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Chairman: Mr. ENKHSAIKHAN (Mongolia)

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The meeting was called to order at 3.15 p.m.

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

1. Mr. MICKIEWICZ (Poland) said that one major achievement of the International Law Commission's thirty-third session had been the adoption of the final text of the draft articles on succession of States in respect of State property, archives and debts. In their final form the draft articles seemed less controversial and could be recommended as a useful basis for the preparation of a new international convention on the subject. Of the additional articles introduced, article 4 was particularly valuable in that it affirmed the principle of non-retroactivity of the articles. Less important, but also useful, were the safeguard clauses included as articles 5 and 6.

2. It could, of course, be doubted whether all the provisions in the draft articles on succession of States reflected the generally accepted rules of customary international law, particularly those relating to archives, which were a very distinctive category of State property. However, his delegation was in general quite satisfied with the draft articles in their final form.

3. With regard to chapter III of the report (A/36/10), which dealt with the question of treaties concluded between States and international organizations or between two or more international organizations, his delegation was pleased to note that substantial progress had been achieved at the Commission's thirty-third session in the codification of that important aspect of contemporary international law. He believed that in the Commission's future work on the topic, attention would be focused on those aspects of international organizations as subjects of international law which differentiated them from sovereign States. As the report had rightly pointed out, international organizations, as composite structures, remained bound by close ties to the States comprising their membership. For that reason, full legal assimilation of international organizations to States would not be possible. It was desirable that the future convention on treaties concluded between States and international organizations should not merely reiterate the provisions of the Vienna Convention on the Law of Treaties, but should contain new provisions specific to the subject-matter. Many of the draft articles presented by the Commission met with that requirement and he hoped that a similar approach would be adopted in the further consideration of articles 7, 20, 36 bis, 62 and 73.

4. Considering the articles discussed at the Commission's 1981 session, his delegation had some doubts as to the advisability of including article 5. While it was not impossible that in future an international organization would participate in a treaty creating another organization, that possibility did not imply that such a case would require the adoption of a separate provision.

(Mr. Mickiewicz, Poland)

5. The reference in article 6 to the "relevant rules of the organization" as a source of that organization's capacity to conclude treaties might cause practical difficulties. Only a relatively limited number of constituent instruments of international organizations were applicable in such a context, in contrast to the considerable number of agreements concluded by international organizations. It would be useful to specify the situation which would arise when the relevant rules of an international organization were silent as to the organization's capacity to conclude treaties.

6. Similarly, it would be proper to clarify the situation of uncertainty created by paragraphs 3 and 4 of article 7, an uncertainty which was damaging to both the interests of the member States of the organization and those of other parties to the treaty.

7. One of the most controversial aspects of the draft articles was the question of reservations. His delegation fully endorsed the modification introduced in the text of articles 20 and 20 bis of the previous draft and the deletion of a stipulation dealing with the possibility of tacit acceptance of reservations by an international organization. The right of tacit acceptance of reservations by the end of a 12-month period was accorded only to States. Nevertheless, some doubts remained with regard to the relationship between new article 20 and new article 5 of the draft.

8. In chapter IV of its report the Commission presented five articles of part 2 of the articles on State responsibility; it was still waiting for Governments to comment on chapters IV and V of part 1. Since his Government's comments would be submitted in due course, he would confine his observations to article 35, which had given rise to considerable controversy. He shared the Commission's view that the elimination or limitation of wrongfulness did not prejudge the question of proper compensation. Thus, a State causing damage was properly held to be liable, even if it had acted in conditions of distress or a state of necessity. It seemed desirable to link the provisions of the article with the situations envisaged in articles 29 and 31.

9. With regard to the five new articles of part 2, his delegation could not support proposals aimed at extending the scope of State responsibility to include relations with alien natural or juridical persons. Nor did it agree that the right of option with regard to the forms of compensation should be accorded to a State which breached an obligation and not to the injured State.

10. He agreed with those delegations which had expressed the conviction that the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law should not only regulate compensation in connexion with the so-called "liability for risk", but should also play a positive role in determining responsibility for damage caused to the environment. It also agreed that the distinction between the terms "liability" and "responsibility" was untranslatable into some languages, and that it would therefore be convenient to use only one term.

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11. In connexion with the draft articles on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that, while many issues had already been resolved, some very controversial problems remained. Most important was the question of ensuring that the diplomatic bag did not contain items other than correspondence, documents or articles intended exclusively for official use. It was a highly controversial question whether, in the case of justified suspicion of abuse of the privilege to freedom of communication, the receiving State should have the right to open the diplomatic bag, either in the presence of a representative of the mission of the sending State or in his absence, or to return to that bag to its place of origin. The Special Rapporteur had rightly given particular attention to the status of a diplomatic bag transported without the escort of diplomatic courier. The Commission should consider whether others, such as the captain of an aircraft, who were given custody of a diplomatic bag in transit should be accorded some degree of functional immunity.

12. Mr. ROTKIRCH (Finland) said that the recent Ad Hoc Meeting of Senior Government Officials Expert in International Law held at Montevideo had concluded its proceedings by adopting a number of conclusions and recommendations, one of which had a direct bearing on the question of the law of the non-navigational uses of international watercourses. The recommendation was a request to the Governing Council of UNEP to adopt a programme for the development and periodic review of environmental law. One of the items enumerated in that connexion concerned protection of rivers and inland waters against pollution. The Governing Council was asked to invite the General Assembly to accord greater priority to the question of non-navigational uses of international watercourses as one of the topics dealt with by the International Law Commission. His delegation hoped that the Sixth Committee would endorse that recommendation.

13. Turning to the Commission's report (A/36/10), and referring first to the draft articles on State responsibility, he said he would confine his observations to part 2 of the draft articles, which concerned the content, forms and degrees of international responsibility. It should be recognized that the foremost concern of the international community in the event of a wrongful act by a State was to ensure the restoration of the pre-existing situation by peaceful means of reparation. Under no circumstances should illegal behaviour by a State lead to the application of measures which might endanger international peace and security. That meant, in the first place, that the legal system should not provide for unilateral sanctions as a recourse for the injured State. Secondly, it meant that the system of responsibility should be made sufficiently effective to ensure that there would be no need for the injured State to resort to actions which might endanger the maintenance of peace. The use of sanctions or punitive consequences should not be left to the discretion of the injured States; the application of such measures should, unless otherwise agreed, be the responsibility of the collective organs of the international community.

14. A different approach was called for in dealing with the question of reparations for a wrongful act. Although the consequences which the internationally wrongful act of a State might have under international law should be determined

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in conformity with the general régime of international responsibility, the ways in which compensation or reparation should be effected, and the amount of such compensation, should be left to the discretion of the States concerned.

15. The distinction followed from the difference between the various types of obligations created by international law. In the first part of its work on the topic the Commission had listed certain basic obligations which every State owed to the international community as a whole (obligations erga omnes). Only the breach of certain serious obligations of that kind should lead to the application of punitive sanctions. His delegation felt that those obligations should be clearly indicated, and that the ways in which punitive sanctions could be applied by the international community should be distinguished from the reparative forms of reaction to the internationally wrongful act.

16. His delegation welcomed the Commission's decision to begin part 2 with general provisions concerning the effects of an internationally wrongful act on the rights and duties of all the parties concerned. A link to part 1, as suggested in paragraph 154 of the Commission's report (A/46/10), would seem to be highly useful. The general provisions should define the position of the State committing the wrongful act, and that of the injured State and third parties, taking into account the nature of the libation that had been breached. In that respect draft articles 1, 2 and 3 needed further elaboration. The Commission should be particularly careful in elaborating the rule of proportionality, as referred to in paragraph 147 of the report. Such a rule should in no circumstances be used as an excuse by the injured State to commit internationally wrongful acts against the State causing the injury. While it was true that the principle of proportionality should be borne in mind in taking reparative action, that seemed to have been taken care of by the application of the principle restitutio in integrum, which was referred to in draft article 4 and in paragraph 149 of the report.

17. With regard to the new obligations created by the wrongful act, there seemed to be an abundance of international case-law to support the three notions referred to in draft article 4, paragraph 1. The reference to remedies permitted by the State's internal law in paragraph 1 (b) should, however, be deleted or at least reformulated. In that context he agreed with the views expressed in paragraph 160 of the report. A reference to the priorities of the injured State in respect of any particular form of reparative action should be included in the draft article. Finally,the draft articles should not seek to impose any particular form of reparation on the parties.

18. Chapter V of the report, which dealt with international liability for injurious consequences arising out of acts not prohibited by international law, indicated that the issues involved in the topic were both complex and controversial. His delegation appreciated the skilful and scholarly work carried out by the Special Rapporteur in his two reports, which were a major contribution to the progressive development of international law in the field of liability and compensation, and formed a valuable starting-point for further work by the Commission.

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19. It had often been emphasized that the question of a State's liability to pay damages in the absence of any fault on its part arose most frequently in connexion with transfrontier environmental damage. In the endeavour to elucidate the law applicable to such cases the Special Rapporteur had been led to consider the problem of the so-called "strict" or "absolute" liability of States in connexion with damage originating in one State and occurring in another. It seemed to be the opinion of an overwhelming majority of jurists that such a liability did not exist. The few cases which seemed to testify to the contrary were too scarce and too closely related to the regional practice of a small number of States to give evidence of a global custom. The Commission had therefore been unable to solve the problem by reference to an international strict liability régime. It could be concluded that such a liability existed only under specific conventional arrangements.

20. The problem of liability in the event of transfrontier pollution damage could not be solved simply on a theoretical basis. Problems created by such damage were a consequence of the rapid development of modern technology, and it was therefore essential to adopt an innovative approach in the endeavour to arrive at legal norms applicable to such problems.

21. Recognition of the fact that there were no existing general rules providing for strict liability of a State under whose jurisdiction or control harmful activities had been conducted did not imply that the State should never be held liable for damage which was not the result of a wrongful act by that State. The principle sic utere tuo ut alienum non laedas could be cited as a maxim in the search for equitable solutions when a conflict of national interests had arisen as a result of transfrontier damage. That was true even in cases where no State had been involved in wrongful conduct. One means of finding an equitable balance of interests was to determine the liability of the party causing the damage. It was clear that such a liability had nothing to do with the duty to pay damages as a result of the application of the rules of responsibility obtaining in the case of a wrongful act. It had long been recognized in national legal systems in which several regimes of no-fault liability had existed that liability was often the only way to accommodate conflicting interests.

22. His delegation felt that the Commission's decision to deal with the topic in the context of State responsibility was a valuable one. State responsibility should be considered in terms of secondary rules of obligation, whereas liability for damage caused by lawful activities should be dealt with in the context of primary rules. In his delegation's opinion the concept of duty of care referred to in paragraphs 172 and 179 of the report did not meet that requirement, and its use in the context of liability would therefore not be advisable.

23. In connexion with draft article 1 on the scope of the articles, his delegation agreed with the Commission that questions regarding the treatment of aliens should not be considered as germane to the topic. His delegation would endorse the use of the term "activities undertaken within the territory or jurisdiction of a State" in that it would appear to cover the widest range of

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cases involving transfrontier damage. The term was also compatible with the language used in the 1972 Stockholm Declaration, which was of crucial importance for the development of international environmental law.

24. Regarding the term "loss or injury", used in article 1, he understood that the Special Rapporteur would give a clearer indication of the scope of that term at a later stage. In his delegation's view "loss or injury" should be understood as a relative concept, to be determined through comparison of the relevant interests involved. It could in no way form the basis for determining an equitable amount of compensation.

25. Finally, his delegation felt that the formulation of subparagraph (b)of article 1 did not seem adequate. That was particularly true of the reference to the ambiguous term "legally protected interests". From a purely theoretical point of view it would seem difficult to draw a distinction between "legally protected" and non-legitimate interests. In the endeavour to identify the relevant interests special emphasis should be laid on the social costs and inherent harmfulness of the activity.

26. In general, the Commission had succeeded in avoiding rigid positions on a very complex topic. Theories of unlimited sovereignty or absolute liability had rightly been set aside. Much work remained to be done, however, particularly in the analysis of specific conventional régimes in which liability was used as a means for balancing national interests.

27. Mr. KURUKULASURIYA (Sri Lanka) emphasized the pivotal role played by the International Law Commission in promoting the progressive development and codification of international law, and the important functions of the Sixth Committee in providing the Commission with guidance concerning the attitudes and responses of Member States to its work. His delegation deeply appreciated the significant work done by the Commission during its 1981 session and, in particular, the courage with which it had approached the topic of succession of States in respect of State property, archives and debts (A/36/10, chapter II), an area of international law in which State practice had been more varied than in others and which involved or touched upon many difficult and politically sensitive questions, all of which the Commission had handled with admirable sensitivity and with consistent reference to the various pertinent United Nations rsolutions and declarations. The latter process must be encouraged by the Committee, as an excellent means of giving tangible effect to those resolutions and declarations, by incorporating their principles in the fabric of the new international legal order. It was gratifying that various organs of the United Nations, including the Commission, had thrown their weight behind initiatives to narrow the economic gap between rich and poor nations and displayed the courage required to effect genuine changes in the international order, whether legal, economic or social, properly reflecting the will of all peoples.

28. It was heartening to note that the Commission had made a real effort, as reflected in the commentary to draft article 14 in chapter II, to harmonize

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international law with the principles and norms contained in the resolutions and declarations relating to the new international economic order, in particular, the Declaration and the Programme of Action on the Establishment of the New International Economic Order and the Charter of Economic Rights and Duties of States. Those declarations and resolutions reflected the will and the aspirations of all peoples of the world and the Commission would do well to continue to turn to them for inspiration and guidance.

29. His delegation commended the Commission on its achievement in the field of succession of States in respect of State property, archives and debts and supported the convening of a conference of plenipotentiaries to consider the draft articles and to adopt a convention codifying that branch of international law. However, it should be borne in mind that hard-pressed developing countries often found it difficult to justify the expenditure required to enable them to be adequately represented at international legal conferences unless the subject-matter was of great consequence to them. That in part explained the faith which they increasingly placed in the work of the Commission, from the point of view of reflecting their interests.

30. Without committing its Government in any way to any part of the draft articles, his delegation wished to express some preliminary views. It welcomed the fact that the scope of the draft articles had been indicated with greater precision in their new title and agreed with the Committee's basic approach that the fundamental rule should be that of agreement between the predecessor State and the successor State, in the absence of which the principles contained in the draft articles became applicable. It also welcomed the decision to structure the draft articles so as to cover each of the three areas of State succession in a separate set of articles, which made for greater clarity and helped to avoid ambiguities, although it did have the disadvantage of considerable repetition, which might be avoided in the drafting of a convention.

31. His delegation noted with satisfaction the clear parallelism between the draft articles in part I, dealing with general provisions, and the corresponding provisions of the closely-related 1978 Vienna Convention on Succession of States in Respect of Treaties. He also welcomed the way in which the scope of the articles was defined in article 3, and the provisions relating to non-retroactivity in article 4, reflecting as they did a general principle of article 28 of the 1969 Vienna Convention on the Law of Treaties to which his delegation fully subscribed. The structuring of the articles in two sections for each area of State succession, the first dealing with general principles and the second with various specific situations, was useful, although it once again raised the problem of repetition.

32. However, his delegation had reservations concerning article 8 in that it linked the criterion for defining State property with the internal law of the predecessor State. Further, the linkage of movable property to the territory established by article 13, paragraph 2 (b), by requiring proof that it was "connected with the activity of the predecessor State", might need to be looked at again. He would also like to see strengthened the provisions of article 14,

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paragraph 4, relating to the invalidity of agreements which infringed the principle of the permanent sovereignty of every people over its wealth and natural resources, so as to reflect the views expressed by some members of the Commission that any such agreements should be void ab initio without the need for the new State to denounce their unfair character.

33. In connexion with the draft articles in part III, dealing with State archives, his delegation was gratified to note that the Commission, as reflected in its commentary to article 26, had taken into account resolutions calling upon the metropolitan Powers to return the works of art and manuscripts in their possession to their countries of origin, adopted both by United Nations bodies and by the non-aligned movement.

34. With regard to part IV, on succession of States in respect of State debts, his delegation viewed with favour the tempering of the principles of succession with the principles of justice and equity so as not to add to the burden of difficulties, particularly economic difficulties, of newly independent States. However, it had reservations on the definition of State debt as contained in article 31 and felt that further consideration should be given to two aspects of that article: first, the question whether it would be preferable to refer therein to debts owed by States to private natural or juridical creditors, and second, the scope and precise meaning of the phrase "or any other subject of international law".

35. His delegation had been happy to observe at first hand the close co-operation that had developed between the Commission and the Asian-African Legal Consultative Committee, which performed the important task of examining the practical implications of principles of international law for the economic and social fabric of its member countries. Its contribution to the progressive development of international law deserved the highest praise and his delegation hoped that the co-operation would be strengthened further.

36. Lastly, his delegation joined with others in requesting the Commission to appoint a new Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses and to conclude the examination of that question without delay.

37. Mr. SPERDUTI (Italy) emphasized the great importance of the work of codification and development of international law relating to State responsibility, convened in chapter IV of the International Law Commission report (A/36/10), and expressed the hope that that work, started by the Commission as long ago as 1955, would be tackled with the commitment it deserved and successfully completed.

38. Work on the topic dealt with in chapter V of the report, that of international liability for injurious consequences arising out of acts not prohibited by international law, was still at a preliminary stage and appeared to be hampered by a rather hesitant approach. The subject was important enough to be regarded as a

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touchstone of a new international order, embodying as it did the principle of solidarity among States, which needed to be given due recognition in international law. It required, in other words, an approach which went beyond the strict boundaries of the traditional conception of the principle of State sovereignty, a conception in which the ancient maxim sic utere tuo ut alienum non laedas had in the past played very little part.

39. A number of cases decided by international courts had highlighted the need for the reaching of agreement between States engaged in activities with potentially injurious consequences and the States likely to be affected by the problem. Such agreements were even more valuable at a time when the general rules of international law on the matter were still in the course of formulation. The Commission's task, however, was fundamentally to apprehend and draw inspiration from the evolutionary trends emerging in the international community, of which an example was the Declaration of the United Nations Conference on the Environment held in Stockholm in 1972. For that reason, it would be highly desirable for the Commission to establish precise guidelines for its continued consideration of the topic, in order to achieve positive results and to resolve the oscillation between different but related concepts which it had thus far displayed.

40. The treatment of the topic, both in the previous year's report (A/35/10) and the report currently before the Committee, had the air of being a supplementary chapter to the draft articles on State responsibility for internationally wrongful acts. For the fact of taking as a starting-point the principle that in order to impose on a State the obligation to make reparation for any injurious consequences arising out of its activities it was necessary to be able to charge that State with a lack of due care, placed the issue squarely in the area of international responsibility for internationally wrongful acts or, in other words, for a breach of an obligation deriving from primary rules of international law. The two obligations were not comparable, as the Commission itself had noted clearly when dealing with State responsibility. It was certainly conceivable in theory to establish a link between those two concepts by elaborating a rule of international law establishing a liability for the risk of injurious consequences inherent in certain activities, accompanied by another rule imposing on the State concerned the obligation to take appropriate preventive measures. That might then entail a heavier responsibility for that State in a case where the harm was caused both by the activities themselves and the State's lack of due care. His delegation could do no more than point out the choice which the Commission must make between the formulation of general principles on international liability for beneficial but potentially dangerous activities and the formulation of rules covering important but specific areas, such as that of the environment, and to stress that the Commission needed to find an approach which would enable it to avoid overlapping with the quite distinct area of State responsibility for internationally wrongful acts.

41. On the question of the jurisdictional immunities of States and their property, dealt with in chapter VI of the report, the Commission's attention

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should be drawn to a distinction which needed to be made, in the context of the activities of States covered by jurisdictional immunity, between activities resulting from the State's exercise of its public power and other activities of the State. The distinction was important because only the activities of the first type were regulated by general international law. Although it was possible to speak of jurisdictional immunity for activities regulated by private law, trade law and, generally, activities which a State carried out iure gestionis as opposed to iure imperii, the source of that immunity was either internal law or treaty.

42. It was not the rule of jurisdictional immunity in general international law which had changed by comparison with the custom of the past; it was States which had undergone a striking transformation, engaging increasingly in forms of action which, like the public management of commercial enterprises, were not essentially different from comparable activities carried out by private persons and no longer so closely linked to the exercise of sovereignty, even though designed to provide for the well-being of the territorial community of the State concerned. That distinction between acta iure imperii and acta iure gestionis was one of the most difficult to draw precisely and he recommended the Commission to give the matter very careful consideration and to draw on the numerous judgements of internal courts for criteria suitable to be used in a codifying convention.

43. His delegation welcomed the co-operation established between the Commission and the International Court of Justice, as well as with other legal bodies working in the field of international relations.

44. It also appreciated the information given in paragraph 278 of the report on the International Law Seminar organized in Geneva by the Office of Legal Affairs.

45. Mr. LACLETA (Spain) recalled that his delegation had commented on the first three chapters of the report of the International Law Commission (A/36/10) at the 41st meeting.

46. With respect to State responsibility for internationally wrongful acts, Spain had already submitted written comments on chapters I, II and III of part 1 of the draft articles, and would submit its comments on chapters IV and V before 1 March 1982. However, he wished to return to a comment that he had made in previous years, and to which there seemed to have been no response. It related to the word "hecho", repeatedly used in the Spanish text of part of the draft articles and now reappearing in draft articles 4 and 5 of part 2, as referring to the behaviour of a State, a usage which was unacceptable in the Spanish language. In Spanish, States, and also juridical persons or individuals, did not commit "hechos", but "actas".

47. With respect to part 2 of the topic of State responsibility, he noted that five draft articles had been referred to the Drafting Committee. At first sight that end result appeared somewhat modest, but the Commission was faced with a complex task. Most delegations had welcomed the central idea that the draft

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as a whole should contain only secondary rules, but article 5, and some of the commentaries to the draft articles, gave rise to doubts about the possibility of proceeding with the work without having regard to certain specific consequences with respect to responsibility and reparation deriving from the nature of the primary rule that had been violated. That applied particularly to the rules referred to in articles 19 and 22 of part 1. The problem posed by article 19 had been fully dealt with in the written comments submitted by his Government. However, he wished to indicate that it might be necessary to take into account the nature of the primary rule infringed not only in that case, but also with respect to the rules relating to the treatment of aliens and to those establishing the internationally protected rights of individuals. Until recently it had been possible to maintain that a human being as such had no subjective rights directly granted and guaranteed by the international legal order, because it was States that had the right to require that their citizens be treated in a particular manner; at that time it was that right, and in most cases it still was, which was violated, the right of the State whose citizen had received treatment different from that internationally established. That example sufficed to indicate the complexity of the subject and the inevitable link between primary and secondary rules. The problem might possibly be solved by means of a distinction between two or three general categories, accompanied by a specification of the type of reparation appropriate in the various general cases. The new draft article 5 seemed to point in that direction.

48. Although the wording of the five draft articles could undoubtedly be improved, they embodied principles that were not open to discussion and constituted a useful starting-point, particularly if in their final form, when part 2 was more advanced,they could be so framed as to avoid the criticism already made by other delegations that they appeared to provide excessive protection for the author State.

49. His delegation hoped that the Commission's work on part 2 would proceed as rapidly as possible to the completion of the first reading, in order to permit a start to be made on the second reading of part 1, which should also take account of the possibilities outlined for part 3, dealing with the position of third States. His delegation would find it very difficult to take any stand on that question until it had some idea of parts 1 and 2, and of the form and content of article 19 in part 1.

50. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that his delegation was pleased that the Commission had taken up the subject, which was an indication of the degree of development that international law should attain in the near future in a more integrated international society. However, the difficulties involved must not be underestimated. The first was the difficulty of establishing with sufficient precision the separation between liability with fault and no-fault liability. There again a linguistic problem arose because the English terms "responsibility" and "liability" were both translated in Spanish by the single word "responsibilidad", in other words the Spanish legal idea of

responsibility was broader than the English counterpart. But that was a minor point. The most serious initial problem had been raised by the Chairman of the International Law Commission when introducing the report at the 36th meeting: was it possible for responsibility to exist for an act that was not unlawful?

51. Some would be inclined to say that there was no such responsibility, and they would approach the problem as involving omission of the necessary precautions to prevent an act lawful in itself from having harmful consequences for third parties. He did not believe that that was the correct approach, since if such precautions were established under a legal rule, clearly the responsibility would derive from the violation of that rule and thus the problem would have been avoided by returning it to the other category of responsibility for wrongful acts. The newness of the topic, and hence its difficulty because of the lack of precedents, derived precisely from the recognition of a responsibility in the form of an obligation of reparation when no wrongful act had been committed. There was no doubt that international society had currently reached a stage of integration which was still far from that achieved in national communities and their respective legal orders. In those communities the establishment of no-fault liability represented an advanced stage of integration, and it should therefore not be surprising that at the international level a similar step should prove difficult. However, the difficulties should not prevent continuation of the work by the new membership of the Commission. His delegation considered that the scope of the problem was much better conceived in paragraph (a) than in paragraph (b) of draft article proposed by the Special Rapporteur, since the reference to obligations in paragraph (b) would entail an immediate reference to the legal rules that had established them.

52. With respect to jurisdictional immunities of States and their property, he agreed that the revised version of the draft articles proposed by the Special Rapporteur, particularly articles 7, 8 and 9, represented an improvement and he understood the great difficulties posed by the topic, which was well illustrated by the great variety of replies given by States to the questionnaire. However, he thought that too much importance had been attached to the consent of States. Although views about the scope of immunity from jurisdiction of States varied considerably, it did not appear, at least from the terms used by States themselves, that consent was regarded as the basic element. He believed that what could be found were different interpretations of certain customary rules, and of their scope and exceptions. But when a State agreed that it should grant immunity from jurisdiction to another State, or when it claimed such immunity for itself, it did not do so on the basis of consensus - except of course in the case of an existing agreement - but because it considered that there was an obligation to admit such immunity. In the final analysis what was agreed to was not the immunity as such but the content of the law that established it, and its interpretation. In any case, he understood that the articles were still subject to consideration and provided no more than a very useful starting-point for future work. It would be very difficult to arrive at a complete body of rules to ensure total uniformity, but it was desirable that precise rules should be drafted on those points where general agreement was possible about the existence of immunity and its exceptions.

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53. His delegation believed that the Commission should bear in mind that when it was drafting what finally had become the Vienna Convention on Diplomatic Relations, and preparing the Vienna Conference, it had not dealt with the subject of the jurisdictional immunity of diplomatic missions as such because it considered that they were State organs and that their immunity derived from State immunity. That was true, but in his view a diplomatic mission had certain specific characteristics which should be taken into account in a specific manner.

54. He did not wish to repeat what his delegation had already said about the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, but he wished to emphasize the need to maintain a purely functional approach to the question. The draft should also be kept within strict limits, since it represented a supplement to a question which was already largely regulated by other conventions that had also been drafted by the International Law Commission.

55. His delegation was rather uneasy about the length of some articles as proposed by the Special Rapporteur, such as article 3, which contained more definitions than the Vienna Convention on Diplomatic Relations, and also references to diplomatic bags of a type that he had never come across. At least in Spanish practice he had never heard of diplomatic bags sent directly to another State, which was what article 1 appeared to refer to. He was also surprised at the reference in article 3, paragraph 1, to the transmission of an official oral message, particularly in relation to other States, and he did not understand the difference between such a person, entrusted with transmitting an oral message to another State, and a special envoy, whose status and function had already been dealt with in other instruments. Since the Commission and the Special Rapporteur had agreed that the text should be revised with a view to simplification, he would make no further detailed comments.

56. In conclusion, he wished to refer to the most notable gap in the report, relating to the law of the non-navigational uses of international watercourses. He understood that the departure of the Special Rapporteur had held up the work, but the General Assembly had rightly stated that it deserved priority attention. It was a matter of great importance to many States, indeed vital for some, and the work on it should be brought to a conclusion as soon as possible. He joined with other delegations which had urged that the new membership of the International Law Commission should take urgent steps to appoint a new Special Rapporteur who could continue the work.

57. Mr. HAYASHI (Japan), referring to the draft articles on State responsibility, said he approved of the three-parameter approach to the question adopted by the Special Rapporteur, whereby he provided for the new legal relationship arising from an internationally wrongful act of a State in relation to, first, the new obligations of the author State, secondly, the new rights of the injured State, and thirdly, the rights and duties of the third State. Articles 1 to 3 provided for general principles covering all three parameters, and were intended

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as a link between the articles in part 1 and those to be included in part 2. The philosophy reflected in the draft articles was commendable and was conducive to the progressive development of international law in that area.

58. With respect to future work, his delegation hoped that the Commission would outline the entire range of part 2 of the draft articles as soon as possible and try to complete its first reading without delay. State responsibility was a topic in which the progressive development and codification of law was urgently needed. He accordingly urged the Commission to devote more time and resources to the topic in future sessions, without spending as many years on it as it had done in preparing the draft articles in part 1.

59. With respect to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he paid a tribute to the Special Rapporteur for his work on the subject, which, since it covered a new field, lacked a background of State practice and was beset with theoretical difficulties. There were therefore substantial obstacles to the establishment of general principles of primary rules in that field. However, it was regrettable that the Commission had not reached agreement as to the fundamental course it should follow in its future work on the topic. At the 1981 session the Special Rapporteur had submitted only draft article 1 concerning the scope of the draft articles and thus the whole range to be covered by the draft articles had yet to be disclosed. He regretted that, largely owing to lack of time, detailed consideration had not been given to the terms of reference of the draft articles, so that the Sixth Committee was still not sure of the direction in which the Commission was heading. It was not clear whether the Commission intended to draw up certain general principles regarding so-called civil liability, which had been dealt with, for example, by the International Convention for the Prevention of Pollution of the Sea by Oil, whether it had in mind the generalization of the principles of so-called State liability, as found in the outer space conventions, or whether it intended to proceed in other directions. Those questions must be answered so that the terms of reference for the work were sufficiently clear before the Commission began drafting specific articles.

60. Mr. SAINT-MARTIN (Canada) said that the number of topics undertaken by the Commission, and their complexity, sometimes led to serious delays in the work. In future the Commission should concentrate on three or four priority topics, rather than conducting six studies at the same time, as in 1981, particularly since it was often difficult for its members to attend meetings. The Commission's work could never be free from some degree of controversy, partly because of the diversity of views it represented and partly because of its very broad mandate.

61. It appeared that the draft articles on succession of States in respect of State property, archives and debts was likely to be the first draft to be submitted to Member States with a view to the conclusion of an international convention. However, there seemed to be some difference of opinion about the solutions proposed by the Commission on that topic. With respect to the definition of succession of States in article 2, paragraph 1 (a), Canada understood

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the argument that the compatibility of the draft articles with the Vienna Convention on Succession of States in Respect of Treaties must be maintained, but it was not prepared to accept the idea that "the replacement of one State by another in the responsibility for the international relations of territory" was suitable wording for the draft articles, however appropriate it might be in relation to State succession with respect t. treaties. First, that definition, despite the content of article 2, paragraph 1 (d), might give no precise indication about the date of succession, a date that was crucial because of the important practical effects that derived from it in law by virtue of the draft articles. Secondly, there had, even recently, been cases of the transfer of responsibility for international relations from one State to another without any question of succession, while it was quite conceivable that in the case of emancipation of a State there could well be a true succession to property and debts between one State and another without any transfer of responsibility for international relations. In view of the impact of that definition on the applicability of the draft articles as a whole, his delegation would have preferred a reference to an agreement between the States concerned, both on the fact of succession and on its date, as the criterion for its having taken place. In default of such agreement, the traditional criterion of the effective control of the territory concerned, confirmed if necessary by international acts of recognition of its effectiveness and legality, seemed to reflect both the real course of events, and international practice, must better than did the draft articles.

62. Similarly, the draft articles were not very explicit on the subject of the relationship that might exist between the effects of a succession of States produced at the time when the succession took place, and the special agreements concluded subsequently, as often happened in practice. Although some articles concerning the newly independent successor State were clearly binding erga omnes, it was not clear whether others were designed to achieve effects ipso jure at the date of succession or effects open to amendment by a subsequent international agreement. Because of the practical importance of the reply to that question, his delegation would like to see the inclusion of a general provision that would give preponderance to the agreement between the predecessor and successor States. Canada endorsed the commentary by the Commission on the subject of the lack of any origin in customary law for the articles on a newly independent State. The same applied to the definition of succession to State debts. The distinction between separation and the creation of a newly independent State was not based on a clear criterion, which might lead to the States concerned being involved in unnecessary controversy.

63. His delegation, like several others, questioned the need for the use of such ideas as "equitable proportion" (article 16, para. 1 (c)), "equitable compensation" (article 16, para. 3) and "contribution of the dependent territory" (article 14, para. 1 (f)), which were intended to help define what would otherwise be very imprecise. However, the Commission seemed to have stopped halfway and had not furnished any quantifiable indications of that equity. If the Commission felt that it had good reason for not including such criteria in

the draft article, it could perhaps have made up for that lack by another solution, for example, in the form of an arbitration tribunal with a jurisdiction based on the consent of a State party. Although conceivable, the settlement of litigation between parties each of which perceived equity in its own way would not be facilitated by the approach adopted in the draft articles.

64. Canada considered that there were some omissions with respect to the subjects of States succession. Property was covered by a rather general provision in article 8 which left the predecessor State considerable discretion. An amendment of its internal law might result in a distortion of the succession, since it was that law which determined its subjects. The term "rights and interests" was vague, since it did not satisfactorily cover the cases that were so frequent in modern times of the participation by the State in economic life, for example in the form of minority State participation in a corporation. On the other hand, debts were very clearly defined in a restrictive manner, in fact so restrictive that a predecessor State could remain a debtor after having signed over, by the succession, the reason for the debt. The question then arose whether the idea of equity, which was present in some parts of the draft, had not been overlooked in others. As to the solutions in specific cases, they seemed to have been made even more difficult than they had been originally. His delegation, like many others which had expressed misgivings, would have preferred to study in detail the reactions of other States to the draft articles as a whole before taking part in a conference convened with a view to drafting the final text of the convention. It therefore proposed that Member States should be given a deadline, before which they could submit to the Secretary-General their written comments, which could then be discussed in the Sixth Committee at the next session of the General Assembly.

65. Turning to the question of treaties concluded between States and international organizations or between two or more international organizations, he congratulated the Commission on the high quality of the drafting revisions to which the first part of the draft had been subjected. With respect to article 3, he wondered whether a simpler and clearer solution might not be to state briefly that only agreements concluded between States and international organizations or between two or more international organizations were subject to the draft articles. There seemed to be a sharp difference of view concerning the mode and effects of consent to treaties on the part of an international organization. His delegation would suggest, with a view to an eventual compromise, and to the possible accession of the European Economic Community to the future convention on the law of the sea, that international organizations wishing to become parties to treaties in accordance with draft articles 6 and 7 should submit, if possible during the negotiations and in any case no later than the time of confirmation, either extracts of the text of their statutes, or a statement by a competent organ describing the established practice in the matter of their competence and procedures. That solution would obviate not only repeated questions and explanations, but also the atmosphere of uncertainty which seemed to prevail sometimes in the minds of potential States parties to the same treaty. His delegation would have no objection to the establishment of confirmation of the consent of an international organization to be bound by a

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treaty (article 14) more on the lines of the ratification of a treaty by a State. Thus Canada would prefer that confirmation to be issued, unless the constitutional instrument of an international organization stipulated otherwise, by an organ made up of States competent to deal with the organization's external relations. The same would apply to reservations and objections formulated by an international organization under articles 19 and 20. If those changes were accepted there would be a double benefit: the other parties to the same treaty would then know that the text was indeed governed by rules of international law, in accordance with the definition of a treaty in article 2, paragraph 1 (a) of the draft, and moreover, the adoption of that solution would facilitate future discussion about the legal effects on the States members of international organizations of treaties concluded by such organizations, a question which seemed to have led to sharp divisions of opinion.

66. He hoped that the Commission would be able to bring its work on that topic, and also its work on part 2 of the topic of State responsibility, to a successful conclusion without delay. The Commission would have the opportunity to work on the drafting of the text on State responsibility in parallel with the study on international liability for injurious consequences arising out of acts not prohibited by international law. He wished to endorse the appeals made by other delegations for the prompt appointment of a Special Rapporteur on the question of the law of the non-navigational uses of international watercourses and the rapid resumption of the study of that topic.

67. Mr. PRANDLER (Hungary) said that the debates on the reports of the International Law Commission had always been the real highlights of the work of the Sixth Committee. Although a number of other items allocated to the Committee played an outstanding role in the over-all activities of the United Nations, the Commission's reports served as a constant reminder that one of the major tasks entrusted to the General Assembly was to encourage the progressive development and codification of international law. The debate on the Commission's report (A/36/10) at the current session was all the more important as the Commission was about to begin a new five-year term.

68. Under its statute, the Commission had been established to generate proposals and to work out drafts with a view to promoting the progressive development and codification of international law. On the whole, the Commission had fulfilled that role; in particular, it had produced the drafts of a number of landmark conventions. Even if some of those conventions had not yet achieved universal acceptance or were to be replaced by new ones, their provisions had nevertheless served as basic guidelines in inter-State relations or had become customary rules of international law. His delegation considered that the most fruitful years of the Commission's existence had undoubtedly been those in which the international climate had been most favourable. There was a close interrelationship between the characteristics of international relations and the process of international law-making. The world was currently witnessing a definite increase in international tension. Without entertaining any illusions concerning the actual contribution of international law to the promotion of friendly

relations and co-operation among States, his delegation believed that the results of international law-making, even if very modest, could exert a salutary effect on international relations. Therein lay the special significance of United Nations activities in that field in general and of the Commission's work in particular.

69. There were those who argued that the Commission had failed to move from the codification and progressive development of the traditional areas of international law towards domains which, in their opinion, should occupy the centre of attention. The authors of a study recently published by the United Nations Institute for Training and Research had analysed in depth the experience of the Commission's work and had formulated a number of conclusions and recommendations. The authors had stated that if the Commission was to fulfil its mandate, it must become more receptive to such new international priorities as economic and technological development, environmental protection, violence control and human rights. They had argued that such topics as the status of guerrillas, the taking of hostages and the legal prohibition of mercenaries must no longer elude the Commission's consideration, adding that if the Commission continued to avoid such areas, it would become a backwater in the development of international law.

70. The Sixth Committee and the General Assembly should give the Commission a clear mandate at the very beginning of its new five-year term. The Committee should therefore carefully examine all pertinent proposals. His delegation was, however, unable to share the basic approach taken by the authors of the study. While it was true that the Commission had been conceived as a body that would have primary responsibility for the progressive development of international law, article 17 of its statute (General Assembly resolution 174 (II)) envisaged other "official bodies established by inter-governmental agreement to encourage the progressive development of international law and its codification". Furthermore, under Article 13 of the United Nations Charter, the task of encouraging the progressive development of international law and its codification rested with the General Assembly and, accordingly, with the United Nations system as a whole. Immediately after the establishment of the Commission, an equally important place in State practice had been accorded to diplomatic conferences, convened with a view to concluding conventions without the prior preparation of drafts by the Commission. The international community had adopted various conventions on that basis. In the 1960s and 1970s, other instruments that had contributed greatly to the codification and progressive development of international law had been elaborated and adopted outside the scope of the Commission.

71. There was also the human factor to be considered. The Commission comprised a number of distinguished lawyers; yet even such outstanding experts in international law could not be expected to pay proper attention to such different topics as the legal implications of remote sensing in outer space, the intricacies of a new international sea-bed authority, environmental problems and the theoretical and practical issues of State responsibility. There should be a certain degree of division of labour among the various forums.

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72. As in the past three decades, the Commission's basic rule should be to concentrate on general multilateral treaty-making, where the conditions for codification and progressive development became discernible through a thorough analysis of State practice. The international community should not forget that the Commission's primary goal was the codification of international law and, at the same time, should not lose sight of the equally important task of progressive development. In the words of article 15 of the Commission's statute, the purpose of codification was to find "the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent and doctrine". While the Commission should play a central role in the general multilateral treaty-making process, its activities should be supplemented by those of diplomatic conferences or ad hoc bodies established to deal with specific topics. The central role of the Commission could be maintained only if its approach to codification and progressive development and its methods of work set a high standard and served as a rule of conduct for the work of such other forums.

73. Hungary agreed with the decision taken by the Commission to consider at its thirt fourth session its long-term programme of work, including general objectives and priorities which would guide its study of the topics on its current programme of work for the coming sessions, taking into account relevant General Assembly recommendations (A/36/10, para. 258). The Commission should expedite its work on topics already on its agenda, with a view to completing its consideration of those topics within a determined time-limit and within its five-year term. His delegation noted with satisfaction that the objectives laid down in 1975 and reaffirmed in 1977 had been largely achieved.

74. Hungary attached particular importance to co-ordination in the field of international trade law, as envisaged by the General Assembly in its resolution 34/142. It noted that the Commission welcomed the opportunity to co-operate with the United Nations Commission on International Trade Law by providing it with relevant information on the Commission's activities and by consulting with it (A/36/10, para. 259).

75. His delegation commended the International Law Commission on its completion of a series of draft articles on succession of States in respect of State property, archives and debts. The indefatigable efforts of the Special Rapporteur had been instrumental in bringing to fruition the draft articles adopted by the Commission at its thirty-third session. Those articles provided a good foundation for the elaboration of a convention on the topic. The new title ("Succession of States in respect of State property, archives and debts") defined the subject-matter of the draft with greater precision. While State property, archives and debts constituted three categories of State succession in respect of matters other than treaties which had been and still were of primary importance in State practice, his delegation endorsed the safeguard clause in article 5. It felt, however, that in its commentary to that article, the Commission should have given more detailed views on the possibility of forms of State succession other than those covered by the draft articles, or at least some illustrative

examples. Such views or examples would have made an important contribution to the widespread use of the commentaries as travaux préparatoires in future applications of the provisions relating to State succession. Similar laconic reasoning on the part of the Commission was in evidence in paragraph 68 of its report.

76. The Commission's excellent work on State succession should be all the more appreciated as the prevailing international practice did not always permit determination of the existence of a generally valid rule. The draft articles therefore represented a bold interweaving of the progressive development of international law and its codification. The Commission deserved particular commendation for stressing the importance of the principle of equity in the application of the rules on the passing of States property, archives and debts. His delegation attached great importance to the in-depth analysis of the notions of equity, equitable principles and the application of the rule ex aequo et bono (A/36/10, paras. 76-85). That analysis would be illuminating in the application of the provisions of the future convention on the law of the sea. His delegation noted with particular interest the comments on the principle of equity contained in paragraph 77.

77. Hungary fully agreed with the position stated by the Chairman of the Commission when introducing the Commission's report. The Chairman had said that, in so delicate a matter, where problems of law were closely linked with political considerations, the Commission and the Special Rapporteur had striven to find solutions that would as far as possible be realistic and balanced; the Commission had been inspired throughout by the need to rely on the principle of equity as a balancing element and a corrective factor, bearing in mind always the maxim "summum jus summa injuria" (A/C.6/36/SR.36, para. 5).

78. Also with respect to the principle of equity, it was unfortunate that the Commission had failed to take into account a number of suggestions made at the thirty-fifth session of the General Assembly on the question of State succession in respect of archives. Article 25 established the primary rule that the passing of State archives of the predecessor State to the successor State was to be settled by agreement between them. On the other hand, articles 28 and 29, while not excluding the possibility that agreements might be concluded, established the rule of automatic passing of the State archives of the predecessor State to the successor State. That was why his delegation was not convinced by the Commission's commentary, according to which paragraph 1 of articles 28 and 29 reaffirmed the primacy of the agreement between the States concerned by the succession of States, whether predecessor and successor States or successor States among themselves, in governing succession to State archives (A/36/10, p. 156, para. (16)). In the view of his delegation, that residual rule relating to agreements on the passing of State archives to the successor State should have been made more explicit, as in the case of article 25. The primacy of agreement between the States concerned would, without any doubt, be in line with the principle of preservation and indivisibility of archives, as embodied in article 24. In that connexion, his delegation noted with satisfaction that article 24 had been adopted as a separate provision and that a more eminent place had thus been given to the principle.

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79. With respect to treaties concluded between States and international organizations or between two or more international organizations, Hungary was grateful to the Special Rapporteur for the topic, for his outstanding preparatory work on the draft articles. The regulation of that field of international law was made necessary by the growing role which international organizations did and could play in the development of international relations. At the same time, the Commission had encountered particular difficulties because that domain of international relations was rather new, and the practical experience available was scanty and often contradictory. The 26 articles adopted by the Commission in second reading had improved the prospects for the adoption of a convention on the subject. His delegation had noted the changes in the wording of articles 19 to 23. Article 20, paragraph 4, should dispel those difficulties that had arisen with respect to the possibility of the tacit acceptance of a reservation by an international organization. While his delegation endorsed the Commission's method of applying, mutatis mutandis, the structure and principal solutions of the 1969 Vienna Convention on the Law of Treaties, it found that the wording of the draft articles had become rather cumbersome in some instances. A number of States, including Brazil, had suggested ways of improving the text.

80. The Commission should expedite its work on State responsibility, jurisdictional immunities of States and their property, and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The question of State responsibility had been under consideration by the Commission for more than 25 years, a situation due primarily to the extraordinary difficulties surrounding the topic. His delegation was confident that the new Special Rapporteur, Mr. Riphagen, would be able to give new impetus to the preparation of a draft convention on that subject.

81. As to the jurisdictional immunities of States and their property, the Special Rapporteur for that topic had submitted four new articles. Those articles and the commentary thereto would provide a good basis for the final elaboration of a convention. With regard to the sttaus of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation was grateful to the Special Rapporteur for the topic for the submission of his second report. Although that question was part and parcel of the law of diplomatic relations, the successful completion of the articles would help to strengthen the legal rules for inter-State relations and co-operation. His delegation endorsed the Special Rapporteur's basic approach concerning the enlarged scope of the draft articles, as indicated in article 1.

82. Like the delegations of Bangladesh, Finland, India and New Zealand, his delegation regretted that the Commission had been unable, at its thirty-third session, to take up the question of the law of the non-navigational uses of international watercourses. Hungary was grateful to the representative of Finland for the new information provided earlier in the current meeting. Inasmuch as 96 per cent of the water of its rivers came from neighbouring countries, Hungary was deeply interested in the progressive development and codification of the

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legal provisions relating to the non-navigational uses of international watercourses. It regretted that no substantial progress had been made on that topic by the Commission. That was due partly to a certain lack of interest on its part. His delegation strongly urged that a new Special Rapporteur should be appointed as soon as possible.

The meeting rose at 6.10 p.m.