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SUMMARY RECORD OF THE 49th 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. KŘIŽ (Czechoslovakia) expressed appriciation for the work done by the International Law Commission (ILC) on the succession of States in respect of matters other than treaties. The draft articles on the succession of States in respect of State property, archives and debts constituted a solid basis for the deliberations of the conference of plenipotentiaries which the Commission had recommended should be convened. His delegation had already stated its position on the issue at the thirty-fifth session of the General Assembly and in the written comments contained in document A/CN.4/338/Add.2.

2. His delegation evaluated positively the changes made by the Commission in the course of the second reading of the draft articles in the light of the comments made by Governments, in particular, the fact that the draft articles left aside the codification of the effects of the succession of States in respect of legal relations involving natural or juridical persons. His delegation agreed with the view, expressed in paragraph 63 of the Commission's report (A/36/10), that the draft articles should appear in the form of an international convention.

3. It was pleased to see that the Commission had decided to treat the question of succession in respect of State archives as a separate part, as his delegation had recommended during the debates at the thirty-fifth session of the General Assembly.

4. Although the decolonization process was almost completed, the future instrument on the succession of States, by facilitating the settlement of the complex financial issues connected with the colonial heritage, would surely safeguard the interests of new States and respond to the demands of the international community as a whole.

5. With regard to the question of treaties concluded between States and international organizations or between two or more international organizations, he expressed regret that the Commission had not been able to complete the second reading of the draft articles and recalled that its comments were reproduced in the report of the Commission (A/36/10, annex II). Accordingly, he simply underscored the main points. In preparing the draft articles, the Commission should proceed from the provisions of the Vienna Convention on the Law of Treaties of 1969, and should also take into account the different scope of the subjectivity of States and international organizations. The Commission should proceed from the premise, during the second reading, that a sovereign State was the sole original subject of international public law and it must determine to what extent the new codification could be analagous to the codification embodied in the Vienna Convention on the Law of Treaties. His delegation felt that it would be premature to make a decision on the 26 articles the second reading of which had been completed and it reserved the right to return to that question when the final text of the draft articles had been submitted. With regard to the legal status of international organizations, his delegation was convinced that the "dynamic compromise" referred to by the Chairman of the Commission would take into account the basic difference in the international legal subjectivity of States and international organizations. The clarifications and improvements made to the

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draft articles - which certain delegations had commented on with satisfaction at the present session - must not cause members to lose sight of the extent of the difference. The new provisions relating to reservations paid better regard to the specifics of international organizations in respect of the acceptance of reservations or the submission of objections to reservations. His delegation was thinking, in particular, of the abandonment of the presumption of acceptance of a reservation by an international organization if that organization had raised no objection to the reservation within a specified period of time.

6. He recalled that his Government had already submitted its comments on the first three chapters of Part I of the draft articles on State responsibility. He noted with regret that the results of the Commission's work on Part 2 had not been satisfactory and that the Commission had not made more progress; Part II should focus on resolving the legal status of the State injured by an act entailing international responsibility. His delegation shared the view that, in drafting Part 2, the Commission should proceed from Part 1 which had been adopted on a provisional basis following the first reading. It also shared the view, expressed in the Commission, that the current text of articles 1-3 proposed by the Special Rapporteur might give rise to the impression that they tended to protect the State which had committed an internationally wrongful act.

7. Work on the question of international liability for injurious consequences arising out of acts not prohibited by international law was still at the initial state. The task at that stage was to find the basic approach and to identify the principal legal norms that would govern that field. In that context he agreed with those members of the Commission who had placed emphasis on the examination of the contractual practice. The Special Rapporteur should also examine to what extent the rule of the duty of diligence in the activities of States within the limits of their jurisdiction should be considered a basic legal principle and should take into consideration the serious doubts that had been expressed in that respect.

8. The question of the jurisdictional immunities of States and their property was particularly important for the development of co-operation among States with different social systems. That question should be considered in light of the principle of the sovereign equality of States which was embodied in the Charter of the United Nations, and reaffirmed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. His delegation appreciated the progress made by the Commission in that respect.

9. Turning to draft articles 7,8,9 and 10 formulated by the Special Rapporteur he said that his delegation could not take a position on them as they had not yet passed through the drafting committee. They required further study in connection with the other parts of the draft, in particular Part III which was to deal with the limitations on and exceptions to the principle of State immunity. Article 7 must be considered in close interrelation with article 6, which the Commission had adopted at its thirty-second session. During the consideration of the Commission's report on the work of its thirty-second session (A/35/10), his delegation had stated that article 6 should set forth, as a fundamental general rule determining the nature of the entire codification currently under preparation, the principle of exempting the State and its property from the jurisdiction of another State. The subsequent provisions of the draft would stipulate

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the limits for the application of that general rule. Unfortunately, the wording of article 6 was ambiguous and gave the impression that the scope of State immunity would be determined only in the next provisions of the draft articles. The main problem which his delegation faced in article 7 was the direct reference to article 6 which caused it to have the same problems with article 7 as it did with article 6. But for that complication the central idea of article 7, paragraph 1, would have been acceptable to his delegation since it was in keeping with section 47 of the Czechoslovak Act on International Private Law. His delegation had no fundamental problems with article 7, paragraph 2, but reserved the right to return to the question in connexion with the consideration of Part III. However, article 7, paragraph 3, again raised the problem of the clash of absolute and functional immunity for it might be interpreted as opening the door to the concept of functional immunity which his delegation could not accept.

10. He agreed that the general rule of the immunity of the State and its property allowed for exceptions in cases where a State explicitly or implicitly waived such immunity. Czechoslovak court practice took account of that possibility, which was provided for in article 8. His delegation would like to see articles 9 and 10, in particular those provisions which regulated the implicit consent of a State to waive its jurisdictional immunity, adjusted editorially so that they did not leave room for different interpretations.

11. His delegation welcomed the fact that, in continuing its study on the status of the diplomatic courier, the Commission had considered the six articles proposed by the Special Rapporteur. It agreed with the approach adopted by the Rapporteur in that connexion. The envisaged draft articles must clearly proceed from existing treaties governing diplomatic and cultural relations but must also take into account the practical experience accumulated since those treaties had entered into force. His delegation also agreed with the Special Rapporteur's decision to limit the draft articles for the time being to diplomatic couriers used by States. Any extension of the scope of the draft articles to couriers of international organizations would require very thorough consideration. Finally, his delegation found acceptable the definition of the diplomatic courier, which covered all types of couriers used by States for all official communications, since existing rules of international law and long-established State practice supported such a general definition.

12. His delegation agreed with the decisions contained in the ILC report (A/36/10, chap. VIII B) with regard to the Commission's future programme of work and considered it particularly important to speed up the preparation of draft articles on State responsibility and on the status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier. It also thought that it would be useful for the Commission to resume its work on the law of the non-navigational uses of international watercourses, which had not been included in the agenda of its thirty-third session.

13. Mr. CALERO RODRIGUES (Brazil) said that, even though chapter VI of the Commission's report (A/36/10) gave a satisfactory summary of the debate on the jurisdictional immunities of States and their property which the Commission had conducted on the basis of the excellent report of the Special Rapporteur (A/CN.4/340 and Add.1), it was still difficult for the Sixth Committee to assess the Commission's work, largely due to the fact that, in addition to the text of two articles provisionally adopted at the

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Commission's thirty-second session (arts. 1 and 6) and that of four articles on which consideration had been postponed (arts. 2 to 5), the Commission's report contained several new draft articles for which there were two versions, the first comprising five articles (7 to 11) and the second, four articles (7 to 10), giving the Sixth Committee a great variety of articles to comment upon. Those articles addressed themselves basically to two subjects, however: the general obligation to give effect to State immunity (art. 7) and consent (arts. 8 to 11 in one version and arts. 8 to 10 in the other).

14. Article 7, which had originally been entitled "Rules of Competence and Jurisdictional Immunity", now bore the title "Obligation to Give Effect to State Immunity". The Special Rapporteur had described article 7 as an attempt to turn the rule of State immunity the other way round. That rule having been affirmed in article 6 as a right of the State (a State is immune from the jurisdiction of another State), article 7 set forth a corresponding obligation (a State shall refrain from subjecting another State to its jurisdiction). He questioned the need for such a provision, since it was obvious that if a State was immune, as a matter of right, from the jurisdiction of another State, that other State had an obligation to refrain from exercising jurisdiction over it. He wondered therefore whether the first part of paragraph 1 of article 7 was necessary. He also had doubts as to the usefulness of the second part of that paragraph, which stated that a State shall refrain from subjecting another State to the jurisdiction of its judicial and administrative authorities, "notwithstanding its authority under its rules of competence to conduct the proceedings" or, in another version, "notwithstanding the existing competence of the authority before which the proceedings are pending". The "authority" (or "competence") of the State or its judicial and administrative authorities to conduct proceedings under its or their own rules was thus presented as a preliminary basis for the application of the rule of State immunity. While he did not dispute the reasoning of the Special Rapporteur as to why immunity could not be invoked if the State was not competent in the first place, he did not see the Commission's work as a theoretical treatise on State immunity but rather as a set of practical rules of law. The aim of article 6 and of paragraph 1 of article 7 should be to set forth as clearly as possible the general principle that, under certain conditions to be specified in the draft articles, a State was immune from the jurisdiction of another State and that, consequently, no State could subject another to its jurisdiction. If a State had no competence under its own rules to conduct proceedings in a given case, it was of course impossible for another State to be subjected to its jurisdiction in that particular case. It hardly mattered, however, whether, theoretically, a State was immune from the jurisdiction of another State not by virtue of the rule of State immunity but rather by virtue of the fact that the other State was not competent under its own rules and until those two situations could be shown to have different legal consequences, he would continue to have doubts as to the usefulness of the second part of paragraph 1 of article 7.

15. In that connexion, his delegation believed that an effort must be made to be as concise as possible in the drafting of international instruments. Without criticizing the work of the ILC, he wished to caution against including in a text provisions that were not absolutely necessary.

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16. With regard to the rest of article 7, i.e. paragraph 2 in one version and paragraphs 2 and 3 in the other, those provisions set out the principle that State immunity was not a formal immunity and that it applied not only when a State was formally named as a party in a proceeding but also when, even though legal action was instituted against some other entity or even against an individual, the proceeding would ultimately subject the State to the jurisdiction of another State.

17. That principle, which his delegation believed should be included in the draft articles, was a sound one. Its expression in legal terms was not an easy task, however, and the Special Rapporteur had adopted first a general approach, then a more specific approach, indicating cases in which the State would be considered indirectly involved, and finally an approach combining the general and the specific.

18. Under the general approach, the Special Rapporteur had suggested initially that the articles should state that a legal proceeding was considered a proceeding against another State and therefore not permissible, whether or not the State was named as a party, "so long as the proceeding in fact impleads that other State". In a later version, the Special Rapporteur had suggested that a proceeding should be considered a proceeding against another State so long as, in effect, it sought to compel that other State either to submit to local jurisdiction or else to bear the consequences of judicial determination which might affect its sovereign rights, interests, properties or activities.

19. Under the specific approach, the articles would state that a proceeding was considered a proceeding against another State if it was instituted against one of the State's organs, agencies or instrumentalities "acting as a sovereign authority, or against one of its representatives in respect of acts performed by them in their official functions" or, in a later version, "as State representatives". The articles would also exclude proceedings which sought to deprive another State of its property or of the use of property in its possession or control.

20. The Special Rapporteur combined the general and specific approaches in paragraphs 2 and 3 of his latest version of article 7, and he was to be commended for his meticulous dissection of the elements of the problem. However, none of the texts suggested gave his delegation entire satisfaction. With respect to the general approach, his delegation was not entirely happy with the expression "impleads" and with the references in the variant formula to proceedings that sought "to compel /another/ State either to submit to local jurisdiction or else to bear the consequences of judicial determination". On the other hand, his delegation was not convinced that the Special Rapporteur had gone into enough detail in developing his text under the specific approach; if an enumeration was to be useful, it must be as comprehensive as possible.

21. His delegation believed that by combining the two approaches, general and specific, the Drafting Committee of the Commission would be able to arrive at adequate solutions on the basis of the material provided by the Special Rapporteur.

22. Although the rule of immunity admitted some limitations and qualifications, it in fact meant that a State had the right not to be subjected to the jurisdiction of another State against its own will. One could say, with the Special Rapporteur, that the

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application of State immunity was "conditional upon the absence or lack of consent of the State against which the exercise of jurisdiction is being sought" (A/CN.4/340/Add.1, para. 45). The Special Rapporteur further said that "the existence of consent could be viewed as an exception to the principle of State immunity", but that for the purposes of the draft articles he preferred "to consider consent as a constituent element of State immunity (A/36/10, para. 214). His delegation tended to agree with Ambassador Calle y Calle in considering that consent expressed by a State was not an exception to State immunity but extinguished it.

23. The approach of the Special Rapporteur seemed to be the correct one but his delegation felt that the draft articles in his third report were far from satisfactory, from both the structural and the drafting viewpoints. His delegation was glad that, in the second version, the various forms of consent had been presented in a single article, without creating the impression that there were substantial differences between "consent", "voluntary submission" and "waiver". "Counter claims" were considered separately, as they should be.

24. In their current form, articles 8 to 10 offered a better basis for the continuation of the work of the Commission, and his delegation was confident that the drafting committee would be able to produce a definitive version that could be accepted by the Commission.

25. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he felt that the Commission had made a good start when it had based itself on the six draft articles submitted in the second report of the Special Rapporteur, which envisaged the draft articles as elaborating specific rules based on existing practice and designed to facilitate the administration of couriers and diplomatic bags and reduce the difficulties arising between States in that field.

26. His delegation shared the general view of the Commission that the Special Rapporteur had taken the right approach. Indeed, many members of the Commission had stated that the Special Rapporteur had successfully demonstrated that the comprehensive and uniform treatment of the problem was possible and that his presentation had done much to alleviate uncertainty as to why the General Assembly and the Commission had considered the topic of such importance, given the body of law which already existed.

27. With respect to the scope of the draft (arts. 1 and 2), the Special Rapporteur suggested that the articles should apply, with a single regime to communications of States with their diplomatic missions, consular posts, special missions or other missions or delegations. Currently, four different conventions applied different régimes to communications, and the idea of a single régime seemed attractive, provided a proper balance was achieved between the principle of free communication and the need to protect the receiving and transit States against abuses.

28. On the other hand, his delegation thought the Special Rapporteur's proposal that the draft articles should include communications between different States and between States and international organizations would be an undue extension of the concept of diplomatic courier and diplomatic bag. The draft articles should apply only to the traditional "endogenous" field of communications between a Government and its agents.

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29. With respect to the application of the draft articles to couriers and bags used by international organizations, his delegation was of the opinion that, although the proposal was a new one, it was not far-fetched, and the possibility merited further study.

30. With respect to the use of terms (art. 3), the number of terms defined was staggering being far greater than the number of definitions included in the Convention on Diplomatic Relations (nine), the Convention on Consular Relations (11), and the Convention on Special Missions (11); at the same time, it was far less than the number contained in the Convention on the Representation of States in Their Relations with International Organizations (34). However that might be, his delegation felt that some of the 23 definitions in draft article 3 were superfluous and that, in the case of many of the terms, either they were self-explanatory or their meaning was so well established in international law that their mention only burdened the text.

31. The three "general principles" embodied in draft articles 4, 5 and 6 had been presented by the Special Rapporteur "only on a preliminary basis, as tentative formulatio designed to elicit an exchange of views"; those principles were already to be found in several international instruments and, accordingly, the Brazilian delegation could accept their inclusion in the draft articles. Those three principles could not be taken separately, and constituted a framework of rights and obligations for all the States involved, the sending State, the receiving State and transit States. Two of those principles, that of freedom of communication and that of non-discrimination and reciproci were presented as creating duties or obligations for the receiving and transit States, while the third principle, on respect for international law and the laws and regulations of the receiving and transit States, would create duties only for the diplomatic courier. As the Commission had noted, there seemed to be a certain imbalance in that presentation. His delegation believed that the articles should set forth clearly that the duty to respe international law and the laws and regulations of the receiving and transit States was a duty not only of the diplomatic courier but also of the sending State itself.

32. Noting, finally, that under its long-term programme of work the Commission would consider establishing general objectives and priorities which, at its future sessions, would guide its study of the topics on its current programme of work (A/36/10, para. 25 his delegation felt that the Commission should go further and take a fresh look at the programme of work itself. Even though the programme of work followed the recommendation of the General Assembly, one of the duties of the Commission under article 18 of its Statute was to survey the whole field of international law with a view to selecting topics for codification and, when it considered that the codification of a particular topic was necessary or desirable, to submit recommendations to the General Assembly. It must be admitted in that respect, that some of the topics in the programme of work o the Commission were of relatively minor significance, while others of major importance w not included and were sometimes considered by other bodies. Without any intention of reserving for the Commission a monopoly on the codification of international law, his delegation was of the opinion that enhancing the role of the Commission would be in the best interest of the international community; to that effect, the Commission's programme of work should more accurately reflect the present-day needs of the international community. He was confident that if the International Law Commission showed its willingness to play a more dynamic role, the General Assembly would be prepared to make fuller use of the Commission's potentialities.

33. Mr. QUATEEN (Libyan Arab Jamahiriya), after expressing special appreciation to the Special Rapporteur on the question of the succession of States in respect of matters other than treaties, observed that the Commission had wisely recommended a change in the title of the draft articles devoted to that question; the new title "Draft articles on succession of States in respect of State property, archives and debts", more accurately reflected the material covered. He also wished to congratulate the Commission on the manner in which it had covered the principle of equity. It had been entirely right to refer to the Judgement of the International Court of Justice (ICJ) in the North Sea Continental Shelf cases, in which the Court had drawn a distinction between equity and equitable principles and had decided that in the cases before it, international law referred back to equitable principles, which the parties should apply in their subsequent negotiations. The Commission had adopted the Court's point of view on equity, namely that equitable principles were actual rules of law founded on very general precepts of justice and good faith, and were distinct from equity viewed as a matter of abstract justice.

34. Concerning the general provisions of the draft articles, his delegation believed that article 3 as currently formulated was too vague and should be revised to specify what was meant by "the effects of a succession of States occurring in conformity with international law" in the context of the various categories of succession of States envisaged under articles 13 to 17. His delegation also proposed that the Commission should study the possibility of adding a new article after article 3 to stipulate that the seizure of State archives would not be recognized if it was contrary to the principle of international law or to those of the Charter of the United Nations, and also to specif the necessary international co-operation measures.

35. With respect to State property, his delegation noted that the Commission had indicated in its commentary on article 8 that the purpose of that article was not to settle what was to become of the State property of the predecessor State, but merely to establish a criterion for determining such property. Article 8 defined State property as property, rights and interests which, at the date of the succession of States, had been, in accordance with the internal law of the predecessor State, owned by that State. His delegation wondered what would happen if certain rights or interests were not considered to be property under the internal law of the predecessor State but were considered as such under the internal law of the successor State or at the international level. That article should therefore be reworded so as to give a more precise definition of State property and avoid the contradiction which seemed to arise from the current wording.

36. With respect to the passing of State property, his delegation agreed with the Commission's conclusion that the basic principle was that the passing of State property from the predecessor State to the successor State should take place without compensation (art. 11) and that the date of the passing of that property was that of the succession of States (art. 10). It nevertheless considered the expression "unless otherwise agreed or decided", used in both article 10 and article 11, to be too vague, and thought that the wording of those two articles should be revised to specify what it was that should be agreed or decided.

37. Article 12, which established the principle of the absence of effect of a succession of States on the property of a third State, was in line with article 3. Turning to the question of State archives, his delegation had the same criticism to make

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as it had made concerning State property, namely that the determination of State archives should not depend solely on the internal law of the predecessor State. It therefore suggested that in article 19, after "according to its internal law", the words "as well as to international law" should be added.

38. With regard to the question of treaties concluded between States and international organizations or between two or more international organizations, his delegation believed that the Commission had been right to decide to use the same structure for the draft articles devoted to that question as that of the 1969 Vienna Convention on the Law of Treaties, while bearing in mind the differences between States and international organizations. His delegation hoped that the Commission would formulate a concise and precise definition of international organizations which would make it possible to grasp the scope of their obligations and responsibilities.

39. As far as Part 2 of the draft articles was concerned, the five articles proposed by the Special Raporteur on the question of State responsibility were a good beginning. His delegation thanked the Special Rapporteur in that connexion and hoped that the Commission would continue examining the general principles enunciated in the first three articles. As to articles 4 and 5, his delegation believed that they should also specify the measures which could be taken by the State injured by an internationally wrongful act.

40. With regard to international responsibility for injurious consequences arising out of acts not prohibited by international law, his delegation thought, as did the Special Rapporteur, that there were many ways of dealing with that question, but that general principles could be drawn from customary and conventional law. In his own opinion, States should be responsible for acts imputable to them, whether wrongful or not, and the responsibility should be in proportion to the injury caused.

41. Mr. SHAH (Pakistan) said that since the Commission's establishment, the emergence of a large number of independent States of the third world had radically changed the international community, and it was therefore necessary to review some of the traditional doctrines of international law, which were a product of the colonial era. The third world countries had not been able to contribute to the formulation of customary international law, which they had been expected to follow since their accession to independence. Furthermore, the growing interdependence of States, the advances made in the field of science and technology and the growth of international trade and international markets had created circumstances which demanded the examination of new areas of law, such as the law of economic relations among States, the enlargement of the scope of international law and a shift in its priorities.

42. Before making any comments on the Commission's report (A/36/10), his delegation wished to state that in order to facilitate the consideration of the Commission's work the report should be completed immediately after the closure of its session and distributed well in advance of the session of the General Assembly.

43. The approach to the topic of succession of States in respect of State property, archives and debts was balanced and realistic. The Commission had taken into consideration the interests of the parties involved and had considered the various types of succession.

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It was aware that in defining the topic as it had done, it had left untouched a number of problems, and it had therefore felt the need to incorporate a safeguard clause in article 5, which stated that nothing in the draft articles should be considered "as prejudging in any respect any question relating to the effects of a succession of States in respect of matters other than those provided for" in the draft. It had added a further safeguard clause in article 6, which specified that nothing in the draft articles should be considered "as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons". The Commission had striven to maintain a degree of parallelism in its work of codification and progressive development of law relating to succession of States in respect of treaties and of law relating to succession in respect of matters other than treaties. His delegation agreed with the Commission that the preparation of draft articles was the most appropriate method for studying and identifying or developing rules of international law in respect of the passing of State property, archives and debts. In view of the lack of consistent practice in relation to the passing of State archives, his delegation especially welcomed the fact that the Commission had elaborated a set of rules designed to regulate the succession of State archives. His delegation supported the Commission's recommendation 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.

44. Turning to the question of treaties concluded between States and international organizations or between two or more international organizations, he said his delegation had noted that the draft articles on that topic were more or less of the same pattern as the 1969 Vienna Convention on the Law of Treaties. Since the number of international organizations was constantly increasing, some standard rules to govern relations between States and those organizations should be framed - undoubtedly a difficult task because at present there was little established practice in the domain of treaty-making power on the part of entities such as international organizations. Keeping in mind the fact that State sovereignty had no limitations except those imposed by reciprocal respect for that sovereignty, whereas international organizations owed their existence to the will of States and took different forms, the Commission had endeavoured to strike a balance between the different schools of thought concerning international organizations. That balance was reflected in the provisions of article 6, according to which the capacity of an international organization to conclude treaties would be governed by the relevant rules of that organization. His delegation believed that the current definition of international organizations did not suffice and that a more comprehensive definition should be elaborated.

45. With regard to the topic of State responsibility, his delegation observed that the debate in the Commission reflected a divergence of opinion on the questions of reparation, counter-measures and proportionality between the wrongful act and the response. The first three articles of Part 2 of the draft, entitled "Content, forms and degrees of international responsibility" were devoted to general principles, and the remaining two articles to the obligations of the State which was the author of an internationally wrongful act.

46. In view of the substantial linkage between the three parts of the topic, his delegation would prefer to reserve its detailed comments until the draft articles were finalized, and would for the time being confine itself to making certain general observations. It considered that there was an urgent need to identify and codify the primary rules, for in the absence of such codification States would have greater scope

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for evasion of responsibility. The criterion for the imputability of State responsibility must be carefully defined and objective formulas found.

47. It was a general principle of law and equity that a State could not be held liable for the acts of its enemies, for example the acts of the participants in an insurrection whose avowed purpose was to undermine the authority of the State, and his delegation proposed that such a principle should be expressly embodied in the draft articles. Furthermore, it considered that responsibility, even under international law, could not be absolute and that there must be circumstances in which the wrongfulness of an act was liable to be excused, for example, when an act or omission was due to an unavoidable cause or undertaken for the purpose of self-preservation. Legitimate counter-measures, force majeure, fortuitous event and distress had already been accepted as circumstances precluding wrongfulness. His delegation considered that necessity and self-defence should be included in the same category, provided they were defined clearly. The Commission should also consider the question whether, if the act or omission was excusable, payment of compensation could nevertheless be required.

48. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation noted that the fundamental question whether a State could incur liability for an act that was not wrongful remained unresolved and that there were considerable differences of opinion on that topic within the Commission. In his delegation's view, there was a need for caution and restraint in the consideration of the topic, for the principle had not yet acquired any firm foundation in customary international law.

49. The work on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was still at an embryonic stage and his delegation would reserve its comments until more work had been done on the draft articles.

50. His delegation greatly regretted that the Commission had not considered the topic of the law of the non-navigational uses of international watercourses at its thirty-third session, for that was one of the most important items on its agenda. The Commission itself had observed that the problems of fresh water were among the most serious issues confronting mankind and that it was therefore necessary to codify and develop the rules of international law on the subject. That topic was of special significance to Pakistan, which was primarily an agricultural country and was largely dependent on river water. His delegation therefore proposed the following principles for the consideration of the Commission: the waters of an international river should be equitably apportioned among the riparian States, having due regard to special circumstances, such as heavy dependence on the water by a particular riparian State and the traditional use of such water; the exercise of rights within its territory by a riparian State should not result in ecological or physical changes that could cause grave danger in the territory of other riparian States; each riparian State should exercise the utmost care within its territory to prevent water pollution; in cases where the utilization of water was likely to cause damage or hardships to other riparian States, the prior consent of those States should be necessary; a right which could be exercised in more than one way should be exercised in such a manner as to cause no damage to any other riparian State; an aggrieved riparian State should be adequately compensated for the loss it suffered as a result of the violation of its rights or the damage caused by the misuse of waters by another riparian State; lastly, riparian States should be under a legal obligation to settle

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their disputes peacefully and, if bilateral efforts were unsuccessful, the international forums available for that purpose should be approached.

51. His delegation urged the Commission to give that topic the highest priority, so that its consideration could be completed as soon as possible.

52. Lastly, his delegation viewed with favour the continuation of the practice of holding sessions of the International Law Seminar in connexion with the sessions of the Commission, since the Seminar had served a very useful purpose.

53. Mr. EL-BANHAWY (Egypt) said that the preparation of the draft articles on succession of States in respect of State property, archives and debts was of particular importance to newly independent States. The draft articles dealt with the topic in a rational manner by subdividing it into five questions: State property, State debts, the legal régime of the predecessor State, the status of the inhabitants, and acquired rights. Moreover, the draft had not neglected the economic aspects of succession, especially with regard to State property, State debts and natural resources. The General Assembly had always given priority to that question and in its resolutions 34/141 and 35/163 it had recommended that the Commission should complete the second reading of the draft articles. The draft was perfectly adequate and could serve as a basis for the adoption of a convention, for it accurately reflected the situation prevailing in international laws and would strengthen the recognized customary rules on the subject.

54. With regard to the general provisions (arts. 1-6), Egypt approved of the scope of the draft as reflected in the new title and its current subdivisions and welcomed in particular the fact that a separate part had been devoted to the subject of archives, which was of great importance to both the predecessor State and the successor State. His delegation noted, in that regard, that modern reproduction techniques enabled the successor State to keep the originals of its archives after the predecessor State had copied the documents in which it was interested.

55. His delegation approved of the comments in the report (A/36/10, para. 76) concerning the importance of the principle of equity, which underlay the rules embodied in the draft regarding the passing of State property, archives and debts from the predecessor State to the successor State. In fact, that principle was a corrective factor which made it possible to preserve the "reasonableness" of the linkage between movable State property and the territory. It also made it possible to interpret in a judicious fashion the concept of property connected with the activity of the predecessor State in respect of the territory. The principle also gave the text a rational character, particularly in the case of the provisions relating to the separation of part or parts of the territory of a State and the dissolution of a State.

56. The fact that the provisions of the draft related exclusively to States was logical and of special importance, since the draft covered all possible situations, and in particular that of newly independent States, whether they were former colonies, former Trust Territories or former Mandated Territories.

57. With regard to the question of State property (arts. 7-18), he considered that the principle of defining that property on the basis of the internal law of the predecessor

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State was not entirely satisfactory and that it would be more appropriate to take into consideration the general principles of the principal legal systems of the world so that the rights of the successor State would not be infringed. Moreover, it was natural that the passing of State property should be effected without compensation, without prejudice to the right of the successor State to demand compensation for the exploitation of its wealth and services. Moreover, the protection of movable property required that a number of criteria and conditions be met, in addition to the principle of good faith. Movable property included important items such as archaeological treasures and certain equipment necessary for the provision of services. Consequently, provisions should be added to the relevant draft articles (arts. 13-17) stating that the passing of movable property should be effected in accordance with official documents, with full respect for the principles of equity and good faith. The question was presented in a completely satisfactory way and the many historical references confirmed the principle of the permanent sovereignty of peoples over their wealth and natural resources (art. 14, para. 4), in accordance with the relevant General Assembly resolutions.

58. In cases involving the separation of part or parts of the territory of a State (arts. 16 and 17), it might be asked to what extent the condition of legitimacy should be added. The dissolution or separation must have taken place in accordance with the principles of international law and the Charter of the United Nations and without the use of unlawful means such as direct or indirect foreign intervention or the use of force or the threat of force against the sovereignty of a State or against the rights of peoples to self-determination.

59. State archives (arts. 18 to 29) were documents essential to the existence of States and also represented their cultural and historical heritage. It was therefore natural to include recent documents such as maps, photographs and films in those archives. In that connexion, it was very important that the rights of newly independent States set forth in article 26, paragraph 7, should be protected.

60. His delegation endorsed the division of State debts (arts. 30 to 39) and the exclusion of the debts of non-governmental organizations as well as "odious debts" and "régime debts" which might be defined as debts involving special political interests. It supported the proposals of the Special Rapporteur although it had been the view of the Commission that it was not necessary to prepare general provisions on such debts and that it would be sufficient to apply the rules relating to all forms of succession of States. The situation of newly independent States in regard to the passing of State debts was based on the principle that the sovereignty of peoples over their natural resources must be protected as well as on the principles of equity and justice, in accordance with comtemporary international law. That was the view taken by the Commission when it had stated, in the part of the report (A/36//10, para. 39) dealing with the financial situation of newly independent States, that it was impossible to evolve a set of rules concerning State debts for which newly independent States were liable without taking into account the situation in which a number of those States were placed; moreover, the debt problem of those countries had become a structural phenomenon whose profound effects had become apparent long before the present international economic crisis (A/36/10, para. 41). In cases involving the uniting of States or separation of part or parts of the territory of a State, the concept of "equitable proportion" specified in article 35 was therefore very appropriate and consistent with the resolutions of the General Assembly.

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61. On the question of treaties concluded between States and international organizations or between two or more international organizations, he noted that it had been necessary to draw up rules different from those in the Vienna Convention on the Law of Treaties. In fact, international organiztions could not be assimilated to States as they were the result of an act of will on the part of their member States and were bound by close ties to the States which were their members; there was therefore a need to establish residual rules which would go beyond the provisions of the Vienna Convention on the Law of Treaties and would govern the competence of different international organizations to conclude treaties.

62. Several points had a bearing on the issue. First of all, it was important that only intergovernmental organizations should be considered to be international organizations for the purposes of the draft articles, namely, organizations consisting of groups of Governments which alone, to the extent that they represented their member States, could have competence in regard to the conclusion of treaties. Moreover such provisions should be applied with a degree of flexibility. Secondly, there was no need for article 5 in so far as constituent instruments of international organizations were covered by the Vienna Convention on the Law of Treaties. The same was true of treaties adopted within an international organization, such as those adopted by the General Assembly of the United Nations.

63. Thirdly, the presentation of credentials by the representative of an international organization should be in accordance with the rules of that organization. In that connexion, it had to be borne in mind that the question of the participation of certain international organizations in the Third United Nations Conference on the Law of the Sea was still under consideration. The remaining provisions were, in general, consistent with the parallel provisions of the Vienna Convention on the Law of Treaties, including the principle Pacta sunt servanda.

64. On the question of State responsibility, the Commission had used as a basis the three parameters set out by the Special Rapporteur. In that connexion, Egypt would have preferre a more clear and simple approach to the question by basing responsibility on three elements namely, the author of the injury, the injury and the degree of causality, with compensatior to be based on a differentiation between contractual responsibility and delictual responsibility.

65. In regard to the other comments in the report on the importance of proportionality between the wrongful act and the corresponding response and on the question of counter-measures, his delegation shared the view expressed by one member of the Commission to the effect that international law was based not so much on the concept of sanction or punishment as on the concept of remedying wrongs that had been committed.

66. There was a clear need to harmonize the five draft articles in Part 2 on the subject of State responsibility. His delegation supported the principle that the primary rights and obligations of the States concerned, notwithstanding violations, should be maintained within the limits of the customary rules of international law and be proportionate to the conditions and extent of the violation; it therefore fully supported the substance of article 2 which was consistent with article 1. It agreed that it was important to provide for a link between the draft articles in Part 1 and those to be drafted in Part 2 in the form of a statement that "an internationally wrongful act of a State gives rise to obligations of that State and to rights of other States" (A/36/10, para. 154). It would

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also prefer the first three articles to be grouped together as a single article dealing simultaneously with the obligations and rights of the author State, the injured State and other States (A/36/10, para. 156).

67. In regard to the question of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation considered that such liability was clearly an objective or no-fault liability. In that connexion, criteria such as due diligence and the balancing of the interests of the States concerned should only be applied if it could be proved that the State within whose territory or control the harm had been generated had the possibility of averting that harm.

The meeting rose at1.20 p.m.