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SUMMARY RECORD OF THE 43rd MEETING

Chairman: Mr. CALLE y CALLE (Peru)

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The meeting was called to order at 11 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 (English and French only) and A/36/428)

1. Mr. MAZILU (Romania) said that the contribution of the International Law Commission to the progressive development and codification of international law was remarkable. The Commission had adopted a realistic conception, according to which international law was the emanation of the will of States, and his delegation approved that position.

2. The Romanian Government reserved the right to submit at a later date its final comments on the draft articles on succession of States in respect of State archives and State debts, when the competent Romanian authorities had completed consideration of them.

3. He endorsed the principle set forth in article 3 and considered that the principles of international law mentioned in that article should be interpreted in the light of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Many expressions in the draft articles and the commentaries thereon, such as "transfer of part of the territory of a State", "separation of part or parts of the territory of a State" and "dissolution of a State" should be interpreted in the light of article 3. His delegation recalled that the principle of self-determination of peoples, formulated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, should not be interpreted as authorizing or encouraging any action likely to dismember a sovereign or independent State or to threaten in whole or in part its territorial integrity or its political unity. Furthermore, under that same principle, every State was obliged to abstain from any action which might damage the national unity and territorial integrity of another State. The principle of self-determination of peoples should be interpreted and implemented in close correlation with the other principles of international law. It was therefore necessary to exclude from the scope of the draft articles territorial changes such as annexation or territorial cession resulting from the use or threat of force or from interference in the internal or external affairs of other States. The set of draft articles on succession of States should guarantee respect for State sovereignty and ensure the fulfilment in good faith of the obligations incumbent upon States in accordance with the purposes and principles of the Charter of the United Nations.

4. His delegation considered that those draft articles should be the subject of a conference of plenipotentiaries which would consider and adopt, in the form of a convention or other appropriate legal instrument, the rules proposed by the Commission.

5. With regard to the draft articles on treaties concluded between States and international organizations or between two or more international organizations, his

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delegation supported the view that the new rules should be the subject of an autonomous instrument separate from the Vienna Convention on the Law of Treaties. It considered that the new instrument might take the form of an international convention, provided that the Commission could formulate norms acceptable to the majority of States.

6. Article 2, paragraph 1 (i), gave the expression "international organization" a definition identical to that contained in the Vienna Convention. His delegation believed that such an abstract and general definition was not adequate to determine the specific legal personality of international organizations. The definition proposed during the Commission's work on the subject of the representation of States in their relations with international organizations would perhaps constitute a better point of departure. He considered also that the definition of the expression "rules of the Organization" was too broad. The expression "the established practice of the organization" was vague and might give rise to great difficulties of interpretation. Moreover, since the "relevant rules of the Organization" were frequently mentioned in the draft articles, that concept should be given in depth consideration. The competent Romanian authorities considered that, for the purposes of the draft articles, the "rules of the organization" should designate those which were established by the constituent instruments of the organization or by conventional or other instruments accepted by all its member States.

7. The capacity of an international organization to conclude treaties was governed, according to article 6, by the "relevant rules" of that organization. However, article 2 did not contain any definition of that expression. If that concept was interpreted in the light of the definition of the rules of the organization contained in article 2, paragraph 1 (j), one reached a conclusion that was difficult to accept, namely, that the "relevant rules" mentioned in article 6 and in other of the draft articles might also be rooted in the "established practice" of the organization. His delegation considered that, in the absence of more precise elements in article 2, paragraph 1, (i), the capacity of the organization to conclude international treaties should be governed by its constituent instrument or conventional or other instruments accepted by all its member States, which established the powers of the organization in its specific area of activity.

8. The provision proposed in article 9, paragraph 2, concerning the adoption of the text of a treaty was based on the corresponding provision of the Vienna Convention. However, when the text of a treaty was considered for purposes of adoption at an international conference, with the participation of international organizations, the application of the two-thirds majority rule might place a State in a paradoxical situation, because it would be participating in the conference nomine proprio, on the one hand, and as a State member of the organization on the other. Reconsideration of article 9, paragraph 2, was therefore necessary in order to ensure concordance between the position of the organization and that of it member States.

9. With regard to article 20, paragraph 2, an initial question which arose was how far that provision took account of existing practice. Moreover, the hypothesis mentioned in the draft articles, namely, the case where the participation of an

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international organization was essential for the object and purpose of a treaty, might arouse serious controversies. His delegation pointed out further that situations of the type envisaged in that paragraph constituted exceptions which came under the particular rules of the treaties in question.

10. With regard to the formulation of reservations (arts. 19 to 23), he considered that the text of the relevant articles was too restricted. It tended to impose limitations on States in the exercise of their right to formulate reservations. That right was the very expression of State sovereignty. His delegation therefore considered that the words "the State may formulate a reservation" should be replaced by the words "a State has the right to formulate reservations" and that articles 20 to 23 should be amended accordingly.

10a. He considered that the wording of the draft articles left room for improvement, the repetitions in articles 7 (paras. 1 and 3), 11, 12, 13 and 14, which impaired the concision of the text, should be deleted.

11. Mr. QUENTIN-BAXTER (New Zealand) said that he wished to focus on the question of State responsibility. Inasmuch as the five-year term of the members of the Commission was about to expire, he would, instead of stating his Government's position on particular points, make general observations regarding the nature of the Commission's work, and thus contribute to the search for an agreement on what direction that work should take in the future. Whereas questions relating to treaties, and even those relating to succession of States, appertained to the era of the 1969 Vienna Convention, State responsibility had become, since the 1970s, the main concern of the Commission and a number of jurists; for them, that question covered the whole range of legal relations between sovereign States. The Commission had been reproached on the grounds that in recent years it had concentrated on the traditional aspects of international law and had not been responsive to the needs of the developing countries; only on the question of the non-navigational uses of international watercourses had the critics been silent. Whatever the merits of those reproaches, which were implicit criticisms of the importance accorded by the Commission to State responsibility, it would be useful to review, on a regular basis and in the light of the requirements of the day, the topics on the Commission's agenda. In that connexion, it was difficult to make a clear distinction between traditional topics and new topics. Although the question of State responsibility was extremely old, the Commission had considered it, within the past 10 years, in a new context. Similarly, the non-navigational uses of international watercourses - a relatively old question - were giving rise to new kinds of problems. On the other hand, the question of liability for acts not prohibited by international law was very new in that it approached from a different angle a wide range of practice among sovereign States.

12. All members of the Sixth Committee who took an interest in the drafting of resolutions on the Commission knew that no topic remained on the Commission's agenda unless it enjoyed broad support within the Committee. Admittedly, inasmuch as the Committee examined the work of the Commission every year, there was perhaps not always the right time-perspective for a review of the choices made with regard to the agenda. Broadly speaking, however, he did not think that

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during the 1970s the Commission had taken a traditionalist approach to State responsibility. It was unfair to claim that the Commission had confined itself to academic questions and was not sufficiently interested in the problems of the developing countries.

13. The Commission's 1962 decision to consider State responsibility within a broader framework than before represented the greatest change of course in its history. The purpose had been to take into account the new interests of the majority of the State Members of the United Nations. The change was certainly not to everyone's satisfaction. The Commission's slow progress was a reflection of the complexity of the topics in question. The developed countries were somewhat frustrated on seeing the Commission move towards new topics to the detriment, in their opinion, of traditional topics. One of the real problems involved in the progressive development and codification of international law was that the greater the resources, expertise and documentation available to a State, the less need it saw for the codification of international practice and the more critical it was of codification work. Such work required both caution and enthusiasm. With a modicum of enthusiasm, the problems encountered with respect to succession of States could be settled to everyone's satisfaction. The same was true of codification in the field of State responsibility. Some developed countries regretted that the origin of international responsibility, covered in part 1 of the draft articles, had been dealt with so briefly, whereas the developing countries considered that text to be a major step forward. It was time for polemics to cease. The Special Rapporteur responsible for part 2 of the draft articles on States responsibility should be urged to make up for the abstract and concise nature of the first set of articles.

14. With regard to the important question of the non-navigational uses of international watercourses, his delegation, like other delegations, regretted that the Commission had not yet appointed a new Special Rapporteur. In that connexion, the very cogent arguments put forward by the representative of Bangladesh had reminded him how difficult the topic was, particularly with respect to the concept of the river basin. The topic had not been easily accepted by the Commission.

15. The goal of the Sixth Committee was to create a climate of trust with a view to reconciling divergent points of view and finding generally acceptable solutions. That was particularly true with respect to such new areas as mankind's activities in outer space and issues related to the transport of petroleum products or pollutants. As a result of the increasing complexity of the modern world, the simple exercise by a State of its sovereignty, without any violation of the sovereignty of another State, affected, more and more frequently, the freedom of other States and the heritage of mankind. One of the objectives of the Sixth Committee was to consider the possibility of elaborating an "umbrella" convention that would lay down general principles to be developed subsequently in narrower fields. Generally speaking, the fact was that whereas States enjoyed great latitude of action in exercising their sovereignty, no State could enjoy unlimited sovereignty. A balance must therefore be established. At the present stage, the Commission's work did not have such an ambitious objective. It was important,

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however, to produce a body of rules suited to the day-to-day issues of State responsibility, as had been the case with regard to the Convention on International Liability for Damage Caused by Space Objects.

16. As to international liability for injurious consequences arising out of acts not prohibited by international law, the emphasis could be either on prevention or on compensation. If the Commission focused exclusively on compensation, it would be giving States licence to cause harm, and that would hardly be constructive as far as the development of international law was concerned. There was a growing tendency among States to conclude bilateral agreements which emphasized the duty to avoid causing harm and included compensatory provisions only in cases where prevention was impossible or too costly; that example should be followed in the elaboration of any "umbrella" convention. It was essential to establish not only which acts were injurious, but also at what point the harm became inadmissible, a matter which related to the internal legislation of States. With regard to pollution, a State could request another State to take preventive measures and to commit itself to provide compensation. Solutions relating to acts not prohibited by international law therefore allowed for the establishment of primary obligations. In that context, it was essential to avoid a misunderstanding concerning the notion of duty of care. It would be wrong to claim that States had an absolute duty of care. No State could offer absolute guarantees regarding the consequences of its acts in relation to such matters as the protection of diplomatic agents. All a State could guarantee was that it would do its utmost to afford such protection.

17. His delegation believed that the Commission should, in the light of State practice, formulate general principles before elaborating the draft articles, which it should submit to the Sixth Committee as soon as possible.

18. Mr. CALERO RODRIGUES (Brazil), recalling that the Special Rapporteur on the topic of State responsibility had indicated his intention of following up his preliminary report with a second report outlining a plan of work and dealing with the new obligations of the State responsible for an internationally wrongful act, considered that the second report (A/CN.4/344) was not in strict conformity with his announced intention.

19. The report was divided into two parts, the second of which, entitled "The first parameter: the new obligation of the State whose act is internationally wrongful", concluded with the presentation of five draft articles. Despite the title, only two of those articles dealt with the first parameter and, throughout the text of the report, and particularly in sections B and C, references were made to a plan of work for part two of the draft articles, yet no such plan of work was offered and its consideration was made difficult by the format of the report itself. It seemed obvious, however, that the task of the Commission in preparing part two would be far easier if some basic questions were clarified by a careful consideration of a plan of work. The inadequate structure of the otherwise excellent report might well have contributed to the fact that the questions it raised had not been given as full a debate in the Commission as the importance of

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the topic warranted, and it was perhaps fortunate in the circumstances that the Drafting Committee had not been able to discuss the articles at the thirty-third session of the Commission.

20. He noted that the Special Rapporteur had suggested that part two should begin with a number of 'general principles' or "preliminary rules", following the procedure adopted in part one, and that he had proposed three articles to be inserted in a special chapter under the heading "general principles", one of which (article 2) would indicate the residual nature of the rules on content, forms and degrees of State responsibility set forth in part two of the draft, while the other two articles (articles 1 and 3) would affirm that certain rights and obligations of a State would not be affected by the breach of an international obligation attributed to that State.

21. Turning first to the principle laid down in article 2, he said that, if a primary rule of international law, which created an obligation, prescribed the legal consequences of a breach of that obligation, it would be reasonable to admit that in the case of a breach the régime thus established would apply rather than the régime established in part two. However, the proposed draft article 2, by affirming that the particular régime of responsibility could derive from any rule "whether of customary, conventional or other origin" and could be determined "explicitly or implicitly" in that rule, went too far in accepting the pre-eminence of the régime established by the primary rule, thus considerably reducing the application of part two and creating highly undesirable legal uncertainties.

22. In his delegation's view, the legal consequences of an internationally wrongful act should be governed by the draft articles, unless a primary conventional rule explicitly established a different régime for the breach of an obligation created by that rule. He therefore agreed with the formulation of article 2 suggested by one of the members of the Commission, Mr. Aldrich.

23. In connexion with articles 1 and 3, he noted that, according to article 1, the breach of an international obligation by a State did not as such, and for that State, affect the force of that obligation, and that article 3 provided that the breach of an international obligation did not in itself deprive that State of its rights under international law. Placed at the very beginning of part two, those provisions might give the impression that undue attention was being paid to the interests of the State that had breached an obligation, and he noted that one member of the Commission had even suggested that it should be made clear in the commentary that the provisions should not be considered as constituting a 'Magna Carta' for the States committing a wrongful act.

24. Two further issues of substance were involved: firstly, the question of whether the breach of an obligation invalidated that obligation; and, secondly, to what extent the breach of an obligation by a State affected, in general, the rights of that State under international law. As to the first question, there would seem to be no reason to doubt that the breach of an obligation did not in itself nullify the obligation; the fulfilment of the obligation might become

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materially impossible, and the State to which the obligation was due might have the right to terminate the legal relationship of which the obligation was a part, but, in principle, the obligation continued to exist after the breach. As to the second question, it would seem logical to say that, while a State could not be deprived of all its rights under international law because it had breached an international obligation, it might be deprived of certain rights in the framework of the new legal relationship created by its internationally wrongful act.

25. While in both instances the Special Rapporteur seemed to have taken the position just outlined, his drafting of articles 1 and 3 was not sufficiently precise and might give rise to difficulties, and there was therefore much merit in the suggestion made by Mr. Aldrich that articles 1 and 3 should be combined in a single article which would read: "A breach of an international obligation by a State affects the international rights and obligations of that State, of the injured State and of third States only as provided in this Part". Similarly, his delegation also supported the proposal made by Sir Francis Vallat, which seemed to have found general acceptance in the Commission, namely that part two of the draft articles should begin with a provision stating that "an internationally wrongful act of a State gives rise to obligations for that State and to rights for other States in accordance with the provisions of this part of the present articles".

26. While his delegation's reservations with regard to articles 1 to 3 related to the wording of its provisions, its reservations regarding articles 4 and 5, which concerned the obligations of a State which had committed an internationally wrongful act, were to do with the very structure of the articles and, in the case of article 5, on the definition of the concepts underlying the provision. In his preliminary report (A/CN.4/330), the Special Rapporteur had suggested that the content, forms and degrees of State responsibility could be defined in the second part of the draft articles on the basis of three parameters: the new obligations of the "guilty" State, the new obligations of the "injured" State and, finally, the position of "third" States. The question to be asked - a question to which the Commission had not provided an answer - was whether it was possible to examine the first parameter without knowing how the second and third parameters would be presented in the draft articles. Rights and obligations could only be considered separately, and the obligations set forth in articles 4 and 5 could only be examined independently, if they were considered as "general" or "independent" obligations, to be distinguished from the obligations created for the "author" State by the rights of the injured States and third States. Articles 4 and 5, in his view, could constitute only a very provisional enunciation of the obligations of the author State - so provisional, indeed, that it might be asked whether it might not have been preferable for the Commission and the Sixth Committee to be called upon to comment on the two draft articles only after the second and third parameters had been defined. In any case he noted that, according to the Special Rapporteur, the first parameter could be divided into three obligations, or three degrees of the same obligation, namely, the obligation to stop the breach, the obligation of reparation, and the obligation to make restitutio in integrum stricto sensu and to render satisfaction. Such obligations

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could also be seen as tending towards a belated performance of the original obligation or a substitute performance of that obligation.

27. In his view, the primary aim of the rules of international law on State responsibility was, as the Special Rapporteur had noted (A/CN.4/330, para. 20), to endeavour to "re-establish the situation which would have prevailed if no breach of the international obligation had occurred", or, as expressed in the 1928 judgement of the Permanent Court of International Justice in the Chorzów Factory case "to wipe out all the consequences of the illegal act", and that primary aim should always be kept in mind, particularly though not exclusively, in relation to international crimes, which formed the subject-matter of article 19 of the first part of the draft articles.

28. In that respect, he felt that article 4 was lacking in clarity: while paragraph 1 (c) referred to the obligation to re-establish the situation as it existed before the breach, and while paragraph 2 mentioned the obligation of financial compensation, the re-establishment of the situation as provided in subparagraph (c) was presented as a follow-up to the measures envisaged in subparagraphs (a) and (b) of the same paragraph 1, and thus seemed to be both a whole and a part of a whole. In order to re-establish the previous situation, a State which had committed an internationally wrongful act was required under subparagraph (a) and subparagraph (b) of paragraph 1 respectively, "to discontinue the act" and to "prevent continuing effects of such act", and also to "apply such remedies as are provided for in, or admitted under, its internal law", "subject to article 22 of part one of the present articles".

29. For his delegation, that provision gave rise to concern on two counts. In the first place, it doubted the appropriateness of the reference to article 22, which dealt with the exhaustion of local remedies, that being a necessary condition before a breach of an international obligation was recognized, because if local remedies had not been exhausted the breach did not legally exist, whereas part II of the draft articles dealt precisely with a situation in which such a breach existed. Was one to understand that a State responsible for a breach had the right to delay the fulfilment of its (secondary) obligation to stop that breach (lato sensu) until such time as new local post-breach remedies had been sought and exhausted? Secondly, the description in paragraph 1 (b) of the obligation of the author State to "apply such remedies as are provided for in, or admitted under, its internal law" could be questioned; it might suggest that, if no remedies existed, there was no obligation to stop the breach (lato sensu). Even though the additional obligations of the author State could be enunciated under the second and third parameters, it would seem necessary, since the Special Rapporteur had chosen to start part II of the draft articles with the obligations of the author State, to spell out those obligations as clearly as possible, and in particular to specify that a State that had breached an international obligation was bound first and foremost to re-establish the situation which would have prevailed if no breach had occurred. If that was impossible for the author State, then - and only then - was the possibility of a "substitute" performance (the obligation to make compensation and provide satisfaction to the injured State) to be contemplated, as stated in article 4, paragraphs 2 and 3.

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30. With regard to paragraph 2 and the question of the transition from the obligation of restitutio in integrum to the obligation of compensation and satisfaction, he noted that that obligation would exist "to the extent that it is materially impossible for the State to act in conformity with the provisions of paragraph 1". Since paragraph 1 was not very clear, the meaning of paragraph 2 also became unclear. If a State could not, in case of a breach, apply remedies "provided for in, or admitted under, its internal law" in accordance with paragraph 1 (a), was it to be concluded that there was a material impossibility of re-establishing the situation as it had existed before the breach? Secondly, with respect to the content of the obligations of compensation and satisfaction, compensation was referred to as the payment of a sum of money corresponding to the value which a fulfilment of the obligations mentioned in paragraph 1 would bear. He wondered whether it should not be admitted that compensation or, as it was sometimes called, "reparation by equivalent" could take some form other than the payment of a "sum of money". Satisfaction, according to paragraph 3, took the form of "an apology and of appropriate guarantees against the repetition of the breach": was it the intention of the paragraph to limit satisfaction to those two forms?

31. Having set forth in article 4 the "normal" obligations of the author State, the Special Rapporteur had dealt in article 5 with the special case in which the internationally wrongful act was a breach of an international obligation concerning the treatment to be accorded by a State to aliens. According to article 5, the State which had committed that breach had an option between restitutio in integrum and compensation. His delegation was uneasy about the position concerning the obligation of restitutio in integrum taken by the Special Rapporteur in that provision, which seemed to be an application of the principle of proportionality. The Special Rapporteur seemed to differ from the widely-held opinion expressed by Professor Dupuy in his 1977 arbitral award in the Topco-Calasiatic case, namely, that "restitutio in integrum is ... the normal sanction for the non-performance of contractual obligations" and that it was inapplicable only to the extent that restoration of the status quo ante was impossible. The Special Rapporteur, who had written in paragraph 137 of his second report (A/CN.4/344) that restitutio in integrum "is not necessarily a legal consequence of the breach" and had stated in the Commission that "in his view restitutio in integrum was not a normal consequence of the breach of an international obligation" (A/CN.4/SR.1666), seemed to accept the idea that, in addition to material impossibility, a legal impossibility could preclude restitutio in integrum and said that "an obligation of the author State to effect a restitutio in integrum stricto sensu may be incompatible with its right to domestic jurisdiction" (A/CN.4/344, paras. 151 and 157).

32. Article 5, which was an application of those concepts, would in fact authorize a State to breach an international obligation for a price, the price of compensation, and the State, having failed to perform that obligation, could free itself from the duty of performance through the payment of a sum of money to the injured State. He cited article 13 of the International Covenant on Civil and Political Rights and said that, according to the proposed article 5, a State

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would not be obliged to live up to its obligation under that provision of the Covenant. By conduct not in conformity with that obligation - for instance, by expelling an alien without due process of law - the State would breach the obligation but would at the same time free itself from it. Even if the re-establishment of the situation that had existed before the breach would not be at all materially impossible, the only consequence of the breach for the author State would be that a sum of money would become due to the injured State. Not much was required of the State under the Covenant: the obligation to apply due process of law existed only in the case of aliens lawfully in the territory of the State and where compelling reasons of national security could not be invoked. Such being the case, was it really necessary or justified in that situation to give the State the benefit of the option envisaged in article 5? He would favour keeping in part II of the draft articles, as in part I, the essential unity of the concept of international responsibility, avoiding the creation of exceptions or special régimes unless it was absolutely necessary to do so.

33. In commenting, as members were expected to do, on the draft articles in part II, he had not been able to do full justice to the second report of the Special Rapporteur, whose eminent legal qualities and intellectual capacity he appreciated. He regretted that the many ideas and concepts in that report had not been discussed before the Commission and the Sixth Committee had embarked on the actual consideration of the draft articles.

34. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that the second report of the Special Rapporteur on the topic (A/CN.4/346 and Add.1 and 2) was very well structured and was an impressive demonstration of the Special Rapporteur's ability to handle a very difficult subject. The Special Rapporteur had been particularly prudent not to draw hard and fast conclusions. Neither the boundaries nor the inner content of the topic were as yet clearly defined, and one could only hope that a consensus on them would emerge through discussions in the Commission and in the Sixth Committee. Some scepticism existed in the Commission; one member had said that "it would be extremely difficult, if not impossible, to lay down fundamental rules that would be applicable to specific situations", another had "wondered whether it was possible to formulate a single set of rules", and a third had said that "he was willing to try to formulate a general régime through the progressive development of international law but he was not sure how the Commission could go in that direction". His delegation took a position similar to that of the third member. It believed that the Special Rapporteur should continue to provide food for thought in his reports, which should present an occasion for a full debate on the general questions involved and on the best way to approach solutions. Only after that should the Commission try to come to grips with draft articles, unless, of course, it reached the conclusion that no prospects existed for developing satisfactory provisions, in which case it should discontinue its work on the subject. He did not believe that the Commission would necessarily reach that extreme, but the possibility should be kept in mind.

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35. His delegation agreed with much of what was contained in the second report of the Special Rapporteur. It shared the view that any solution should seek to establish a balance of interests. On the one hand, there was the State in whose territory the activities were performed and which actually had a right to carry out within its own boundaries activities that were not prohibited by international law; on the other hand, there was the State which suffered the injurious consequences and which might claim the right not to be subjected, in its territory, to harm that originated in another State. Two elements were thus essential for the establishment of legal rules: activities not prohibited by international law, as cause, and damage in another State, as consequence. His delegation found it difficult to conceive rules to be applied if one of the two elements was missing; that was why it found it difficult to envisage general rules aimed at preventing damage. In his "cryptic" article, the Special Rapporteur proposed that the future draft articles should apply to activities giving rise to "actual or potential loss or injury to another State". The concept of "potential loss or injury" seemed to him to be too extensive, since it could be interpreted as covering almost the whole spectrum of activities within a State. As an example of the problems inherent in such a concept, he asked whether a State should have the right to interfere with the construction of nuclear power plants in another State because they were too near to its borders? How near? What if a State was so small that any location would be too near its borders with another State?

36. His delegation understood the concern of the Special Rapporteur that obligations of reparation should not take the place of obligations of prevention; nor did it question the duty of care. However, it did not yet see how that duty of care or the obligations of prevention could be developed into rules of a general nature such as those contemplated under the topic. Furthermore, even if all possible care had been taken, damage could still be inflicted. His delegation therefore believed that devising rules to be applied when damage occurred should be the main concern. On that basis, a single régime could be established covering also two additional situations which the Special Rapporteur, at least for the time being, considered to be special cases: unforeseen accidents, and the existence of circumstances precluding wrongfulness. As a complement to that régime, some concrete rules, as opposed to general rules, for the duty of care might also be contemplated.

37. The Special Rapporteur seemed to be convinced that a good body of doctrine, and States themselves, were so mistrustful of the concept of strict liability that it could not be taken as a basis. He apparently believed that his own approach, in which pride of place was given to preventive rules, would allow for a better solution and that, as he put it, "the monster of strict liability should be domesticated". However, his delegation doubted more and more the possibility of producing an adequate set of rules and wondered whether it would not be better, instead of domesticating the monster, to grasp the bull by the horns. With proper qualifications, including the establishment of thresholds of harm, the concept of strict liability could perhaps be accepted as a reasonable foundation for the work on the topic.

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38. As stated in the Commission's report (A/36/10, para. 197), "the search for general principles should be pursued, with a willingness to venture cautiously into the realm of progressive development, but also with a consciousness that different kinds of situation may be found to require different treatment". His delegation agreed with that proposition and was confident that the Special Rapporteur would continue his in-depth exploration of the topic until satisfactory answers were found.

39. Mr. RIOS (Chile) said that the progress achieved by the Commission on some of the topics on its agenda was particularly welcome in view of the fact that the term of office of its members was about to expire; it would be helpful if those members of the Commission to whom specific tasks had been entrusted could continue their work, so as to facilitate the elaboration of the draft articles with which they were dealing.

40. In the view of his delegation, the draft articles produced under the topic of succession of States in respect of matters other than treaties regulated a large number of very complex situations and provided equitable, realistic and balanced solutions. The draft articles on succession of States in respect of State property, archives and debts were an essential complement to the Convention on Succession of States in respect of Treaties and, subject to the safeguard clause in article 5, they would, if adopted in the form of a convention, complete the codification of the most important questions relating to succession of States. In view of the diversity of cases of State succession covered by the draft articles, his delegation could not agree that, since the few colonies still remaining would shortly disappear, any convention adopted on the basis of the draft articles would, like the Convention on Succession of States in respect of Treaties, seldom need to be applied in practice. While his delegation regretted that no such instruments had existed when decolonization was at its height, it believed that in the future, even when all dependent States had attained their independence, the conventions would provide solutions to the problems raised by the other cases of State succession dealt with in the draft articles. His delegation therefore endorsed the Commission's recommendation that an international conference of plenipotentiaries should be convened to adopt a convention based on the draft articles, and it was confident that, once the necessary modifications had been made, the convention would command general acceptance. It reserved the right to make more detailed observations on the draft articles at such a conference, after giving them the close study they demanded, and expressed its thanks to the representative of Iraq, whose statement on the subject would greatly facilitate that study.

41. While his delegation approved of the fact that the draft articles on treaties concluded between States and international organizations or between two or more international organizations had been given the same structure as the Vienna Convention on the Law of Treaties, to which it was a vital corollary, it was nevertheless important that they should retain their own individual character so as to have legal force independently of the Convention. It therefore agreed with the decision not to make reference to the Vienna Convention even in the case of

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articles modelled on the provisions of that Convention. The compromise solution which had been arrived at in article 6, concerning the capacity of international organizations to conclude treaties, seemed fair and his delegation was sure that it would be universally accepted. It welcomed the fact that article 26 reproduced the corresponding provision of the Vienna Convention, since the principle pacta sunt servanda was one of the bulwarks of the certainty of international law. In view of the importance of the question of treaties concluded between States and international organizations or between such organizations, his delegation considered that it should be given priority and hoped that the Commission would be able to complete the second reading of the draft articles on the subject at its 1982 session.

42. On the question of State responsibility, his Government believed that the articles thus far submitted to Governments for comment were a decisive contribution to the progressive development and codification of international law. The five articles on content, forms and degrees of international responsibility proposed by the Special Rapporteur at the 1981 session did not call for any specific comments. Despite the importance which his Government also attached to international liability for injurious consequences arising out of acts not prohibited by international law, it was of the view that it would be better for the Commission to complete its work on the draft articles on responsibility incurred as a result of wrongful acts before proceeding to draft any articles on liability for non-wrongful acts, which would necessarily be complementary in nature.

43. Turning to the question of jurisdictional immunities of States and their property, he said that his delegation wished to reaffirm its adherence to the principle that every State was exempt from the domestic jurisdiction of another State. In the case of public acts of a State performed in exercise of its sovereignty, that principle should be applied without qualification. However, in the case of commercial activities or acts jure gestionis generally, there might be exceptions to that principle, in accordance with the generally accepted rules of contemporary international law. By and large, his delegation endorsed the observations made on the subject by the Chairman of the Commission when introducing the Commission's report.

44. His delegation hoped that the Commission would continue its consideration of the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and would give it the priority assigned to it by the General Assembly.

45. He welcomed the co-operation between the Commission and regional bodies such as the European Committee on Legal Co-operation, the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee and the Arab Commission for International Law, which was bound to give the Commission a better idea of the various legal systems throughout the world.

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46. While sharing the concern expressed by some delegations at the length of time taken by the Commission in producing its draft articles, his delegation understood that the amount of work entrusted to the Commission by the General Assembly, and its conscientious approach to that work, precluded its proceeding at greater speed.

47. Lastly, his delegation wished to stress the importance of the International Law Seminar usually held during the Commission's sessions and to thank the lecturers who had participated in the 1981 session, including Mr. Badr and Mr. Ospina.

The meeting rose at 1 p.m.