of the contents of the diplomatic bag, in the light of rapid technological advancements in the field. The use of such devices would also, it was stated, place a number of countries which did not have such devices at a disadvantage. The smaller developing countries did not possess sophisticated electronic and mechanical devices and, thus, were not in a position to resort to the practice of reciprocity normally applicable in such cases. The draft articles should, it was said, be based on the principle that the bag should not be detained or inspected by any means whatsoever. This was consistent with the 1961 Convention on Diplomatic Relations and the Commission had considered the question in depth at its twenty-seventh session. The draft articles, it was said, also contained safeguards against possible abusive use of the bag in draft article 25 (Content of the diplomatic bag). The entire legal system depended, it was said, on good-faith compliance by States with their international obligations. The draft article offered an acceptable measure of flexibility which enabled States to conclude agreements on mutual inspection procedures and deal with specific cases.

322. One representative was of the view that paragraph 1 of the draft article could be formulated in rather less categorical terms. The principal element in the paragraph, namely, the inviolability of the diplomatic bag, was accurately set out in the formulation "the diplomatic bag shall not be opened or detained", and examination of the bag through electronic or other mechanical devices was clearly prohibited. However, the formulation "exempt from any kind of examination" was too broad in scope in that all forms of external examination would then be excluded. It would be preferable, it was said, to model paragraph 2 of draft article 36 on article 35 of the 1963 Convention on Consular Relations.

323. Some representatives were of the view that electronic scanning of the diplomatic bag should be permitted. The provisions of paragraph 1 of the draft article, in completely excluding the possibility of electronic scanning, was not well-balanced. It was hard to see how such control could jeopardize diplomatic communications, if scanning was designed solely for detection of metallic objects. Another representative noted that his country accepted electronic screening of its diplomatic bag in the interests of the safety of civil aviation. The confidentiality of the contents of the bag may be affected but airlines could not be required to undertake the risks of transporting such bags without electronic examination. If an airline agreed to transport such bags without such examination, the sending States should then assume responsibility for consequences. One representative was of the view that, though electronic scanning should not be practised as a matter of routine, it should be permissible in specific circumstances when grounds for suspicions were strong. The Government of his country had reached such a conclusion following a recent review of the 1961 Convention on Diplomatic Relations.

324. One representative, noting the long discussions of the question of use of electronic procedures in examining the diplomatic bag and also the view that electronic scanning, even under strictly controlled conditions, might affect the

confidentiality of the bag and place developing countries at a disadvantage, considered it advisable to abide by the established rule of absolute inviolability while providing for some flexibility in its application, as currently proposed in paragraph 1 of the draft article.

325. Paragraph 2. Some representatives considered the provisions of paragraph 2 of draft article 36 appropriate. There was, it was said, on the one hand, widespread concern as to improper use of the bag and the threats to the security of States and, on the other, the importance of preserving the security of communications. A reasonable balance had to be found. The present formulation of paragraph 2 was, it was said, a step forward, and the reintroduction into the draft article of a provision that had existed in customary law prior to the 1961 Convention on Diplomatic Relations was welcomed. The paragraph ensured, it was said, sufficient flexibility of application as it allowed the receiving State to request the return of the bag if there were serious grounds to assume that it contained something other than documents or articles for official use.

326. Some representatives, agreeing in principle with the provisions of paragraph 2 of the draft article, also commented further on particular aspects. One representative made reference to what he said was the increasing tendency to use the diplomatic bag as a means of transport for all kinds of objects, including objects of considerable weight and volume, provided they were for official use. It would, he said, become increasingly difficult to prevent the diplomatic bag from becoming a means of transport. Another representative was of the view that paragraph 2 seemed to provide reasonable safeguard against possible abuse as it provided that, if the authorities of a receiving or transit State had serious reason to believe that a diplomatic bag contained articles other than official correspondence, the request could be made that the bag be returned to its place of origin. The point was made that the provisions of paragraph 2 could perhaps be improved to provide that it would be for the sending State to determine whether the bag should be returned or opened. It would be unreasonable, it was also said, to allow a receiving State the unfettered right to decide unilaterally on the return of the bag. One representative was of the view that paragraph 2 should follow the provisions of article 35 of the 1963 Convention on Consular Relations.

327. Some representatives found the provisions of paragraph 2 of the draft article unsatisfactory. The differences in the régimes applicable to bags under the 1961 and 1963 Vienna Conventions on diplomatic and consular relations required, it was said by one representative, a harmonization and unification of applicable rules. The middle-of-the-road approach, however, proposed in paragraph 2, which sought to formulate a generally acceptable rule, had resulted in a provision whose wording was not satisfactory to any school of thought. The paragraph gave a receiving or transit State discretionary authority to return a diplomatic bag to its place of origin, and this would extend to all bags the uncertain régime of the consular bag and would call into question the régime applied to diplomatic bags under the 1961 Convention on Diplomatic Relations. The satisfactory solution would be to achieve a balance between, on the one hand, the principle of the inviolability of the bag and, on the other, the security of a transit or receiving State. The difficulties of achieving such a balance could only be resolved through reliance on good faith and it was to be noted also that the validity of a principle could not be

challenged because it had been contravened or abused. The point was made by another representative that paragraph 2 seemed to negate one of the principles governing the freedom of diplomatic communications and to turn a proviso used in consular practice into a general principle. Such an approach could seriously affect diplomatic communications between a State and its missions. States that did not intend to apply the rules set out in the 1961 Convention on Diplomatic Relations to all couriers could make declarations to that effect in accordance with new draft article 43. It was also regrettable, it was said, that the reference to the duty of a receiving and transit State to protect the diplomatic courier and the diplomatic bag which had been included in the earlier version of paragraph 2 of draft article 36 had been deleted. One representative stated that any solution which sought to modify the régime of the diplomatic bag by infringing its inviolability was unacceptable, and thus, he stated, he could not agree to the proposal in paragraph 2 that the diplomatic bag be returned to the place of its origin.

328. The relationship between draft article 36 and draft articles 42 and 43 was the subject of comment by some representatives. One representative saw an incompatibility between draft article 36 and draft articles 42 (Relations to other conventions and international agreements) and 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags); the latter two draft articles being also inconsistent with article 27, paragraph 3, of the 1961 Convention on Diplomatic Relations. One representative questioned whether it was possible to conclude, as the Special Rapporteur seemed to have done, that under draft article 36 there should be inviolability at all times of the diplomatic bag stricto sensu, while at the same time giving a State the opportunity under draft article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) of declaring to which types of couriers and bags it wished the provisions of the current draft articles to apply. If such a conclusion involved acceptance of the provisions of draft article 36, he wondered what rule would be applicable in a case where a State made a declaration under draft article 43 that it would apply the draft articles to diplomatic bags stricto sensu and another State which made a declaration under article 6 (Non-discrimination and reciprocity) that it would apply the régime of the consular bag to diplomatic bags. Conversely, if the conclusion reached by the Special Rapporteur was that the proposal for the option was not accepted in draft article 36 and that optional exceptions should be confined to draft article 43, States that were parties only to the 1961 Convention on Diplomatic Relations would be able to restrict the application of the draft articles to the diplomatic bag and courier stricto sensu. States that were parties to both the Convention on Diplomatic Relations and the 1963 Convention on Consular Relations would not, however, be in a position to solve the problem of abuse of the diplomatic bag under the provision of inviolability, as they could not make an optional exception under article 43 limited to that point only. This might hinder wide acceptance of the draft articles. His delegation hoped that this fundamental difficulty would be resolved.

329. Some representatives referred, in this connection, to the proposal for a revised version of draft article 36 made by one member of the International Law Commission and noted in paragraph 182 of the Commission's report. Some representatives expressed their support for the proposal.

330. One representative stated that, where States had serious reason to believe that the confidentiality of the bag had been abused, the régimes set out in the 1961 and 1963 Conventions on diplomatic and consular relations should apply. He preferred, therefore, a clear-cut provision along the lines of the provisions proposed for paragraphs 1 and 2 of draft article 36 in paragraph 182 of the Commission's report. The introduction of an optional régime based on reciprocity along the lines of the provisions proposed for paragraphs 3 and 4 of draft article 36, in paragraph 182 of the Commission's report, might be acceptable if it were a two-way option in terms of which States could decide whether to apply to all kinds of bags the régime established for diplomatic bags or the régime applicable to consular bags. The application of the rules of reciprocity also required further elaboration.

331. Another representative considered that the provisions of draft article 36 should be simplified. The provisions did not seem to go far enough in the case of a diplomatic bag, and seemed to go too far in the case of a consular bag. These were difficulties encountered when one sought to merge different régimes. The question of examination by electronic means, which draft article 36 sought to resolve through a general prohibition of such examination should not be dealt with expressly in the draft article. Thus, the wording proposed by a member of the Commission in paragraph 182 of the Commission's report seemed the preferable course.

332. One representative, noting that under draft article 43, a State could, by written declaration, designate the types of couriers and bags to which it wished the draft articles to apply, was of the view that this could lead to a plurality of régimes, which would be confusing and cause administrative difficulties. He recalled that at the thirty-ninth session of the General Assembly, his delegation had proposed the introduction of an optional dual régime: one régime for the consular bag to which article 35, paragraph 3, of the 1963 Convention on Consular Relations would apply, and another régime for the other bags to which the consular bag régime could apply by declaration made by one of the parties. He was very much in favour of the reformulation of draft article 36 as proposed by one member of the Commission in paragraph 182 of the Commission's report. He noted, however, that the proposed solution had raised certain difficulties for the Special Rapporteur, who had, in paragraph 184 of the Commission's report, stated that "the application of the régime established in article 35, paragraph 3, of the 1963 Convention on Consular Relations to the diplomatic bag ... would clearly derogate from the régime established in the 1961 Convention on Diplomatic Relations". It should be noted, however, that the new version of paragraph 2 of draft article 36 also constituted a derogation from the régime established in the 1961 Convention and, if a derogation was inevitable, the one with the advantage of leading to a clearer situation should be selected.

333. One representative, referring to paragraph 2 of draft article 36 and the question of the opening of the bag and the different régimes under the 1961 and 1963 Conventions on diplomatic and consular relations, considered that a unified régime along the lines of the 1963 Convention on Consular Relations would be acceptable. The further options proposed in the Commission, leaving to individual States the choice of régime applicable to particular bags, were, however, also of interest. The comprehensive régime proposed by the Special Rapporteur in revised

draft article 43 seemed to offer a systematic and advanced solution, but the plurality of régimes that would result could prove complicated in practice. The suggestion, therefore, in paragraph 182 of the Commission's report, may prove an adequately flexible and clear solution.

334. Some representatives expressed reservations with respect to the proposal made as to the revision of draft article 36 in paragraph 182 of the Commission's report. One representative stated that he had followed with interest the discussion of the question of an optional régime under which States may, by written declaration, agree among themselves to treat diplomatic bags in the manner of consular bags under the 1963 Convention on Consular Relations. This would allow like-minded States to agree that, when a State had serious reason to believe that a bag contained prohibited items, it could demand that the bag be opened or returned to its place of origin. Such an approach had certain attractions but the question arose, in the light of draft articles 42 and 43, whether the separate régimes may not in practice be too complex. A uniform régime for bags would be of great benefit to all States maintaining diplomatic relations and could be guaranteed only if the rules on treatment of bag were standardized and easily applicable by customs authorities.

335. One representative considered unacceptable the suggestion, in paragraph 182 of the Commission's report, that a State be given the option of declaring unilaterally that it would apply to a diplomatic bag the rule applicable to a consular bag. Such an option would be clearly contrary, not only to the 1961 Convention on Diplomatic Relations but also to international customary law. Thus, he was opposed to any agreement inter se and to any optional régime.

336. Another representative considered that the revised version of draft article 36 proposed by the Special Rapporteur made it clear that the diplomatic bag may not be opened and was exempt from any kind of examination. This was an improvement on the earlier version of article 36 introduced at the Commission's thirty-sixth session. The formulation suggested in paragraph 182 of the Commission's report, which would make part of the proposed convention dependent on declarations by parties, leading possibly to uncertainty, did not seem appropriate. The Commission ought, therefore, to decide on a rule applicable to all cases along the lines of the Special Rapporteur's proposal provided there was no abuse with respect to the contents of the bag. If abuses continued to occur, the matter would have to be reconsidered.

Article 37. Exemptions from Customs inspection, Customs duties and all dues and taxes

337. Some representatives expressed agreement with the provisions of draft article 37 which, they noted, were an amalgamation of former draft articles 37 and 38. There was now only one article on exemptions from Customs inspection, Customs duties and all dues and taxes and that was appropriate.

338. One representative considered the expression "in accordance with such laws and regulations as they may adopt" in draft article 37 superfluous.

339. A number of representatives were of the view that draft article 37 should concern itself exclusively with matters relating to exemption from dues and taxes. They were of the view that matters concerning Customs exemption and related questions ought to be the subject of draft article 36 (Inviolability of the diplomatic bag).

340. One representative, though noting that the existing draft article 37 was an improvement, felt that provisions of the draft article were inconsistent with the title of the draft article. The question of permission for entry, transit or exit of the diplomatic bag should, he thought, be considered under draft article 4 (Freedom of official communications).

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

341. One representative was of the view that the expression "in the event of termination of the functions of the diplomatic courier" in draft article 39 could give rise to practical difficulties and should be considered in the light of the provisions of draft article 11 (End of the functions of the diplomatic courier).

342. Another representative proposed that draft article 39 be redrafted so as to cover not only the termination of the functions of the diplomatic courier but also cases in which he might be temporarily unable to exercise his functions.

343. The point was made by one representative that the obligation to immediately advise the sending State of any circumstance preventing delivery of the diplomatic bag, which the draft article would impose on a receiving or transit State, seemed excessive and should be reconsidered.

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

344. The view was expressed by one representative that, notwithstanding certain differences of opinion on the provisions of draft article 40, the basic concept of the draft article was not being called into question, namely, that a diplomatic courier or bag entering the territory of a transit State without prior notice should generally enjoy the same treatment and inviolability as a diplomatic courier or bag whose arrival had been duly notified.

345. One representative considered that the word "fortuitous" in the expression "as a consequence of force majeure or fortuitous event", may give rise to difficulties.

346. The point was made that the draft article should also cover cases where the diplomatic bag was entrusted to the captain of a commercial aircraft or the master of a merchant ship as was done in draft article 39.

347. Several representatives were of the view that draft articles 39 and 40 should be combined into a single article. The view was expressed by one representative

that that might be done by devoting one paragraph of such a single article to the situations now covered by draft article 39 and another paragraph to the cases covered by draft article 40. Another representative, however, did not consider a merging of draft articles 39 and 40 appropriate. While it was true that the two draft articles seemed to cover situations of force majeure or fortuitous event, the particular situations addressed in each article were not identical. As the Special Rapporteur had explained in paragraph 187 of the Commission's report, draft article 39 concerned situations where the bag was no longer in the custody of the diplomatic courier, whereas draft article 40 concerned situations where, though the diplomatic courier and the bag deviated from a normal itinerary, the courier may still have custody of the bag. It was logical that a State not initially foreseen as a transit State should provide the sending State with the necessary information as to the whereabouts of the courier and the bag.

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

348. A number of representatives expressed agreement with the present text of draft article 41. One representative considered inclusion of the draft article essential since, although many States still did not maintain diplomatic or consular relations with other States, diplomatic couriers continued to maintain communication between the States concerned and their various representatives and missions abroad. There was also, he noted, an appropriate reservation made in paragraph 2 of the draft article as to recognition of a State.

349. There was, it was also noted, a similar provision in article 82 of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

350. The rights and obligations of receiving and transit States, it was said, should not be based on the existence of diplomatic relations with the sending State. Even if a sending State entrusted protection of its interests to a third State, acceptable to a receiving State, the authorities at Customs points would be those of the receiving State and it would be undesirable for such authorities to be allowed to inspect the bag on the basis of non-recognition of the sending State. The draft article, therefore, met an important practical need, reflected the practice of a large number of States and was in keeping with the main purpose of the draft articles, namely, safeguarding the sovereign right of any State to communicate with all its missions abroad even in exceptional circumstances.

351. Some representatives, though agreeing that the draft article was necessary, considered that its wording could be improved. The point was made by one representative that the existing language of the draft article might be understood as imposing obligations, of a bilateral nature, on a receiving State with respect to the couriers and bags of a sending State with which the receiving State did not maintain diplomatic or consular relations or whose existence or Government the receiving State did not recognize. The view was expressed by another representative that, as currently formulated, the draft article could be the subject of misinterpretation. The draft article did not in fact concern bilateral

relations but, rather, communications between a State and its missions to an international conference or an international organization when there were no diplomatic relations between the sending State and the host State. Though the wording of the text was in need of improvement, the draft article was both necessary and useful.

352. Some representatives considered the draft article unnecessary. One representative noted that the Special Rapporteur's explanation to the effect that the purpose of the draft article was to provide for non-recognition or absence of diplomatic or consular relations between a sending State and the State serving as host to an international conference or international organization was not incorporated in the body of the draft article. The draft article was, in any event, out of place having regard to what ought to be the proper scope of the draft articles.

353. One representative considered that the draft article was superfluous and could be deleted.

Article 42. Relation to other conventions and international agreements

354. One representative, concurring in the observations made in paragraphs 195 to 197 of the Commission's report, stated that the draft articles on the status of the diplomatic courier and the diplomatic bag accompanied by diplomatic courier should be applied as a lex specialist and that there ought to be a measure of flexibility in their application. Another representative stressed the importance of the question of the relationship between the draft articles and the four (1961, 1963, 1969 and 1975) Conventions that were usually referred to in the discussions of the Commission. An analogy, he stated, might be drawn with the relationship between the 1946 Convention on the Privileges and Immunities of the United Nations, and later agreements between the United Nations and Member States which hosted certain United Nations agencies. The later agreements were supplementary to the 1946 Convention, and where the Convention and the agreements dealt with the same question, their provisions were to be interpreted in such a way as not to narrow the effect of either instrument. A similar arrangement could be made for draft article 42.

355. The view was also expressed that, although the draft article sought in fact to set out a constructive proposal, there were still a number of uncertainties in its provisions which should be resolved in the light of the views expressed in the Sixth Committee.

356. Paragraph 1. The provisions of paragraph 1 required, it was said, certain clarifications. The provisions of the draft article would be acceptable, it was said by one representative, particularly if it was understood that the words "without prejudice to the relevant provisions in other conventions or those in international agreements in force", in paragraph 1, meant that the draft articles were intended to complement the four Conventions, especially the 1961 and 1963 Conventions. One representative questioned whether the "provisions of the present

articles" were really "without prejudice to the relevant provisions in other conventions or those in international agreements in force". For example, if draft article 36 (Inviolability of the diplomatic bag) was to be approved in either of the versions presented in the Commission's report, a substantial modification of article 27 of the 1961 Convention on Diplomatic Relations would follow. Thus, the formulation "without prejudice to the relevant provisions, etc." gave rise to uncertainties.

357. Some representatives, in that connection, expressed preference for the original version of paragraph 1 proposed by the Special Rapporteur. The point was made that the draft articles should consolidate and specify the law relating to the diplomatic courier and, if necessary, go beyond the content of the relevant codification Conventions. It would be desirable to provide that the draft articles were intended to complement the existing Conventions. The word "complement" contained in the original wording of paragraph 1 of draft article 42 should be reinserted. The existing provisions of paragraph 1 did not, it was said, clearly establish the relationship between the draft articles and the large number of international agreements already in force on the same matters.

358. Some delegations suggested that a possible alternative to reintroducing the former provisions of paragraph 1 was deletion of paragraph 1 altogether.

359. Paragraph 2. One representative was of the view that the provisions of paragraph 2 should be made much more flexible. Another representative believed that paragraph 2 could give rise to difficulties of interpretation on the question of the scope of the specific agreements concluded between States with respect to the diplomatic courier and diplomatic bag. It would be preferable to provide expressly that States, by specific agreement, amend certain provisions of the draft articles. The point was made by one representative that, if such provisions as paragraph 2 (b) of draft article 6 (Non-discrimination and reciprocity), paragraph 2 of draft article 42 (Relations to other conventions and international agreements) and draft article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) were maintained, there was danger that such flexibility could lead to a proliferation of régimes applicable to official bags, casting doubt on the effectiveness of an international instrument and, hence, on its usefulness.

360. One representative was of the view that draft article 42 should be deleted altogether.

Article 43. Declaration of optional exceptions to applicability in regard to designated types of couriers and bags

361. Some representatives were in agreement with the approach taken by the Special Rapporteur in draft article 43, as explained in paragraph 198 of the Commission's report, and supported the desirability of such an article, designed to introduce a certain degree of flexibility in the draft articles.

362. The point was made by one representative that the draft article made allowance for the fact that only two of the four Conventions mentioned in draft article 3 (Use of terms) were in force, and provided for the important possibility of applying to the draft articles reservations made in relation to the two conventions that had not yet entered into force. For that possibility to be made absolutely clear, the suggestion was made that, in draft article 43, a specific reference should be made to draft articles 1 (Scope of the present articles) and 3 (Use of terms).

363. One representative, agreeing with the principle that the Special Rapporteur had sought to embody in draft article 43, stated that he would have preferred a uniform and universally recognized régime for the courier and bag based on the 1961 Convention on Diplomatic Relations, the 1963 Convention on Special Missions and the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. Another representative stated that inclusion of the draft article would be acceptable, provided it was made absolutely clear that optional exceptions were at variance with the content and the objective of the draft articles as a whole, and must neither erode the régime established under the 1961 Convention on Diplomatic Relations nor strengthen the régime established under the 1963 Convention on Consular Relations.

364. The view was expressed that though the draft article sought to set out constructive proposals, there were still a number of uncertainties in its provisions which should be clarified in the light of the views expressed in the Sixth Committee.

365. The point was also made by one representative that, if the existing provisions of the draft article were to be retained, it would be necessary to also retain paragraph 2 of the draft article which allowed for the withdrawal of a declaration of an optional exception. The possibility of the withdrawal of such a declaration would not lead to instability in international relations. On the contrary, withdrawal of such a declaration could only serve to strengthen the régime of rights and duties under the draft articles.

366. Some representatives considered draft article 43 unacceptable. The view was expressed that, should a State be given the option to apply the draft articles to all or some of the types of couriers and bags, a degree of flexibility would ensue that would be inconsistent with the underlying objective of the draft articles and would result in uncertainty as to their interpretation and application. An optional declaration under the draft article would, in effect, be a disguised reservation which would relieve the declarant State of substantive obligations under the draft articles. The draft article would, it was said, give rise to a plurality of régimes. The separate régime for the diplomatic courier and bags and the separate régime for the consular courier and bags posed no problem, as those régimes had been established in recognition of the different nature of diplomatic and consular services. A provision of the nature of draft article 43 would, however, introduce excessive diversity and uncertainty and exacerbate rather than resolve the problems posed by the existence of various other instruments governing the status of diplomatic couriers and bags, and thereby defeat the aim of unifying international practice and developing general norms of international law.

367. The point was also made by one representative who considered the provisions of the draft article permitting declarations of optional exceptions unacceptable, that the provisions of article 298 of the United Nations Convention on the Law of the Sea could not serve as an appropriate precedent in this case as article 298 of that Convention applied wholly to procedures for the settlement of disputes and did not concern the substantive obligations of States.

368. Other observations made by representatives on the relationship between the provisions of draft article 43 and the provisions of draft article 36 have been noted under draft article 36 above.

E. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

1. General observations

369. A number of representatives expressed satisfaction with the progress made on the topic of jurisdictional immunities of States and their property and were pleased to note that the Commission expected to complete its first reading of the entire set of draft articles on the topic at its 1986 session.

370. The untiring efforts of the Special Rapporteur, Mr. Sompong Sucharitkul, were praised.

371. It was noted there were still differences of opinion on the question whether State immunity should be absolute or limited.

372. Some representatives considered that absolute immunity was no longer appropriate at a time when the activities of States extended far beyond the traditional exercise of functions of government. They were of the view that the distinction between acts of a State jure imperii, to which immunity should attach and acts of a State jure gestionis, to which immunity should not attach, should be maintained. The distinction was widely recognized, it was said, in the practice of States and was an essential element in the modern doctrine of immunity of States.

373. The point was made that the notion that immunity should apply to commercial service was unreasonable and also inconsistent with the thrust of the draft articles adopted so far by the Commission in first reading. The nature of a given activity must, it was said, govern the question of immunity, and where the nature of an activity was commercial the fact that it might be conducted by a State organ was not the basis for an assertion of State immunity.

374. Some representatives were of the view that the concept of functional or limited immunity and the distinction between acts of a State jure imperii and acts jure gestionis were questionable and unacceptable. They were of the view that States should conduct their relations in conformity with the principle of sovereign equality and that a State could not be made subject to the jurisdiction of another State without its express consent. The draft articles formulated thus far on the topic seemed more likely, it was said, to dilute the principle of State immunity than to codify it in a manner acceptable to all groups of States. The views and

practice of the socialist and most of the developing countries had not, it was said, been duly taken into account.

375. The view was expressed by a number of States that, in considering the question of restricted immunity to government activities of a commercial nature, account should be taken of the fact that the economic activities of States, particularly developing countries, were not performed entirely by the private sector.

376. The expansion of the economic and financial activities of the State made it more difficult to draw a line between acts of a State jure imperii and acts of a State jure gestionis, and such a distinction no longer constituted a sufficient criterion for making exceptions to State immunity. The point was made that the Commission should, in order to break the prevailing deadlock, seek criteria better suited to current circumstances without unduly delaying its work on the topic.

377. The view was also expressed that the Commission should concern itself less with doctrinal differences and more with practical results. The law, it was said, should develop on the basis of a pragmatic compromise between the two conceptual approaches and in a spirit of reasonable adjustment to contemporary realities.

378. One view expressing reservations about the approach taken to the topic, suggested the revision of draft articles 1 to 18 so as to take into account a number of elements, namely: (a) who should determine the nature of a commercial contract and what means should be considered for the settlement of disputes on the matter; (b) that a State enjoyed immunity with respect to the jurisdiction of another State by virtue of international law; (c) that the obligation imposed on a State to give effect to the immunity of another State was incumbent on all its organs and authorities and not only on the judicial authority; (d) that a State should give effect to the immunity of another State in a proceeding instituted either directly or indirectly against it by non-governmental entities under the jurisdiction or control of the forum State; (e) that in a proceeding against public servants of a State, the defendant State shall determine whether, in accordance with its domestic laws, the proceeding is against its organs and whether the acts of which the public servants were accused were of public nature. In this respect a certificate from the defendant State, similar to that envisaged in draft article 19, paragraph 7, should determine the governmental nature of the act; (f) that States should adopt laws and regulations to prevent costly and abusive proceedings over which they have jurisdiction against other States; (g) that the waiver of immunity by a State should be in writing and in an express and unequivocal manner; (h) that a State's intervention in a proceeding before a court of another State may be considered as waiver of immunity only if such intervention was for reasons other than presenting evidence for the immunity invoked by that State; and finally (i) that failure on the part of a State to appear before a court of another State should not be interpreted as a waiver of immunity or its consent to the exercise of jurisdiction by that court.

2. Comments on draft articles

(a) Articles provisionally adopted by the Commission

Article 3. Interpretative provisions

379. Comments were made, by one representative, on draft article 3 which was adopted by the Commission at its thirty-fifth session and whose relevant provisions read as follows: "In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should so be taken into account if in the practice of the State that purpose is relevant to determining the non-commercial character of the contract."

380. The representative recalled that in the Sixth Committee last year a number of reasons had been advanced by his delegation in support of the argument that the purpose of a transaction should not be taken into account in determining whether the transaction was official in nature and, thus, immune or commercial in nature and not immune. There was, he stated, a still further reason that could be advanced. Draft article 3, as presently worded, would have regard to the practice of a defendant State as the criterion for determining whether the purpose of a transaction should be taken into account. State practice differed, however, and such diversity would undermine the predictability and certainty required in legal transactions. If adopted, in its present form, draft article 3 would lead to unfamiliar practices being invoked and, thus, to further confusion.

Article 13. Contracts of employment

381. Comments were made by one representative on draft article 13, which was adopted by the Commission at its thirty-sixth session. The representative was of the view that draft article 13 should be revised, since it established, in paragraph 1, a dual requirement: that the immunity of a State could not be invoked before a court of another State, if an employee had been recruited in that other State and was "covered by the social security provisions which may be in force in that other State". Every country had its own social security system, he said, and it could happen that provisions regarding social security had been provided for in the contract, in which case the employee would not be protected by the social security provisions normally in force. He proposed, therefore, that the relevant words in paragraph 1 of draft article 13 be amended to read "and is covered or may be covered by its social security provisions".

Article 19. State-owned or State-operated ships engaged in commercial service

382. Paragraphs 1 and 4. A number of views were expressed on the question on which the Commission had been unable to agree, namely, whether the word "non-governmental" should or should not be included after the word "commercial" in paragraphs 1 and 4 of draft article 19. As it had reached no decision on the matter, the Commission

had placed the word "non-governmental" within square brackets in the formulations "commercial [non-governmental] service" and "commercial [non-governmental] purposes".

383. Some representatives were of the view that the word "non-governmental" should be omitted in paragraphs 1 and 4. If it were included, it was said, the provisions of the paragraphs would be narrowed unacceptably and pose difficulties of interpretation.

384. Some representatives were of the view that the word "non-governmental" should be retained in paragraphs 1 and 4. It was pointed out that many developing countries utilized their State-owned ships in commercial service for public-sector purposes and immunity should apply in such cases.

385. Some representatives were of the view that a State-owned ship was always used for purposes of State and should enjoy immunity. Any other approach, it was said, would damage the interests of a State using its own property. The view was expressed that a formulation should be found in draft article 19 which would protect State property in all its forms.

386. Some representatives pointed out that in their countries State-owned ships were assigned to the shipping entities which operated them on their own responsibility and met liabilities from their own funds. The provisions of draft article 19 allowed proceedings to be also instituted against States which owned but did not operate such ships. It was true that the commentary to draft article 19 noted that it was a question of choice of parties against whom to institute proceedings - the State or the operator of the ship. However, such a position was unsatisfactory and unacceptable.

387. The point was made by one representative, with respect to State-owned or State-operated ships engaged in commercial service, that the 1923 Geneva Convention on the International Régime of Maritime Ports and the 1926 Brussels Convention for Unification of Certain Rules relating to the Immunity of State-owned Vessels both employed the criterion of the use to which a ship was put to determine its status. Article 96 of the United Nations Convention on the Law of the Sea provides that ships owned or operated by a State and used only on government non-commercial service should have complete immunity on the high seas from the jurisdiction of any State other than the flag State. Thus, to enjoy immunity, a ship should be owned or operated by a State and be used in government non-commercial service. If the ship was used for commercial service the ship lost its right to immunity. As to the provisions of draft article 19 the following observations were made by the representative: draft article 19 was formulated in the negative ("unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity ..."); the word "non-governmental" should be omitted in draft article 19 as, under the above-mentioned Conventions, a State-owned ship in commercial service did not enjoy immunity; the present provisions of draft article 19, by reason of their negative formulation, would afford immunity to State ships in private non-commercial service and this would substantially modify the rule in article 96 of the Convention on the Law of the Sea and this did not seem appropriate; and the Commission should rely on

the formulation in article 96 of the Convention on the Law of the Sea and if this were done draft article 19 should not be included when setting out exceptions to State immunity.

388. Paragraph 3. The point was made that the expression "inter alia" in the opening clause of paragraph 3 of draft article 19 should be deleted, as such an expression negated the clarification which the subsequent enumeration, in the subparagraphs of paragraph 3, sought to provide.

389. Paragraph 7. The provisions of paragraph 7 of draft article 19 (which provide that in court proceedings, when there is question as to the character of a ship or cargo, a certificate from a competent authority shall serve as evidence of character) was considered by some representatives to be useful. The view was also expressed, however, that such a provision was incompatible with many legal systems in which a court was given wide competence to determine acceptable evidence, and in their present form the provisions of paragraph 7 might, it was said, enable a State through issuance of certificates to preserve its ship from the jurisdiction of a foreign court.

390. Other aspects. The point was made that consideration should be given to including in draft article 19 a provision on the State-immunity aspects of the practice of arresting ships belonging to the same owner as the ship that was the subject of a legal proceeding.

391. According to a view in which the commentary to article 19 was found to be useful, particularly in clarifying the terms "operate" and "operation", misgivings were however expressed about the use of the term "exploitation" in the commentary. It seemed that the terms "exploitation" and "operation" were presented as synonyms. The former denoted an idea of profit but the latter did not necessarily imply that understanding. In this view the distinction between those two terms was considered important to the extent that it introduced the notion of profit which attached to commercial transactions and acquired a particular meaning for the developing States.

Article 20. Effect of an arbitration agreement

392. Some representatives expressed concurrence with the provisions of draft article 20. The draft article, it was said, incorporated the concept of implicit acceptance by one State, party to an arbitration agreement, of the supervisory jurisdiction of a court of another State otherwise competent in the matter. It was noted that draft article 20 did not apply to intergovernmental arbitration agreements nor to a case where the parties to the arbitration agreement had otherwise agreed; and that a court could exercise supervisory jurisdiction only on three specific aspects - validity or interpretation of the arbitration agreement, arbitration procedure and setting aside of the arbitration award. Thus, it was noted, a court could not interfere unduly with an arbitration nor could it substitute itself for an arbitral tribunal. The point was made that acceptance of the supervisory jurisdiction of a national court under draft article 20 presented no danger for a weaker party in an arbitral proceeding as the supervisory jurisdiction of a court offered guarantees against bias in arbitration panels.

393. Some representatives were unable to agree with the provisions of draft article 20. It was not, it was said, an irresistible implication nor an irrebuttable presumption that where a State had consented to arbitration, it had waived its immunity with respect to all matters arising from the arbitration, including legal proceedings relating thereto. It was felt that affirmation of the principle of State immunity in draft article 20 was desirable, in order that waiver of such immunity could then be seen to be dependent on a statement to that effect by the State concerned. The point was made that the provisions of draft article 20 seemed to be against the interests of the developing countries.

394. As to the two sets of square brackets included in draft article 20, namely, "[commercial contract]" and "[civil or commercial matter]" the view was expressed that retention of the formulation in the first set of square brackets was desirable. It would, it was said, be difficult for States which had recently passed legislation accommodating the distinction between acts jure imperii and acts jure gestionis to now move in a reverse direction towards expanded immunity. Some expressed the view that the formulation in the second set of square brackets was preferable, while some others preferred the alternative in the first set of square brackets.

395. One representative considered that draft article 20 should include reference to the recognition and enforcement of arbitral awards in the list of matters to be subject to the supervisory jurisdiction of a court. There was, it was noted, a reference to the matter in the commentary to draft article 20 but preference was expressed to seeing paragraph (c) of draft article 20 amended to read: "the recognition and enforcement or the setting aside of the award". The setting aside of an arbitral award and its enforcement were, it was said, two faces of the same coin and there was no reason for providing for one and not for the other.

(b) Articles proposed by the Special Rapporteur

(i) Part IV. State immunity in respect of property from enforcement measures (draft articles 21 to 24)

General observations

396. The view was expressed that the title of part IV in the English version should be changed to "State immunity from enforcement measures in respect of property".

397. A number of representatives expressed agreement with the view that competence to authorize measures of enforcement against the property of a State was not included in the general jurisdictional competence of a court, and that, thus, before such enforcement measures were permissible a separate waiver by a State with respect to such enforcement measures was necessary.

398. Some representatives were of the view that the rules applicable to State immunity from enforcement measures with respect to property might be set out in part II, "General principles" of the draft articles and that the proposed part IV would then be unnecessary.

399. The provisions of part IV would, it was said, require careful consideration before their final form was determined. A view expressed concern that part IV as currently designed might imply that it applied to State property and not to that of its organs, agencies or instrumentalities, which were covered by draft article 7, paragraph 3.

400. It was said that the scope of part IV would have to be revised in the light of the definition of State property that should appear in paragraph 1 of draft article 2 ("Use of terms").

401. Some representatives expressed endorsement of the provisions of part IV. State immunity from enforcement measures with respect to property was, it was said, an area in which international opinion seemed to favour more absolute and less qualified immunity.

402. Changes in the formulation of specific provisions in part IV were suggested by some representatives. The point was made that replacement in part IV of the concepts of "attachment", "arrest" and "execution" by the general expression "judicial measures of constraint upon the use of such property, including attachment, arrest or execution" had improved the text. The point was made that some of the concepts in part IV needed to be clarified, particularly that of "control" or "interest" in property. (Please see also observations below on particular draft articles.)

403. Some representatives were of the view that exceptions to State immunity from enforcement measures could only derive from the express consent of the State whose property was to be subject to such measures. The view was expressed that a rule existed in international law in terms of which State property enjoyed immunity from any enforcement measure of a judicial or administrative authority of another State. The draft articles of part IV, it was said, did not seem to codify such norms of customary international law but proposed new rules which would modify customary law and abolish the principle of absolute immunity in this area. The view was expressed that the international community considered attachment of and forced execution against the property of another State a major step that might have serious consequences for inter-State relations.

404. Immunity from attachment and execution was more absolute than immunity from jurisdiction. The latter allowed of exceptions whereas the attachment and execution against State property could be carried out only with the express consent of the State concerned, and such consent would be considered null and void if the property involved was non-attachable. Such a principle should, it was said, be fully reflected in part IV of the draft articles.

405. One representative expressed the view that the Commission appears not to have considered the question of how a State was to invoke immunity before the courts of another State or the question of the authority which would settle disputes as to whether in a given case one of the exceptions to the principle should apply. Such disputes were international disputes and the matter should be reviewed carefully by the Commission.

406. The point was made that consistency should be maintained in drafting rules on jurisdictional immunity and on immunity from enforcement measures.

407. The point was made that jurisdictional immunities, and more particularly enforcement measures, should be made subject to reciprocity.

408. The view was also expressed, however, that there were shortcomings in a system which made enforcement measures against the property of a foreign State subject to reciprocity. Ideally, it was said, a system should not only take into account the sovereign needs of States but also ensure that private parties obtained the enforcement of such rights as had been granted to them by a court against a foreign State. A link, it was said, should be maintained between exceptions to immunity from jurisdiction and exceptions to immunity from enforcement measures.

Article 21. Scope of the present part

409. Some representatives considered the provisions of draft article 21 satisfactory and believed they reflected State practice and international law.

410. The point was made that draft article 21 should reflect the relationship between immunity from jurisdiction and immunity from execution.

411. Some representatives were of the view that the provisions of draft article 21 were superfluous, particularly as its essential aspects were covered in draft article 22.

412. The point was made that if draft article 21 was to be retained its language should be carefully examined to be sure that it covered exactly what was contained in the provisions that followed.

413. Observations were made on the use of certain expressions in draft article 21. The view was expressed that the expression "control" may give rise to different interpretations and should not be used, and that reference should be made only to State property and property in the possession of a State. The view was expressed that the expression "property in which it [the State] has an interest" was unclear and should be replaced by more precise wording.

Article 22. State immunity from enforcement measures

414. Some representatives were satisfied with the provisions of draft article 22 which in their view, adequately expressed the principle of State immunity from measures of enforcement and indicated which types of property were not covered by such immunity. The draft article was, it was said, an important step forward in the progressive development of international law in this field and rightly went beyond the European Convention on State Immunity of 1976 elaborated within the Council of Europe. The present wording of the draft article should not be weakened, it was said, by requiring, for instance, reciprocity or prior diplomatic negotiations.

415. The point was made by one representative that draft article 22 as presently formulated (unlike the version earlier proposed by the Special Rapporteur, which adopted use of the property or funds for commercial purposes as sole criterion for absence of immunity) required that the property or funds should also be allocated for a specific payment or be specifically earmarked for payment of judgement or other debts. The draft article began by stating that "A State is immune without its consent ... from judicial measures of constraint ... unless ...", and then went on to provide for exceptions to the rule which involved implied consent. The present formulation of draft article 22 should be re-examined, it was said, with a view to returning to the earlier version of the draft article.

416. Some representatives considered draft article 22, particularly its earlier version, subject to the same difficulties as had caused controversy over draft articles 6 and 12. While national legislation in some countries permitted attachment of foreign State property used in commercial transactions, this was not universally true. The point was made that even the European Convention on State Immunity, the only multilateral convention on the subject, contained a stipulation against execution against State property without the State's consent. They, therefore, failed to understand the reason for extending in draft article 22 the concept of "limited immunity" and hoped that the language of the draft article would be reconsidered.

Article 23. Effect of express consent to enforcement measures

417. The view was expressed that the title of draft article 23, "Effect of express consent to enforcement measures" should be brought into line with the title of draft article 8, "Express consent to exercise of jurisdiction" already provisionally adopted by the Commission.

418. The Special Rapporteur's revision of draft article 23 to its present form, in light of the provisions of draft article 8, was welcomed. The underlying principles of draft article 23 were considered to be in accordance with the sovereign equality of States and general international practice. It was noted that in terms of subparagraph (c) of paragraph 1 a State's consent could be expressed in "a declaration before the court in a specific case"; and, in terms of paragraph 2, consent to "the exercise of judicial measures of constraint" required a separate waiver.

419. The point was made that it should be clearly stated that consent to the exercise of jurisdiction was not the same as consent to attachment and execution, which required separate expression.

420. The view was expressed that draft article 23 raised questions and its purpose was unclear. It was said that the provisions of draft article 23 still appeared too complicated.

421. The point was made that draft article 23 was now limited to indicating the modalities of State consent to measures of constraint.

422. The view was expressed that draft article 23 should apply only to cases not covered by draft article 22 and that the relationship of draft article 22 to draft article 23 should be clarified.

423. The view was expressed that the relationship of draft article 23 to draft article 24 should be clarified. If draft article 23 contained a general rule on State consent then draft article 24 seemed unnecessary, it was said, and could be deleted.

Article 24. Types of property generally immune from enforcement measures

424. Observations on article 24 as a whole. Some representatives expressed agreement with the provisions of the draft article 24. Some expressed agreement with the general approach in the draft article though they were of the view that specific provisions required examination. The draft article, it was said, deserved special attention and the hope was expressed that the Commission would be able to discuss the matter in greater detail next year.

425. Some representatives questioned the necessity for such a draft article. The point was made that draft article 22 expressed the general rule that State property could not be subject to measures of attachment, arrest or execution by a foreign court, and indicated which types of property were not protected by the general rule. Thus, it was unnecessary to indicate in draft article 24 which types of property were protected. A further enumeration of protected properties under the general rule could cast doubt on the general application of the rule of immunity.

426. The observation was made that the provisions of draft article 24 were intended to protect developing countries from pressures to waive their immunity. However, it was also possible, it was said, that any type of State property not mentioned in the article could be deemed subject to enforcement measures.

427. One representative, noting that draft article 24 seemed to assume, in the first instance, the non-immunity of State property (rather than the immunity of State property), was of the opinion that it would be preferable if the article began with its present paragraph 2 (which now read "In no circumstances shall any property listed in paragraph 1 be regarded as property used or intended for use for commercial and non-governmental purposes.") and then listed in subparagraphs (a) to (e) the categories of property that should in no case be considered as property used for commercial and non-governmental purposes.

428. Observations on particular provisions of article 24. One representative expressed satisfaction with the Special Rapporteur's wish to change the wording of the opening clause of draft article 24 so as to remove any suggestion of a rule of jus cogens.

429. The point was made, with reference to subparagraph (a) of paragraph 1, that the immunity of the property of diplomatic and consular missions was essential. One representative considered it essential that property predominantly in use for

the purpose of maintaining and carrying out the functions of a diplomatic, consular or visiting mission should be specifically excluded from the definition of commercial property.

430. The provisions of subparagraph (b) of paragraph 1 should, it was considered, indicate more fully the military property to be considered immune.

431. A number of representatives commented on the provisions of subparagraphs (c) and (d) of paragraph 1. One considered their present formulation to be too vague. Another considered the provisions of subparagraph (c) important to developing countries which maintained a portion of their foreign currency reserves abroad for various international payments. The point was made that inclusion of the words "and not allocated for any specified payments" in subparagraph (c) and inclusion of the words "and not specifically earmarked for payments of judgement or any other debts" in subparagraph (d) seemed inappropriate. Such "allocation" or "earmarking" denoted, it was said, consent and the purpose of the subparagraphs of paragraph 1 appeared to be the listing of properties that would be immune from attachment and execution even in cases where consent was present. It was noted that recent national legislation on the matter required only that such property not be used by central banks or for monetary purposes; and made no reference to the question of allocation for judgement purposes.

432. The observation was made, with reference to subparagraph (e) of paragraph 1, that the term "public property" should be retained because "private property", even if it formed part of the national cultural heritage of a State, could not be exempted from measures of enforcement.

(ii) Part V. Miscellaneous provisions (draft articles 25 to 28)

433. Some views were expressed on the provisions of part V of the draft articles, not yet considered by the Commission, comprising draft articles 25 to 28.

434. The observation was made that the provisions of draft article 25, which concerned the immunities of personal sovereigns and other heads of State, were generally acceptable, though it should be made clear in paragraph 1 (a) that proceedings relating to private immovable property in the territory of the forum-State were "real actions", a term used in paragraph 1 (a) of article 31 of the Vienna Convention on Diplomatic Relations.

435. A question was raised as to the advisability of the procedure proposed in paragraph 1 of draft article 26 which, concerning the service of process and judgement in default of appearance, seemed to imply that the document instituting proceedings against a State should be transmitted to the Ministry of Foreign Affairs of the defendant State. It would, it was said, be preferable if the competent authorities of the State of the forum were required, instead, to transmit the relevant documents through the diplomatic channel to the Ministry of Foreign Affairs of the defendant State for onward transmission to the competent authority. Service of documents could be deemed to have been effected by their receipt by the Ministry of Foreign Affairs. The suggestion was made, with reference to paragraph 3 of draft article 26, that a minimum time-limit should be prescribed before a judgement in default of appearance was rendered against a State.

436. The point was made with respect to paragraph 3 of draft article 27, which concerned procedural privileges, that a State which was a claimant in a court of another State should pay any judicial costs or expenses for which it may become liable.

437. The observation was made that draft article 28, which concerned the restriction of immunities and privileges, was in its existing form vague and could give rise to difficulties.

F. RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

(second part of the topic)

438. A number of representatives expressed their appreciation at the Commission's continuation of its work on the topic of relations between States and international organizations. The interest, importance and complexity of the topic were referred to, as was also the desirability of its codification. The cautiousness and prudence shown by the Special Rapporteur, Mr. Leonardo Díaz-González, in proceeding with his work on the topic was, it was noted, in accordance with the requirement of prudence recommended to him by the Commission.

439. Some representatives questioned the usefulness of the Commission's continuing its work on the topic. There were, it was said, other more pressing subjects to be considered. The nature of the topic was such that it was likely, it was said, to give rise to a variety of doctrinal difficulties and Governments were disinclined to expand the privileges and immunities of international organizations. It was noted in that connection, however, by one representative that it was the General Assembly that had requested the Commission to study the subject and that it was important for the Commission to continue its work on the topic.

440. As to the scope of the topic, one representative considered that the Commission should adopt a broad approach and also cover regional organizations in its study such as, for example, the regional organizations of the Americas.

441. A number of representatives expressed support for the first draft article, on the legal personality of international organizations, that had been proposed by the Special Rapporteur. It was said in that connection that, by providing in the first article that international organizations should enjoy legal personality under international law, the Special Rapporteur was proposing to give expression to the basic principle which should be the foundation of the draft articles. One representative referred in particular to paragraph 2 of the draft article, which provided that the capacity of an international organization to conclude treaties was governed by the relevant rules of the organization. While the principle of sovereign equality of States identified States as the primary subjects of international law, he said, that was not so in the case of international organizations, which were the result of an act of will on the part of States which gave such organizations juridical features. It was essential not to lose sight of that principle, on which the draft article was based, when the topic was being considered. It was reasonable, in view of the difference in nature between States

and international organizations, to limit the capacity of international organizations. The draft article touched also, it was to be noted, on the law of treaties. Another representative was of the view that the two paragraphs of the draft article should be considered as two separate draft articles.

442. The point was made by one representative that, in connection with the first draft article on the legal personality of international organizations, a question arose as to the basis on which international organizations could be subject to the domestic law of States. This was, he said, a matter to be resolved through individual agreements between States and each organization. It was inappropriate for such a matter to be considered in the context of the current topic.

443. As to the future work of the Commission on the topic, support was expressed for the Commission's conclusions set forth in paragraph 267 of its report and, in particular, for the Commission's recommendation that the Special Rapporteur should proceed with great prudence and present a schematic outline of the subject-matter to be covered by the various draft articles he intended to propose on the topic as a whole. It was hoped that the Special Rapporteur and the Commission would be in a position to provide as complete a definition as possible of an international organization as a subject of international law, a definition which was currently lacking.

444. The suggestion was made by one representative that, if work on the topic was to continue, the views of States should be submitted to the Commission as well as information on the status of the multilateral conventions on the subject. The suggestion was also made by another representative that the views of international organizations themselves should be sought. The questionnaire addressed to international organizations in 1978 had omitted, it was noted, to pose the basic question whether codification and development of the law on the present topic was necessary or desirable.

G. THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

445. Several representatives referred in their statements to the importance of the topic on the law of the non-navigational uses of international watercourses and the urgency of reaching acceptable solutions to the problems of fresh water. Regret was expressed that, due to circumstances beyond the Commission's control, there had been delays in work on the topic and the momentum had apparently been lost. The Commission would, it was hoped, assign top priority to the topic in the future.

446. Some representatives considered the topic to be the most urgent and one of the most important topics currently before the Commission. Note was taken in particular of paragraph 287 of the Commission's report which referred to "the importance of continuing the work on the topic with minimum loss of momentum, in light of the need to complete the work on the topic in the shortest time possible", as well as to the Commission's confidence that it would be able to bring its work on the topic to an early, speedy and successful conclusion without any break in continuity. Hope was expressed that there would be specific texts to comment upon in 1986.

447. Representatives welcomed the appointment of the new Special Rapporteur, Mr. Stephen C. McCaffrey.

448. A number of representatives agreed with the Special Rapporteur's proposals concerning the manner in which the Commission might proceed with its work. Satisfaction was expressed that the Commission intended to build on the progress already achieved and to aim at further progress in the form of the provisional adoption of draft articles. Such an approach was considered appropriate in the light of the complexities of the subject.

449. To ensure that its work was brought to a successful conclusion the Commission and the Sixth Committee should, it was said, endeavour to find formulations that would protect the interests of all States. The new draft articles to be submitted should, it was said, take account of the various observations already made and try to reconcile divergent opinions in order to obtain general approval. Confidence was expressed that the Commission would strike an appropriate balance and build on work carried out so far while avoiding the temptation to abandon key perceptions already accepted by the Commission.

450. The point was also made that, in the light of the need to complete work on the topic as soon as possible and to reach generally acceptable solutions, State practice and well-established customary rules should not be overlooked. Similarly, it was deemed worth recalling that, in adopting its resolution on the law of international watercourses in 1970, the General Assembly had noted that it had been agreed in the Sixth Committee that intergovernmental and non-governmental studies on the subject should be taken into account by the Commission in its consideration of the topic.

451. One representative noted that, at the present stage, an observation was necessry with respect to the aim being pursued. The Commission, in paragraph 288 of its report, stated that its task was "to find solutions that were fair to all interests and thus generally acceptable", whereas in paragraph 273, the Commission had stated that it was "possible to identify certain principles of international law already existing and applicable to international watercourses in general". These two apparently paradoxical statements were not so in reality, he said, because the question of international watercourses simultaneously concerned both the codification and the progressive development of international law, within the meaning of Article 13 of the Charter.

452. Some representatives, however, considered that efforts should focus on achieving a correct balance between the rights and duties of all riparian States, an objective which the Commission had not yet achieved. The subject did not lend itself to effective codification unless efforts were restricted to the drafting of guidelines. Doubts were expressed with regard to certain concepts contained in the present proposed draft articles. It was impossible, it was said, to establish universal regulations. As the obligations with respect to the use of various international watercourses varied, because of the different types of and views concerning watercourses, such obligations lent themselves more appropriately to codification in regional agreements, rather than in an international convention. Each watercourse had its sui generis nature, and many States were not familiar with

the notion of international watercourses. There did not seem to be any need for a convention, guidelines would be sufficient. The only way to define an international river system was by means of a convention between the riparian States. The deliberations at the thirty-seventh session of the Commission had indicated that there was conflict on that point between members. The legal régime governing watercourses should, it was said, be developed principally by the riparian States in order to determine properly what the specific elements of such a régime should be. The Commission should accordingly, confine itself to making general recommendations that might be of assistance to riparian States.

453. The view was expressed by one representative that members of the Commission had once again made it apparent that the law of the non-navigational uses of international watercourses continued to be the most controversial subject studied by the Commission. The Special Rapporteur had drawn attention to the fact that no consensus had been reached on the major issues raised in the proposed draft articles 1 to 9, which had been referred to the Drafting Committee in 1984. The Special Rapporteur should, it was said, take stock of the situation and consider, in the light of the discussions in the Commission, the Sixth Committee and the General Assembly, whether, in the interests of realism and efficiency, there was any real chance of the work of codification being completed. This representative, like, he stated, a number of others, was not convinced that the question as a whole was yet ripe for codification. The revised draft of a convention comprising 41 draft articles which had been submitted by the previous Special Rapporteur in his second report (A/C.4/381) had only confirmed their fears. The revised draft articles, both in form and concept, were more like a General Assembly resolution than a genuine legal instrument. Some of the draft articles could be considered only as general guidelines for States, and not binding rules. To include guidelines in a "framework agreement", as had been envisaged, was neither feasible nor useful. Sight should not be lost of the fact that the Commission's main task was to further the codification and progressive development of international law by establishing draft articles destined to serve as a basis for future treaties setting forth legal rights and obligations. Perhaps the law on the subject did not even lend itself to the elaboration of a draft model agreement.

454. Other representatives, however, were of the view that it would be possible, on the basis of the work already carried out, to draw up general rules on international watercourses, as well as rules to facilitate co-operation among riparian States with a view to improving the management of such watercourses. One representative expressed puzzlement in hearing doubts expressed with respect to the viability of the topic and its vital importance to States, given the absence of such views in the Commission. To stretch the requirement of consent to absolute limits was an invitation to tension and chaos and ran counter to the duty of States to co-operate and to the principle of good-neighbourliness. In view of the increasing scarcity of fresh water, the only rational solution was optimum management through fair allocation and co-operation to satisfy needs in a reasonable manner. The Commission had drawn up a framework convention as a guideline for States, and such work should be applauded rather than impeded by arguments which appeared to have physical characteristics as their sole basis.

455. The view was expressed that the draft articles on the topic could be regarded as a framework agreement, laying the foundations for later agreements on specific watercourses. In view of the diversity of international watercourses in terms of their physical characteristics and of the human needs they served, only general principles should be dealt with at the international level and States should be permitted to enter into specific agreements with respect to individual rivers. The draft should, however, contain principles which were sufficiently precise and detailed to appeal to parties and safeguard the rights of interested parties in the absence of a specific agreement, especially with regard to the reciprocal rights and obligations of States in co-operating in joint management and administration of international watercourses.

456. As to the general principles to be reflected in future work on the topic, it was hoped that the draft convention prepared by the previous Special Rapporteur would serve as a model for States in elaborating agreements on the subject, notably with a view to reconciling the joint utilization of international watercourses with the concept of full sovereignty over natural resources. The Commission was urged to take account of the principles of State sovereignty, respect for permanent sovereignty over natural resources and good-neighbourly relations. According to one view maintained, what was fundamental was the right of permanent sovereignty over natural resources and the right of each State to determine how the watercourses in its territory should be used. The belief was also expressed that the United Nations Environment Programme (UNEP) principles of conduct on natural resources shared by two or more States adopted by consensus at Nairobi in 1978 were extremely useful in codifying the vital topic in question.

457. Some representatives noted with satisfaction that, with respect to the draft articles proposed by the previous Special Rapporteur and referred to the Drafting Committee in 1984, the present Special Rapporteur intended to continue the work of his predecessor without radical departure. The previous Special Rapporteur had, it was maintained, laid solid foundations for further work.

458. Other representatives noted, however, that the possibility of discussing the substance of some of the draft articles already presented should not be ruled out in view of the importance and complexity of the subject-matter, and as no consensus had been reached on some major questions. Interest was expressed in receiving the views of the present Special Rapporteur on the major issues raised by draft articles 1 to 9 proposed by the previous Special Rapporteur. The Commission had, it was said, not been in a position to consider those draft articles and its discussions had resulted only in ambiguous decisions. Also, the basic concepts regarding future regulation had changed three times within a short period, which indicated the need for clarification of the major issues. Serious misgivings were voiced with regard to those draft articles because of their ambiguity and lack of clarity due to conceptual differences of approach. Regret was expressed that two of the basic concepts included in earlier versions of the draft articles had been modified: the concept of "system" and that of "shared natural resource". The elimination of those two concepts in the proposals of the previous Special Rapporteur had removed the justification for several of the other draft articles which, it was urged, should again be the subject of a general debate.

459. The view was expressed by one representative that the concept of an "international watercourse" was not definable in general terms. The only definition possible was through an agreement between particular riparian States. However, the point was also made that the unity of a watercourse, in terms of the interdependence of its component parts, must be recognized: the description of a watercourse should be fundamentally based on the concept of the unity of hydrological cycles and the international character of a watercourse must be determined on the basis of its geographic expanse over more than one State and not merely on the basis of how its water was used. The introduction of the concept of relativity into the definition of the international character of a watercourse was not, according to this view, acceptable. The concept of relativity was prejudicial to the interests of lower riparian States and was based on the erroneous assumption that it was theoretically possible for one State to use parts of a watercourse without affecting use by another State. It would be logical to regard an international watercourse as a shared natural resource that was subject to the principle of equitable distribution.

460. Commenting on specific draft articles proposed by the previous Special Rapporteur, one representative considered that there was vagueness in draft article 4 which had to be addressed; that draft article 5 was of a very novel character, particularly paragraph 2, and questions of substance had to be addressed; that draft article 8 involved a problem of equity in that it did not take into account many factors of paramount importance in the sharing of the waters of an international watercourse, the demographic factor not always being a major factor; and that the consideration of draft article 9 should be deferred, since it touched on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

461. Another representative stated that a matter of concern was the enumeration of factors that would determine "a reasonable and equitable" share of the uses of the waters of an international watercourse. The objective was to harmonize the needs of all parties in the overall availability of water resources. Given the technical feasibility of massive withdrawal or storage of water, or the diversion of the natural flow of an international watercourse, account must be taken of all the factors that adversely affected the overall availability of water. A logical extension of the principle of equitable sharing of the waters of an international watercourse would be to prohibit not only use by or activities of a riparian State that might cause "appreciable harm" to the rights or interests of another riparian State, but also use or activities having an adverse effect on riparian States. An enumeration of factors determining appreciable harm to or adverse effect on a riparian State must necessarily be a part of any agreement on the non-navigational uses of international watercourses.

462. The view was also expressed by one representative that it could prove useful to establish an ad hoc group for the topic.

H. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

1. International liability for injurious consequences arising out of acts not prohibited by international law

463. The appointment of Mr. Julio Barboza as Special Rapporteur for the topic "International liability for injurious consequences arising out of acts not prohibited by international law" was welcomed by a number of representatives.

464. The Commission, it was noted, had received with appreciation the preliminary report of the Special Rapporteur. It was also noted with satisfaction that the Special Rapporteur did not intend to reopen general discussion of the topic and intended to pursue work along already accepted lines. The view was expressed that, although elaboration of draft articles had barely begun, the conceptual structure for the topic seemed complete. It was noted, however, that the Special Rapporteur had raised certain matters of substance on which he might wish to propose changes which he had not detailed up to that time.

465. A number of observations of a general nature were made on the topic.

466. A number of representatives spoke of the importance of the topic, which, they said, had a unique role to play in contemporary international law. The point was made that the topic required greater attention and that it was necessay to establish, for example, the extent to which international law had been consolidated in the matter of nuclear energy and other areas where exceptional technological progress had been made.

467. The view was expressed that, in the absence of a special international convention, no undisputed basis could be found in general international law for a claim in the event of injurious consequences arising from acts not prohibited by international law, as the concept sic utere tuo ut alienum non laedas did not constitute a general principle of international law. The point was made, however, that there was sufficient room on the basis of existing practice for elaborating on such a concept.

468. The view was expressed that the whole thrust of the topic was to place emphasis on principles of neighbourliness and co-operation. States were encouraged but not obliged, it was said, to conclude agreements designed to prevent and, if need be, repair transboundary harm when harmful effects were foreseeable. The responsibility of the source State was not engaged except if there were refusal by a source State to discharge the duty of co-operation.

469. The view was also expressed, however, that the specific confines of the topic had still to be defined, and reference was made to earlier concerns as to the broad approach that had characterized treatment of the topic. Closer examination of the goals to be achieved and of the manner in which they should be achieved was, it was said, necessary.

470. The point was made that under contemporary international law there could be no liability for acts not prohibited by international law except by virtue of an agreement between States.

471. The view was expressed that the Commission should continue its study of the topic with a view to establishing a suitable balance between the freedom of action of States and right to appropriate compensation for damage caused by lawful activities.

2. Programme and methods of work of the Commission

472. A number of representatives expressed general satisfaction with the conclusions and intentions of the International Law Commission concerning its programme, procedures and methods of work, as reflected in paragraphs 297 to 306 of its report. Efforts of the Commission to keep its programme and methods of work under review were welcomed; chapter VIII, section B, of the report of the Commission reinforced confidence in that process. It was said that the report showed that the Commission was able to adapt its working methods while maintaining its high standards in the codification and progressive development of international law.

473. A number of representatives welcomed the establishment by the Commission of a Planning Group whose activities would enable the Commission to use its time more flexibly and rationally. The Commission was urged to continue to review its methods of work with an open mind.

474. Certain representatives, however, referred tothe slow progress of work made on certain topics and urged the Commission to improve its methods of work. All members of the Commission should, it was said, participate actively and contribute their experience. Yet it was said that the fact that the Commission had, for some years, not been in a position to submit, on the topics before it, a final set of articles to the General Assembly, was not in itself a reason for concern. The quality of the Commission's work was mainly due to the prudent and scholarly manner in which its deliberations had always been conducted. Expediting work at the expense of the quality of the results would certainly not promote the cause of the development and codification of international law. Moreover, it was said, the work of the Commission could progress more rapidly if it received sufficient support to bring it to a successful conclusion.

475. One representative believed that it would be timely for the Commission's Planning Group to consider somewhat further the Commission's methods of work, since there appeared to have been a disquieting drift in the Commission's efficiency and effectiveness. The Commission and the Sixth Committee might give closer attention to improving the Commission's organization of work and production of documentation, and to the possibility that the approach of Special Rapporteurs to their topics might be sharpened. In the choice of topics which it referred to the Commission, the Sixth Committee should avoid those on which there were entrenched political divergences and the Commission, for its part, should refer such topics back to the Sixth Committee. It should not be regarded as incumbent on either a Special Rapporteur or the Commission as a whole to resolve internally and unilaterally all points of difficulty which arose on a topic. The Commission had worked conscientiously and hard, but, although it had considered all items on its agenda except for item 8, its time seemed to have been poorly apportioned. His

delegation, therefore, endorsed the Commission's decision to keep on its agenda for future sessions review of the status of its programme and methods of work.

476. Reference was also made by some representatives to what was perceived to be the overcrowded agenda of the Commission and to the question of the Commission taking up at each session all the items on its agenda. By attempting to consider at each session all items on its overcrowded agenda, the Commission had prepared only a few drafts in recent years, it was said. The overcrowded agenda was also deemed responsible for the length of time between the beginning of work on a topic and the finished draft. Changes of Special Rapporteurs of the Commission's membership were not infrequent, which delayed the work even further. Comments were also made with regard to the role of the General Assembly in referring new topics to the Commission for consideration (see section A, above). Certain representatives felt that it would be useful if the Commission focused its attention on fewer items at each session, instead of trying to cover all the topics on its agenda. This would also assist the Drafting Committee in disposing of some of its backlog.

477. Stress was placed, however, on the importance and difficulty of the subjects considered by the Commission and the fact that several of them overlapped or at least had the potential to do so. Such actual or potential overlaps added to the substantive problems and it was fortunate that consideration of the subjects was concurrent, thus reducing the danger of inconsistencies in the various drafts. It was also remarked that devoting an equal amount of attention to each of the items on the agenda need not lead to a reduction in the number of specific proposals to be drawn up by the Drafting Committee and adopted by the Commission.

478. In introducing the draft resolution on the report of the Commission, the spokesman for the sponsors noted that the following operative paragraph had been proposed for inclusion in the draft: "Encourages the Commission to organize its work by staggering the consideration of some of the topics in its current programme of work, which would enable a more in-depth consideration of its reports". He stated, however, that it had been concluded that it would be appropriate to defer consideration of that useful suggestion until the next session of the General Assembly.

479. As far as planning the programme of work for the thirty-eighth 1986 session of the Commission, representatives expressed general satisfaction with the intentions of the Commission as set out in paragraphs 298 and 299 of its report. The 1985 session had, it was said, positioned the Commission for an exceptionally productive conclusion of the current quinquennium in 1986. It was deemed useful if the Commission focused its attention on topics in respect of which early codification was highly desirable or the study of which was sufficiently far advanced. The hope was expressed that the Commission, at its thirty-eighth session, would complete its first reading of the draft articles on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and the topic of jurisdictional immunities of States and their property. It was also noted that the Commission, in its report, had acknowledged that it would be highly desirable to complete a first reading of Parts Two and Three of the draft articles on State responsibility.

480. One representative considered as optimistic the hope expressed in the Commission's report that it would finish the first reading of the draft articles on the status of the diplomatic courier and of the diplomatic bag not accompanied by diplomatic courier and of the draft articles on jurisdictional immunities of States and their property at its next session, before the conclusion of its current term of membership. As for the Commission's expressed desire to also complete a first reading of Parts Two and Three of the draft articles on State responsibility, he said that the language used by the Commission suggested that it had little hope of doing so.

481. One representative hoped that the Commission would make greater efforts at its next session to complete its work on the topics whose study was sufficiently far advanced and hoped that it would find the time to look into the possibility of proposing new wide-ranging programmes of work. That would make allowance for basic needs in the field of the codification and progressive development of international law on the threshold of the twenty-first century.

482. Regarding the question of the documentation of the Commission, the view was expressed that it was too lengthy, which hampered comprehension and entailed additional costs. Also, it was hoped that the Commission would make an effort to ensure that its report was circulated earlier. Certain representatives, moreover, referred to the need to improve the quality of documents in the Spanish language, particularly translations.

483. One representative said that presentation, in the Commission's report, of the work on a topic, which followed the sequence of work in the Commission, did not facilitate an understanding of such work. While the Commission clearly needed to do its work in different stages, the question was whether it would not be feasible in the preparation of the Commission's report to use a methodology which, in one place in the report, would reflect the Special Rapporteur's presentation of a particular article with the related commentary, the Commission's examination of the particular article, any revision of the article by the Special Rapporteur, and the work of the Drafting Committee on the article. If such an approach was not technically feasible, a methodology of presentation which would approximate as far as possible such an approach would be desirable.

484. Another representative recalled that the commentaries prepared by Special Rapporteurs on earlier topics most successfully handled by the Commission amounted to scholarly expositions of the relevant international law. In his view, this was not so clearly the character of commentaries on some of the topics currently being studied by the Commission. Those commentaries tended to be little more than a compendium of views expressed in debate which could, at their worse, do more to obscure than to clarify the provision under discussion.

485. Representatives who referred to the question of the Yearbook of the International Law Commission expressed concern about the delay in its publication. Such delay was extremely regrettable because the required dialogue between the Commission and the legal experts of States was only possible when the results of the Commission's work were accessible. It was considered essential to expedite the publication of the Yearbook and it was hoped that the Secretariat would take all necessary steps for its speedy publication.

486. Support was also expressed for publishing a revised, updated version of the valuable reference work entitled "The Work of the International Law Commission".

3. Co-operation with other bodies

487. Representatives welcomed the constructive co-operation between the International Law Commission and regional bodies active in the field of international law, namely, the Arab Commission for International Law, the Asian-African Legal Consultative Committee, the European Committee on Legal Co-operation and the Inter-American Juridical Committee.

4. Gilberto Amado Memorial Lecture

488. Appreciation was extended to the Government of Brazil for having made possible the holding in 1985 of the Gilberto Amado Memorial Lecture.

5. International Law Seminar

489. Representatives stressed the importance and usefulness of the International Law Seminar held during the sessions of the Commission, particularly for nationals of developing countries, which gave participants the opportunity to become better acquainted with the work of the Commission as well as of other United Nations organs and international organizations in Geneva. The view was expressed by a number of representatives that care should be taken in the selection of participants to ensure that deserving candidates from all regions, and in particular all developing regions, were given the opportunity to attend. Tribute was paid to Governments which continued to provide fellowships. The representatives of certain States indicated that, as in the past, their Governments would make fellowships available to contribute to the participation of nationals of developing countries. The hope was expressed that funds would also be forthcoming from other sources.

490. Concern was expressed regarding the financial difficulties which threatened the holding of future International Law Seminars. An appeal was made to States that had made generous contributions in the past to raise contributions so that the Seminar could continue to be held without interruption. Moreover, other Governments which possessed the necessary resources were urged to give serious consideration to financing the Seminar.

491. One representative of a developing country appealed to other developing countries to follow his own country's example by making at least symbolic contributions on a continuing basis towards defraying the costs of International Law Seminars held in conjunction with sessions of the International Law Commission. The seminars served primarily the interests of the developing world. Regular contributions, no matter how small, would represent a token recognition of their value.

Notes

1/ Official Records of the General Assembly, Fortieth Session, Supplement No. 10 (A/40/10).

2/ Ibid., Fortieth Session, Sixth Committee, 23rd to 36th, 46th and 47th meetings.

3/ Item 133 was considered by the Sixth Committee at its 23rd to 36th and 50th meetings, held between 28 October and 12 November and on 2 December 1985. Ibid., 23rd to 36th and 50th meetings.
