United Nations
GENERAL ASSEMBLY
THIRTY-SIXTH SESSION
Official Records *

SIXTH COMMITTEE
47th meeting
held on
Thursday, 12 November 1981
at 10.30 a.m.
New York

SUMMARY RECORD OF THE 47th MEETING

Chairman: Mr. CALLE y CALLE (Peru)

CONTENTS

81-57972

17 p.

Distr. GENERAL
A/C.6/36/SR.47
24 November 1981
ENGLISH
ORIGINAL: FRENCH

/...

The meeting was called to order at 10.55 a.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. Mr. BALANDA (Zaire) said that it was unfortunate that most delegations had not had access to the different reports of the special rapporteurs on the topics dealt with by the International Law Commission, for they would have had a better understanding of the evolution of the Commission's work, an evolution that was inevitable in any long-term exercises as was illustrated by the successive changes in the title of the first topic dealt with in the report (A/36/10).

2. The basic principles selected by the Commission were, by and large, taken from the practice of States and that was a guarantee of their future acceptance. The law formulated by the Commission should not, however, be limited to reflecting the past; it should be directed also and primarily to the future and, in that regard, a prominent place should be reserved for all matters relating to the emergency of new States on the international scene. The international law which the Commission had to formulate under its mandate should be situated midway between the interests of the old societies and those of the new nations; that was a sine qua non of its practicability. The Commission was, moreover, well aware of the need to give particular attention to the situation of new States since, in the draft articles on succession of States in respect of State property, archives and debts, it had in each case given special coverage to the situations created by decolonization. It was also important for all the world's principal juridical systems to be represented in the membership of the Commission.

3. The draft articles on the succession of States in respect of State property, archives and debts included a striking number of provisions of a purely residual nature, i.e. which applied only in the absence of contrary rules agreed between the parties (articles 10, 11, 13, 16, 17, 21, 25, 28, 29, 33, 35, 38 and 39), and his delegation feared that the secondary character of rules laid down in the draft articles might weaken the scope of the draft. Furthermore, the freedom which the draft articles allowed to the States concerned seemed inconsistent with the exigencies of codification, especially in an area where the interests of States were such that their practice often followed other directions. He was all the more surprised at the Commission's desire to formulate residual rules on the matter as it was aware of the imbalance of forces characterizing the situation of the new States vis-a-vis their former parent States. In spite of their accession to sovereignty, those States were still dependent and would remain so as long as the new international economic order was not a reality. Moreover, very often, for the purposes of take-off, they were dependent on technical assistance provided, in many cases, by nationals of the former parent State. It was not always certain that those nationals, who were supposed to help the young States solve immediate problems, including problems connected with the various aspects of succession, gave precedence to the interests of the States they were helping over those of their own homelands. That fact together with the inequality of the partners meant that the agreement which the Commission wished to establish as a ground rule might well remain a mere pious wish. In paragraph (16) of the commentary on article 13, the Commission emphasized that agreement in the case of peace treaties should be

(Mr. Balanda, Zaire)

treated with a great deal of caution. Such caution was even more justified when considering the ratio of forces as between a Power and a State which had links of dependence with it. In that connexion, he welcomed the safeguard clause in article 14, paragraph 4, designed to protect newly independent States from leonine agreements that would violate the principle of the permanent sovereignty of every people over its wealth and natural resources. His delegation nevertheless believed that, to be effective, the rules on the succession of States should be compulsory.

4. Noting that the draft articles made no reference to the indefeasible nature of the right of succession, he said that that was a self-evident fact.

5. He regretted that the concept of equity which was central to the provisions in the three parts of the draft articles, was left vague. Whereas in internal law it was not easy for a judge to decide a case ex aequo et bono in the absence of objective criteria, the situation was even more difficult in international law if every jurisdiction was subject to the agreement of the parties (cf. the optional clause relating to compulsory jurisdiction in article 36, paragraph 2, of the Statute of the International Court of Justice) and if a tribunal could have recourse to the equity rule only if the parties agreed thereto. That was at least the opinion of the Institute of International Law (A/36/10, para. 82) and it had also led the International Court of Justice, in the North Sea Continental Shelf cases, to establish a distinction between equity and equitable principles. In spite of the usefulness of the ex aequo et bono procedure, it was particularly difficult to apply in the context of the succession of States as the objective elements which would enable the judge to decide were sometimes voluntarily eliminated from the discussions by the parties.

6. Noting that the succession of subjects in international law other than States was excluded from the scope of the draft articles, he stressed that it would not be easy to identify in every situation which legal entity was involved. There might be some ambiguity regarding the concept of State, especially where a State consisted of entities enjoying a certain autonomy in the matter of international relations.

7. As for succession in respect of State property, he regretted that the term "responsibility" was used in paragraph 2, subparagraphs (a), (d) and (e), even though the article reproduced wording used in the 1969 Vienna Convention on the Law of Treaties and the 1978 Vienna Convention on Succession of States in respect of Treaties. An expression such as the "conduct" or "direction" of international relations would be preferable in order to avoid any confusion with the notion of State responsibility. Moreover, the wording of subparagraph (e) should be simplified. It might be replaced by the following text: "'newly independent State' means a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory the international relations of which were conducted by the predecessor State". He also questioned the usefulness of article 2, paragraph 2, and wondered whether the Commission might not be to some extent renouncing its codification function by stipulating that the terms used in the draft articles might, in the internal law of States, have a different meaning from that given by the Commission. Apart from that criticism,

(Mr. Balanda, Zaire)

the wording would gain from simplification and he proposed the following text: "The terms used in the provisions of the present articles are without prejudice to the meaning they may have in internal law."

8. Draft article 3 which provided that "the present articles apply only to the effects of a succession of States occurring in conformity with international law" seemed to reduce the scope of the draft. There was reason to wonder what international law was meant since there was no widespread and standard practice in respect of the succession of States.

9. Article 4, which introduced the idea of temporal application, had the merit of extending the scope of the future convention to the succession of States occurring before its entry into force, but he feared that it would be difficult to apply and pointed out, in that connexion, that the preliminary draft of the African Charter of Human and Peoples' Rights contained a provision on the provisional entry into force which had been roundly criticized and deleted from the text submitted for approval to the Eighteenth Summit of the Conference of Heads of State and Government held at Nairobi.

10. He wondered whether article 5, did not duplicate article 1 which defined the scope of the articles in respect of State property.

11. With regard to article 6, it was easy to draw a distinction between natural persons and the State, but the same was not necessarily true in the case of certain categories of juridical persons. In Zaire, for example, SOZACOM and GECAMINES were enterprises owned entirely by the State and although they had their own legal personality they were an emanation of the State itself. Article 6 should therefore be amended so that at least the category of juridical persons he had just mentioned would not be excluded from the scope of the draft articles. Furthermore, since article 6 mentioned only rights and obligations, his delegation wondered what the situation was with regard to interests. Article 8, on the other hand, specified that "State property" meant "property, rights and interests", but omitted the word "obligations", although State debts constituted only one aspect of the obligations of the predecessor State.

12. Since article 8 stated that State property meant "property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State", his delegation wondered what became of the rights and interests which the predecessor State had owned at the date of the succession according to provisions other than those of its internal law. In paragraph (2) of the commentary to that article, the Commission mentioned the "treaty" by which King Leopold II had ceded the independent State of the Congo to Belgium, and in that connexion, he wondered how the rights and interests acquired by Belgium by virtue of that act of cession could be considered as having been acquired by virtue of Belgian internal law. He supported the Commission's decision to consider as State property only rights and interests of a legal nature as opposed, for example, to political interests, which were very difficult to define.

(Mr. Balanda, Zaire)

13. Noting that the rule concerning the passing of State property without compensation set forth in article 11 took into account certain situations which might lead the parties to derogate from that article, his delegation wondered whether that possibility did not weaken the principle itself.

14. His delegation agreed with some members of the Commission, who had expressed the view that article 12 was superfluous, since the predecessor State could not dispose of property which did not belong to it.

15. While agreeing with the Commission that additional conditions should be required in connexion with the passing of movable State property, his delegation considered that the criterion for the passing of such property proposed in article 13, paragraph 2 (b), i.e. the linkage between the movable property and the territory to which the succession related, namely the activity of the predecessor State, was not easy to apprehend, for the relationship between movable property and the activity of the State in the territory to which the succession related was not always obvious. Difficulties could arise in the application of such a provision when part of the territory of a State was transferred to another State. The criterion of utility, which had also been taken into consideration in international judicial practice in connexion with succession to State property, was likewise difficult to apply in practice, although it was based on considerations of equity or justice.

16. His delegation wished to congratulate the Commission for having paid particular attention in the draft articles to the situation of newly independent States. The effects of decolonization, and in particular problems relating to succession to State property, persisted for years after accession to political independence. The Commission should never forget that situation in its work relating to the codification and progressive development of international law, for otherwise it would elaborate only law deriving from relationships based on domination.

17. In addition to the aforementioned difficulties raised by the concept of equity, the rule embodied article 14, paragraph 1 (c), which was based on that concept, might create additional difficulties, for proportion was not easy to establish, especially since the immovable property concerned was not necessarily situated in the territory of a third State. The principle of permanent sovereignty of peoples over their wealth and natural resources, on which article 14, paragraph 4, was based, substantially enhanced the principle of political independence, to which it lent an essential economic dimension. The Commission had been completely right to state that any agreement which infringed the principle of permanent sovereignty should be void ab initio.

18. His delegation endorsed the substance of articles 16 and 17, but felt that some of the words in article 17 were redundant, since a State which "dissolved" necessarily "ceased to exist".

19. With regard to the question of succession of States in respect of State archives, he recalled that the conference of heads of State or government of

(Mr. Balanda, Zaire)

non-aligned countries held in Algiers and Colombo had adopted resolutions on the restitution of art treasures and ancient manuscripts to the countries from which they had been looted. In fact, archives were the soul, the conscience and the memory of peoples and the principle of restitution pure and simple without any possibility of compensation should be formalized, for several reasons. First, archives were the patrimony of peoples and thus belonged to them, with all the attendant implications relating to exercise of the right of recovery by the legitimate owner. Second, that principle should be imposed in order to prevent a foreign country from maintaining under its cultural domination the people whose archives it retained. Lastly, archives also constituted an inventory of the resources belonging to each people. For all those reasons, the President of the Republic of Zaire had proclaimed, in his historic statement at the United Nations in 1973, the need for restitution to each State of its art treasures.

20. His delegation considered that, since archives were the property of the peoples to whom they related, they could not "belong" to the predecessor State, as indicated in draft article 19, for the word "belonged" indicated the existence of a right of ownership; that was not the intention of the draft, which established the principle of the restitution of archives. The predecessor State should possess only those archives which concerned it following a specific case of succession in accordance with its internal law. He therefore thought that in article 19 the words "according to" should be replaced by the words "by virtue of".

21. If archives were the property of the peoples to whom they related, there could be no question, as indicated in article 20, of the extinction of any right of the predecessor State to which the creation of a right of the successor State would correspond. The predecessor State could not possess the archives of others "animo domini"; it was only the temporary holder thereof. Since the restitution of archives had to be pure and simple, there would no longer be any raison d'etre for the rule of compensation justified by an alleged interest of the predecessor State.

22. He was glad that the Commission had affirmed the principle of the unity of State archives in article 24.

23. He agreed with the statement in paragraph (8) of the commentary to article 25 concerning the fate of archives removed from or constituted outside the transferred territory. He considered that the successor State should be given all the archives, historical or other, relating to the transferred territory, even if those archives were situated outside that territory. He recalled that the right of recovery had been sanctioned by the Treaty of Peace signed at Frankfurt on 10 May 1971 between France and Germany, by article 52 of the Treaty of Versailles, by the Rapallo Treaty of 12 November 1920 and by the agreement between Italy and Yugoslavia of 23 December 1950.

24. Thus, if all the archives of the successor State had to be returned to it without payment of expenses or compensation, as his delegation believed, the words

(Mr. Balanda, Zaire)

"exclusively or principally" in article 25, paragraph 2 (b), should be deleted, especially since they reflected a subjective appreciation. His delegation's view that all archives should pass to the successor State was corroborated by long-standing State practice. That was particularly important for newly independent States, which needed every available means in order to make a good start. A State without archives was, indeed, deprived of its memory. The obligation imposed on the predecessor State in article 25, paragraph 3, should be an obligation of result and not an obligation of means. In his view, the rule formulated in a more positive manner in article 26, paragraph 4, should be presented as a general rule, i.e. a rule applicable to all cases of succession of States and not only those involving newly independent States.

25. By virtue of the principle of the unity of archives, not only State archives but also those in the possession of private individuals should be returned to their lawful owners. Moreover, the rule of restitution of archives should be formalized outside the context of State succession.

26. The residual rule embodied in article 28 appeared in fact to have the characteristics of a primary rule. It was difficult to imagine that States would conclude an agreement to ratify their separation, at least at the time of the separation. The term "normal administration" in paragraph 1 (a) of articles 28 and 29 was too vague and failed to take into account the concept of full restitution of all archives, which his delegation favoured. The term seemed to allow for a division of archives into several categories - including the category of administrative archives - a division that was contrary to the principle of individibility of archives.

27. As to succession of States in respect of State debts, article 38 could benefit by a more concise formulation. The meaning of the term "other subject of international law" was not clear. The criteria for determining respective categories of debts were not precise enough. The distinction between State debts proper and the debts of public enterprises became blurred in reference to enterprises whose shares were all held by the State. Through such enterprises, it was the State itself that was engaging in commercial or industrial activities. The Commission had pointed in its report to the difficulties that could arise out of the distinction between State debts and the debts of public enterprises.

28. His delegation agreed with the Commission that the criterion of purpose and actual use of the debt contracted was not adequate to explain the difference between local (non-State) debts and localized (State) debts. It was therefore difficult to accept a priori the presumption of benefit, which was central to the concept of local debt or localized debt.

29. The Commission should retain the concept of odious debts. In view of the particular situation of the newly independent States, it was important to scrutinize the nature of each debt before imposing it on those countries. The principle of non-transferability of debts embodied in article 36 was a step in that direction. In that connexion, his delegation fully shared the view expressed by the Commission in its commentary to that article. That position by the Commission was consistent with the concerns expressed by the General Assembly, in its resolution 3201 (S-VI) of 1 May 1974, and by the Trade and Development Board.

(Mr. Balanda, Zaire)

30. Article 36, paragraph 2, which reaffirmed the principle of the permanent sovereignty of every people over its wealth and natural resources, was the corollary to article 29, paragraph 4, which reaffirmed the right of peoples to their cultural heritage - a reminder that the independence of peoples was both on the cultural and on the economic planes. The commentary to article 36, paragraph 2, rightly stressed the "capacity to pay" of the newly independent States; they could not be expected to implement an agreement and thereby jeopardize their economies.

31. His delegation would support the convening of a conference of plenipotentiaries, with the participation of international organizations, with a view to concluding, on the basis of the excellent work done by the Commission and the comments made by States, a convention on succession of States in respect of State property, archives and debts.

32. With regard to treaties concluded between States and international organizations or between two or more international organizations, his delegation noted that the draft articles could constitute supplementary instrument to the Vienna Convention on the Law of Treaties.

33. The special nature of relations between States and international organizations justified the definitions contained in article 2. Article 3 was also useful, since it defined the scope of the draft. In view of the increasingly frequent conclusion of unwritten agreements, it would be useful to specify that the draft articles sought to govern only agreements reflected in signed instruments.

34. On the other hand, it was not necessary to refer, in article 4, to the principle of non-retroactivity, which was a basic rule of general treaty law.

35. In article 7, the Commission had demonstrated realism and flexibility by presuming that certain persons, in virtue of their official capacity and functions, had powers, even though the basic principle embodied in the article was that every representative must prove that he was authorized to act on behalf of the organization whose representative he claimed to be, for the purpose of validly communicating the consent of the organization.

36. Article 8, which allowed for the subsequent confirmation of an act performed without authorization, had the effect of consolidating situations created in good faith.

37. Article 9, paragraph 2, stated that the adoption of the text of a treaty should be by a two-thirds majority. The justification for the special regime was not clear from the commentary. There was also some question as to the usefulness of the freedom given in article 10, paragraphs 1 (a) and 2 (a), with regard to the authentication of the text of a treaty concluded between States and international organizations or between international organizations. According to almost universal practice, the text of a treaty became definitive as soon as it was signed, signed ad referendum or initialled by the representatives of the entities that had negotiated it.

(Mr. Balanda, Zaire)

38. Article 11 was of minor interest, since it merely adapted to the situation of international organizations the means of expressing consent to be bound by a treaty already available to States under the Vienna Convention.

39. Article 17 did not specify what majority of the other contracting States or the other contracting international organizations was required for consent to be given to a State or organization to be bound by only one part of a treaty. The question was whether consent should be given unanimously, by a simple majority or by a two-thirds majority.

40. Article 18 repeated the rule of good faith already contained in article 18 of the Vienna Convention. Article 19 assimilated international organizations to States as far as the freedom to formulate reservations was concerned. Basically, States could not be assimilated to international organizations, primarily because only States were sovereign entities. Moreover, neither the interests of States nor their policies always coincided with those of international organizations. International organizations, even when they were political in character, had a very limited range of action because of their specificity. That was not the case with States, whose range of activity was unlimited and highly diversified. It followed that States should enjoy greater protection than international organizations, which were exposed to fewer risks in view of the rather limited scope of their activities. The formulation of reservations should therefore not be identical in the case of treaties concluded between States and in the case of treaties to which international organizations were parties. The desire to simplify the wording of article 19 should not obscure the basic difference in nature between States and international organizations.

41. The idea of provisional application of treaties, dealt with in article 25, had already been resisted at the Ministerial Conference held at Banjul in 1981 for the purpose of elaborating the African Charter on Human and Peoples' Rights. Several delegations had taken the view that the arbitration and mediation commission referred to in the draft Charter should not be established before the Charter entered into force.

42. His delegation wished to reserve its position regarding the topics which the Commission had not yet finished considering. With regard to State responsibility, however, it believed that the codification of the topic would be useful only if the draft contained specific rules that could lead to a solution to the thorny problem of "implementation". It was hardly useful to determine that a State was the author of an internationally wrongful act, if it was not thereby obligated to make reparation for the damage caused. That was a delicate issue in that it raised the question of immunity of States from jurisdiction in general and their immunity from enforcement in particular. His delegation therefore awaited with interest the results of the Commission's work on that topic.

43. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he thought that that status should extend to relations between States and international organizations and to relations between organizations. However, specific safeguards should be provided in order to prevent any abuse of the diplomatic bag and courier.

(Mr. Balanda, Zaire)

44. The ILC was and must remain a subsidiary organ of the General Assembly responsible for the codification and progressive development of international law. It should not, therefore, become independent, although it should be able to determine freely its own methods of work. In carrying out its functions, the ILC should take into account all situations which might have implications for the newly independent States. Only in that way would it be able to contribute to the progressive development of an international law conducive to ensure that balance of forces which the contemporary world so badly needed.

45. Mr. MAZILU (Romania) said that, in his view, the new articles 1-5 to be incorporated in Part II of the draft articles on State responsibility instituted a good basis for discussion. However, the provisions of those articles should be developed as clearly and concisely as possible in order to avoid any ambiguity. His delegation considered that, as had been suggested in the International Law Commission, articles 1 to 3 should be redrafted so as to avoid giving the impression that they tended towards protection of the wrongdoing State and should be combined in a single article dealing with both the obligations and the rights of the author State, the injured State and other States, and specifying clearly the responsibility assumed for the injury. The ILC should also devote itself in future to establishing rules that would not only halt but prevent breaches by stipulating the obligations to stop the breach, the obligation of reparation and the obligation of restitutio in integrum stricto sensu, in the light of State practice, judicial and arbitral decisions, and doctrine. The final wording of those rules should bear in mind the principles governing relations between States and the need to promote co-operation.

46. With regard to "international liability for injurious consequences arising out of acts not prohibited by international law", his delegation believed that certain requirements must be borne in mind. In order to prevent such acts, existing instruments, such as the Stockholm Declaration, should be taken as a basis, and it should be clearly specified that States must ensure that activities carried out within their jurisdiction did not cause harm to other States. It was also necessary, in the light of the experience acquired in connexion with the Law of the Sea, to specify the modalities for the settlement of disputes relating to acts committed, or effects produced, in zones outside the jurisdictional limits of the author State in order to make the new rules comprehensive and their application more effective. It was also necessary to expand the analysis of case law so that the rules drafted would take into account the diversity of existing situations.

47. His delegation was, in principle, in favour of the guidelines adopted by the International Law Commission for future work on the topic (A/36/10, paras. 195 et seq.). It believed, however, that the topic of State responsibility should in future be studied in the light of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, and of the principles derived from practice in international good-neighbourly relations.

48. The draft articles on jurisdictional immunities of States and their property should, in the opinion of his delegation, take greater account of State practice

(Mr. Mazilu, Romania)

in that field, of the experience of both developed and developing countries, and of the trends in treaties on the subject. His delegation considered that the analysis should not be limited to treaties which provided examples of consent to certain limitations on the jurisdictional immunity of States and that there should be a detailed examination of all trends in order to identify the most characteristic ones and thereby avoid one-sided rules.

49. With regard to the text of the draft articles, there should be a closer link between the definitions in subparagraphs (a) to (f) of article 2 and the rules in articles 7 and 8. The provisions of article 9 on voluntary submission should be improved. His delegation was of the opinion that the express consent of the State to the application of the legal procedure of another State was a sine qua non. It also believed that the question of reciprocity in the matter should be studied in greater detail, so as to take into account not only existing practice but changes in it in future.

50. Regarding the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation commended the Special Rapporteur, Mr. Yankov, on having taken into consideration a number of comments made by the Sixth Committee at previous sessions.

51. The general principle of "freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags" should find expression in the final text, which would need to be drafted in the light of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions, and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. The rights and duties of both the receiving State and the transit and sending States should also be specified in order to ensure safe and normal handling of the type of international communications in question.

52. His delegation considered that because of the topic's practical importance the work on the law of the non-navigational uses of international watercourses should be pursued, bearing in mind the comments made by a number of delegations, including his, during the debate in the Sixth Committee.

53. His delegation appreciated the efforts of the International Law Commission to expand its co-operation with other international legal bodies and to organize seminars and symposia, which were particularly useful in training young lawyers from various countries, especially developing countries. His delegation also believed that the work of the United Nations in the field of the peaceful settlement of disputes and good-neighbourly relations among States could give the International Law Commission a useful new course to follow.

54. The appeal for disarmament and peace of the Socialist Democracy and Unity Front of Romania, which had been distributed as an official document of the General Assembly, recapitulated the rules and principles on which international relations were based. The achievement of the objectives set forth in that appeal

(Mr. Mazilu, Romania)

presupposed the evolution and further development of international law, and the strengthening of its role in the promotion of peace and international co-operation and in the establishment of a new economic order. It was in those areas that the International Law Commission would be called upon to make an even more substantial contribution under the next mandate given to it by the General Assembly.

55. Mr. BEDJAOUI (Algeria) said that, while international law reflected the progress made in international relations, it also had a dynamic role. It was in that sense that the United Nations Charter had helped to "liberate" international law by stipulating, in Article 13, paragraph 1, that the General Assembly should encourage "the progressive development of international law". The International Law Commission had come into being as a result of that concern and had succeeded, despite the inherent limitations of its statute and the heterogenous nature of a changing international community, in participating in the process of establishing an international legal order which recognized some of the effects of decolonization and met some of the requirements of development. In the same way that a particular form of international law had served as the chosen instrument for achieving dominance, the norms of contemporary international law must, if they were to correspond to reality, express a new function of the law required as a consequence of relations among an increasing number of subjects of law which were more heterogenous and aspired to greater equality in their status. A new and authentic legal order which took into account the changing circumstances of politics, economics and society which determined international relations, could only be achieved after a transitional phase in which international law was adjusted: it was the task of the Commission to bring about that adaptation.

56. Unlike the traditional evolution of international law, in which conventional law emerged from customary law, codification sometimes resembled progressive development. Such a pattern revealed, in his opinion, a preference for the "agreement", which resulted from a more democratic process than customary law, in the formulation of which not all States had participated. It also indicated that the Commission was aware of the urgent need to bring into being a system of law which took account of new realities. If conventional law sometimes failed to become customary law, that was undoubtedly due partly to the fact that the process by which conventional law came into being was relatively long drawn out, and partly to the fact that there could be a hiatus between the norm so laboriously arrived at and the changing reality it was intended to regulate. Due to a lack of foresight, the international norm was often doomed to obsolescence even before it had been accepted as part of positive law.

57. His delegation was pleased to note that the Commission was making a greater effort to meet the specific needs of the international community than to conform strictly to an "established practice" which was difficult to find in reality. Undue respect should not be accorded to tradition, and the virtues of innovation should not be ignored.

58. With regard to the question of succession of States, a phenomenon as venerable as that of the institution of the State itself, he noted that the contemporary

(Mr. Bedjaoui, Algeria)

juridical norm, which embodied the right of peoples to self-determination and the principle of the sovereign equality of States, seemed to some, precisely because it took into account the parameters of change, a radical reversal rather than a modest advance in the development of law. In that regard, his country, and the many other countries which had experienced colonialism, had a right to regard the "breakthrough" in international law in the field of succession of States in respect of State property, archives and debts as a very restricted one. The scale and variety of the disagreements in that field would have called for a greater number of more comprehensive provisions aimed at contributing to a peaceful settlement of disputes by offering equitable solutions favouring co-operation and eliminating the traces of the past.

59. He noted that the 39 draft articles retained in second reading, which related to three specific categories of succession, did not deal with all aspects of the subject, and that the Commission's report, referring to the 1978 Yearbook of the Commission, stated that other aspects, such as territorial problems, natural resources, status of persons, and particularly nationality, could be considered at a later stage. While recognizing that such a consideration could not fail to benefit friendly and co-operative relations between States and to facilitate the peaceful settlement of disputes, he felt that such a viewpoint in no way detracted from the conceptual and practical self-sufficiency of the draft articles on succession of States in respect of State property, archives and debts, and that, given the priority accorded to those questions, the General Assembly should adopt appropriate provisions in order to implement the recommendation in paragraph 86 of the Commission's report.

60. In supporting that recommendation and advocating the conclusion of a convention, his delegation was simply indicating its dedication to the progress of international law and its ultimate goal of peace, while furthering Algeria's true interests as a country which, after emerging from more than a century of colonial domination was endeavouring to free itself from the consequences of the past through the elaboration of an international conventional norm conforming to the wise principle of equity. His delegation also believed that the Commission's productivity was influenced by the fate of the work which cost it so much effort. Lastly, there seemed to be no reason why the subject should not be the subject of a convention, when succession of States in respect of treaties, which formed only a part of the same topic, had resulted in a convention within a very short space of time.

61. Under the guidance of Mr. Reuter, the Commission's second reading of the draft articles on treaties concluded between States and international organizations or between two or more international organizations was currently under way and would lead to adoption of the draft by the Commission, thereby making a natural and indispensable addition to the Vienna Convention on the Law of Treaties, with which the draft articles had close and evident links. He welcomed the fact that the parallelism with the Vienna Convention had not precluded innovations intended to reflect the specific characteristics which resulted from the differences between the subjects of international law concerned and which must of necessity give rise to provisions safeguarding, to the greatest extent possible, the principle of the

(Mr. Bedjaoui, Algeria)

equality of the contracting parties while ensuring a certain flexibility, taking into account both the conceivable limits of consensralism as applied to international organizations and the limits of their capacity to enter into contracts.

62. His delegation agreed with the substance of draft article 3, which was simply a faithful reproduction of article 3 of the Vienna Convention. It naturally construed the phrase "subjects of international law other than States or international organizations" as referring in particular to entities of public international law which had proved their capacity to contract obligations and to honour those obligations, namely national liberation movements, and his delegation was surprised that such an identification, which was already recognized in humanitarian law, was not mentioned in the commentary.

63. In connexion with the five draft articles on the topic of State responsibility proposed by Mr. Riphagen which dealt with the content, forms and degrees of State responsibility, he noted that the preliminary rules set forth in articles 1 and 3 resembled in their format clauses safeguarding the rights of the State which was the author of an internationally wrongful act, and that only the wording of draft article 2 related to the determination of the obligation of the author State. That impression should be dispelled, and his delegation hoped that the Drafting Committee would restore the function of the articles as general principles by adjusting their orientation and arranging their format accordingly.

64. He considered that the obligation of reparation which, according to article 4, was one of the obligations incumbent on a State which had committed an internationally wrongful act, nonetheless allowed third States a capacity - or indeed an obligation - to register disapproval, including, at the very least, non-recognition of the new situation created by the internationally wrongful act.

65. In connexion with "counter-measures" and the principle of proportionality which should provide the basis for such measures, he felt that it might be worthwhile to devote appropriate provisions to the subject, even if it were understood that "particular responses to particular breaches" would be excluded, since there was a danger that, if the obligation to make reparation was confined to financial compensation, the resulting texts might not achieve their intended objective.

66. Similarly, while it was appropriate that the breach of an international obligation involving aliens, whether natural or juridical persons, should be the subject of a specific draft article, it was no less important for breaches of international obligations deriving, for example, from the United Nations Charter, to be covered in the greatest possible detail. From that point of view, draft article 4, paragraph 1 (c) should be interpreted as imposing a peremptory obligation of imperative result on the State which committed an internationally wrongful act.

67. He stressed the need, in determining the legal consequences of breaches of obligations, to take account of aggravating or attenuating circumstances and

(Mr. Bedjaoui, Algeria)

expressed the view that concepts such as "intent" should be very carefully defined if they were to serve as basic criteria in determining aggravating circumstances, in order to avoid disputes or conflicting interpretations.

68. He welcomed the fact that the Commission had based its work on three logical parameters, which would enable it in the future, as the Chairman of the International Law Commission had pointed out, "to offer specific solutions to specific situations."

69. With regard to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he noted that although the link between that question and that of State responsibility, highlighted by Mr. Quentin-Baxter, had been discussed in depth in the Commission, it had not yet been possible to fix precisely the point of intersection of harm and wrong.

70. In connexion with the "scope of the articles", which was the subject of draft article 1, he recalled that in 1980 his delegation had observed that the scope of the topic could not be restricted to the realm of the physical environment, for ecological damage was only one part of the injurious consequences arising out of acts not prohibited by international law.

71. He acknowledged that the difficulty of the topic lay above all in the fact that State practice in the area had not developed to the point where it had been able to engender a customary law on which, at least in the short term, conventional rules could be based; nevertheless, he believed that the work of codification which had been commenced was justified by the real and varied nature of damages of that type, one of the characteristic features of modern times.

72. He took the view that in order to ensure a fair balance between the interests involved, responsibility in that area should be grounded both on the concept of duty of care, in a more refined and subtle form, and on the obligation of reparation. Liability, so conceived, would impose on States a whole network of obligations of prevention and protection which would take account of a range of factors, including the conditions peculiar to developing countries. In that context, the concept of "legally protected interests" of another State, mentioned in draft article 1 (b), while technically referring to responsibility for wrongful act, nevertheless highlighted the natural limits that the interdependence of nations and the principles of good neighbourliness imposed on the sovereignty of States in circumstances involving activities likely to have injurious consequences beyond the boundaries of the territory within their jurisdiction.

73. From that point of view, it served no purpose to ask whether the envisaged provisions should apply indiscriminately to "actual or potential loss or injury" or only to injury already caused, and there was some contradiction in trying to establish general rules designed to be complementary to norms which were already in existence or being prepared which would not accord the appropriate importance to the dynamic obligation of prevention and its legal implications.

(Mr. Bedjaoui, Algeria)

74. His delegation believed that it made sense to elaborate "rules of conditional authorization" rather than "rules of prohibition" and that only when the boundaries of the topic had been delineated clearly would Governments be in a position to give their views on the correct scope of the codification of that topic.

75. On the question of the jurisdictional immunities of States and their property, the differences of opinion concerning the concept of "immunity" were too pronounced to enable anything other than a compromise solution to be reached. It was almost certainly in such a spirit of compromise that the Special Rapporteur, Mr. Sucharitkul, had added to the rule concerning the general principles embodied in draft article 6, provisionally adopted, five new draft articles, which narrowed its scope eschewing the principle both of "absolute" and "full" immunity. Furthermore, draft articles 8 to 11 did not appear to give the concept of consensra ism the importance which it deserved as one of the mainstays of positive international law. However, that was a first impression based on the fragmentary nature of the draft in its existing form and might be dispelled by a study of the revised draft articles.

76. He felt that the inductive method employed would guarantee order by progress in the work of the Commission.

77. Concerning the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he noted that the six draft articles submitted by the Special Rapporteur, including a set of rules entitled "General provisions", advanced the consideration of the topic into a phase involving the study of specific issues which gave promise of successful completion in the very near future.

78. He endorsed the over-all approach to the definition of the enlarged scope of the draft articles and regarded the general principles in draft articles 4 to 6 as particularly wise and well-balanced.

79. Concerning the exclusion of international organizations from the scope of the draft articles, by means of a safeguard clause, he wondered whether the technical difficulties which had prompted that move might not be resolved by closer study, enabling the communications of international organizations to be brought within the scope of the draft articles. In that way, it would become possible to extend the provisions of the draft to national liberation movements, which contemporary law recognized as new subjects of international law. Rendering the rules applicable to diplomatic communications uniform in that way would respond to both the needs of codification and the demands of progressive development.

80. As the Commission approached the start of a new term of office for, and possibly the enlargement of, its membership, he was happy to endorse the statement in paragraph 258 of the Commission's report that "those objectives established in 1975 and reaffirmed in 1977 had been largely realized." He recalled that the

(Mr. Bedjaoui, Algeria)

enlargement of the Commission to 25 members, decided 20 years ago, had been due to the wish of the General Assembly to reflect within the Commission the emergence of newly independent States on the international scene and the birth of at least one new legal system engendered by the movement of liberation of peoples.

81. The initiative taken by the third world countries, designed to enlarge the membership of the Commission yet further, was very encouraging both for the Commission and for international law: that enlargement would being about a more equitable representation within the Commission of political and legal sensibilities as reflected in international relations, and would impart to that body fresh dynamism and renewed energy, thus opening up broad horizons for the progressive development of international law and facilitating the construction of an international legal order capable of ensuring an age of peace and development for all.

The meeting rose at 1 p.m.