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SUMMARY RECORD OF THE 50th MEETING

Chairman: Mr. CALLE y CALLE (Peru)

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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. STAVROPOULOS (Greece) said that during its latest five-year term, the Commission had achieved concrete results on important topics and had realized many of the goals it had set at the beginning of the term. The Special Rapporteurs and the Codification Division of the Office of Legal Affairs were to be commended on their contribution to that successful performance.

2. At its thirty-third session, the Commission had concentrated on the second reading of its drafts on the two topics to which the General Assembly had given the highest priority. At the same time, the Commission had advanced in its consideration of the remaining topics on its active programme of work. In that manner, it had shown once again the flexibility of its existing procedures, which could be adapted to changing circumstances. By relying on Special Rapporteurs, the Commission was able to focus its attention on a small number of topics at any one session, without slowing down the work on other topics. Special Rapporteurs for topics of lower priority could continue their individual research for the preparation of their successive reports, while the Commission advanced in other areas until circumstances called for a full debate on those topics.

3. With respect to succession of States in respect of matters other than treaties, the 13 excellent reports of the Special Rapporteur had been decisive in enabling the Commission to arrive at the adoption of the final draft articles. The Commission's commentaries to each of the 39 articles should prove to be of great practical help, particularly to the newly independent States. During its second reading, the Commission had succeeded in notably improving the structure and content of the draft, in the light of the written comments submitted by Governments and the observations made during the debates in the Sixth Committee. The Commission had been right to recommend that the General Assembly should convene a conference of plenipotentiaries to study the draft with a view to concluding a convention on the subject. His delegation supported that recommendation because it believed that a constant rhythm should be maintained at all stages of the codification process. Over the 33 years of its existence, the Commission had proved to be a remarkably efficient mechanism for the elaboration of legal texts. Those texts had served, in most cases, as the foundation for the adoption of international conventions by the General Assembly or by plenipotentiary conferences. The record of the Commission's achievements showed that its speed of production had been geared to the capacity of States to absorb written law. The situation currently facing the General Assembly vividly illustrated that assertion. The General Assembly had before it two final drafts prepared by the Commission in response to insistent requests by the Assembly. In 1982 it was expected that the Assembly would have before it yet another final draft. In other words, in the short interval between 1978 and 1982 the Commission would have adopted three final drafts relating to disparate and complex topics, on the final disposition of which the Assembly had to pronounce itself. The accumulation of final drafts emanating from the Commission at the request of the Assembly indicated that the Commission worked at a satisfactory pace. It was to be hoped that the Assembly would show corresponding speed in implementing its mandate regarding the progressive development and codification of international law.

(Mr. Stavropoulos, Greece)

4. The Commission's draft articles on succession of States in respect of State property, archives and debts were predicated upon two principles, namely, consensualism and equity. They thus constituted a solid base on which to build, at a plenipotentiary conference, a legal instrument embodying rules on the topic. With that objective in mind and in order to facilitate its achievement by the conference, the General Assembly would be well advised to include in the provisional agenda of its thirty-seventh session an item entitled "Conference of plenipotentiaries on succession of States in respect of State property, archives and debts". At that session, the Sixth Committee would thus have the opportunity to consider the substance of the draft, taking into account the written comments which Governments might wish to submit, with the aim of clarifying the various positions and finding common ground on some questions that might remain controversial. Confident that the Sixth Committee would adopt such a course of action at the conclusion of the current debate, his delegation would defer any substantive comments on the draft until the thirty-seventh session or, at any rate, until such time as the conference was convened. There was, however, one aspect which had given rise to a great divergence of views. The reference to "any other financial obligation chargeable to a State" had been excluded from the definition of "State debt" in article 31. It might perhaps prove useful in the future discussion of the issue to keep in mind the proposal made by one member of the Commission, according to which the definition would refer to "any other financial obligation recognized by a rule of international law as chargeable to a State".

5. With regard to the draft articles on treaties concluded between States and international organizations or between international organizations, his delegation was satisfied with the improvements made by the Commission in second reading, under the stewardship of the Special Rapporteur, in response to observations concerning, in particular, the simplification of the text. In addition to adopting 26 articles of its final draft, the Commission had considered and referred to the Drafting Committee 15 more articles. There was therefore every reason to expect that, at its thirty-fourth session, on the basis of a further report to be submitted by the Special Rapporteur, the Commission would complete its work on the topic by examining the remaining articles and the annex and adopting the whole of the final draft.

6. His delegation welcomed the Commission's methodological approach to the codification of the topic and to the relationship between the draft and the 1969 Vienna Convention on the Law of Treaties. There appeared to be a great deal of misunderstanding concerning the precise effect of the technique used by the Commission in elaborating a set of draft articles. The drafting of articles was merely a technique for the preparation of legal texts. The elaboration of draft articles, incorporating and combining elements of lex lata and lex ferenda in such a manner as to enable them to serve as a basis for the conclusion and adoption of an international instrument, whether a convention or not, was the reflection of the consolidated procedure that had evolved in the practice of the Commission on the basis of the provisions of its statute. Because of the strict requirements which that procedure imposed upon the preparation of texts, it had proved to be the most adequate and effective technique for identifying and embodying the rules of international law relating to a given topic. The fact that the work was in the form of a set of draft articles in no way prejudged the recommendations that the Commission could make under article 23, paragraph 1, of its statute regarding

(Mr. Stavropoulos, Greece)

further action once the work was completed. For example, the set of draft articles prepared by the Commission on arbitral procedure had been brought to the attention of Member States as a set of "model rules" for their consideration and use in General Assembly resolution 1262 (XIII). In that connexion, it should also be borne in mind that the value of draft articles, even those in the process of being elaborated by the Commission, as evidence of customary international law, might be independent of the fact that they had not yet been embodied in a convention. That was graphically shown, with reference to the Commission's current draft on treaties to which international organizations were parties, by the advisory opinion given by the International Court of Justice on 20 December 1980 on the interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt.

7. As to the content of the articles constituting the draft, his delegation associated itself with the comments concerning articles 1 to 26 made on behalf of the European Economic Community by the representative of the United Kingdom, as well as with the concern previously voiced by the Community regarding article 36 bis.

8. His delegation wished to commend the Special Rapporteurs for the remaining four topics dealt with by the Commission at its thirty-third session. Greece understood the circumstances that had led the Commission to postpone the appointment of a new Special Rapporteur on the law of the non-navigational uses of international watercourses and welcomed the Commission's intention to proceed with such an appointment. The appointment should be made as soon as possible, so that the Commission could complete its consideration of the topic during its next term of office.

9. The Commission had been responding efficiently and promptly to the increased demands placed upon it by the international community. Not even the harshest of critics could ignore the significant accomplishments of the Commission or the central role it had played and was called upon to play in assisting the General Assembly in its implementation of Article 13, paragraph 1 (a), of the United Nations Charter. It was generally recognized that the Commission had served the international community well, had done exactly what had been expected of it and had successfully filled the gap in treaty-making by producing fundamental texts, which the family of nations had readily accepted. The worth of the Commission had recently been recognized once more by the General Assembly when it had decided to review the multilateral treaty-making process. The Assembly had emphasized the Commission's important contribution to the preparation of multilateral treaties. Nevertheless, there was talk about various improvements which should be made in the working methods of the Commission so that it could better meet the needs of a changing world. The Commission itself, in its observations regarding the review of the multilateral treaty-making process, had suggested that its Special Rapporteurs should be provided with more assistance and facilities to enable them to perform their duties satisfactorily in the future. It had also suggested that its progress might be faster if it had more time and resources at its disposal and more assistance from Governments at all stages. The Commission had taken the view that it might well become necessary for it to make more use of questionnaires addressed to Governments. It had drawn attention to the risk that the pace of its work might be affected if its agenda became too congested.

(Mr. Stavropoulos, Greece)

10. One representative had stated that there existed a certain malaise about the Commission and its work, but that there was no wide agreement on its causes or extent. In that representative's view, the General Assembly could not evade its share of responsibility for not giving the Commission adequate guidance on the topics with which it wanted the Commission to deal or on the direction which work on a given topic should take. That representative had listed various reasons for the malaise and had suggested that the General Assembly resolution on the item should simply request the Commission to adopt a programme of work for the next five years in the expectation that it would adhere to it.

11. The so-called malaise would seem to result from a perception that the Commission, as currently constituted and organized, would not measure up to the expectations of the international community. That community was characterized by increasingly complex and far-reaching scientific and technological developments and by the growing gap between the "haves" and the "have-nots". Such a perception manifested itself in the facile allegation that the Commission was almost entirely concerned with the codification of international law, to the exclusion of progressive development. The authors of a study recently published by the United Nations Institute for Training and Research (UNITAR) had concluded that if the Commission continued to avoid such areas as economic and technological development, environmental protection, violence control and human rights, it would become a backwater in the development of international law. According to the authors, it was the members of the Commission themselves, with the help and support of the Sixth Committee, who perhaps could do the most to transform the image of the Commission from that of a conservative bulwark of traditional doctrine to that of a body which was ready to meet the challenges of a changed international order.

12. The Commission was being accused of a crime it had not actually committed. It was being accused of the failure to initiate studies relating to the progressive development of international law. Those making that accusation were disregarding the mandate that the Commission had been given by its statute. According to the statute, the Commission itself could select topics for codification (art. 18). However, proposals for the progressive development of international law were not formally initiated by the Commission, but were referred to it by the General Assembly, individual Member States or other authorized organs, agencies or bodies (arts. 16 and 17). It would appear from the statute that the General Assembly retained for itself and the individual Members of the United Nations the right to initiate topics involving the progressive development of international law, perhaps because of the political character that such topics might have. In practice, the Commission had found that it did not require one method for codification and a different one for progressive development, since the articles it prepared on particular topics combined elements of both lex lata and lex ferenda.

13. Whether the topics on the Commission's current programme of work did in fact touch upon the most pressing problems requiring legal regulation on the international plane was a matter that had been authoritatively determined year after year, in resolution after resolution, by the democratic process in the General Assembly. If the Commission, as was alleged, was not working on items relating to new fields of international law, that failure had to be attributed to the General Assembly, the Sixth Committee and Member States.

(Mr. Stavropoulos, Greece)

14. The facts therefore did not bear out the assertion made in the study published by UNITAR. A dispassionate look at the type of topic dealt with by the Commission and the content of its work on those topics revealed that, even in those areas of international law in which extensive State practice, precedent and doctrine already existed, the rules formulated by the Commission following its consolidated procedure were attuned to the concerns and needs of the international community. That was indicated by the large measure of acceptance of the Commission's drafts that had been submitted to the scrutiny of States — old and new — in the context of plenipotentiary conferences of the General Assembly. It might be wondered whether, in view of the incorporation of certain provisions in texts currently being elaborated, such as article 19 of the draft on State responsibility or article 36 bis of the draft on treaties to which international organizations were parties, the implied criticism was indeed one of excessive or even regressive development.

15. The Commission had proved to be a most efficient instrument for the discharge by the General Assembly of its Charter obligations concerning the progressive development of international law and its codification. The Commission had shown the requisite flexibility to adapt its methods to the demands of the international community and had maintained those methods under constant review in order better to achieve that objective. It should be encouraged to continue doing so. In particular, the Commission should, at its thirty-fourth session, consider ways and means of improving its methods, including the need to increase the assistance that had traditionally been given to the Commission and its Special Rapporteurs. It remained, however, for the representatives of States to determine whether or not they wished to use the Commission to provide the legal regulation required by new situations.

16. Ms. BERBERI (Sudan) said that her delegation would address several of the subjects contained in the Commission's report (A/36/10) in a single statement since, unlike other delegations, it did not have a number of technical advisers at its disposal. However, it considered that the practice, whereby delegations wishing to do so made a number of statements on agenda item 121, which had become widespread during the current session, was sound and a logical way of tackling the Committee's work on that important item.

17. It was a notable development that the Commission had decided to limit the scope of the draft articles on succession of States in respect of matters other than treaties and had, consequently, decided to entitle the final draft: "Draft articles on succession of States in respect of State property, archives and debts". It followed that matters not covered by the draft articles could be regulated in accordance with international custom as stipulated in the safeguard clause in article 5. Her delegation had noted with satisfaction that the Commission had sought to maintain a structural parallel between the draft articles and the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on the Law of Treaties. The draft articles concerning specific categories of succession of States were in keeping with the characteristics and requirements of succession of States in respect of matters other than treaties. Her delegation was not, as yet, in a position to state its definitive view on the draft articles

(Ms. Berberi, Sudan)

but wished to express its general support for the scope and structure of the articles as proposed by the Commission. It supported the recommendation of the Commission, contained in paragraph 86 of its report, that the General Assembly should convene an international conference of plenipotentiaries to study the draft articles on succession of States in respect of State property, archives and debts and to conclude a convention on the subject.

18. The Commission had been able to complete the second reading of 26 draft articles on the question of treaties concluded between States and international organizations or between two or more international organizations. Her delegation was aware that there were diverse views concerning the capacity of international organizations to conclude treaties. Such organizations differed not only from States but from each other and article 6 reflected that basic fact. As noted in paragraph 120 of the report, the Commission had decided to prepare a draft which, in form, was entirely independent of the Vienna Convention and the Law of Treaties in the sense that the text as a whole represented a complete entity that could be given a form which would enable it to produce legal effects irrespective of the legal affects of the Vienna Convention. Her delegation supported the Commission's decision set forth in paragraph 128 of the report to keep the order of that Convention so far as possible so as to permit continuous comparison between the draft articles and the corresponding articles of the Convention.

19. Her delegation noted with regret that the Commission had been unable to continue its work on the law of the non-navigational uses of international watercourses because of the election of the Special Rapporteur for that topic to the International Court of Justice. Her delegation followed the development of that item with particular interest and associated itself with those delegations which had requested the Commission to appoint a new Special Rapporteur for the topic at the first meeting of its next session so that the work could continue. Her delegation supported the Commission's practice of appointing Special Rapporteurs but recommended that it should seek a practical method of continuing its work on all items on its agenda under all circumstances, even if the Special Rapporteur for a specific topic was absent for any reason. The Commission might perhaps appoint a deputy for every Special Rapporteur in order to avoid a repetition of what had happened at its 1981 session in connexion with the law of the non-navigational uses of international watercourses.

20. Her delegation attached great importance to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier because it believed that the diplomatic bag represented the basic means for official communications between States and their diplomatic missions. It was aware that the legal provisions concerning that matter remained dispersed in a number of international instruments and therefore considered that work should continue with a view to the possible elaboration of an appropriate legal instrument.

21. Her delegation shared the view that the Sixth Committee should assist in drawing up the Commission's programme of work for the next five years. It recommended that during that period the Commission should complete work on three of the topics currently before it, the question of treaties concluded between States and international organizations or between two or more international organizations,

(Ms. Berberi, Sudan)

the law of the non-navigational uses of international watercourses and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It should be possible to complete work on those topics during that period if the Commission set itself a fixed time-table. With respect to other topics, in particular international liability for injurious consequences arising out of acts not prohibited by international law and jurisdictional immunities of States and their property, her delegation suggested that the Special Rapporteurs for those topics should, on the basis of their practical experience, present proposals to the Commission at its first meeting concerning those areas on which tangible progress could be made during the next five years.

22. Mr. ENKHSAIKHAN (Mongolia) said that, at the thirty-third session of the Commission, work on the draft articles on succession of States had somewhat overshadowed other topics which were equally deserving of the Commission's attention. His delegation hoped that, at its next session, the Commission would be able to devote more time to the consideration of such important topics as State responsibility, the jurisdictional immunities of States and their property, and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

23. His delegation particularly welcomed the report submitted by the Special Rapporteur on the topic of succession of States in respect of matters other than treaties. A number of significant improvements had been made in the texts of the draft articles considered by the Commission in second reading. The principal improvement was in the definition of the scope of the articles; the new version of article 1 made it clear that the draft articles referred only to State property, archives and debts. In deciding to restrict the application of the articles to those aspects of State succession, the Commission had taken into account the fact that they were of paramount importance and were most frequently encountered in State practice.

24. His delegation commended the Commission's wise decision to adhere as closely as possible to the format of the Vienna Convention on Succession of States in Respect of Treaties, and to group the draft articles on State archives together in a separate part of the draft.

25. With regard to the new elements introduced into the draft, his delegation was particularly pleased to note the inclusion of the safeguard clause in article 5. Article 6, which should be viewed in the context of article 31, should reassure those members of the Commission who had voiced some misgivings about the treatment of State debts in the draft articles.

26. The new wording of article 14 was satisfactory. The new subparagraphs (b) and (c) of paragraph 1 helped to clarify the situation regarding succession of States in cases involving newly independent States, and were fully compatible with the interests and aspirations of emerging developing States. In connexion with subparagraph (c), paragraph 1, of article 14, he noted in paragraph (15) of its commentary to that article the Commission stated that that new subparagraph was intended to make paragraph 1 as complete as possible so as to avoid problems of interpretation.

(Mr. Enkhsaikhan, Mongolia)

27. His delegation fully agreed with the Commission's view that State archives, by virtue of their physical nature, contents and function, were of interest to both successor and predecessor States and constituted a special category of State property. Among the more noteworthy new provisions introduced in second reading, he wished to single out article 26, paragraph 4, which imposed on the predecessor State the obligation to co-operate with the successor State in efforts to recover any archives which, having belonged to the territory to which the succession of States related, had been dispersed during the period of dependence. Article 24, on preservation of the unity of State archives, was also a welcome addition to the draft.

28. In connexion with part IV of the draft articles, his delegation supported the Commission's decision to reject the proposed inclusion in article 31 of a subparagraph (b) referring to "any other financial obligation chargeable to a State" on the ground that the definition of State debt should be limited to financial obligations arising at the international level, i.e. between subjects of international law.

29. In general, his delegation felt that the draft articles as adopted in second reading could provide a basis for the elaboration of a future convention, which would be the most appropriate and effective way of codifying international law in the field of the succession of States. He agreed with the recommendation in paragraph 86 of the report, that the General Assembly should convene an international conference of plenipotentiaries to study the draft articles and to conclude a convention on the subject.

30. The Commission had made worth-while progress on the topic of treaties concluded between States and international organizations, or between two or more international organizations, by completing a second reading of the first 26 draft articles. Those articles had been found largely acceptable by many States in that they struck a satisfactory balance between "liberal" and "conservative" points of view. In that context, his delegation felt it necessary to reiterate that international organizations and States did not enjoy equivalent status under international law. International organizations were not primary subjects of international law but rather subjects whose status was determined by their constituent instruments. He hoped that the Commission would complete its second reading of the remaining draft articles on that topic in the near future.

31. Mr. GÖRNER (German Democratic Republic) recalled that his delegation had stated its position regarding the jurisdictional immunities of States and their property in the Sixth Committee at the thirty-fifth session of the General Assembly: its written comments on the topic appeared in document A/CN.4/343/Add.2. His delegation's position in that regard derived from its conviction that the general immunity of States from the jurisdiction of other States followed logically from the fundamental principle of international law which recognized the sovereign equality of States and, correspondingly, the equivalent immunity of all States. His delegation welcomed the progress made by the Commission at its 1981 session producing draft articles on the topic. It should, however, be stressed that a final appraisal of draft articles 7 to 10 could not be made until those articles could be studied in connexion with the proposed part III, to be entitled "Exceptions to or limitations upon the general principles of State immunity".

(Mr. Görner, German Democratic Republic)

32. Draft article 7, which provided for the obligation to give effect to State immunity, was a necessary complement to the principle of State immunity in that the principle and the obligation to observe it formed an organic whole. In the revised version of paragraph 1, the reference to the "otherwise competent judicial and administrative authorities" (in alternative A), or the phrase "notwithstanding the existing competence" (in alternative B), would appear to be unnecessary. The question whether a given court was competent or incompetent was determined by the domestic law of the State concerned and not by international law. If one State respected the immunity of another State, no court should be entitled to exercise jurisdiction in a proceeding against that other State, regardless of whether a court was otherwise competent under national law to deal with the question concerned. Where a court proceeding was instituted against another State, the objection which that State might raise would derive solely from the violation of its rights to jurisdictional immunity. On the whole, alternative B seemed to be simpler and clearer than alternative A.

33. With regard to paragraphs 2 and 3 of article 7, his delegation would reserve its comments for a later stage when draft article 3 and the draft articles of part III were presented.

34. The proposed wording of draft article 8, on consent of State, did not give rise to any difficulties for his delegation. However, in the revised version of draft article 9, which dealt with expression of consent, it was unclear what was to be understood by the phrase "or taken part or a step in the proceeding" in paragraph 4. His delegation felt that very strict criteria ought to be applied in drawing the implication from the conduct of a State that it consented to submit to the jurisdiction of the court of another State in a proceeding against it. In order to make the paragraph clearer it would be preferable to confine the presumption of such consent to cases in which a State had by itself instituted legal proceedings in a court of another State. By the same token, the words "a step in the proceeding" should be deleted from paragraph 4.

35. While paragraph 1 of draft article 10, on counter-claims, seemed quite adequate to cover cases in which a State had by itself instituted legal proceedings in a court of another State, it was still open to question whether a State's participation in a proceeding presupposed that it was a party to it. A further question was whether the fact of appearing as witness was covered by the phrase "taken part or a step in the proceeding". Obviously, the way in which such terms were defined had far-reaching implications. In general, his delegation regarded jurisdiction with respect to counter-claims as going too far in all cases where the State concerned had not itself instituted the proceeding. It would help to eliminate ambiguities in that connexion if the phrase "taken part or a step in the proceeding" was clarified or interpreted in a very restrictive sense.

36. His delegation had noted with great interest the second report of the Special Rapporteur on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. In particular, it welcomed the presentation of the first set of draft articles, which provided a sound basis for further negotiations. His Government's views on the matter were set forth in documents A/31/145 and A/CN.4/321/Add.7.

(Mr. Görner, German Democratic Republic)

37. His delegation supported the Special Rapporteur's suggestions on the further course of action to be followed and on the proposed format of the future legal instrument as set out in his second report. It also agreed with the Special Rapporteur that detailed discussion of the general provisions should take place at a later stage. In that connexion, his delegation believed that the Commission's work on the topic could be expedited by the presentation of a relatively comprehensive set of draft articles on the proposed part II.

38. His delegation was pleased to note that the Special Rapporteur had retained the concept of "official courier". Both State practice and relevant international conventions already provided a general legal basis for the comprehensive and uniform treatment of all kinds of couriers and bags used by States in officially communicating with their missions abroad, wherever such missions might be situated and whatever their functions. The Special Rapporteur's second report reflected the doubts which some members had expressed with regard to the desirability of introducing new terms and concepts into one of the oldest branches of international law, and his delegation favoured retention of accepted terminology, with the proviso that the future legal instrument should contain either a clear-cut assimilation formula covering all kinds of couriers and bags or precise and detailed provisions on every single kind of official courier.

39. In connexion with the various kinds of couriers, his delegation considered that the Special Rapporteur's second report (A/CN.4/347/Add.1) provided a practical basis for further work and welcomed his intention to work out detailed provisions governing the legal status of a captain of a ship or aircraft who was entrusted with a diplomatic bag. It also agreed that it would be advisable at the current stage to concentrate on couriers employed by States.

40. His delegation supported the draft articles in principle, and the tentative definition of the "diplomatic courier". In particular, it felt that the subdivision of draft article 1 into two paragraphs represented a satisfactory approach which would adequately reflect the current practice of States.

41. With regard to the Commission's programme of work, he endorsed the considerations presented by the Commission in paragraphs 253 to 258 of its report. He believed that the Commission should give priority to three topics: firstly, the international responsibility of States; secondly, treaties between States and international organizations or between international organizations; and thirdly, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The discussion of the Commission's report by the Sixth Committee at the current session had shown that those problems were of great interest to numerous States, since the codification and progressive development of international law in those fields would be of great practical relevance for the shaping of peaceful intergovernmental co-operation. His delegation also supported the view that the Commission's long-term programme of work should make provision for the short-term treatment of topical political subjects.

42. Mr. AL-QAYSI (Iraq) said it was fortunate that ample State practice was available with regard to the jurisdictional immunities of States and their property. In terms of definite texts, however, only two draft articles, articles 1 and 6, had emerged from the Commission's two most recent sessions; the results achieved were modest, though by no means insignificant.

(Mr. Al-Qaysi, Iraq)

43. It was generally agreed that the Commission should deal with general principles before examining the various possible exceptions to or limitations on such general principles. The general principle of State immunity stated in article 6 seemed on the whole appropriate. The dissenting view referred to in paragraph 218 of the Commission's report (A/36/10) could be evaluated only on the basis of how successful further draft articles, yet to emerge in definitive form, would be in translating State practice. If State practice was accurately and reasonably reflected in the draft articles to follow, then the phrase "in accordance with the provisions of the present articles" in article 6 would not have the effect of disqualifying the norm stated therein from being a basic rule of international law.

44. With regard to article 7, which was the corollary to article 6, his delegation found its basic input generally commendable. Iraq would, however, like to see the article so constructed as to make it absolutely clear that it did not seek to enunciate a general exemption for foreign States from the need to observe the laws of the territorial State.

45. Draft articles 8 to 11 dealt with the notion of the consent of a State to the exercise of jurisdiction, where the State was entitled to immunity under international law. The prime consideration seemed whether consent should be an overriding principle amounting to the establishment of absolute or qualified immunity, or whether it should have some part to play so that, when it was lacking, the rule of immunity would apply in the context of legal proceedings. While his delegation looked forward to the future work of the Commission on that topic, it wished to pay a special tribute to the Special Rapporteur for the work he had already done.

46. As to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation agreed that the method applied by the Special Rapporteur was good (A/36/10, para. 245). The comprehensive approach to the question, based as it was on a close examination of the relevant multilateral conventions, was a sound legal basis for a uniform régime governing the status of the courier and the bag. There was no denying that clear rules did exist in the relevant international conventions, but the amplification of those rules in the light of modern State practice would serve to dispel some of the uncertainty which often gave rise to practical problems. His delegation was grateful to the Special Rapporteur for the successful manner in which he had demonstrated the importance of the topic. While Iraq agreed that the principles laid down in the articles already presented could form the basis for the entire draft, it also felt that a proper balance should be established between the rights and obligations of sending States and receiving States, through the insertion of a specific article on the subject. It did not understand why international organizations were excluded from the scope of the draft articles. Such organizations played an increasingly active role in current international relations. A relative measure of secrecy or confidentiality in some communications by international organizations might be crucial to the attainment of the objectives of such organizations. His delegation also believed that the provisions of draft article 3 ("Use of terms") should relate exclusively to definitions and that all the substantive elements in subparagraphs (1), (2), (3) and (7) should be eliminated. In addition, his delegation considered that the already well-established terms "diplomatic courier" and "diplomatic bag" should be

(Mr. Al-Qaysi, Iraq)

used, since any new terms might create confusion. Iraq welcomed the Special Rapporteur's intention to make further improvements in the text of the draft articles. In that respect, it hoped that the scope of the topic would be confined within the necessary limits. Every effort should be made to avoid unnecessary repetitions, which would add nothing to what was already established in State relations. His delegation would be looking forward to the Commission's future work on the topic.

47. Turning to chapter VIII of the report, containing the other decisions and conclusions of the Commission, he was pleased to observe that the Commission had been able to maintain its traditional link with the International Court of Justice. Since both bodies dealt with the current state of the law, albeit for different purposes, that link presented the best opportunity for mutual reflection upon how the law should be best conceived, which was of immense value in enhancing the codification and progressive development of international law. He was also happy that the Commission had maintained its close ties of co-operation with certain regional legal bodies, since those ties served to widen the harmonization of views and hence facilitated wider acceptance of the Commission's work.

48. The great value and usefulness of the International Law Seminar, which had become an established institution, were undisputed. He proposed that the Chairman should write to Mr. Pierre Raton, who had assumed a large share of responsibility for the Seminar in previous years, expressing the Committee's gratitude for his efforts.

49. It was evident from paragraph 256 of the report that the new Commission intended to adopt roughly the same method of work as it had followed in recent years. Any attempt to improve the working methods of the Commission had to be based on directives contained in General Assembly resolutions. It was therefore important for the Committee to set achievable and realistic targets, while offering constructive criticism and performing whatever supportive role was required. The Commission's past achievements were undeniable and, within its flexible working methods, the Commission should be able to respond effectively to the needs of the international community as evidenced by the political, economic, and social conditions of the modern world. That would require the establishment of a proper balance in the Commission's work. There was no reason why one topic should be allowed to "mushroom" at the expense of another, and particularly at the expense of the topic of the law of the non-navigational uses of international watercourses, whose importance in terms of human survival could not be over-emphasized. He supported and welcomed the Commission's conviction, expressed in paragraph 257 of the report, that it could do better work and in the longer run achieve greater results by concentrating its attention on a smaller number of topics at any one session, since that approach would also go a long way towards easing the Committee's difficulties in evaluating the merits of the Commission's work each year. His delegation whole-heartedly agreed with the emphasis laid by the Commission, in paragraph 258, on the need, for the efficient functioning of the Commission, to establish general objectives and priorities guiding the programme of work to be undertaken by the Commission during a term of its membership, or for a longer period if appropriate.

50. Mr. THIAM (Chairman of the International Law Commission), expressed regret that he was unable to stay for the remainder of the Committee's debate and emphasized the difficulty of the Commission's task. International law applied to an immensely variegated world society, rich in varied ways of thinking and feeling. The role of the codifier, demanding both a thorough and acute awareness of the realities of the modern world and an equally acute conception of the ideal towards which the international community was striving and which shaped its common destiny, was to seek out the inner philosophy and vision which underlay those surface diversities. Taking existing reality as a basis for establishing the ideal was what was essentially implied by "codification and progressive development".

51. What differentiated the codification of international law from that of internal law was that the latter applied to individuals governed by a sovereign Power able to enforce its legislative provisions, whereas the former applied to States or, in other words, to sovereign entities able to choose whether and to what extent they would be bound by a given provision. Although cases of the kind known as jus cogens, where a development in international awareness eventually produced a binding rule, were increasingly frequent, the realm of international law remained fundamentally that of conventional law and continued to be dominated by the principle of State sovereignty.

52. Codifiers had to be keenly aware of that situation, for there was nothing to be gained by elaborating rules destined from the start to be ineffectual because most States would not accept them. Hence the Commission's approach characterized by the quest for acceptable compromise. Hence also its slowness, for consulting States was a lengthy process, especially because the international community was continually expanding and because States themselves were slow, cautious and wary, not to mention haughty, touchy and demanding; gaining the confidence of a State was often a highly delicate challenge.

53. A further difficulty was the diversity of legal systems, often reflected even in use of vocabulary. Legal systems drew their life and strength from the peculiar character of their peoples, and a well-constructed international instrument was one which, similarly, drew on the wealth of material offered by the different social systems.

54. Yet a third difficulty for the codifier was the fact that international law was the legal expression of political society and must take account of the division of the world into developed and developing countries, as well as differences in social and economic systems and internal political structures, which were quite often resistant to new norms of international law. In order to reconcile the differing requirements of codification and progressive development, it was important not to seek to sweep away all existing practices, but to sift out and select those which reflected constant and enduringly acceptable principles, while at the same time introducing into contemporary international law the important modern political concepts of justice and solidarity.

55. The Commission was thus trying to reconcile traditional law with the new law. It had conserved the cardinal principle of State sovereignty, together with the conventional character of international law, carefully avoiding the troubled

(Mr. Thiam, Chairman, ILC)

regions of supra-national legislation and drawing as much as possible on customary and conventional international law, in as far as it was not contrary to the norms of jus cogens, while seeking to promote progressive development in as large a measure as possible by incorporating new values of importance in the contemporary world. Many aspects of the succession of States in respect of State property, archives and debts, for example, including the rules on the passing of State property and State debts, the treatment of "odious debts", the sovereignty of a State over its wealth and natural resources and the "archives-territory" link, were innovative in spirit, while their principles were necessarily tempered by equity. The same was true of the treatment of the topic of treaties concluded between States and international organizations or between international organizations, where the aim was to establish a framework within which States, the traditional subjects of international law, could dwell side by side with international organizations, those new subjects which were often regarded warily but which had unquestionably become vital and privileged instruments of international co-operation. Furthermore, although the question of international responsibility did not lend itself readily to the elaboration of specific rules, the Commission's treatment of it had introduced a large number of concepts which took account, in determining the degree of responsibility of an author State, of the pressures and manipulations to which a weak State could be subject in a world characterized by inequality. Similarly, in connexion with the topic of the jurisdictional immunities of States and their property, the wariness of new States was not directed against the rule of immunity but against abuses of that rule, since they were well aware that the activities of States beyond their borders were far more likely to involve major States than the smaller ones; while immunity should continue to be a cardinal principle of international law, it should above all not be confused with impunity. As a last example, the innovative spirit had also been seen at work on the topic of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, making it important to consider the question of whether international organizations and, indeed, national liberation movements, should enjoy the same status as States.

56. The concerns of the Commission and the Committee were the same. The only difference was one of approach; the Committee might be seen as the legislative and the Commission as the executive, since it was the task of the second to translate the intentions of the first into reality. For that reason, the Commission looked forward, as always, to the resolution reflecting the views expressed in the Committee's debates which would be adopted by the General Assembly.

57. He assured those delegations which had expressed concern on the matter that as soon as the new Commission had been formed, it would very quickly appoint a Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses.

58. In conclusion, he commended the serene atmosphere of the debate in the Committee, which was a source of great encouragement to the Commission in its work; international law was such a delicate mechanism that its growth was stunted by any tensions or moments of crisis which blocked the possibilities for dialogue. That was why the members of the Commission wished to emphasize, for the benefit of the members of the Committee, who were not only jurists but also representatives of a political assembly, that the best way to assist the development of international law was to help to maintain a climate of peace and security in the world.

59. Mr. ROSENSTOCK (United States of America) said that it was difficult, and potentially hazardous, to comment on the Commission's work in the jurisdictional immunities of States and their property at a relatively early stage in its development. However, his delegation was far less certain about the direction being taken in that regard than it had been the previous year. In particular, it was most unfortunate that the Drafting Committee had not been able to address itself to some of the alternatives presented by the Special Rapporteur.

60. He shared the concern expressed by other delegations that the second part of article 7, paragraph 1, was an unnecessarily theoretical concept which would only cause confusion. It appeared to reflect a residue of another approach to the problem, or an awarenss of an aspect of sovereign immunity as applied in national courts, which was interesting but not necessarily relevant to a convention.

61. It was particularly difficult to comment on the handling of the question of consent before having an idea of the exceptions to or limitations on the general principles envisaged. An acceptable part III, while not entirely eliminating his delegation's concern about the handling of the matter, might shift the focus of that concern from the general approach to questions of a more limited and largely technical character. In any event, he was concerned that far too much importance was being accorded to the notion of consent.

62. Even taking the draft on its own terms, he still had difficulties in accepting some aspects of it. For example, it was artificially restrictive to regard "consent" as confined to actions by a State in connexion with a particular legal proceeding. When a State divested itself of sovereign immunity by participating in a private capacity in the commercial marketplace or by engaging in transactions involving real property outside its borders, that State also "consented" to the exercise of jurisdiction against it, should disputes arise in connexion with those undertakings. Proceeding on the premise that part II of the draft articles exhausted the forms in which consent might be manifested was not a sound basis for the Commission's future work. Further, his delegation had reservations about the treatment of consent in draft articles 8 and 10, which did not adequately explain the interrelationship that was intended between "consent" and "waiver". The problem was accentuated by article 9's restriction of "waiver" to instances of State conduct in relation to a particular legal proceeding, a narrow formulation justifiable only if additional articles made it clear that sovereign immunity might be waived through a variety of other means recognized by international law. The draft articles also failed to make it clear whether the various forms of consent described were intended to operate independently at varying stages of a legal proceeding, or whether consent, once found, was to be effective for all subsequent stages. The answer might well be different in particular cases.

63. More generally, the articles appeared not to give sufficient attention to the differences in the various forms of jurisdiction — adjudicative, legislative and enforcement — that might be relevant to the consideration of immunity; draft articles 2 (b), 2 (g), 3 (b) and 6 presented different formulations of the question, whereas the draft should consistently make clear its focus on adjudicatory jurisdictions. He therefore hoped that the Commission's work in the following year would give a sharper focus to the central topics of the proposed articles.

(Mr. Rosenstock, United States)

64. If there was any topic that justified the thought that the Commission did not focus on the useful issues, the question of the status of the diplomatic courier and the diplomatic bag unaccompanied by diplomatic courier was surely such a topic. The area was already governed by settled rules; there had been no fundamental problems with them, except perhaps for some abusive uses of the bag which did not affect their validity, and there had been no suggestion that there was any urgent need to expand their scope. It was not a topic which responded to contemporary needs, nor did it represent an intellectually essential counterpart to any existing work.

65. In conclusion, he believed that the highest priorities for the new membership of the Commission should be the appointment of a Special Rapporteur on the law of the non-navigational uses of international watercourses, and the preparation of a new five-year programme of work.

The meeting rose at 1.05 p.m.