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

1. Mr. RIPHAGEN (Netherlands) said he wished to speak first on the topic of jurisdictional immunities of States and their property. The Special Rapporteur for that topic was a well-known expert on the subject, and his previous publications on the question had drawn the attention of the international legal world. Referring to paragraph 225 of the Commission's report (A/36/10), he said that although the practical necessity of a step-by-step examination must be recognized, it might be asked from the logical standpoint whether the exceptions mentioned in that paragraph should not be dealt with before the rules on waiver of immunity by consent and on consent implied by conduct. An immunity could only be waived when it existed. Furthermore, it was necessary to avoid giving the impression that consent, even constructive consent, was the only legal basis for non-immunity.

2. In the area in question the Commission was faced with a conflict of sovereignties. That conflict could, of course, be resolved by one sovereign giving in to another through consent. It had never been claimed that the rules of international law on jurisdictional immunity of States and their property were rules of jus cogens. The main point was to provide for the resolution of the conflict by rules of international law where there was no consent, in other words, to define the rules of international law relating to the scope of the immunity. The changing pattern of international relations required a new look at old practices and rules, particularly since international trade in the widest sense had become vital for all States and Governments of all persuasions were increasing their direct participation in economic activities. How was that conflict of sovereignties to be solved in modern circumstances? The maxim par in parem non habet imperium was a valid starting-point, but it worked both ways, since a State could not use the territory of another State for the exercise of its imperium without the consent of that other State. Thus another technique was needed to resolve a conflict, apart from the consent approach worked out through "waiver", "irrevocable waiver", "implied consent", and "constructive consent". Such a technique involved a differentiation of the sovereignties of both States involved. It was necessary to examine the ways in which that sovereignty was exercised by one State, and the ways in which that affected the exercise of sovereignty by the other State, and to distinguish what was "principal" and what was "incidental" in the various situations. That was not easy, and it might be sometimes necessary to accept a certain amount of arbitrariness in the abstract resolution of the conflict. The problem was illustrated by the general tendency to treat immunity from the jurisdiction of the courts differently from immunity from the direct application of the public force, as in the cases of attachment and execution; non-immunity in the former case did not necessarily imply non-immunity in the latter. Moreover, immunity from the jurisdiction of the courts did not mean that the substantive legal rules of the State of the forum were applicable to the foreign State.

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3. Another point was that the applicability of some types of substantive rules of the forum State must imply the jurisdiction of its courts to administer those substantive rules, irrespective of the status of the persons interested in a given situation. On the other hand, where a legal relationship between States which was governed by municipal law was involved, it might be argued that in case of dispute the defendant State should enjoy immunity from the jurisdiction of the courts of the plaintiff State provided that the courts of the defendant State were competent to settle the dispute. More generally, immunity of a State should perhaps be regarded more as a matter of a forum privilegiatum than as the absence of any forum.

4. In many cases decided by national courts attention centered on the differentiation between the various ways the defendant State acted; consequently, the functional distinction between acta jure imperii and acta jure gestionis was often applied, and the status of a foreign government agency as an entity separate from the foreign State as such was often considered relevant. The separability of imperium and gestio, and the separability of foreign State and State agency, was often doubtful, and it might prove necessary to cut the Gordian knot in some way. It was significant that the United States Foreign Sovereignties Immunity Act of 1976 and United Kingdom State Immunity Act of 1978, although both founded on a perception of what the existing rules of existing customary international law were, had in several instances chosen different solutions.

5. Another general question on which those two national legislations, and indeed the practice of national courts in other countries, differed was the question whether immunity or non-immunity depended on the factors connecting the situation with the forum State, and if so, which connecting factors were relevant. Thus, for example, the United States legislation provided for non-immunity of a foreign State in any case in which the action was based on an act outside the territory of the United States in connexion with a commercial activity of the foreign State elsewhere and that act caused a direct effect in the United States. On the other hand, the United Kingdom Act established a rule of non-immunity for commercial transactions without requiring any factor connecting the transaction with the United Kingdom. In both the United States and the United Kingdom there were other rules which, regardless of the involvement of a foreign State, limited the possibility of bringing a case before a United States or a United Kingdom court if there was no connecting factor whatever. Nevertheless, the question of the limits of national jurisdiction in general was different from the question of State immunity, if only because the latter question was more directly linked with the prohibition under general international law of the exercise of imperium in the territory of another State.

6. All those observations raised the question whether it was really possible to draft a complete set of rules on the topic suitable for inclusion in a world-wide international convention. It should be noted that even the European Convention on State Immunity did not ensure complete uniformity of the rules on State immunity to be applied in the States parties; those States could go further in the restriction of foreign State immunity than the Convention stipulated, although they had to respect immunity for acta jure imperii. That meant that the States parties to the Convention reserved the power to cut the Gordian knot in different ways.

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7. The Commission might best approach the topic simultaneously from two sides, on the one hand trying to formulate a number of reasonably precise rules relating to cases in which every State was ready to recognize the immunity of any other State, and at the same time trying to formulate similar rules relating to cases in which every State was prepared not to enjoy immunity. That double approach, which might narrow the gap, obviously excluded the staging of a general rule followed by exceptions, since that would imply a complete resolution of the conflict in all cases. If general agreement could be reached on such complete resolution, so much the better, but if that proved difficult the double approach seemed worth trying.

8. Turning to the topic of State responsibility, he referred to the statement made by the representative of the United Kingdom at the beginning of the 40th meeting, in which he had stated that while in part 1 of the draft it had proved possible to formulate abstract secondary rules which would in principle apply irrespective of the nature or content of the international obligation breached, in part 2 it would be necessary to have regard to those factors (A/C.6/36/SR.43, para. 8). The Netherlands delegation fully agreed with that statement. Indeed, from the outset of the discussion of the opic in 1969 the Commission had expressed the fear that there could not be one régime of State responsibility but that the breach of different types of obligations entailed different types of legal consequences.

9. In its report on its twenty-eighth session (A/31/10) the Commission had observed that international wrongs assumed a multitude of forms and that the consequences they should entail in terms of international responsibility were certainly not reducible to one or two uniform provisions. Indeed, the differentiation of régimes relating to the legal consequences of a breach of an international obligation was already foreshadowed in several articles of part 1, notably article 19, dealing with international crimes and international delicts, and article 22, dealing with international obligations concerning the treatment of aliens. It would therefore hardly be possible for the Commission to respond to the wish expressed by the representative of Brazil at the 39th meeting to keep fully alive in part 2 the essential unity of the concept of international responsibility that that representative regarded as so essential a feature of part 1. That was not really a matter of words, but went to the root of the whole endeabour of the Commission to draw up a complete set of rules on the origin of State responsibility, its content, and its implementation. The further the Commission advanced towards the subsequent stages of the process of international law, the more unavoidable it would be to distinguish between the various types of international obligations, and even to go back and differentiate between the various sources of those "primary" obligations: general internationa law, treaties, and decisions of international institutions.

10. That did not mean that there were no general rules on the topic, but simply that the elaboration of those rules must take account of the variety of State practice in that field and of the shifts of emphasis in modern world opinion. Not so long ago little special attention had been given to the legal consequences

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of breaches of international obligations, since the main view had been that such a breach created a completely new situation in which the injured State could take whatever steps it thought necessary to restore right and justice. Opinions had developed considerably since those days, but the world was still far from a system of international law under which any breach of an international obligation was considered as a breach of the international legal order as such, so that the consequences of such a breach should be "wiped out" as completely as possible by the international community as a whole, and the authors of such breaches punished. The present-day régimes of State responsibility were situated somewhere between those two extremes and were therefore necessarily differentiated. That was particularly true of modern rules of international law which did not velate primarily to the interests of States in their relations among each other, but rather protected the interests of the international community as a whole on the one hand, and the interests of individual persons, irrespective of nationality, on the other. His delegation believed that the Commission realized the inherent difficulties of the topic and had in effect adopted, at least provisionally, a plan of work under which part 2 would be divided into three sections, dealing respectively with the new obligations of the author State, which could equally well be formulated in terms of what the injured State had the right to demand from that State; the new rights of the injured State, or what action it was entitled to take, possibly in deviation from its obligations towards the author State; and the legal position, new rights and possibly even new obligations of third States in terms of remedying the wrongful situation created by the breach.

11. His delegation agreed with the representative of Brazil that in all three sections rights and obligations were closely interlinked, as they were in the so-called "primary" rules. In those circumstances there might be merit in establishing a framework for all three sections as a reminder to the reader of the individual articles that whatever rules were contained in those articles the original primary obligation remained an obligation, that the State injured by the breach was not completely free to respond as it thought fit, and that there were special régimes. Where to set forth such a framework, and the drafting of the relevant articles, were matters that the Commission would have to discuss. His delegation, like the Brazilian representative, welcomed the suggestions made in the Commission by Mr. Aldrich and Sir Francis Vallat. However, his delegation felt that the possibility must be borne in mind that a special of self-contained régime might implicitly be accepted in rules of customary international law. The recent judgement of the International Court of Justice in the case concerning United States diplomatic and consular staff in Teheran seemed to confirm that possibility.

12. Apart from such special régimes, there seemed to be room for differentiation according to the nature of the international obligation breached. The Commission should pay close attention in future discussions on the topic to how far the draft articles in parts 2 and 3 should go in that respect. A first differentiation was made in articles 4 and 5 with regard to the obligation of the author State to re-establish the situation as it had existed before the breach. Article 5 proposed that in the case of a breach of an international obligation relating to

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the treatment of aliens, the author State had the option of either restoring the situation as it had been, or paying a sum of money to the injured State corresponding to the value which the fulfilment of the obligation would bear. If the author State chose the second option and the special circumstances mentioned in article 5, paragraph 2, prevailed, the author State should also provide satisfaction in the form of an apology and appropriate guarantees against repetition. He did not believe that that proposal would enable the author State to opt out of the primary obligation in exchange for payment of a sum of money, since it could not be said that a sanction was a price paid for making an infringement of the law lawful. The real point was that to re-establish the original situation, though not physically impossible, might require retroactive national legislation, which in international practice States were unwilling to envisage for the sake of the private interests involved. In international practice there were no clear examples of such measures being demanded by injured States, even less awarded by an international court. Neither the Chorzow Factory case nor the award in the Topco-Calasiatic case envisaged in the inoperative parts was anything other than the payment of a sum of money, which was in fact what had happened in both cases.

13. Nor did his delegation believe that the theoretical example given by the Brazilian representative, involving article 13 of the International Covenant on Civil and Political Rights, was really relevant. It was doubtful that that provision really contained an obligation relating to the treatment of aliens as such, in other words, as nationals of a foreign State. The Covenant dealt with human rights, and not with the rights of States in the person of their nationals. Moreover, in that case the primary obligation was an obligation to provide procedural remedies under internal law for the national person concerned. If such procedural remedies were not provided for in national legislation, and if there were no compelling reasons of national security for the situation of the person concerned, there was a breach of an obligation. That breach did not necessarily entail a new obligation to readmit the person concerned to the territory. He noted that even in the more elaborate European Convention on Human Rights the absence of a required procedural remedy did not necessarily entail a claim for compensation for the damage, far less a restoration of the original situation. That was established by the judgement of the European Court of Human Rights in the case De Wilde, Ooms en Vensyp.

14. It should also be noted that article 22 of part 1 of the draft articles on State responsibility as adopted by the Commission not only envisaged an obligation of the alien concerned to exhaust local remedies, but also envisaged that through those remedies the alien concerned might obtain an equivalent treatment, which again might clearly be a treatment which was not a complete re-establishment of the situation as it had existed before the breach. It would appear that the reference to article 22 in article 4 of part 2 had no other purpose than to make clear that in the cases mentioned in article 22 the initiative of applying such local remedies should rest with the injured individual concerned.

15. Turning to the topic of the non-navigational uses of international water courses, he said that his delegation had commented on the substance of the question

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in previous years, and had expressed its appreciation of the work already done by the Commission. In 1981 the Commission had not dealt with the topic at all, and although his delegation understood the reasons, it deeply regretted that state of affairs. The topic was of the utmost practical and urgent importance in the modern world and should be given a very high priority. Even though a new Special Rapporteur could not be appointed until the beginning of the Commission's next session, the Commission could still make some progress on the subject at the same session on the basis of the reports of earlier Special Rapporteurs and of the articles already provisionally adopted.

16. Mr. KASSOLKO (Byelorussian Soviet Socialist Republic) said that part 1 of the draft articles on succession of States in respect of State property, archives and debts had been considerably enlarged since the thirty-second session of the International Law Commission. Three new draft articles - articles 4, 5 and 6 - had been introduced, and article 1, which dealt with the scope of the draft articles, had been amended in the light of the Commission's decision to confine their application to certain "matters other than treaties" which the Commission felt were of paramount importance, namely State property, State archives and State debts. The new wording of article 1 was therefore entirely appropriate.

17. In the second reading of the draft articles in part 2, which concerned State property, most of the changes made had been editorial. Some difficulties might arise in connexion with the new form of article 14, paragraph 1 (c), which established the conditions in which immovable State property should pass to a newly independent successor State. In that instance, his delegation felt that the correct approach was for the States concerned to reach a settlement by concluding an appropriate treaty. A similar approach was called for in the case of article 17, paragraph 1 (b).

18. The Commission's decision to include the articles on State archives in the main body of the draft seemed fully justified because archives were a distinctive type of State property, and succession in such matters called for specific rules. The draft articles provided guidelines which would help to solve problems arising in connexion with the passing of State archives to the successor State. The safeguard clause included as article 24 established that questions relating to preservation of the unity of State archives could be resolved without invoking the provisions of the draft articles, i.e. through specific agreements between the States concerned.

19. Many delegations had taken exception, on legal grounds, to the inclusion in the first version of the draft articles on State debts (part 4) of paragraph (b) of article 16 (now article 31). The removal of that provision in second reading had been entirely justified. Questions relating to debts owed by a predecessor State to individual natural and juridical persons, including its own citizens and juridical persons, could only be resolved on the basis of internal law, and did not fall into the category of obligations under international law. The provision in article 16 (b) had therefore been extraneous to the scope of the draft articles.

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20. In general his delegation believed that the clarifications and additions incorporated by the Commission in second reading had ensured that the new version of the draft articles on State succession in respect of State property, archives and debts could provide the basis for a future international convention. The consideration and adoption of such a convention by the Sixth Committee would undoubtedly help to strengthen the Committee's role in the progressive development of international law.

21. General Assembly resolution 35/163 had recommended that at its thirty-third session the Commission should commence the second reading of the 60 draft articles on treaties concluded between States and international organizations or between international organizations. However, the Commission had succeeded in approving only 26 articles in second reading.

22. One important addition to the draft articles was article 5, which corresponded exactly to article 5 of the 1969 Vienna Convention on the Law of Treaties. The new article provided that the draft articles applied to any treaty which was the constituent instrument of an international organization and to any treaty adopted within an international organization.

23. The original version of articles 19 to 23, which dealt with reservations, had been based on the assumption that international organizations and States had equal rights in the matter of reservations; in particular, those articles had envisaged the possibility of tacit acceptance of reservations by an international organization if that organization did not object within a period of 12 months, a provision which many delegations, including his own, had found unacceptable. The new versions of the draft articles on reservations were fully in conformity with the articles of the 1969 Vienna Convention. However, there was an important difference in article 20, paragraph 4, which did not extend the right of tacit acceptance to an international organization. The issue was one which the States parties to a treaty should resolve among themselves by appropriate means.

24. His delegation hoped that the Commission would complete its second reading of the remaining draft articles at its next session.

25. At the thirty-third session, the Special Rapporteur for the topic of State responsibility had submitted five new draft articles on the content, forms and degrees of State responsibility. In his delegation's view, however, the new articles were lacking in clarity and would require extensive redrafting. In its future work on the topic, the Commission should focus its attention on the formulation of legal norms defining not only the responsibility of States for internationally wrongful acts, but also on the corresponding obligations arising from such acts. In that context it should take into account the provisions already embodied in part 1 of the draft articles on State responsibility. The obligations of a State which had committed an internationally wrongful act should be seen from the standpoint of the rights of the injured State and those of all other States, rather than from the perspective of the rights of the "author" State as was the case in articles 4 and 5. It was also important that the Commission should speed up its final consideration of the draft articles on State responsibility.

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26. As the Commission's report indicated, work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law was still at an early stage. Unfortunately, the draft article submitted by the Special Rapporteur did not adequately cover the scope of the proposed draft articles. Furthermore, in his discussion of the subject, the Special Rapporteur had introduced the concept of "duty of care" (A/36/10, para. 177), which was without foundation in law and was not applicable as a norm of international law. The topic would therefore require a great deal more work.

27. The Commission had also had before it articles 1 to 6 of the draft articles on the jurisdictional immunities of States and their property; those articles too were unsatisfactory in that they failed to address the substance of the topic and did not define the scope of jurisdictional immunity. The Special Rapporteur's five new articles (articles 7 to 11) had subsequently been regrouped into four articles (articles 7 to 10), dealt with the obligations of States to guarantee the immunity of a foreign State, and set out the exceptions to that obligation. Those articles were basically sound in that they reflected the existing practice of States, by which any State enjoyed immunity from the jurisdiction of another State. At the same time, articles 7 to 10 would undoubtedly require thoroughgoing revision. The Commission should endeavour to draw up norms of international law on the jurisdictional immunity of States and their property which would be applicable by all States without prejudice to their interests and sovereign rights.

28. The six draft articles proposed by the Special Rapporteur for the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier constituted part 1, "General provisions", of the proposed draft. In his delegation's view, the draft articles provided a satisfactory basis for further work on the other parts of the draft. It was to be hoped that the Commission would accord priority to the topic with a view to elaborating a definitive text.

29. In general, his delegation considered that the Commission had achieved some worthwhile results at its thirty-third session, particularly on the topic of succession of States in respect of State property, archives and debts, but that progress was still too slow. The time had come to review the Commission's long-term programme of work with a view to tackling new and pressing issues which were of concern to all States Members of the United Nations.

30. Mr. HUANG Jiahua (China) said that his Government placed high hopes in the International Law Commission and subscribed to the view that the codification and progressive development of international law should be the Commission's primary objective. The Commission had undoubtedly achieved some progress, at its thirty-third session, despite its heavy workload.

31. Succession of States had been a very complex and sensitive issue in international law. With the passing of time, however, and particularly in the wake of the rapid development of the national liberation movements, newly independent States had emerged on the international scene. The relevance and urgency of that

(Mr. Huan Jiahua, China)

issue had therefore diminished somewhat. At the same time, it was true that some newly independent States were still seeking reasonable solutions to their problems in that regard. Their cases must not be overlooked. The draft articles on succession of States were an obvious improvement over the traditional rules of international law in that area. Article 3 provided that the articles applied only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations. That provision was essential in that it effectively denied the legitimacy of a succession occurring as a result of foreign aggression or military occupation.

32. The draft articles not only treated the newly independent States as a special and separate category, but also contained reasonable provisions that focused on the practical problems frequently encountered by those States in cases of succession relating to State property, archives and debts. Furthermore, the draft articles provided that agreements concluded between the predecessor State and the newly independent State to determine succession to State property or debts should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources. They also provided that such agreements should not endanger the fundamental economic equilibria of the newly independent State. Those articles, although of a general nature, were conducive to the development of newly independent States and would help them to avoid the adverse effects of debts.

33. The draft had also adopted the sensible approach of separating succession to archives from succession to property, and dealing with the former in a separate part. State archives were different from State property in the ordinary sense of the latter term. In actual practice, quite a few newly independent States had encountered frequent obstructions when they had asked the former colonial Power to return State archives. The draft articles adopted in second reading had incorporated laudable improvements with regard to the title, the temporal effect and application.

34. However, the current draft still contained deficiencies. As far as the definition of "State debt" was concerned, article 31 still retained the notion of "any other subject of international law", which was unnecessary, ambiguous and likely to create controversy. Moreover, the non-transferability of odious debts was a principle of paramount importance to the developing countries. Regrettably, the current draft did not contain a clear and specific provision on such non-transferability. The explanation provided in the Commission's report (A/36/10) was unsatisfactory. Given the special nature of odious debts and the fact that they ran counter to the fundamental principles of modern international law, the Commission should adopt a clear stand on that question and include relevant provisions.

35. Article 20, paragraph 3, was patently inadequate. Inasmuch as the archives concerned affected the security and vital interests of the newly independent State, the draft should stipulate unambiguously that the predecessor State could not arbitrarily duplicate, damage or destroy the archives and must promptly return

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them to the successor State. The drafting of the articles on treaties concluded between States and international organizations or between international organizations was quite a difficult task. Not enough international practice and experience were available, and there were international organizations of all descriptions, differing in legal form, organizational structure and functions. Such differences made it hard to formulate general legal norms that could apply to all types of international organization. Furthermore, international organizations could not be equated with States. The latter enjoyed sovereignty, whereas international organizations were established and given then mandates by their member States. Therefore, although both States and international organizations could conclude treaties, their characteristics and competences differed. The legal principles governing the conclusion of treaties between States could not be applied wholesale to treaties concluded between States and international organizations or between international organizations. That was an important question of principle that warranted careful study in the drafting process. Although some consideration had already been given to that aspect, it would not be easy to reflect it adequately in the draft articles.

36. The practice of international organizations with regard to reservations was minimal, and the examples adduced by the Commission were not typical. In first reading, the Commission had set forth two different principles in respect of reservations; it had given up that approach in second reading and had applied instead the general principle of freedom to formulate reservations. The validity of that approach required further study, and his delegation reserved the right to make additional comments thereon.

37. On the question of State responsibility, the Commission had already produced some general concepts as well as the text of five articles for part 2 of the draft. As indicated in paragraph 136 of the Commission's report (A/36/10), the preliminary report of 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. They were the new obligations of the State whose act was internationally wrongful, the new right of the injured State and the position of the third State in respect of the situation created by the internationally wrongful act. His delegation believed that the first two parameters were needed. As far as the third was concerned, since the internationally wrongful act of a State did not necessarily create a new legal relationship with a third State, it was important to stipulate the specific circumstances under which the wrongful act affected a third State, in order to prevent some countries from deliberately seeking pretexts for unlawful interference in the disputes of other States. In the Special Rapporteur's preliminary report, it was also stated that in responses to an internationally wrongful act, the principle of proportionality should be adhered to. In other words, the victim State's responses to or claims against the wrongful act should be proportional to the substance and degree of the act. That was a reasonable provision which was basically just and contributed to the maintenance of international peace and security.

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38. The question of jurisdictional immunities, which involved the sovereignty, legal system and vital interests of States, arose frequently in international relations and was therefore of great relevance. His delegation believed that the main legal basis for the jurisdictional immunities of States was the important principle of respect for national sovereignty. It was essential to proceed from that basic premise and to take fully into account the current international reality and the specific conditions of States. Only then would the articles formulated be more practical, harmonize the interests of all States and promote normal international intercourse and development. Two of the articles drafted by the Special Rapporteur for the topic had been provisionally adopted by the Commission. Article 6, paragraph 1, stipulated that a State was immune from the jurisdiction of another State in accordance with the provisions of the articles. That was tantamount to a negation of the independent existence of a fundamental principle of international law, namely, the immunity of States, and was therefore inappropriate. His delegation believed that the principle of jurisdictional immunities of States should first be affirmed in the "General principles", after which specific provisions could be worked out.

39. The League of Nations had unsuccessfully undertaken the arduous task of the codification and progressive development of international law. Under the auspices of the United Nations and with the active support of Member States, the Commission had completed work on more than 20 items, including some important contemporary international conventions, such as the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Vienna Convention on the Law of Treaties. The Commission's commentaries to the draft articles, as well as the relevant documents, were valuable reference materials that could help to clarify international customary norms and international practice. That was all praiseworthy. However, according to the principles and purposes of the United Nations Charter, the codification and progressive development of international law constituted more than a purely legal and technical exercise. The main purpose should be to serve the cause of international peace and security. Measured against that fundamental objective, the Commission's work appeared to leave ample room for improvement.

40. Since the Commission's task was to promote the codification and progressive development of international law, its work should not be limited to the traditional areas of international law, but should emphasize the codification, study and progressive development of international law in connexion with issues that emerged as the international situation evolved. Only in that way could the Commission have a promising future and retain its relevance and vitality. There was a current tendency to convene special conferences and establish ad hoc committees to work on important international conventions, thus eclipsing the Commission and weakening its role. That question deserved attention. The Commission should not monopolize the important international conventions, least of all those which involved important interests of States and required full consultations among Governments. It was obviously unrealistic to expect the Commission to assume the full burden of that work. It was, however, absolutely essential that the Commission should not be constrained by established patterns,

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but should be allowed to look at reality with a view to the progressive development of international law. If the laws devised by the international community were incapable of solving the problems of real life, then those laws would simply lose their meaning and effect.

41. In order to better fulfil its mandate, the Commission should gradually adapt to the requirements of the development of international relations. As far as the substance of its work was concerned, it should ensure that the draft articles reflected the shared aspirations and reasonable demands of the developing countries. While his delegation was pleased with the commendable improvements made in recent years, it felt that in that area the Commission still fell far short of expectations. The developing countries had suffered from aggression and oppression for long periods. They were currently playing an increasingly important role on the international scene. Upholding justice was an important principle in the progressive development of international law, and his delegation hoped that the Commission would make greater contributions in that respect in its future work.

42. As far as its composition was concerned, there should be a suitable increase in the number of developing countries represented in the Commission, so that it could truly reflect the reality and needs of different States, regions and legal systems. Accordingly, his delegation was gratified to learn that the idea of increasing the number of seats allotted to the developing countries had already attracted the whole-hearted support of many countries.

43. The Commission should improve its methods of work. The drawing up of a legal text had to pass through several stages; it could not be an expeditious process. On the other hand, some draft articles prepared by the Commission were verbose. That lack of conciseness appeared to be a technical problem, but did not affect considerably the efficiency of the Commission's work. The purpose of law-making was to secure the broadest compliance by States. If the substance focused on real needs and the drafting was made more precise, there would be minimal waste of time and improved efficiency. His delegation hoped that the Codification Division would do its best to provide services and assistance to the Commission.

44. The promotion of the codification and progressive development of international law in the interest of international peace and justice was the honourable, but arduous and challenging task before the Commission. His delegation stood ready to help the Commission to perform its work successfully.

45. Mr. MAHBOULI (Tunisia) paid a tribute to the Special Rapporteur for the topic of State succession, in respect of matters other than treaties, for his remarkable work on the subject. The study of State succession by the International Law Commission, which had begun in 1967, had culminated in the consideration of the 39 draft articles currently before the Committee and the resolution recommending to the General Assembly the convening of a conference with a view to the conclusion of a convention on the subject. His delegation hoped that the conference would meet as soon as possible, so that codification of the subject, begun by the 1978 Vienna Convention on Succession of States in Respect of Treaties, could continue.

(Mr. Mahtouli, Tunisia)

The envisaged convention should be most valuable and would offer both the predecessor and the successor States established and equitable rules enabling them to settle the questions raised by State succession with respect to State property, archives and debts, thus obviating many future complications. The great increase in the number of newly independent States had created renewed interest in the question and given a further impetus to studies on the subject, but that did not mean that a standard law on State succession had been produced. The rules applied had long been fragmentary and the treaties between predecessor and successor States, when they had been concluded, had always been designed to meet a particular situation. The many examples of treaties cited in the commentary to the draft articles showed the variety of different solutions arriced at for the various cases of State succession. Although the legal precedents went back a long way, they were not voluminous, and the principles that international practice had with difficulty succeeding in deriving from them had been vigorously questioned by States which considered that those principles, formulated without their participation, could not govern the new situations created by independence. For all those reasons a convention that would allow both the predecessor and successor States to understand clearly the scope of their rights and obligations would be a most valuable contribution.

46. That contribution would not be diminished by the fact that in the case of a new State the successor State would not be a party to the convention, and would therefore have been unable to oppose its provisions. That objection had been raised during the discussion in the International Law Commission, but his delegation regarded it as questionable. Article 4 weakened the principle of the relativity of treaties by providing that in certain cases the convention could have a retroactive effect. Thus the new successor State could make a declaration that it would apply the provisions of the convention in respect of its own succession of States when that had occurred before the entry into force of the convention. But even where the successor State made no such declaration, the convention would retain its full importance because the draft articles, while embodying certain new rules, above all represented the codification of existing rules. The imposition of the latter rules had entailed many problems that had often soured the relations between predecessor and successor States, but those rules were currently well established and generally accepted. That body of rules was about to become the general law on succession of States in respect to State property, archives and debts. The new State would thus find itself bound by the provisions of the convention insofar as those provisions expressed the generally accepted legal view concerning the rules of international law governing the subject. That aspect of the convention was emphasized by the Commission, which had stated in paragraph 63 of its report (A/36/10) that a new State, though not formally bound by the convention, would find in its provisions the norms by which to be guided in dealing with questions arising from the succession of States. But if the rules governing the subject had already been established, the question arose whether, in that case, it was useful to draft a convention. The Commission's report replied to that question by stating in the same paragraph that a convention had important effects in achieving general agreement as to the content of the law which it codified and thereby establishing it as the accepted customary law on the matter.

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The report also noted that in the last analysis everything would depend on the support given by States to the convention and the extent to which it faithfully reflected international customary law. The Committee must now decide whether the draft articles as a whole faithfully reflected the state of customary law on succession of States in respect of State property, archives and debts.

47. The draft articles appeared to his delegation to be well balanced and pragmatic, and to reconcile the interests of the predecessor and successor States. They represented a happy compromise that took account of the principles of traditional international law and at the same time reflected the new requirements of international public order and in particular the right to development. Thus, without committing his Government or prejudging the position it would take at the appropriate time, his delegation considered in principle that the draft articles were acceptable, subject to certain comments.

48. The conception of the draft convention was such that, in general, its provisions were of a residual character. Thus, articles 10, 11, 14, 16, 17, 21, 22, 28, 29, 33, 36, 38 and 39 set forth the rules to be applied in each case with the addition of the phrase "unless otherwise agreed". His delegation understood that since each case of State succession constituted a particular situation, the States concerned must be given a certain latitude to adapt the forms of succession to the requirements of the situation and their own reciprocal interests. That view was in accordance with the current status of international law and reflected the essential role of consensus, which was the foundation of international law. The latitude left to States to regulate the modalities of succession by agreement was embodied in different forms of wording in the draft articles, for example articles 14, 26 and 36, concerning the case of a newly independent State. Article 14, concerning succession in respect of property, provided in paragraph 4 that agreements concluded to determine succession to State property otherwise than by the application of paragraphs 1 to 3 should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

49. Article 26, concerning succession in respect of archives, did not use the term "otherwise", but merely stated in paragraph 7 that agreements concluded between the predecessor State and the newly independent State in regard to State archives should not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

50. Article 36, concerning succession in respect of State debts, provided in paragraph 1 that no State debt of the predecessor State should pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provided otherwise. The word "otherwise" could be interpreted as a means of enabling States to lay down provisions that ran counter to the principles embodied in the draft articles; his delegation would therefore prefer either the simplified formulation of article 26, paragraph 7, which, without using the word "otherwise", allowed for an agreement between the predecessor State and the newly independent State, or a formulation in article 36 that would subject to specific conditions any agreement involving a derogation from the principles

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embodied in the draft articles. In allowing for the conclusion of agreements, the draft articles introduced a necessary element of flexibility, given the diversity of cases of succession; they did not, however, authorize States to include in such bilateral agreements provisions that ran counter to the articles. Tunisia therefore believed that the Commission should re-examine the question, with a view to finding a different formulation under which such bilateral agreements would supplement, not derogate from, the articles. The draft was supposed to provide an equitable régime that would protect both the predecessor State and the newly independent State. The practice of derogation by agreement would give the upper hand to the State already in a position of strength.

51. Article 11 provided that unless otherwise agreed or decided, the passing of State property from the predecessor State to the successor State should take place without compensation. The experience of the decolonization process had shown that the passing of State property with compensation caused a number of problems, due to the limited financial means available to the newly independent State and to the atmosphere of litigation that was not conducive to co-operation between the two States in question. His delegation therefore proposed that, as far as newly independent States were concerned, there should be strict limits on exceptions to the principle of passing of State property without compensation.

52. Tunisia was pleased to note that the Commission had devoted an entire part of the draft articles to succession of States in respect of archives, which were extremely important in terms of the cultural identity, administration, and economic and social development of countries. The fact that provisions governing that category of succession had not been included in independence agreements reflected both the under-development of the newly independent States and the desire of the old colonial Powers to impose unilateral solutions. The awareness of newly independent States of the importance of those archives, the development of document reproduction technology and the attention paid to the question of archives by international organizations, particularly UNESCO, should enable the newly independent States to recover a part of their cultural heritage of which they had been dispossessed. The Commission's draft articles proposed practical measures for the implementation of the many United Nations resolutions on the protection and restitution of cultural and historical archives.

53. His delegation supported the general principle, adopted by the Commission, that State debts should not pass to newly independent States. Such States, whose economies were often fragile, would thus be spared that heavy debt burden. The Commission had been right not to seek to establish automatically a symmetrical relationship between succession in respect of property and succession in respect of debts, but to take into account the realities of the situation. As had often been stated in a number of international forums, the indebtedness of the developing countries was an unbearable burden that threatened the international financial system as a whole. The Commission's approach would help to prevent a further aggravation of the financial situation and, ultimately, to redress the inequalities among States.

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54. As to the question of treaties concluded between States and international organizations or between international organizations, his delegation was grateful for the excellent work performed by the Special Rapporteur for the topic. It also endorsed the methodological approach adopted by the Commission, according to which the draft articles, though similar to the 1969 Vienna Convention on the Law of Treaties, would be independent of that Convention (A/36/10, para. 119). The 26 articles adopted by the Commission in second reading were not controversial, inasmuch as most of them corresponded, mutatis mutandis, to the provisions of the 1969 Vienna Convention. As a result of the simplification that had taken place since the first reading, the draft articles were now closer to the provisions of the Vienna Convention. There was thus a movement towards unification of the legal régime of the two categories of treaties. The distinction made in 1969 between treaties according to the nature of the parties had been justified by the particular legal status of international organizations. As the Commission's work on the topic had progressed, the specific import of the distinction had become somewhat blurred and was now of little importance for at least 24 of the draft articles.

55. The question of reservations had posed a number of problems. The Vienna Convention had confirmed the legality of reservations. The Commission had abandoned its earlier complex provisions governing reservations and, in second reading, had adopted the principle that parties were free to formulate reservations either to treaties between international organizations or to treaties between States and international organizations. By assimilating international organizations with States in that respect, the Commission was again moving towards the unification of the legal régime of the two categories of treaties. His delegation was not too happy with article 20, paragraph 4, according to which a reservation would be considered to have been accepted by a State if it had raised no objection to the reservation by a certain date. That question should be given closer consideration.

56. Mr. MAHOURAT (Argentina) expressed satisfaction that the Commission, as it approached the end of its mandate, had been able to complete the work assigned to it in the priority areas singled out by the General Assembly. However, he regretted the failure to appoint a successor to the Special Rapporteur on the question of the law of the non-navigational uses of international watercourses, which had delayed the work on that topic, and urged the Commission to make an appointment as soon as its new members had been elected.

57. He welcomed the cooperation which the Commission had established with the International Court of Justice and the various regional legal bodies, especially the Inter-American Juridical Committee. He was sure that such co-operation would make an increasingly constructive contribution to the attainment of the common objectives of the Commission and the other bodies concerned.

58. The text of the draft articles on succession of States in respect of State property, archives and debts was not satisfactory and successfully reconciled apparently conflicting interests. The draft provided the most judicious solution to the problem of State debts; the safeguard embodied in article 6 married well

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with the definition of State debt in article 31, while article 34, paragraph 1, preserved the rights and obligations of creditors. The commentaries to those articles amply justified the solution opted for in the draft as well as the rejection of the broader definition of State debt favoured by certain delegations. Furthermore, the general principle of equitable proportion underlying the draft articles lent them sufficient internal unity to enable them to be accepted as a code.

59. For those reasons, his delegation supported the suggestion that the envisaged convention should be prepared by a special plenipotentiary conference. The need for such a convention was becoming increasingly pressing owing to the accelerated rate at which new States were emerging, a consideration which had almost certainly underlain the General Assembly's recommendation to the Commission that it accord priority to the topic.

60. In the case of the draft articles on treaties concluded between States and international organizations or between international organizations, the text had been simplified, without loss of precision, by the method of merging two paragraphs or two articles into one, used, for example, in the case of articles 13, 15 and 18, 19 and 19 bis, 20 and 20 bis, and 23 and 23 bis. Use that method in the future would permit further refinement of the final draft. His delegation endorsed the definitions proposed in article 2 concerning use of terms, and in particular the definition of the term "international organization", which accorded with that contained in the Vienna Convention on the Law of Treaties and which, by its flexibility, would help to ensure the continued applicability of the draft articles in changing international circumstances. However, it would be useful for the Commission to tackle the delicate question of so-called "international public institutions", on which there was as yet no firm doctrine.

61. He also welcomed the solution found to the question of the tacit acceptance of reservations, embodied in article 20.

62. His delegation appreciated the considerable progress made with regard to the draft articles on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law. On the latter topic, in particular, he welcomed the attention given to the concepts of "ultra-hazard" and "due care", as well as the Special Rapporteur's recognition, in his second report, of the inadequacy of the old concept of "invasion of sovereignty", basing his opinion in particular on the Trail Smelter case. The fact that the topic was closely interrelated not only with the broad problem of the protection of the environment but also with the monetary policy of States, gave some indication of the complexity of the problems the Commission would face in the future and the caution, moderation and lucidity with which it must tackle them.

63. In relation to the question of the jurisdictional immunities of States and their property, his delegation supported the rules concerning consent of State established in article 8 and, in particular, the general provision in paragraph 1: those provisions complemented the rules for voluntary submission contained in

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article 9. However, he had some doubts about the limitation embodied in article 6, paragraph 1. He trusted that the Drafting Committee would find a more appropriate formulation for articles 7, 8, 9 and 10.

64. The six draft articles proposed in the second report of the Special Rapporteur for the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier were an adequate basis for the future elaboration of the topic, although he questioned the appropriateness of the definition of the scope of the draft articles contained in article 1, paragraph 1, in that it had been extended to encompass communications with "other States or international organizations". However, no further comments were called for at the current stage, given the preliminary nature of the work carried out thus far.

65. His delegation attached great importance to the role of the Commission as a source of customary law which reflected the prevailing legal opinion at a given time. Indeed, the Commission's success in that regard should offset any discouragement caused by the difficulties and delay often involved in the formulation of conventional rules and was an additional reason to hope that its work would proceed fruitfully.

66. Mr. ROSENSTOCK (United States of America) said that it was difficult to consider the draft articles relating to State responsibility, other than in a very preliminary and provisional way, until it was clear how the articles were intended to relate to each other. Each draft article would have to be examined later in the light of the entire draft convention, when completed.

67. Articles 1, 2 and 3 of part 2 of the draft were a most useful statement of the general rules applicable to the relationship between international obligations and breaches of those obligations. He trusted that the Drafting Committee would give due consideration to the suggestions made to improve the wording or the organizational structure of the articles.

68. Articles 4 and 5 gave concrete form to the Special Rapporteur's insight that the maxim that States had an obligation to effect a restitutio in integrum strictu sensu actually encompassed a number of differing duties owed by States in the new situation created by a breach of an international obligation, including discontinuing the wrongful act, releasing and returning the persons and objects held through such an act, preventing the continued effects of the act, and further duties to re-establish, as nearly as possible, the situation existing before the breach. The approach of separating and classifying the remedies traditionally analysed together sought to preserve the flexibility applied in international practice and international tribunals in dealing with the consequences of international wrongs, while providing clear principles on which to base the obligations of States that had breached international obligations. That approach was a worthy point of departure for clarifying the rules concerning the content, forms and degrees of State responsibility. However, considerable study and debate was required before the difficult problems of the legal issues concerned could be solved.

(Mr. Rosenstock, United States of America)

69. In connexion with the discussion in the Commission, recorded in paragraph 158 of the report (A/36/10) on whether an injured State must make specific demands on the author State before taking any countermeasures in response to a breach of international law, he believed that it would be reasonable in most situations to require an injured State to notify the author State of its belief that a wrong had occurred and to explain what remedy it sought; indeed, it would frequently be highly precipitate, if not ludicrous, to take retaliatory measures before giving such notice. On the other hand, it would not be fair to burden the injured State with an obligation to delay unduly in taking legitimate countermeasures in cases where such measures might be the only means available to restrict the consequences of the original breach or to prevent the original violator from holding an unfair advantage during settlement of the dispute. The Commission must give due consideration to those practical problems when preparing its draft articles on the subject of retaliatory measures.

70. With regard to the question of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation agreed with the importance accorded to the subject and commended the Special Rapporteur's masterly analysis of the Trail Smelter case. He hoped that it would be possible to draft a set of general rules combining the need to provide reparation for damage done in certain situations with the need to indice the taking of preventive measures by States engaging in certain types of activities. The intellectual problems involved were not insurmountable. The essential question was one of a sense of community: to what extent were States prepared to recognize, in concrete terms, the consequences of the interdependent nature of the world and the enhanced technological capacity to cause harm across borders? Domestic legal systems readily accepted, as to some extent did international opinion, the principle of societal interests limiting the freedom of action of the individual, involving protection and, where necessary, indemnification of others and society as a whole. The form in which the ultimate result should be expressed was open to debate.

71. Consideration of the topic should not be diverted by the fact that work was also progressing on the question of State responsibility for wrongful acts; the two should proceed largely independently. The topic most closely related to that of "injurious consequences" was that of the non-navigational uses of international watercourses, and he greatly regretted the failure to appoint a new Special Rapporteur on the latter topic, for to stress the one and allow the other to lapse was illogical and unwise.

72. He agreed with many of the comments made by the representative of Brazil, although he could not accept his pessimism as to the utility of the concept of "due care" in providing a measure of obligation to prevent. Whether the international duty of "due care" was a substantive obligation or a function of an existing obligation was open to argument; that it existed was beyond question, in spite of the arguments of the representative of New Zealand to the contrary. It was equally clear that it could be built on, in the areas of notification and negotiation, and he looked forward to a further report from the Special Rapporteur to clarify the picture. If the concept of "due care" proved to be an insufficient

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foundation, then the concepts of "strict liability" and "ultra-hazard" must be tackled, but the former was a potentially easier route and the chance to establish very useful rules should not be missed through excess of ambition.

73. The general pressure to reduce discussion as quickly as possible to precise drafts should not be allowed to block full analysis of the Special Rapporteur's third report. The Special Rapporteur might also consider preparing a schematic outline of his view of a possible final product.

74. The topic of injurious consequences was a challenge to the ability of the legal community to solve problems before they became a constant source of disputes, and that topic, together with the related topics of international responsibility and the non-navigational uses of international watercourses, required priority treatment in the next five years.

75. Mr. RAHMAN (Bangladesh) said that the main achievement of the International Law Commission at its 1981 session had undoubtedly been the completion of its work on the topic of succession of States in respect of State property, archives and debts, and his delegation wished to express its deep appreciation to the Special Rapporteur for his outstanding contribution. The ultimate aim of the Commission's work on the topic was to prepare articles which could serve as the basis for the conclusion of a convention reflecting customary international law and providing sensible and practical guidelines.

76. His delegation welcomed the close parallels between the majority of the draft articles contained in part 1, which dealt with general provisions, and the corresponding provisions of the 1978 Vienna Convention on Succession of States in Respect of Treaties. The draft articles confined the scope of the topic to succession in respect of State property, archives and debts, and their application was not intended to be retroactive. State succession in respect of matters other than treaties and matters not covered by the draft articles continued to be regulated by rules of customary international law. The definition of State property in article 8 was of necessity based on the assumption of State ownership of the property, including rights and interests, at the time of succession and in accordance with the internal law of the predecessor State. That assumption, in his delegation's view, was essentially correct.

77. Another valid assumption was that residuary rules would apply in cases of succession of States in the absence of mutual agreement between the States concerned. The question of the residuary principle was dealt with in paragraph 116 of the Commission's report (A/36/10). In article 13, which dealt with the case of transfer of part of the territory of a State, the primary rule was that of agreement between the predecessor and successor States; in the absence of such agreement, the question of succession to State property would be settled by the application of residuary rules.

78. With regard to articles 18 to 29, it was evident that State archives were a special case in the context of State succession. The definition of State archives

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adopted in the draft articles essentially followed the criterion of ownership of documents under the internal law of the predecessor State at the time of succession. State archives could be of interest to both the predecessor and the successor State by virtue of their physical nature, contents and function, and also by virtue of their value as part of a nation's cultural heritage. The Commission had rightly emphasized the importance of close co-operation among States for settling disputes relating to archives, and the duty of both predecessor and successor States to negotiate in good faith with a view to reaching satisfactory settlement of such disputes.

79. Articles 25 to 29 were especially valuable in that they appeared to have achieved the necessary balance between the interests of the predecessor and successor States and the rights of their peoples. The approach adopted by the Commission in that regard was basically the same as that in section 2 of part 2 on State property. The primary rule was that of agreement, in the absence of which residuary rules were to be followed. In general, his delegation found the articles on State property and State archives broadly acceptable.

80. The main question raised by the draft articles in part 4, which dealt with State debts, was, as the Commission had rightly emphasized in paragraph (5) of the commentary to article 31, whether and in what circumstances a triangular relationship was created and dissolved between a third State as creditor, a predecessor State as first debtor and a successor State which agreed to assume the debt. In that context the basic subject-matter was debts assumed by the predecessor State alone, since the phenomenon of State succession ensued as a result of a territorial change affecting that State only.

81. It should be emphasized that nothing in the draft was designed to prevent the predecessor State, the successor State and the third State from reaching an agreement, irrespective of the general rules of State succession, in cases involving the passing of property, archives and debts.

82. In formulating articles 30 to 34, the Commission had kept in mind the structure adopted for the articles on State property and State archives. Similarly, particularly in view of the divergency in State practice and legal literature on the principle to be applied in cases of the transfer of part of the territory of a State, the applicable rules on State debts as enunciated in article 35 maintained a certain parallelism with those relating to the passing of State property and State archives, the basic rule being that of agreement, in the absence of which the residual rule of equity applied. The passing of State debts to a successor State was justified by the passing of State property, assuming that the predecessor State could not pass on to the successor State any better title than that exercisable by the predecessor State itself. Subject to those general observations, his delegation would support the convening of a general conference to consider the draft articles.

83. On the topic of treaties concluded between States and international organizations or between international organizations, the approach of the

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Commission was basically sound in that the present draft bore a close relationship to the Vienna Convention on the Law of Treaties, without in any sense being any extension of its scope or application. A new convention was inevitably the only framework for the draft articles. The new provisions in the articles had been kept within the appropriate limits of situations not already covered by treaties between States, and the Commission had been right to cast the draft articles in a form entirely independent of that of the Vienna Convention, and without any renvoi to that Convention. The wording of the draft articles was still too complex; the reasons for that situation were given in paragraph 125 of the report. However, the text emerging from the second reading was far better and easier to follow than the previous version. The Commission's work on the item had been most satisfactory; he hoped that it would be able to complete the second reading and recommend the final adoption of the draft articles in the form of a convention.

84. Despite the fact that the codification of the draft articles on the law of the non-navigational uses of international watercourses had been under consideration for five years, it had not been given the attention it deserved; the lack of a Special Rapporteur or any report on the matter had resulted in general disappointment, particularly among States which continued to suffer from the ambiguities in the existing legal provisions. It was essential to appoint a new Special Rapporteur immediately, if necessary through a special session convened for the purpose.

85. On the question of State responsibility, the Special Rapporteur had been able to dispel some of the doubts expressed in connexion with the general principles of the five draft articles. However, their actual formulation was subject to drafting adjustments. There might be, as the Special Rapporteur suggested, a need to look again at some of the provisions in part 1 of the draft in the context of the work on part 2.

86. In conclusion, he paid tribute to the Commission for maintaining its close relationship with the International Court of Justice and its co-operation with other regional bodies engaged in the progressive development of international law.

The meeting rose at 5.55 p.m.