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New York

SUMMARY RECORD OF THE 46th MEETING

Chairman: Mr. CALLE Y CALLE (Peru)

later: Mr. EL-BANHAWY (Egypt)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 121: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-THIRD SESSION (continued) (A/36/10 and Corr.1 and A/36/428)

1. Mr. ROSENNE (Israel), referring to chapter II of the report (A/36/10), concerning succession of States in respect of State property, archives and debts, emphasized the extreme complexity both of the topic itself and of the commentary which accompanied it. A very detailed examination of the chapter and of its wide implications would be necessary before it was possible to take any position on it. He was glad to see that the comments made in recent years by his delegation on various provisions had been followed through the Commission.

2. In connexion with the recommendation recorded in paragraph 86 of the report that an international conference of plenipotentiaries be convened to study the draft articles and to conclude a convention on the subject, he questioned whether the kind of anonymity preserved by foot-note 87, which merely indicated that certain members had reserved their position on the recommendation, was really appropriate. While his delegation was currently unable to express any view on that recommendation, it would, if pressed, be unable to support it. It would be appropriate to place the item on the provisional agenda of the thirty-seventh session of the General Assembly, at that session it might be possible to deal with the substance of that very important question and to have a clearer picture of what kind of conference of plenipotentiaries was being envisaged. Should the majority of the Committee favour a debate limited to that one topic the following year, the Secretariat should assist by providing a memorandum on the suggested organization of the conference, its cost, its duration, its possible timing and other relevant matters.

3. Significant progress had been achieved on the question of treaties concluded between States and international organizations or between one or more international organizations, dealt with in chapter III of the report. However, there was a certain contradiction between the first sentence of paragraph 105, which referred to the final approval of articles 1 to 26, and the second sentence, which spoke of making "minor drafting adjustments" to those articles. That, together with the reference in foot-note 593 to the possibility that the new article 5 might make it possible to resolve "various other questions", and the fact that in paragraph (3) of the commentary to article 20 both article 5 and article 20 were noted as provisions to which the Commission might return at its next session, indicated that chapter III was not only partial, but more provisional than might at first have been thought. In those circumstances, the Commission should have followed the precedent set in 1965, when it had only partially completed its second reading of the draft articles on the law of treaties, for if it completed its second reading of the draft articles along the present lines, something more than minor adjustments might be required to articles 1 to 26, especially in view of the enlargement and the changed membership of the Commission in the coming year. Consequently, the Commission should not be held too strictly to its statement in the first sentence of paragraph 105.

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4. His delegation greatly appreciated the considerable improvements made by the Commission during its second reading of articles 1 to 26, and was fully confident that that type of redrafting would be applied to the balance of the material.

5. He had been asked to explain the observation which he had made in an earlier meeting of the Committee that the Commission might not be able to complete work on the topic under consideration until 1983. His delegation had always taken the view that a thorough preliminary examination of every article of the 1969 Vienna Convention on the Law of Treaties, was essential, in order to establish if and how it could be applied to a treaty to which an international organization was a party, before the topic itself could be adequately and practically treated. It had never believed that that examination would be the end of the work, nor that a multilateral convention would be the only way of completing it. Indeed, the risk that such a convention might have an unwelcome impact on the 1969 Vienna Convention, by changes in wording or by new interpretations, in his delegation's view, outweighed any possible advantages; in that context, the general tenor of paragraphs 119 et seq. of the report was not convincing.

6. More experience had recently been gained of the practical aspects of the problem, especially from the Third United Nations Conference on the Law of the Sea, which had highlighted, among other things, the concrete implications of the participation of an international organization in a new convention, an issue which demanded a fairly close examination, not only of the Vienna Convention on the Law of Treaties, but also of the draft Convention on the Law of the Sea, in order to establish the nature of the problems involved and how they were to be solved, both politically and technically.

7. In the light of the foregoing, what the Commission needed to do on the topic, after completing its close analysis of the 1969 Vienna Convention, was to produce a set of flexible guidelines for the process by which international organizations could become contracting parties to multilateral treaties the majority of parties to which were sovereign States; all other matters were either secondary or not governed exclusively by the law of treaties and therefore did not need to be included. The full analytical conclusions of the Commission on its second reading of the articles would always be useful and available for reference, probably requiring no further action other than a general debate in the Committee, but the reduction of the large quantity of articles to a series of well-conceived general guidelines would be of the greatest value. The practical details of such participation of international organizations would be a matter for negotiation in each particular case, as it had been in the Conference on the Law of the Sea.

8. However, if the Commission found such a course impracticable, and made its customary recommendation to conclude the matter through an international convention, the Secretariat should, once again, furnish a memorandum on the procedural and organizational problems involved in a possible diplomatic conference on the law of treaties or on any other manner of terminating the topic.

9. There was an additional series of problems, relating to the manner in which the international organizations to which the draft articles were intended to apply

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could become bound by them and be associated in their final adoption. It was possible that close examination of those aspects would in the last analysis reinforce his delegation's view that a formal convention supplementing the Vienna Convention was not the most appropriate way of resolving the topic.

10. In connexion with the topics reported on in chapters IV, V and VI of the report, his delegation currently had nothing to add to what it had stated on previous occasions, but requested that in the topical summary to be prepared on the debate by the Secretariat, appropriate references, especially to his delegation's statements of the previous year, should be included.

11. With regard to chapter VII, the Commission should keep in mind, in connexion, for instance, with paragraph 236 of the report and article 2 on "couriers and bags not within the scope of the present articles", that international organizations were not in a position to guarantee reciprocity, one of the most important elements of diplomatic law. Further, while article 5 emphasized the duties of the diplomatic courier, the Commission might find it desirable to strengthen the protection granted to him and to the official bag he was carrying. Those two observations were without prejudice to his delegation's basic view that existing diplomatic law, if properly interpreted in good faith and applied, was adequate for normal purposes.

12. His final observations related in general terms to the preparation of the report. His delegation wished to reiterate its earlier appeals that the Commission's annual reports should be much less repetitive, especially when they were interim reports, and the commentaries much less discursive. There was no need for a repetition of the detailed considerations which had led the Commission to its conclusions; those were a matter for the reports submitted to the Commission by its Special Rapporteurs and other documents. In that connexion, his delegation had been shocked to learn that those reports were no longer distributed or easily available in New York and joined with other delegations in asking for the situation to be rectified. If necessary, that matter could be mentioned specifically in the Committee's report to the General Assembly, and form the subject of a formal decision.

13. Both the Committee and the Commission should be aware of the comments of the Secretary-General on the report of the Joint Inspection Unit on control and limitation of documentation in the United Nations system (A/36/167/Add.2) and particularly the comments on recommendation 3; while it was not practical or desirable to establish rules for the maximum length of its reports, the Commission would do well to keep in mind the general problem of the quantity of current documentation and draw the implications of the Secretary-General's observation that the General Assembly might alternatively "decide that reports submitted to it by any body that received written meeting records (verbatim or summary) should not, save in exceptional cases, include a summary of the debates".

14. His delegation was even more critical of the excessive delay, worsening from year to year, in the publication and distribution of the annual report, which was regrettably attributable, in his view, to defective administrative arrangements. The report of the 1981 session of the Commission, which had terminated on 24 July, had not been distributed until after the Sixth Committee

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had started its substantive work, and under those circumstances it was all but impossible for delegations to obtain the views, however preliminary, of those whom they represented. The Conference on the Law of the Sea had proved that the Secretariat was quite capable of producing long and complicated documents in six languages in a relatively short space of time, and he understood that with modern techniques of document reproduction it would be possible to speed up considerably the preparation and publication of the Commission's report, regardless of its length. He therefore hoped that, in a spirit of co-operation, something would be done to effect the necessary improvement in the distribution of reports in the future, a comment which applied also and above all to the report of the United Nations Commission on International Trade Law, which in the current year had been delayed inexplicably and to an extraordinary degree. Indeed, it was astounding how many of the documents on matters requiring decisions had not been in time for the session of the Committee; some, indeed, were still not available in all the languages. He regretted the necessity of ending his statement on such a note, and could only hope that strenuous efforts would be made, before the next session, to prevent any further deterioration in the situation.

15. Mr. DIAZ GONZALES (Venezuela) said that as the Commission approached the end of its five-year mandate, it was an appropriate moment for general evaluation of its work and the way in which it had executed the instructions of the General Assembly. In his delegation's opinion, the working methods and procedures used by the Commission thus far had proved appropriate and effective; any change in them, or in the Commission's structure and functioning in general, would be undesirable and unjustifiable. Despite the criticisms heard from some quarters, the results obtained by the Commission were fully satisfactory.

16. Attempts to speed up the process of codification and, especially, the progressive development of international law would not necessarily be positive and might even be counterproductive. In cases where it had been decided not to entrust the elaboration of an international legal instrument to the International Law Commission, - the interminable negotiations of the Third United Nations Conference on the Law of the Sea being an outstanding case in point - the results had been very disappointing, whereas whenever the preparation of the legal foundation of a topic had been separated from the political negotiations and entrusted to the Commission, the basic working document produced by the latter had greatly facilitated successful negotiations among States.

17. The Commission had not, as some had asserted, remained static in its methods but had evolved and striven to adapt to the changing circumstances of a world society in constant flux. The changing membership of the Commission, particularly with the invaluable contribution of members from States which had become independent since the end of the Second World War, had also naturally, brought about gradual changes in the Commission's approach to its work, giving greater importance to the progressive development of international law, alongside the traditional work of codification. That evolution was, of course, provided for in the United Nations Charter and in the Commission's Statute. However, the genuinely new factor was the fact that the many nations which in the past had been the passive subjects of colonial rule were now in a position to participate

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actively in the elaboration of international law, rendering inevitable the advent not only of the new international economic order but also of a new international legal order, adapted to the needs, interests and aspirations of the whole of the international community and not, as in the past, to those of a small privileged group.

18. His country, a traditional defender of the rule of law over that of force, accorded great importance to the work of the Commission, whose useful contribution to peace and to peaceful international coexistence was undeniable. Indeed, the results of its work had been so successful that texts prepared by it had been used as reference documents by the International Court of Justice, as the representative of France had pointed out, even before they had been adopted by a diplomatic conference or, indeed, by the Commission itself.

19. The draft articles on succession of States in respect of State property, archives and debts contained in chapter II of the report (A/36/10), were a good example of the new approach taken by the Commission, enabling it to harmonize the traditional process of codification with the progressive development of international law. The draft articles not only embodied State practice and customary law but also incorporated concepts designed to preserve the inalienable rights of newly independent States, and he commended the inclusion of the principle of equity - which had been established by many authorities, among them the International Court of Justice, as being "an independent and autonomous source of law", - as one of the principles underlying the draft articles.

20. One of the most important draft articles on that topic was article 14, which was an example of the progressive development of international law and sought to safeguard the principle of the permanent sovereignty of each nation over its natural resources, which had been affirmed unequivocally in a number of General Assembly resolutions and other United Nations instruments.

21. The draft articles in general had been prepared in such a way as to be capable of serving as a basis for the conclusion of a convention, as indicated in paragraph 62 of the report. His delegation agreed with the view expressed by the Commission in paragraph 63 that there were grounds to affirm the value of a codifying convention as an instrument for consolidating legal opinion regarding the generally accepted rules of international law on the topic and that experience had shown that a convention was likely to be regarded as more authoritative and accordingly be more effective as a guide, thereby achieving general agreement as to the content of the law which it codified and becoming the accepted customary law on the matter. His delegation endorsed the recommendation contained in paragraph 86 of the report that the draft articles should be submitted to an international conference of plenipotentiaries with a view to concluding a convention on the subject.

22. With regard to the topic of treaties concluded between States and international organizations or between two or more international organizations, he congratulated the Special Rapporteur, on his work, which had enabled the Commission to improve the draft articles in line with the comments of Member States and of the Sixth Committee. He hoped that the Commission would be able to complete the second reading of the remaining articles at its next session.

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23. Turning to the topic of State responsibility, he noted that the discussion in the Commission had been of a preliminary nature, and agreed that a plan should be drawn up for the drafting of part 2. The Commission should proceed on the basis of the articles in part 1, already approved in first reading. There should still be opportunities for some revision and reciprocal adjustment during the second reading. His delegation also agreed that part 2 of the draft should begin with an article establishing the link between the articles in part 1 and those in part 2, in the form of a statement that "an internationally wrongful act of a State gives rise to obligations of that State and to rights of other States in accordance with the following articles" (A/36/10, para. 154).

24. With reference to articles 1 to 5, which had been referred to the Drafting Committee, his delegation had some doubts about their current drafting and structure. It would be better to combine articles 1 to 3 in a single article relating to the rights and obligations of the author State, the injured State and other States, and providing that those rights and obligations should be affected only by a breach to the extent stipulated in the other articles in part 2. That would avoid the impression given by the drafting of articles 1 to 3 as proposed that those articles tended to protect the State that had committed a wrongful act.

25. With respect to international liability for injurious consequences arising out of acts not prohibited by international law, he said that it was not yet clear to his delegation what the content, scope and aim of the topic was to be. States often determined by agreement the conditions in which potentially dangerous activities could be carried out. By concluding agreements the States precluded the possibility of wrongfulness in their mutual relations, and replaced it by obligations relating to the harmful consequences of acts prohibited by international law. Once rules were worked out to regulate certain activities, rights and obligations were established; rights that could be demanded by one State, and obligations that would have to be met by another State. The failure to meet such obligations would naturally give rise to a wrongful act. There was thus no question of a lawful act that could give rise to consequences harmful to the interests of another State. The States remained within the boundaries of what was legally permitted in carrying out certain activities within the limits of their own jurisdiction. Such activities might give rise to harmful consequences, and the aim was to attempt to regulate, by laying down rules of international law, not the activities themselves, but their consequences. Nobody, for example, could prevent a State from building a nuclear plant in its own territory, but the State concerned must meet the obligation to respect certain rules to prevent pollution of the environment of neighbouring countries. When legal rules established obligations for a State, even within its own jurisdiction, together with rights that could be exercised by another State, the action that produced wrongfulness ceased to be a lawful act entailing international liability and became a wrongful act coming under the heading of general responsibility for wrongful acts. Consequently his delegation did not see how it would be possible to establish rules of international law to regulate the consequences of lawful activities carried out by a State within the limits of its own jurisdiction.

26. With respect to the distinction between the "primary" and "secondary" rules, his delegation considered that, like all abstractions, it could distort as well

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as illuminate. The "gray" area between the two types of rule was too broad, and his delegation was not fully convinced that it had been possible to respect the distinction completely in part 1 of the draft articles on State responsibility. His delegation also had serious objections about the duty of care, which it would explain at a later date. In accordance with the rule enunciated by the International Court of Justice in the Corfu Channel case, whenever a State within whose territory or control substantial transboundary harm was generated and the State had knowledge of the harm, or means of knowledge, and opportunity to act, the test of attribution had been satisfied. It was not necessary to describe that rule, which had an objective character, as a reflection of the duty of care. A reference in any context to the duty of care had moral but not legal value.

27. With reference to the Trail Smelter case between Canada and the United States, his delegation was not convinced that the correct conclusion had been drawn. Before the arbitral award it would have been possible to speak of a wrongful act, but once the decision had been accepted by both parties the consequences of the smelter's activities entailed responsibilities for one of the States, which thereby incurred an obligation to compensate the other States for the damage caused, because such consequences were regarded as wrongful by virtue of the arbitral award, in other words, by virtue of a rule in force between the parties. Even in internal law States were increasingly regulating pollution, which was punishable by law. The regulation of polluting activities by legal provisions was becoming an important part of the internal legal order of States. In any case the acts concerned were wrongful and not lawful.

28. That left the question of unforeseen accidents to be resolved. There the problem was how to establish means of reparation of a harm, if the nature and scope of the act causing the harm was not known. His delegation had serious doubts about the viability of the topic. If it was agreed that the study should continue, it should be undertaken first at a general level. Venezuela supported the view that in modern conditions useful activities that could produce harmful transboundary effects should be regulated if any regulation was necessary under international law, with minimal recourse to rules of prohibition. In any case there should be particular regard, inter alia, for what was laid down in principle 23 of the Stockholm Declaration on the environment, relating to the circumstances of developing countries.

29. Turning to the topic of jurisdictional immunities of States and their property, he said his delegation had some reservations about the wording of draft article 6, paragraph 2, since the words "in accordance with the provisions of the present articles" seemed to indicate that article 6 was replacing other independent legal provisions. Venezuela considered that the drafting of article 8 should be amended to avoid giving the impression that it was establishing an absolute and unlimited immunity. It would be better to refer to complete immunity. It was also inappropriate that the draft articles appeared to be based on the idea that jurisdictional immunity existed solely in so far as it was established in the draft articles. It would be better to adopt the principle reflected in article 15 of the 1972 European Convention on State

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Immunity, which established that a State was entitled to immunity from jurisdiction except in a number of cases mentioned in articles 1 to 14 of that Convention.

30. With respect to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that Venezuela continued to believe that there was no point in drafting a separate convention on the subject, considering that the relevant multilateral conventions in force were sufficient to regulate all matters relating to the diplomatic courier.

31. It was most regrettable that the Commission had not dealt with the law of the non-navigational uses of international watercourses at its thirty-third session. It had rightly decided that the new members of the Commission should elect the new Special Rapporteur on the topic. Nevertheless, he hoped that the topic would be given high priority in the Commission's future programme. His delegation wished to thank the outgoing members of the Commission for the valuable work they had done during the past five years.

32. Mr. GÖRNER (German Democratic Republic) said that in view of the great importance of the Commission's work on State responsibility and the amount of time it had spent on it, the progress made thus far was not satisfactory. It appeared necessary to adopt a specific plan for the speedy continuation of the work. He endorsed the comment of the Brazilian representative at the 43rd meeting that the Commission's task in preparing part 2 of the draft articles would be easier if some basic questions were clarified by careful consideration of a plan of work.

33. His delegation would not comment on the five draft articles on State responsibility before the Committee at the current stage, when the general structure of part 2 of the draft articles was not yet clear; it had already pointed out at the preceding session that the work on part 2 of the draft articles should proceed directly from the provisions of part 1. Once the meaning of the term "internationally wrongful act" had been defined in part 1, the point was to define the content of the legal situation generated by an internationally wrongful act, in other words to outline the new legal relationship established by a State's commission of a wrongful act and the duties arising as a result. The measures taken to remedy such wrongful acts were conducive to enforcing the original international obligation that had been breached. His delegation shared the view of some others that the new rights of the injured State, for instance the victim of aggression, and the positions of third States in respect of the situation created by the internationally wrongful act, must be the essence of part 2 of the draft articles. The Commission should concentrate in particular on drafting articles on international responsibility for international crimes, since such articles had a central place within the rules of State responsibility. The work on the topic was one of the most important before the Commission, and his delegation consequently supported the proposal that the resolution to be adopted in 1981 should expressly provide for the work to be continued with priority.

34. His delegation had followed with great interest the work on international liability for injurious consequences arising out of acts not prohibited by

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international law, because specific regulations of liability could have a considerable influence on the application of an international treaty, or even on the readiness of States to conclude a treaty. The discussions held thus far on the theoretical aspects demonstrated the complexity of the question. It was appropriate that future work should be based on an analysis of existing international treaty practice. While the court decisions considered by the Rapporteur were informative, they provided no reliable evidence of an overwhelming or even general legal opinion. An analysis of State practice would certainly also be useful in determining the content and scope of the terms used.

35. His delegation supported the view of the Special Rapporteur that State responsibility and liability for injurious consequences arising out of acts not prohibited by international law should not be seen as contradictory or competitive. That implied the understanding of the liability rules as auxiliary, additional or procedural rules, which should be applied in those instances where a primary rule of liability existed. However, it was doubtful whether such a rule already existed in customary law, or whether it could be formulated in so abstract a manner that it could be applied to all conceivable circumstances. If not, then such rules could be developed only for those partial issues which were either not covered, or insufficiently covered, by a special treaty régime.

36. The German Democratic Republic firmly supported the view already expressed in the Commission that in view of the objective difficulty in developing a general rule of liability for all spheres of application, it appeared necessary always to put a rule of liability on a contractual basis and to observe that different circumstances required different treatment. Liability presupposed specific contractual or otherwise agreed regulations. His delegation supported the Special Rapporteur's view that the concept of strict liability could not be taken as a basis for the work on the topic, and it also agreed with the view expressed in paragraph 174 of the report that two classes of case - unforeseeable accident, and circumstances precluding wrongfulness - should be reserved for further consideration. With respect to the scope of the rules to be developed on the topic, he said that the precise determination of the scope of any set of rules was very important for its operation, particularly when the treatment of such global issues as the protection of the environment was concerned. In that field there were a number of individual treaty regulations and additional regulations were being developed within the framework of the United Nations Environment Programme. He therefore doubted the advisability of considering such a general scope of application as that introduced in the discussion under the formula "common heritage of mankind" since such a term appeared to be too vague to be generally applied in the present context.

37. Mr. RAKOTONDRAMBOA (Madagascar) said his delegation welcomed the International Law Commission's decision to change the title of the draft articles on the topic of succession of States in respect of matters other than treaties to "Draft articles on succession of States in respect of State property, archives and debts". Inasmuch as the initial title had covered a very broad area, the Commission would have been unable to complete the second reading at its thirty-third session, as

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the General Assembly had requested in resolution 34/141. The new delimitation of the scope of the draft articles reflected a sound approach to the progressive nature of the codification of international law.

38. His delegation noted the extreme importance of article 4, which developed and adopted for the purposes of the draft the principle of non-retroactivity embodied in article 28 of the 1969 Vienna Convention on the Law of Treaties. The wording of the articles in the respective parts of the draft could appear repetitive. The text, however, did gain in clarity; if the draft was to enjoy the same status as the 1978 Vienna Convention on Succession of States in Respect of Treaties, problems of interpretation would have to be avoided.

39. The references to the internal law of the predecessor State in the definition of "State property" and "State archives" in articles 8 and 19 respectively were appropriate. A predecessor State could hardly deny ownership when such ownership was established in its internal legislation. If a predecessor State decided to change the legal status of the property or archives that would otherwise pass to the successor State, the timing of that change in relation to the date of succession would be proof of a deliberate attempt by the predecessor State to side-step peremptory norm of international law. The internal law of the predecessor State served solely to indicate whether or not that State had ownership at the time of the succession; such internal law was not to be taken into consideration when the purpose was to determine whether property was immovable or movable. Should the internal law be taken into account for that purpose, part II, section 2, of the draft articles could give rise to disputes between predecessor States and successor States, instead of constituting a body of generally acceptable solutions. In countries whose legislation derived from the French system, for example, the distinction between public domain and private domain and other distinctions in private law might in practice frustrate the application of the solutions adopted by the Commission in relation to, inter alia, general principles.

40. In the absence of an objectively measurable criterion, his delegation approved of the use of the terms "movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates" in various articles of section 2. The wording was clear, and the criterion relating to "activity", together with the other criteria, should make it easier to apportion movable State property.

41. The commentaries to articles 14, 26 and 36, which were penetrating and referred to precise historical facts and documents, showed how right the Commission was to give preferential treatment to the newly independent States. Underlying the problems of succession of those States was the fact that their legal, political and economic relations with the former metropolitan States were characterized by inequalities and imbalances. Under article 26, paragraph 4, the predecessor State had an obligation to co-operate with the successor State in efforts to recover any archives which, having belonged to the territory to which the succession of States related, had been dispersed during the period of dependence. That obligation went with a concomitant obligation to locate and

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sort the archives before they were passed to the successor State. Two factors made that process more difficult: the archives of greatest importance to the newly independent States were sometimes removed by predecessor States before the territories in question became independent; and the predecessor States were sometimes reluctant to hand over the archives to the successor States. At best, such reluctance was reflected by a deliberate silence on the part of the predecessor State regarding the existence of particular archives. The newly independent State could easily be ignorant of the existence of such archives, to which its nationals had been denied access during the period of dependence. The predecessor States should fulfil in good faith their obligation to co-operate, so as not to thwart the efforts of the successor States.

42. His delegation supported the definition of "State debt" contained in article 31. The addition to the definition of a subparagraph relating to any other financial obligation chargeable to a State would have introduced a heterogeneous element. The question of private creditors was already covered in article 6.

43. With respect to treaties concluded between States and international organizations or between international organizations, his delegation supported the Commission's decision to maintain as close a parallelism as possible with the corresponding provisions of the 1969 Vienna Convention on the Law of Treaties. Despite appearances, that method was difficult and perilous, for the reference text could exert a power of fascination that impaired the critical faculty. The fact that the Special Rapporteur and the other members of the Commission had avoided that pitfall reflected their mastery of codification techniques. His delegation also supported the decision to make the draft articles entirely independent of the 1969 Vienna Convention without renvoi to that Convention.

44. Relatively few States were parties to the 1969 Vienna Convention and the 1978 Vienna Convention on Succession of States in Respect of Treaties. However, the international community could not depart too far from the provisions of those Conventions, that were a reflection of universally accepted practice. Consequently, the limited number of accessions and ratifications was deceptive, and could not be used as a basis for assessing the real impact of the efforts made to codify international law.

45. His delegation was grateful to the members of the Commission who had attended the International Law Seminar; they had generously devoted some of their precious time to the participants, most of whom were from developing countries. Madagascar was also grateful to the States that had made financial contributions to the Seminar.

46. Mr. JAGOTA (India) said that, while it might be true that the work of the International Law Commission had been more effective in the field of codification than in that of the progressive development of international law, its achievements with regard to the law of treaties, the law of diplomatic and consular relations, and indeed the law of the sea, were deservedly well known and had led to the adoption of major international conventions in the 1950s and 1960s. More recently,

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the Commission had also completed its studies on succession of States in respect of treaties, on special missions and on the representation of States in their relations with international organizations of a universal character; conventions on all of those topics had been adopted by plenipotentiary conferences.

47. In the previous five years, the Commission's major contribution had been the development of the law of State succession. The Commission's decision to change the title of the draft articles on succession of States in respect of matters other than treaties to "Draft articles on succession of States in respect of State property, archives and debts", had been taken in recognition of the fact that other topics relating to State succession could best be regulated by customary international law. Article 5 made it clear that the articles should not be considered as prejudging any question relating to the effects of a succession of States in respect of matters not covered by the draft articles.

48. The definition and scope of the subjects covered by the draft articles had also been clarified. Although State archives could have been dealt with under the heading of movable State property, the subject had quite properly been treated separately because of its distinctive character. Similarly, while the scope of the topic of State debts had been restricted, the interests of creditors had been protected by including a special provision in article 34.

49. The structure and subject-matter of the articles on State succession had been aligned with the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on the Law of Treaties. The specific substantive provisions in the articles had been organized into five categories of State succession, a procedure which, at the risk of some element of repetition, contributed to greater clarity. The applicable norms and the framework for a solution became clearer once the concrete case of succession was identified with a specific category of State succession.

50. Recognizing that the disappearance of colonialism and the emergence of newly independent States had been one of the most important developments in the post-war world, the Commission had focused its attention on protecting the legitimate interests of such States, and had progressively developed international law in that field. Article 14 on State property, article 26 on State archives, and article 36 on State debts, which together contained the provisions applicable to such States, had been given pride of place and should receive global support and approval.

51. The draft articles on State archives were flexible but workable. The subject was a sensitive one which required the balancing of many interests, namely the right of a territory or State to possess the archives that belonged to it, its need to possess the archives required for the normal running of its administration, the right of the peoples of the States concerned to development, to information about their history and to their cultural heritage, preservation of the unity of archives, and the promotion of co-operation between the States concerned to provide reproductions of documents of mutual interest. The framework of the rules was generally the same as for those governing movable State property.

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52. In the draft articles on State debts, the interests of creditors had been adequately protected in article 34, and any agreement on State debts which departed from the rules embodied in the articles required the acceptance of the claimant affected third State or other creditor. The main point on which a difference of views persisted was whether the definition of State debt in article 31 should include any financial obligation of a State as such, or whether State debts for the purpose of the articles should exclude debts to a natural or juridical person. Although his delegation supported the restrictive recommendation of the Commission in that regard in the interest of keeping the topic of State succession within its known limits, it was prepared to review its position provided no complications were introduced in the applicable rules of international law. In any case, article 6 did not prejudice the rights and obligations of natural and juridical persons.

53. His delegation believed that the draft articles had reached a stage at which they should be considered by an international conference of plenipotentiaries with a view to adopting a convention on the subject. Whatever the likelihood that such a convention would enter into force in the near future, it would certainly be of great practical value to States.

54. At its thirty-third session the Commission had succeeded in completing a review of articles 1 to 26 of the draft articles on treaties concluded between States and international organizations or between international organizations which, by and large, followed the structure, contents and sequence of the corresponding provisions of the Vienna Convention on the Law of Treaties in the interests of maintaining conformity and avoiding problems of interpretation.

55. Bearing in mind the need to draw a distinction between the character and status of States and international organizations, the Commission had used different terms to describe the representative character of the negotiators and the form in which consent to be bound by a treaty should be expressed. Thus, whereas the representative of a State should have "full powers" the representative of an international organization should have "appropriate powers". Similarly, whereas a State might "ratify" a treaty, an international organization might express its consent to be bound by a treaty by an "act of formal confirmation". The distinction had led to some duplication, as in the case of articles 7, 14 and 16. It had also influenced the deliberations of the Third United Nations Conference on the Law of the Sea, in which the question of participation in the emerging Convention by international organizations and other entities had been under negotiation. It appeared to his delegation, however, that by the time the articles had been completed and submitted for consideration at an international conference of plenipotentiaries, the use of the terms "full powers" and "ratification" might perhaps apply equally and without distinction to States and international organizations, just as the terms "acceptance", "approval" or "accession" applied equally to both.

56. In a treaty between States and international organizations, the most important element was the competence of such organizations in the subject-matter of the treaty and their related capacity to conclude such a treaty. Where such competence of an international organization was not exclusive, so that treaties

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might be concluded in the same subject-matter both by that organization and by its member States, or where the competence varied and grew with the passage of time, relations between States and international organizations as parties to a common treaty could become unclear and troublesome. Where the common treaty established an international institution, it might also be necessary to avoid duplication or plural representation. Such matters were currently under negotiation at the Third United Nations Conference on the Law of the Sea. Draft article 6, which provided that the capacity of an international organization to conclude treaties was governed by the relevant rules of that organization, and the definition of "rules of the organization" in article 2, paragraph 1 (j), might need to be modified to ensure that changes in the capacity and competence of an international organization after the conclusion of a treaty did not affect the scope of the treaty relations between the parties without their express consent.

57. The topic of State responsibility had been before the Commission and the Sixth Committee for a very long time. In 1980, the Commission had begun its consideration of part 2 of draft articles on the subject, which dealt with the consequences of State responsibility. In his most recent report, the Special Rapporteur for the topic had proposed a set of five draft articles, of which three constituted general provisions and two dealt with the obligations of States. It should be pointed out that the provisions in articles 1 and 3 were not intended to protect the author State but to introduce the element of proportionality in the relations between a wrongful act and the response thereto. Draft articles 1 to 5 had been submitted to the Commission's Drafting Committee and a perusal of paragraphs 133 to 160 of the Commission's report (A/36/10) indicated that the Drafting Committee might provide a link between those articles and part 1 of the draft articles on State responsibility. The Drafting Committee should review the text of articles 4 and 5 with the aim of avoiding cross-references. His delegation hoped that the Commission would make every effort to expedite its work on the draft articles.

58. The two reports submitted by the Special Rapporteur for the topic of international liability for injurious consequences of acts not prohibited by international law had usefully defined the scope of the topic and its relationship to that of State responsibility for internationally wrongful acts. His main aim appeared to be to establish an appropriate nexus between the duty of care in the performance of acts not prohibited by international law and the harm or injurious consequences caused by the performance of such acts. Consideration of the question whether the rules to be adopted would be mainly of a procedural character or would be specific primary rules relating to the preservation of the human environment, abatement of transfrontier pollution or injury or exploitation of a shared or common resource, should be postponed until the Special Rapporteur had submitted further reports. His delegation hoped that he would focus his attention on State practice, with a view to indicating trends in the development of international law on the topic and eliminating those areas of the topic which overlapped with that of State responsibility arising from internationally wrongful acts.

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59. The topic of jurisdictional immunity of States and their property, which had been before the Commission since 1978, was of great practical and professional importance to States and their legal advisers. Both the substantive and procedural aspects of State immunity were changing and it would be a difficult task for the Commission and the Sixth Committee to codify and develop the law on the subject. The principal consideration would be the status of the rules on State immunity. Should they be treated, as hitherto, as general rules with specific exceptions based on the sovereign equality of States and the protection and promotion of friendly relations and co-operation between them? Or should they be treated as an exception to the territorial sovereignty of States? The Special Rapporteur had opted for the former viewpoint, and the Commission's report had expressed the hope that, when the specific exceptions had been elaborated, the draft articles would reflect a generally acceptable compromise.

60. Since the Drafting Committee had been unable to review the draft articles so far submitted by the Special Rapporteur, his delegation would postpone its comments on their substantive aspects until the 1982 session of the Commission. However, it wished to commend the Special Rapporteur and the Commission for their practical approach to the problem.

61. Until recently, his country had followed State practice in the United States and the United Kingdom, where it had been changed by statute in 1976 and 1978 respectively. His Government would, therefore, have to review its own position to ensure reciprocity, and hoped to be guided by the Commission's recommendations on the subject and by the comments made by Governments and by delegations in the Sixth Committee.

62. In the debate in the Commission on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier some members had maintained that existing conventions, namely those on diplomatic and consular relations, on special missions and on representation of States in their relations with international organizations, were perfectly adequate. Others had taken the view that a comprehensive and uniform treatment of the problem was feasible. His delegation would await further developments before deciding between the two points of view.

63. The Commission should consider carefully whether the scope of the subject should be restricted to States and their missions and delegations or whether it should include official communications between States and international organizations or between those organizations themselves. In addition, the definition of the term "diplomatic bag" might require careful examination to ensure that the bag contained only official communications between the sending State and its missions or delegations and not other articles which had no bearing on such communications. It might be desirable to include an article on the duties of the sending State. The receiving State should also have the right to prescribe the maximum size of a bag. The Special Rapporteur had stated that there was widespread support for the unconditional inviolability of the bag, and that the likelihood of abuses should not be exaggerated. His delegation agreed with the need to continue with work on the topic, and hoped that its suggestions would help in further reducing the possibility of abuse.

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64. With regard to the question of the Commission's future work, he suggested that the Sixth Committee and the General Assembly should recommend that the Commission give priority to the following topics: firstly, completion of its work on treaties concluded between States and international organizations or between two or more international organizations; secondly, completion of its consideration of the draft articles on State responsibility; and thirdly, the finalization, or substantial progress towards finalization, of its work on the law of the non-navigational uses of international watercourses. On the latter topic, his delegation agreed with the representative of Bangladesh that the subject should be considered by the Commission as a matter of urgency. In that context, he hoped that any differences between his country and Bangladesh would be resolved in a peaceful and friendly manner within the framework of a law which was fair and equitable to both sides.

65. Finally, he said that his delegation was happy to note the friendly and co-operative relations subsisting between the International Law Commission and the International Court of Justice, and between the Commission and the regional intergovernmental bodies concerned with the development of international law.

66. Mr. AL-QAYSI (Iraq) said that under part 2 of the draft articles on State responsibility, the Commission was considering the consequences which an internationally wrongful act of a State might have under international law in different cases. The preliminary report submitted by the Special Rapporteur for the topic (A/CN.4/330) set out three parameters for the possible new legal relationship arising from an internationally wrongful act of a State (A/36/10, para. 136). The first parameter (the new obligations of the State whose act was internationally wrongful) had been primarily the subject-matter of the Special Rapporteur's second report, in which five draft articles were proposed.

67. His delegation agreed with the majority of members of the Commission that the ideas underlying the first three draft articles should be expressed at the outset as a frame for the provisions in the other chapters of part 2 (A/36/10, para. 155). Articles 1 and 4 enunciated the rule that, notwithstanding the breach of an international obligation by a State, the primary obligations and rights of that State should continue to be in force. Inasmuch as the draft articles were dealing with breaches of obligations on the basis of rules of international law, it was not clear why the reference to international law was made in article 3, which dealt with rights, and not in article 1, which related to obligations. Moreover, his delegation did not feel that articles 1 and 3 should be kept apart and that article 2 should be sandwiched between them. Articles 1 and 3 dealt with the interrelated questions of the rights and obligations of the author State, whereas article 2 dealt with the origin of the legal consequences of the act. In addition, the rules stipulated in articles 1 and 3 should, to the extent that they provided a frame for the other chapters of part 2, be made subject to the rules stipulated in the other draft articles, for otherwise the value and importance of the draft articles would be greatly diminished. Accordingly, his delegation believed that there was considerable merit in the suggestion referred to in paragraph 156 of the Commission's report (A/36/10).

(Mr. Al-Qaysi, Iraq)

68. Article 2, which was intended to refer to special régimes of legal consequences attached to a breach of an obligation in a specific field, envisaged the possibility of determining, by the rule imposing the obligation, the legal consequences of a breach of the obligation, in a manner inconsistent with the general rules of the draft articles. While his delegation supported the idea underlying that article, it hoped that the Commission would clearly delineate, in the drafting of the article, the boundary between the rule provided therein and the rest of the draft.

69. It would be useful to indicate in the wording of article 4 the correlation between the new obligations of the author State and the new right of the injured State, and possibly other States, to demand that the author State should adopt certain conduct after the breach. It was essential to balance those two concomitant aspects of the new relationship created by the breach. With regard to article 5, his delegation shared the view that a breach of an obligation concerning the treatment to be accorded by a State to aliens entailed the same legal consequences as a breach of any other international obligation (A/36/10, para. 159). Traditionally, the subject of treatment of aliens occupied a respectable place in the field of State responsibility. However, his delegation questioned the value of a special régime for that subject in an article which would seem to be no more than a provision falling back on that already contained in article 4. The drafting of the two articles, if they were to remain as separate articles, should be simplified. In their current form, they lacked the quality of smooth flow. At any rate, Iraq wished to pay a special tribute to the Special Rapporteur, for the scholarly quality of his reports. It hoped that the Commission would succeed in completing its work on the topic at an early date.

70. The Commission had continued its consideration of international liability for injurious consequneces arising out of acts not prohibited by international law. At the thirty-second session, the Special Rapporteur for the topic had stressed what the main thrust of the topic should be and had referred to the two principles that should be involved in the construction of any regime and in the ascertainment of liability when no regime applied (A/35/10, para. 137). At that session, members of the Commission had taken different views on whether the topic was adequately founded in legal doctrine. The discussions at the thirty-third session seemed to indicate that the Commission was still feeling its way; the divergence of opinion on a variety of points attested to that. For example, the Special Rapporteur had established the structure of a broad obligation not to allow activities within the territory or control of a State to cause substantial, physical transboundary harm to other States and their nationals, as well as a supporting obligation to do whatever might be necessary to make the first obligation effective (A/36/10, para. 176). The divergent reactions to that structure on the part of members of the Commission were summarized in paragraph 178 of the report. Again, whereas several members had expressed reservations as to the status in customary law of the duty of care, some members had placed especially strong emphasis upon that duty, regarding it as the minimum standard of acceptable behaviour in the age of interdependence (para. 179). Several members had expressed doubts about the "gray area" or "twilight zone" which they felt to be represented by the topic (para. 180).

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71. Such examples should not lead to a pessimistic view regarding the future of that complex, yet highly important, topic. There existed some positive indications which permitted cautious optimism. There was the general acknowledgement of the validity of questions relating to the inner content of the topic. There were also the important directives for future work (A/36/10, paras. 195-199), which, if followed, would enable the Commission to grapple with the difficulties inherent in the topic. His delegation agreed that the main field of study should be that in which States had shown a sense of obligation, and that the search for general principles should be pursued, with a willingness to venture cautiously into the realm of progressive development, but also a consciousness that different kinds of situation might require different treatment. It agreed that general rules should be identified on the basis of a pragmatic and empirical examination of the sources, with minimal recourse to rules of prohibition. Iraq also endorsed the views reproduced in the second part of paragraph 183 of the Commission's report. The topic was concerned, not with a breach of the duty of care, but with care as a function of a primary rule of obligation.

The meeting rose at 6.05 p.m.