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SUMMARY RECORD OF THE 40th MEETING

Chairman: Mr. CALLE Y CALLE (Peru)

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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, A/36/428)

1. Sir Ian SINCLAIR (United Kingdom) said it would be helpful if the complex form and content of the Commission's annual report could be modified to make it more easily understandable. A simple synopsis at the beginning of each chapter of the decisions taken at the current session of the Commission, with cross-references to the texts or commentaries where appropriate, would enormously facilitate the task of delegations in preparing their statements.

2. The main achievement of the Commission at its 1981 session had been the completion of its work on the draft articles on succession of States in respect of State property, archives and debts. In general, the draft articles on State property and State archives were broadly acceptable. However, there appeared to have been significant developments on certain points relating to State debts. First, his delegation regretted the Commission's decision to modify the definition of State debt in article 31 to exclude any other financial obligation chargeable to a State. His delegation continued to believe that the draft articles on State debt should cover not only inter-State debts but also debts involving creditors who were alien individuals or corporations. Although article 34, paragraph 1 provided that a succession of States did not as such affect the rights and obligations of creditors, the provision was deliberately narrow, as paragraph (10) of the commentary to article 34 made clear. Secondly, his delegation doubted whether the new article 6, a safeguard clause designed inter alia to ensure that the debts owed by a State to private creditors, whether natural or juridical persons, were legally protected and not prejudiced by a succession of States, was fully satisfactory, since it was based on the mistaken assumption that debts of that nature were in no way regulated by international law.

3. The safeguard clause which the new article 5 represented was highly desirable in view of the limitation of the draft articles as a whole to the succession of States in respect of State property, archives and debts. Articles 18 and 20 to 23 on State archives, which were also new, did not give rise to major problems, since they corresponded to similar texts in the section on State property. He particularly welcomed the new article 24, which stressed the importance of preserving the unity of State archives. He also supported the general approach suggested in paragraph (18) of the commentary to article 26. Article 33, on the date of the passing of State debts, and article 21, on the date of the passing of State archives, must be read in conjunction with the commentary. His delegation had no difficulty with the principle that in each case the date of passing should be the date of succession of States, provided it was clearly understood that some delay might occur in the physical transfer of archives or in the arrangements for the successor State to take over responsibility for the servicing of debts.

4. With reference to those articles of chapter II which were virtually unchanged from earlier drafts, his delegation continued to have some reservations about the

(Sir Ian Sinclair, United Kingdom)

use of concepts such as "equitable compensation" or "equitable proportion" without any indication of the factors which ought to be taken into account in determining what was "equitable"; the explanations in paragraphs 76 to 85 of the report were not very illuminating. He did not dispute the notion of equity either as a balancing or corrective element or, indeed, as a more substantive norm; he was, however, troubled by the uncertain and infinitely variable content of equity in international law at the current stage of its development.

5. More serious reservations applied to new article 36 and paragraph 4 of new article 14, relating as much to the content of the commentaries as to the specific texts themselves. For example, he did not regard the explanations in paragraphs (26) to (32) of the commentary to article 14 as a balanced account of the principle of permanent sovereignty over natural resources and its consequences; nor was the argumentation in paragraph (63) of the commentary to article 36 fully persuasive. It was particularly difficult to understand how the concept of "equitable proportion" might be considered appropriate in other cases of succession but would "raise serious questions of interpretation and possible abuse" if applied in the context of decolonization.

6. The new provisions in article 4 presented no serious difficulty, since they were borrowed almost verbatim from article 7 of the Vienna Convention on Succession of States in Respect of Treaties, which in turn had been based largely on a proposal made by his country at the Vienna Conference on Succession of States in Respect of Treaties. However, article 4 highlighted a fundamental problem. The Commission had recommended the convening of a plenipotentiary conference and the conclusion of a convention on the subject, and set out, in paragraph 63 of its report, a variety of reasons why such a codifying convention would assist in consolidating legal opinion regarding the generally accepted rules of international law in the field. However, such a convention raised, in an acute form, as the Commission emphasized in paragraph (1) of its commentary to article 4, the issue of temporal application. In seeking to regulate by means of a convention any question relating to the succession of States, it would be unwise and unrealistic to ignore the significance of the constraints imposed by the law of treaties. The fact that the Vienna Convention on Succession of States in respect of Treaties, not a particularly controversial instrument, had so far been signed or ratified by so few States probably indicated that States saw no particular advantage in subscribing to a Convention which did not really solve existing problems but simply provided guidelines for the solution of hypothetical future problems. Whatever its effects in terms of consolidation or modification of State practice, its example suggested that the conclusion of a convention on the topic under consideration might not be the most effective means of promoting the progressive development and codification of international law in the field, and that adding to the list of codifying conventions which had failed to attract widespread support from States should be avoided. Governments should have the opportunity to submit written comments on the final set of draft articles and, in particular, to offer their views on whether they should be referred to a plenipotentiary conference with a view to the adoption of a convention or embodied in some other form of instrument. A final decision might then be taken in 1982.

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7. On the question of treaties concluded between States and international organizations or between two or more international organizations, he did not need to add to the lengthy written comments already submitted by his Government on articles 1 to 60, which had been adopted on second reading; in any event, his delegation wished to associate itself in advance with the statement shortly to be made in the Committee on behalf of the European Community. On a general point, his delegation was not fully persuaded by the arguments advanced in paragraphs 119 to 128 of the report against its suggestion that the Commission should review its methodological approach during the second reading process and simplify the draft articles by utilizing the technique of renvoi to the relevant articles of the Vienna Convention on the Law of Treaties. The argument that the technique had not been used previously in codifying conventions was not decisive and the legal difficulties hinted at by the Commission seemed to his delegation to be exaggerated. Nevertheless he noted with satisfaction that in the course of the second reading the text of the draft articles had been substantially shortened and simplified, particularly in the case of the series of draft articles on reservations, which were a very marked improvement on those provisionally adopted on first reading and seemed, in general, to be responsive to some of the detailed points raised in the written observations submitted by his Government.

8. On the topic of State responsibility, the Commission faced difficult problems of methodology in its preparation of a set of draft articles on the content, form and degree of international responsibility. In part I of the draft it had proved possible to formulate abstract secondary rules which could in principle apply irrespective of the nature or content of the international obligation breached or of the seriousness of that breach; however, in part II it would be unavoidable to have regard to those factors, since they would partially determine the redress due to the injured State. His delegation sympathized with the suggestion made by the Special Rapporteur in his second report that the Commission might need to look again at some of the provisions in part I of the draft in the context of its work on part II. For example, there was a clear link between article 5 of part II and article 22 of part I on the question of the exhaustion of local remedies. He was not suggesting a comprehensive review of part I at the current stage but wished to draw attention to the need for coherence in the draft as a whole.

9. There seemed to be a fundamental problem underlying the Commission's very cautious and restrained approach to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The topic inescapably anticipated the perimeters of liability to be established in the course of the Commission's work on State responsibility; it was thus somewhat inchoate and his delegation doubted whether it would be possible at the current stage to formulate "auxiliary rules of a procedural character". The time was not yet ripe for the formulation of such general principles and the concepts of "duty of care" and "balancing of interests" were insufficiently precise to be capable of general application. Further discussion and a further report from the Special Rapporteur were necessary; the Commission should refrain from reaching any final conclusion as to the scope of the topic until further progress had been made on the related subject of State responsibility.

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10. With reference to the question of jurisdictional immunities of States and their property, the general thrust of article 7 was broadly acceptable, but further thought might have to be given to its precise formulation. The article should be so constructed as to be applicable essentially to legal proceedings before the courts and to respect the independence of the judiciary. The article as originally drafted could have been interpreted as countenancing a general exemption for foreign States from the need to observe the laws of the territorial State. The notion of direct or indirect impleading which underlay the wording of paragraph 2 of the draft article also required further consideration.

11. Article 8 as originally proposed presented more problems; as the Commission rightly pointed out in paragraph 221 of the report, there was a clear danger that the wording could have created the impression of establishing a rule of absolute or unqualified immunity. The concept that the exercise of jurisdiction in legal proceedings with respect to a foreign State required the consent of that State was unacceptable as a basis for further consideration.

12. In connexion with the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation shared the reservations summarized in paragraphs 246 and 247 of the report; it would be a quite unjustifiable waste of the Commission's limited time and resources for it to embark on what would amount to little more than a restatement of existing conventional rules. However, it supported the intention not to include the official communications of international organizations; many international organizations would have no need for elaborate protection of their communications, their immunities and privileges being based on the concept of functional and demonstrable need and regulated in each case by Headquarters and other agreements. The same was true of special missions. In short, the superstructure envisaged for the topic so far was too complex; what was needed was an empirical study leading to the formulation of such additional rules as might be necessary to deal with the real problems confronting States, such as the growing abuse of bag privileges.

13. His delegation was disappointed by the Commission's failure to appoint a new Special Rapporteur on the topic of the non-navigational uses of international watercourses, since work on that important subject would thus inevitably be held up for two years. It hoped that the Commission would make an appointment at its 1982 session.

14. As the Commission approached the beginning of a new five-year cycle, it was appropriate to assess the role which it played in fulfilling the purposes set out in Article 13 of the Charter. Despite the positive and impressive achievements of the Commission since its inception in 1949, it had occasionally been argued that in recent years it had allowed itself to concentrate unduly on topics of peripheral interest to the international community. In view of the Commission's overcrowded agenda and the breadth of the topics involved, it was essential for both the Committee and the Commission to be more discriminating in selecting

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priorities and in the treatment of topics. It was necessary to establish a viable work programme for each five-year cycle, which should embrace the completion of work on certain items on the long-term programme of work but also leave room for new but narrowly-framed items which could be completed in one or two sessions.

15. It had also been suggested that the Commission's working methods rendered it unsuitable for the consideration of questions on which rapid action was necessary. His delegation did not accept that, but the Commission must continue to be responsive and receptive to the needs of the international community and be prepared to review its working methods and to envisage new techniques so as to make more effective use of its collective wisdom and experience. The Committee had an equal responsibility in terms of setting realistic targets and being supportive, as well as offering constructive criticism.

16. Mr. SUCHARITKUL (Thailand) observed that the Sixth Committee and the International Law Commission had grown over the years, not only in regard to their workload, which was now considerable, but more particularly in the maturity of their approach to the items entrusted to them. Several major topics had occupied their attention concurrently and would continue to do so for the foreseeable future. The growing number of substantive items assigned to them by the General Assembly reflected the latter's increasing confidence in their ability to perform their duties.

17. In all its work, the International Law Commission had been guided by the Sixth Committee in matters of legal policy, selection of topics and the final substance and form of its work. The Sixth Committee, in turn, had been given ample opportunity to consider and comment on the Commission's work. Both bodies thus shouldered a fair share of the burden of elaborating rules of international law and their close collaboration was in fact indispensable to the balanced growth of international law. Observations made in the Sixth Committee provided an indication of international legal developments and Governments' attitudes and inclinations and should continue to be encouraged as a means of enabling nations large and small to contribute to the formulation of rules of modern international law.

18. With regard to the new procedure of allowing members of the Committee to make more than one statement on item 121, his delegation believed that that procedure should be applied in a liberal manner and should never serve to curtail the freedom of representatives to speak once only on the item. In the long run, the new procedure might prolong rather than shorten the debate but, whatever its merits or demerits, his delegation was not opposed to trying it out as long as representatives were not obliged to divide up their statements into separate parts dealing with different sections of the Commission's report.

19. The Sixth Committee had a useful role to play in making new rules of international law which were more humane and more widely accepted. Every

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procedural change that might affect its role should therefore be watched very closely, especially in regard to developing countries, whose views must be heard if legal rules were to develop equitably. If some of the rules of traditional law had been noticeably intolerable, the minimum requirement of new laws was that they should at least be tolerable to the overwhelming majority of smaller and less rich nations of Asia, Africa and Latin America. Nor could the proposition be tolerated that, because a rule of law was disagreeable to a particular nation or group of nations, the community of nations must regard as binding a rule which was diametrically opposed to the one proposed by the rest of the world. Such an unhealthy attitude still persisted, although less and less so in the Sixth Committee, whose members were concerned for the future well-being of mankind rather than motivated exclusively by national, short-term interests. A legal proposition did not cease to be binding simply because one or two States stood to lose some undue advantages by it. If all members of the Committee, particularly those from developing countries, could make their views heard, that would ensure that international law was improved to serve mankind as a whole. The Committee must therefore be unfettered by procedural impediments.

20. As the Commission's latest mandate came to an end, it should be noted that in the past five years it had added to its already considerable list of achievements draft articles on such topics as succession of States in respect of treaties, the Most-Favoured Nation Clause and succession of States in respect of State property, archives and debts.

21. With regard to the last-mentioned topic, to which the Commission had given top priority, his delegation wished to pay tribute to Ambassador Bedjaoui, the Special Rapporteur whose successive reports had made a material contribution to the monumental task of preparing draft articles on the topic and had helped to guide the Commission towards the adoption of a well-balanced set of articles. Without committing his Government to any part of the draft articles, his delegation wished to state its general agreement with most of the criteria embodied in them. On the whole, the draft articles represented a careful balance between the interests of the parties concerned: the predecessor State, the successor State and third States. Another parallel was strictly maintained between succession to State property and State debts. That parallel was realistic and justified by practice, while the addition of special treatment for State archives was helpful in emphasizing the integrity and unity of such archives as a means of preserving a nation's cultural heritage while allowing related States to share effectively in that common heritage.

22. It was not unnatural to argue that the successor State, in succeeding to the predecessor State, must succeed to its rights and obligations. That general principle was subject to appropriate exceptions, however, where succession to obligations would create undue hardship, especially in the case of newly independent States, which should attain independence with a clean slate. The extent of succession to rights and obligations also varied from case to case depending on the situation and type of State succession.

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23. Although the draft articles confined their scope to succession to State property, archives and debts and were applicable only when succession took place after their entry into force, States could nevertheless agree otherwise. It should also be borne in mind that, in any case of State succession, the overwhelming majority of States were third States whose interest in the effect of such succession must be given due consideration.

24. The definition of State property contained in article 8 was necessarily based on State ownership of property at the time of succession according to the internal law of the predecessor State. Clearly, there must be a State property from the point of view of the predecessor State if it was to pass that property on to the successor State, and the internal law of the predecessor State was thus decisive. That provision was, however, without prejudice to other international controversies vis-à-vis the whole world or any third State which was free to prove a better title under international law. For instance a property considered by customary international law to form part of the common heritage of mankind could not constitute State property and could not therefore be passed to a successor State.

25. The definition of State archives contained in article 19 followed in essence the criteria of ownership of documents under the internal law of the predecessor State at the time of succession, while the definition of State debts contained in article 31 referred solely to the financial obligations of States and excluded all non-financial obligations. Such financial obligations were in turn limited to those owed in personam to another State, international organization or any other subject of international law and excluded obligations towards private organizations, companies or individuals. The expression "international organization" was intentionally vague, as was the term "subject of international law", which was flexible enough to cover any changes that might occur in rules of customary international law, including the concept of "collectivity of States", non-self-governing territories and some legally recognized liberation movements. It was possible that, in the not too distant future, "mankind" and "individuals" would be considered as subjects rather than objects of international law, with direct rights and duties under international law.

26. Another rule fundamental to the regulation of the passing of State property, archives and debts was the consent of the States concerned. Nothing in the draft articles prevented the predecessor State, the successor State or a third State from agreeing to pass on property, archives and debts in whatever way they chose. Relevant treaty provisions regulating devolvement took precedence over other rules of State succession, and the will of the States concerned was supreme.

27. The draft articles did not deal with the effects of State succession on State property of the predecessor State situated in a third State which did not recognize either the new State or the fact of State succession, or with the effect of State succession on State property of a third State situated in the predecessor State but not recognized as such at the time of succession. Recognition had a role to play in both cases. Thus the consent of third States

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might be relevant in giving effect to State succession to certain categories of State property. That applied even more to the passing of State debts, since acceptance by third States seemed to be required for whatever arrangements the predecessor State and successor States might have agreed on, failing which the provisions of the draft articles must prevail. The rights of a third State creditor could not be impaired through the passing of the debt from the predecessor to the successor State without the consent of that third State. The third State continued to have the right to be repaid in full irrespective of the identity of the debtors and whatever division of the debt was decided upon by the predecessor and successor States. The passing of State debts to a successor State was justified by the passing of State property. It should be noted that the predecessor State could not pass on to the successor State any better title than that exercised by the predecessor State. Similarly, the successor State was not expected to take on financial burdens greater than those assumed by the predecessor State through the passing of State debts. Debts in violation of jus cogens would not be honoured in so far as they violated the peremptory norms of international law.

28. Subject to those observations his delegation was prepared to support the convening of a general conference to consider the draft articles on State succession in respect of State property, State archives and State debts, as recommended by the International Law Commission.

29. Turning to the question of treaties between States and international organizations or between two or more international organizations, he said that, as with the Vienna Convention on the Law of Treaties, several years would be needed for the completion and adoption of another instrument governing international agreements between States and international organizations, as broadly defined to include all kinds of intergovernmental organizations. Apart from the type of treaties under current examination there appeared to have emerged a series of treaties of a third kind, binding on States by virtue of a system of international law governing their relations with institutions which were extranational, with funds and interests transcending national boundaries. Questions of treaties with transnational agencies would also have to be dealt with in the future.

30. The type of treaties under current examination contained more inherent difficulties than had been anticipated. While the treaty practice among States had become more or less uniform and firmly established, the diversity among the international organizations was reflected in the absence of established practice concerning treaty-making power. Whereas the smallest of international organizations might have little or no governmental or sovereign power, and thus little power to bind the organization in an agreement with another international organization or a State, there were collectivities of States which partook of some of the sovereign powers of their members, including even the treaty-making power in a limited field such as trade agreements, or legislative power in fiscal spheres. The differences between the organizations themselves meant that in many cases it was difficult to identify the organ or mechanism of treaty-making, or who within the organization was empowered to express its consent to be bound by a treaty. There might be a question whether such an expression of consent

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could be binding without prior authorization from the governing board or council of the organization.

31. The question of treaties between an international organization and its member States or other States was particularly complex, as might be illustrated by various headquarters agreements.

32. Multilateral conventions of a universal character, such as the draft Convention on the Law of the Sea, might be open to signature by participants which were mainly States, but relevant international organizations could also become bound by their provisions and acquire the rights and duties flowing from the convention by virtue of the special nature of their functions. Between States, the 1969 Vienna Convention on the Law of Treaties would normally apply to the convention, but for the various types of international organizations involved, the application and interpretation of the provisions of such a global treaty would have to be governed by the type of draft articles currently under study.

33. Turning to the topic of State responsibility, he said that the whole concept had grown in keeping with a changing world. It could no longer be viewed in the limited context of a South-North relationship in which a poor country was obliged to pay a richer country whose citizens had suffered damage as a result of expropriation, since in the modern world nationalization was as common in the North as in the South. His delegation congratulated Mr. Riphagen on his second report, containing five draft articles. The time dimension was significant in relation to the type of internationally wrongful acts committed. There might be a single act committed once, or there might be a series of acts, or again, there might be a longstanding positive act or an equally longstanding omission. Thus the obligation to desist from the wrongful act would not apply in the case of a single act already committed. The violation of the airspace of a neighbouring State by an aircraft, for example, could not be stopped by causing disintegration of the equipment in mid-air. There would be other obligations such as the duty to leave the foreign airspace, to express regret, and to guarantee that there would be no recurrence of such violations. The unlawful seizure of aircraft or diplomatic premises could be stopped by releasing the aircraft or premises. The obligation for the past was to undo the wrong committed and bring about a return to the status quo. The obligation to reduce or mitigate the damage was related to the obligation to desist from committing further internationally wrongful acts or to discontinue the internationally wrongful act. That would be followed by an obligation to perform belatedly the original obligation that had been breached or to restore the status quo. There would also be obligations for the future, in the form of a substitute performance which in the final analysis would consist of reparation in financial terms.

34. The notion of international liability for injurious consequences arising out of acts not prohibited by international law was elusive because of the constant evolution of international law, since an act not prohibited at one period, such as nuclear test explosions, could be prohibited at a later date; the act concerned would then become an internationally wrongful act for which there would be State responsibility. The time element was therefore crucial. Preliminary issues and some fundamental rules had been discussed, and the topic merited further consideration by the Commission at its future sessions.

(Mr. Sucharitkul, Thailand)

35. As Special Rapporteur for the topic of jurisdictional immunities of States and their property, he wished to thank the members of the Sixth Committee for the comments and observations made during the debate on the topic. Thus the abundance of legislative and judicial materials furnished by various countries had facilitated the search for consistency in State practice.

36. The Commission had already adopted article 1, on the scope of the draft articles, and article 6, on State immunity. With respect to the latter article, it appeared more appropriate to start from the proposition that State immunity was a principle or a rule rather than an exception to a superior norm, since it was an assertion of sovereignty by the State claiming jurisdictional immunity on the ground that since it was sovereign, it was not subject to the exercise of jurisdiction by another State.

37. Article 7, on rules of competence and jurisdictional immunity, dealt with two further elements of the main principle of jurisdictional immunity: the existence of a valid jurisdiction, and the determination of the situation of a proceeding involving another State. In civil law jurisdictions the question of State immunity arose in connexion with the existence and exercise of jurisdiction or competence and the fine distinction sometimes drawn between the two. Thus State immunity was relative to the existence of competence or competent judicial jurisdiction. However, in common law countries the doctrine of State immunity had evolved from the analogy of the position of the local sovereign who was the source of the law, and as such above or beyond local jurisdiction. Sovereign immunity as such was unconnected with the existence of competence and could be claimed by a foreign State regardless of the question of lack of jurisdiction on grounds of private international law or under the conflict rules. The contrast of positions in civil law and common law jurisdictions had rendered less visible the fine relativity between competence and immunity.

38. Another notion that required further clarification was the ascertainment of the validity of a claim of State's interests to justify a claim of State immunity. The proceedings in question must be against the State, which could be directly named as party, or against one of its agents. The definition of "foreign State" as contained in article 2, paragraph 1 (d), and the further interpretation in article 3, paragraph 1 (a), if adopted, would dispense with the need for article 7, paragraph 2, which was designed to identify "proceedings against another State".

39. Article 8 dealt with the element of consent. Jurisdiction was not founded on consent, but absence of consent was a condition of State immunity, whereas the ascertainment of consent would permit the exercise of jurisdiction in a particular proceeding involving a foreign State or in which a foreign State had an interest. Such consent could take many forms: written agreement, ad hoc agreement, agreement in writing, or agreement by virtue of clear and unequivocal conduct.

(Mr. Sucharitkul, Thailand)

40. Articles 9 and 10 dealt with various forms of expressing consent to the exercise of jurisdiction by another State. Article 11 was concerned with waiver of immunity and methods and effects of such waiver.

41. After the Commission had discussed articles 7 to 11, the Special Rapporteur had revised article 7 and combined articles 8, 9 and 11 into revised articles 8 and 9. Article 10 had thus become the last article in part II. Article 7 had been reformulated to set forth the principle of State immunity as an obligation of a State with competent jurisdiction to accord immunity. The draft articles would next be considered by the Drafting Committee, and to indicate the extent of the progress made the Commission had authorized the inclusion of the revised articles 7, 8, 9 and 10, as prepared by the Special Rapporteur in accordance with the trends of opinion of the Commission, as foot-notes in chapter VI of the Commission's report (A/36/10).

42. At its next session the Commission would finalize the draft articles submitted thus far and revised, and begin consideration of further reports dealing with part III, exceptions to State immunity, and eventually part IV, immunity of State property from seizure, arrest and execution.

43. His delegation welcomed the considerable progress made by the Special Rapporteur, Mr. Yankov, in his extensive second report on the status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier.

44. In future the Commission would be considering reports on two other topics, the non-navigational uses of international watercourses, on which Mr. Schwebel had submitted an additional paper earlier in 1981 after his election to the International Court of Justice, and the second part of the topic of relations between States and international organizations, now under preparation by the Special Rapporteur, Mr. Días-González. Since at its next session the Commission would have several draft articles on various topics before it awaiting consideration by the Drafting Committee, it might be advisable for the Drafting Committee to meet as soon as possible.

45. It was gratifying that the Commission had continued to maintain close co-operation with other parties, including the International Court of Justice and regional bodies engaged in the progressive development of international law. The International Law Seminar had been successfully organized during the session. Its programme had been made possible by generous contributions from various Governments; their help was much appreciated, and it was to be hoped that their sponsorship would continue.

46. Mr. RIPHAGEN (Netherlands) said that provided State succession was not the result of acts contrary to international law, the resulting change of sovereignty did not at first sight seem to require the laying down of any general rules of international law except as to the impact on third States. The impact of State succession on treaties concluded by the predecessor State was already dealt with in another Convention. The predecessor State and the successor State would have to face a number of questions arising from the transfer of territory, but in

(Mr. Riphagen, Netherlands)

principle they were free to make any arrangements they wished, and in any case where there was no arrangement, the successor State had full sovereignty over the territory that had passed to it, subject to its international obligations and the treaties which applied after the transfer, and under general international law. It appeared that the draft articles wished to make clear the implications of an orderly transfer of sovereignty over territory. The simple principle underlying those implications was that the successor State not only succeeded in sovereignty over territory, a right under international law, but should also receive a corresponding part of the rights and obligations of the predecessor State that were of a private law nature, governed by internal or municipal law.

47. Two further questions arose. The first was how the successor State should obtain its rights and obligations and the second was what the "corresponding part" was. One thing was clear; although the legal relationship between the predecessor and successor States was governed by international law, the rights and obligations which should pass from one to the other remained rights and obligations governed by municipal law, and were therefore subject to possible changes in the applicable municipal law. Whether such changes in themselves as an "act of State" were allowed by international law or entailed international State responsibility was outside the scope of the rules of State succession. So also was the question of what the applicable municipal law was, in other words, the municipal law of which State was applicable.

48. The first question, namely how the successor State should obtain the rights and obligations concerned, was less important provided the result was achieved, and that the successor State obtained the material means, and assumed the material burdens that went with the government of the territory concerned. Since the rights and obligations, assets and liabilities concerned were governed by internal law the inclination would be to allow the transfer of those rights and obligations to take place through the legal acts normally provided for such transfers in the applicable municipal law system. For instance, the transfer of immovable property in many internal legal systems required a special formal act, and registration thereof in some central office, so that all concerned could know who was or had been the owner. However, the practice of States did not seem to point in that direction, and in any case internal law often did not provide for legal acts for the transfer of debts and archives. But that was a minor matter. International law was interested only in the result and in the corresponding international obligation of the predecessor State and successor State to co-operate in achieving that result. If the material objects involved were easily identifiable, international law might even provide for an "automatic" transfer, although it would still be for the applicable municipal law system or systems to draw the legal consequences within such a system. As to debts, the result required by international law was a purely financial one: part of the financial burden should part to the successor State. But that could be achieved without any change of debtor under the applicable internal law, simply by providing that the successor State should pay to the predecessor State a sum of money corresponding to the successor State's part of the burden which the predecessor State continued to carry. As to archives, the actual transfer for the purposes of enabling the successor State to govern the territory involved could take the form of providing copies of the originals, particularly if the originals had no other value than the information contained therein.

(Mr. Riphagen, Netherlands)

49. There was no need for general rules of international law to deal with such technicalities, since they could best be left to the predecessor or successor States concerned. The meaning of the word "pass" as applied to rights and obligations governed by municipal law had still to be determined by the applicable internal law. Rules of international law had a direct effect within the system of municipal law only if the latter so provided. Of course, a rule of international law might oblige a State to give such "direct effect" to its rules, and municipal courts sometimes gave such direct effect even though the national constitution or other national legislation did not expressly oblige them to do so. In any case, where the general rules of international law were vague, as they often must be in order to cover a variety of situations, they required detailed elaboration by the State or States addressed. Most of the articles drafted by the Commission were of necessity rather vague, referring as they often did to "equity" in the sense of ex aequo et bono rather than in the sense in which the term was used, for example, by the International Court of Justice. On the other hand, where a rule of international law dealt with easily identified objects - such as immovable property situated within a defined territory - there was less objection to automatic application of the rule, although any doubts on the objects involved had still to be resolved by the States concerned, or by the appropriate form of international settlement if disagreement should arise.

50. Much more important was the question of what assets and liabilities of the predecessor State should devolve upon the successor State as a consequence of the change of sovereignty over territory. In that regard the rules adopted by the Commission showed a very serious imbalance. Whereas the rules regarding "property" dealt not only with material objects but also with rights and interests owned by the predecessor State (article 8), including debt-claims, and while "archives" could comprise anything except pure objets d'art, in dealing with "debts" the articles fell back on an exceedingly narrow group of debts, i.e. those owed to another State, an international organization "or any other subject of international law" (article 31). It was clear that, among the liabilities of the predecessor State, the debts it owed to another State or international organization were only a fraction of its total debt. To deal with that fraction alone made no sense, either in economic or legal terms, since, whatever criterion was applied for distinguishing between transferable and non-transferable debts, the person or status of the creditor was always irrelevant. In all cases, and in the rules proposed by the Commission itself, the question hinged on the link between a specific debt and the territory to which the succession related, an issue to which the status of the creditor was obviously unrelated. It was similarly irrelevant when, in the case of a newly independent State, the concept of "fundamental economic equilibrium" was taken into account.

51. Nor could the status of the creditor as a subject of international law be relevant in other contexts. If the obligation of the predecessor State to pay money to another State was derived from a treaty between the predecessor State and a third State, the draft articles on State succession were inapplicable. If, on the other hand, the predecessor State's obligation to pay derived from a

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loan contract or other transaction governed by the applicable internal law, the third State had a position no different from that of any other creditor. It should be borne in mind that the financial burden could in part be shifted from the predecessor to the successor State without any change of debtor by a financial arrangement between the predecessor and the successor State by which the latter paid to the former a sum of money equivalent to part of the payment of the debt by the predecessor State. In short, if a diplomatic conference were to be convened to adopt a convention on State succession in respect of property, archives and debts, article 31 in its existing form could not provide a basis for its deliberations.

52. Turning to the question of treaties concluded between States and international organizations or between two or more international organizations, he said that the Commission and the Special Rapporteur for the topic were to be congratulated on their successful simplification of the texts of the draft articles in second reading. Such a simplification was based on the realization that, in law, treaties to which an international organization was a party were not essentially different from treaties between States. Most of the rules laid down in the Vienna Convention on the Law of Treaties were, in substance if not in wording, fully applicable to both types of treaty. Any additional problems arose from the fact that international organizations had States as their members and were themselves governed by a treaty between those States. However, most of those problems emerged only at a later stage than that covered by articles 1 to 26 of the draft articles approved by the Commission i.e. at a stage subsequent to the conclusion and entry into force of treaties to which an international organization was a party. The relevant factor at the earlier, procedural, stage was that a State and an international organization were both "organizations".

53. As to the contents of treaties to which an international organization might become a party, including the question of possible reservations, there was no difference a priori between an international organization and a State. An international organization was never completely "sovereign", a fact which inhibited its power to enter into treaties inasmuch as it should not accept obligations it could not perform. At the same time the general rules of international law could not prejudge the question of what powers a particular international organization might possess. In that connexion, it seemed strange that draft article 20 did not contain a provision corresponding to article 20, paragraph 3, of the Vienna Convention on the Law of Treaties. It was certainly not excluded that an international organization, e.g. a regional organization, could become a party to an international treaty such as a quasi-universal treaty which was also the constituent instrument of another international organization. If then the regional organization, or for that matter a State, which wished to become a party to that universal treaty intended to enter a reservation, there was no reason for not applying the rule that such reservations required the acceptance of the competent organ of the universal organization of which the universal treaty was the constituent instrument. The requirement that a collective decision be taken on the acceptability of a specific reservation entered by a prospective member was equally valid whether than prospective member was a State or an international organization.

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54. It was at the stage of negotiations on the text of the treaty that any particular procedural problem arising from the possible participation of an international organization had to be solved; in the elaboration of general rules of international law in that regard there was no point in departing from the guidelines of the Vienna Convention. At the next stage, i.e. that of "observance, application and interpretation of treaties", it could be asked whether all the rules of the Vienna Convention on the Law of Treaties could be applied to an international organization participating in a treaty. Of course, there could be no reservations to application of the principle of pacta sunt servanda, and there seemed to be no reason to interpret treaties differently according to the status of the parties. There were, however, a number of other points on which the analogous application of the Vienna rules to international organizations might create problems with respect to the coexistence of sovereign member States and the international organization to which they belonged. Some of the Vienna rules were obviously based on the assumption that a State was either a party to a treaty or a third State. Could such a simple and sharp distinction be applied to treaties to which both an international organization and the States of that organization were parties? Alternatively, should it be affirmed that, in respect of a treaty in which an international organization participated, the member States of the latter were neither parties nor third States? His delegation was inclined to the latter view, but was fully aware that such a solution was not fully adequate to the problems involved. There were in any case reasons for doubting the applicability of articles 34 to 38 of the Vienna Convention, which related to treaties and third States. The main point of difference was that, in the case of a treaty between States, rights and obligations of third States were derived from the treaty itself, whereas in the case of a treaty in which an international organization participated there was an additional factor to be taken into account, namely the treaty governing the international organization itself. If the member States of an organization had rights and obligations under a treaty in which the organization itself participated, those rights and obligations were held by them as members rather than as States, a circumstance which would seem to exclude a priori the direct application of the rules laid down in articles 34 to 38 of the Vienna Convention.

55. A comparable issue arose in connexion with article 29 of the Vienna Convention, which dealt with the so-called "territorial scope" of treaties. Since an international organization obviously did not normally have "territory", the text adopted by the Commission on first reading reproduced article 29 of the Vienna Convention only in respect of a State party to a convention in which an international organization participated.

56. A further question was whether a treaty in which an international organization participated would create rights and obligations for that organization in respect of only some of its member States. The question was of more than merely theoretical concern, and was the subject of very active discussion in the third United Nations Conference on the Law of the Sea. Once again, it appeared that the issue was one which could be resolved within the treaty itself rather than one for which a general or even residual rule could be established.

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57. The sharp dichotomy between States parties to a treaty and third States was also at the basis of article 30 of the Vienna Convention, which dealt with the application of successive treaties relating to the same subject-matter. In first reading the Commission had adopted an article modelled on the Vienna Convention because the "successive treaties" were all treaties in which an international organization participated. The additional problems arising from the relationship between such treaties and treaties between States, one or more of which happened to be members of an international organization, were not such as to call for the elaboration of general rules. Indeed, it might be wise to leave the negotiators of a particular treaty free to address the question and to find a solution without being forced to do so by a residual rule.

58. Mr. GÖRNER (German Democratic Republic) said that his delegation would confine itself to preliminary comments, since it had had only a brief period in which to study the comprehensive report of the International Law Commission (A/36/10), and the drafting of a number of the Commission's codification projects was still at an early stage.

59. His delegation attached particular importance to the Commission's work on succession of the States in respect of matters other than treaties, since such problems had a direct practical bearing on the development of international relations. In the course of the Commission's consideration of that project his Government had submitted written observations (A/CN.4/338). His delegation welcomed the fact that the Commission had, at its thirty-third session, concluded the second reading of the draft articles on the topic of succession of States in respect of State property, archives and debts, and had adopted the relevant draft articles as a whole. The draft articles as adopted provided a sound basis for the elaboration and adoption of a convention, and he paid tribute to the Special Rapporteur, whose 13 reports had been indispensable to the Commission in that area of its work. The early adoption and entry into force of a convention would undoubtedly contribute to the strengthening of legal security in international relations, and his delegation supported the Commission's proposal that a conference of States, be convened to conclude such a convention.

60. It was a matter for satisfaction that the draft articles were, in their current form, a distinct improvement on their predecessors. Furthermore, the Commission had succeeded both in adopting the definitions and terms used in the Vienna Convention on Succession of States in respect of treaties and in preserving, wherever possible, a parallel structure and terminology in the various sectors of the draft. Such harmonization was particularly valuable in ensuring the uniform application and interpretation of the future convention.

61. It was a special advantage of the draft that the three topics dealt with - State property, archives and debts - were treated as being relatively independent, and that the Commission had sensibly confined itself to those aspects of the three topics which were of relevance to international law: a broader consideration would inevitably have infringed upon the prerogatives of domestic regulation. It had also been beneficial that the Commission had incorporated provisions of the Vienna Convention which had been adopted as a result of lengthy negotiations.

(Mr. Görner, German Democratic Republic)

That applied especially to problems relating to the retroactivity of the future convention and to the procedure for the peaceful settlement of disputes arising from the application or interpretation of the convention.

62. The existing draft articles did, however, reveal a number of short-comings. For example, his delegation believed that the future convention should include an article indicating that State debts of a predecessor State which were odious or in conflict with international law could not be subject to the obligation of succession. In addition, the implications of article 6 had yet to be examined: that article must not have the effect of extending privileges to the private creditors of the predecessor State vis-à-vis the successor State or of hampering the new State in the exercise of its sovereign rights, namely the right to establish its own legal order and the right to exercise permanent sovereignty over its natural and other resources. His delegation hoped that such short-comings could be remedied during the negotiations at the proposed conference, and that it would be possible to draft a convention which would take into account the legitimate rights and interests of all States and which would therefore meet with universal acceptance.

63. His delegation noted with satisfaction that the Commission had begun its second reading of the draft articles on the topic of treaties concluded between States and international organizations or between two or more international organizations. His country's position on that project had been outlined on many previous occasions, particularly in his Government's written observations on articles 1 to 60 (A/CN.4/339/Add.6).

64. In respect of the second reading, his delegation thought it necessary to reaffirm its position concerning the definition of the "rules of the organization" as provided for in article 2, paragraph 1 (j). In its current wording the definition left too much room for interpretation in that its coverage was not strictly confined to rules recognized by all the member States of an international organization. For example, it implied, in the context of article 6 of the draft, that violation of the sovereign rights of an organization's member States was not definitely ruled out. Since that might ultimately affect an organization's implementation of a treaty, it was necessary to further qualify the notion of "practice" in such a way as to eliminate what was referred to in paragraph (24) of the commentary to article 2 as "uncertain or disputed practice". One way to achieve greater clarity would be to use the phrase proposed by his Government in its written observations of 1981, namely "the organization's practice established in accordance with the constituent instruments". Such a wording in no way precluded the further development of the treaty-making capacity of an international organization in accordance with international law.

65. In connexion with article 3, his delegation welcomed the fact that the term "entities" had been replaced by the term "subjects of international law". The requirement of the generally recognized principle that international agreements could only be concluded between subjects of international law had thus been met.

(Mr. Gorner, German Democratic Republic)

66. In conclusion, his delegation expressed the hope that in its work on the draft articles the Commission would continue to draw on the comments and observations received from Governments, so that the second reading of the first set of draft articles could soon be completed.

67. His delegation reserved the right to outline its position on the other chapters of the report at a later stage of the debate.

The meeting rose at 6.05 p.m.