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New York

SUMMARY RECORD OF THE 45th MEETING

Chairman: Mr. ZEHENTNER (Federal Republic of Germany)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 108: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-FIRST SESSION (continued) (A/34/10 and Corr.1, A/34/194; A/C.6/34/L.2)

1. Mr. ROSENSTOCK (United States of America) said he was pleased to note that the International Law Commission (ILC) had completed its first reading of the draft articles on succession of States in respect of matters other than treaties. The new draft was a considerable improvement on that submitted to the Sixth Committee at its previous session, particularly in regard to the formulation of article 16 (b). In view of the volume and importance of the credit currently extended to States from private sources, and bearing in mind the needs of the developing countries, it would be most unfortunate if such a provision were to be omitted, for the result could be a limitation of the sources of credit available to States and international organizations. It would be anomalous to call into question the protections required by any credit source while at the same time perceiving easier access to private markets as an objective of the North-South dialogue. Thus, common sense, the history of the subject and current practice afforded ample support for the inclusion of article 16 (b) in the draft.

2. He regretted, however, that the ILC had again included in the commentary unnecessary material which raised questions of economic policy and treated General Assembly resolutions out of context and in a manner inconsistent with their recommendatory character. He also regretted that it had not been possible to reach agreement on a more comprehensive draft.

3. The new articles on State responsibility raised fewer difficulties than the previous articles, since they were comprehensible, relevant to practical matters and capable of rational application. However, while he recognized that the point dealt with in article 29, paragraph 2, was valid vis-à-vis a third State and that the wrongfulness of the act was not affected by the consent, he wondered whether there ought not to be some notion of an estoppel so far as the consenting State was concerned. Perhaps that point could be dealt with in the commentary.

4. With regard to article 30, a conceptual query arose as to whether it was correct to speak of "the wrongfulness of an act" or whether it would be preferable to say "an act which would otherwise be wrongful shall not be wrongful if the act was due ...". Articles 31 and 32, on the other hand, seemed to strike an acceptable balance.

5. His delegation had already had occasion to criticize certain parts of the draft for its unnecessary complexity and he therefore trusted in future that it would be simplified, in a realistic approach, so that it could be ratified and applied by a large number of States. In that connexion, he paid a tribute to the Special Rapporteur, Mr. Roberto Ago, for his outstanding work.

6. Referring to the question of treaties concluded between States and international organizations or between two or more international organizations, he said that his delegation was concerned to note that the ILC was reshaping the original approach of Professor Reuter, Special Rapporteur, which was to recognize

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that, although international organizations were not States, in the sphere of treaties their status was not essentially different, and that the Vienna Convention on the Law of Treaties should therefore apply with relatively few changes.

7. The ILC appeared to be fashioning what in a number of respects would be a new convention, in a conscious attempt to reduce international organizations to second-class actors on the world scene. On that topic, it appeared that the ILC was being influenced by the opinions of those whose views in regard to international organizations had been dated in 1945 and which, in the light of the decisions of the International Court of Justice and current practice, could now only be regarded as regressive.

8. The tendency to regard international organizations as strange and dangerous creatures was evident from article 39 and the commentary. It was not clear why the expression "by agreement" sufficed in the case of States, which had started every war fought during the previous 300 years, whereas, in the case of international organizations, it was necessary to say "by the conclusion of an agreement". Paragraph 2 was clearly unnecessary and should not be included, since it could be assumed that a reasonable interpreter of a treaty would attempt to give meaning to all its parts.

9. Articles 40, 41, 43 and 44 followed the initial approach of the Special Rapporteur, but article 42 was a further example of the psychological and political desire, cloaked in a legal framework, to perceive international organizations in terms that had perhaps been valid before the Covenant of the League of Nations had entered into force. In that article, treaties between States and international organizations and treaties between two international organizations were dealt with separately, the reason given being that it was purely for considerations of drafting. No such reason could, however, warrant the creation of distinctions when there was no difference to justify them.

10. The same approach was to be seen in article 45 and the commentary. That article departed from the hypothesis that heads of States, ministers of foreign affairs and even ambassadors were rational people, responsible for their acts, but did not similarly regard comparable officials of international organizations. Yet he knew of no international officials who had behaved as irrationally as many heads of State or Government in the previous 50 years. Nor was the difference between the word "acquiesced" and the expression "renounced the right to invoke" all that great.

11. A number of questions had been raised as to whether an international organization could be guilty of using force in order to secure the conclusion of a treaty. If the ILC insisted on drawing up a comprehensive treaty, rather than a protocol to the Vienna Convention on the Law of Treaties which would simply introduce changes in the articles where that was absolutely necessary, an article on the use of force by international organizations would have to be included. In that case, the commentary should be simpler and should not reopen the debate on the meaning of "use of force" within the context of the Vienna Convention.

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12. A good start had been made in the work on the law on the non-navigational uses of international watercourses. It was extremely important to adopt rules in that regard, which should be based on the notion of interdependence and on the maxim sic utere tuo ut alienum non laedas. States could not be free to treat the waters flowing through their territory exclusively as theirs without regard to the interests of neighbouring countries. Any serious approach to that area should be based on the river basin. He endorsed the General Assembly's decision to accord priority to the topic and urged those Governments which had not yet done so to submit their comments as soon as possible.

13. His delegation continued to have serious doubts about the utility of the work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Despite the heightened awareness of the ease with which the inviolability of embassies and the immunities of diplomats could be jeopardized, no significant problems were known to exist in regard to diplomatic couriers or unaccompanied pouches. Low priority should be accorded to that question, so as not to take up time which the ILC needed for more important matters.

14. Similarly, the second part of the subject of relations between States and international organizations did not, in his view, merit the ILC's attention at that time.

15. On the other hand, the ILC could and should make a contribution in regard to the jurisdictional immunities of States and their property. The preliminary report submitted by the Special Rapporteur justified the confidence expressed in him and it was to be hoped that Governments would shortly provide the ILC with the information it required so that it could draw up rules on the matter as soon as possible.

16. With regard to the multilateral treaty-making process, the Sixth Committee might wish to consider the suggestions submitted by Governments on the matter and the Mexican representative's comments, with which he agreed for the most part.

17. Lastly, he commended the ILC on the quality of its work and expressed the hope that it would continue to be the primary source for the codification and progressive development of international law.

18. Mr. MACKAY (New Zealand) said that it was often difficult for delegations to analyse the report of the International Law Commission in the short time available. The introduction by the Chairman of the Commission was therefore very useful in providing an over-view of its most recent session, and in focusing the attention of the Sixth Committee on those aspects on which the Commission was seeking comments.

19. The Commission had made good progress, particularly with regard to the succession of States in respect of matters other than treaties. Special praise was due to the work of revision and co-ordination of the older draft articles on property and debts. A solution to the remaining substantial problem, the definition of State debts, was not to be found in taking sides as to the inclusion or exclusion of the second subparagraph of article 16, but rather in making positive contributions which would provide new material for the Commission in its second reading. In that

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context, he emphasized the need for the draft to remain relevant to the situation of all States, and not of certain States only. However, in dealing with State archives, special attention must be paid to the needs of newly independent States. He believed that, with co-operation from Governments, the time-lag in dealing with the matter of archives in relation to the rest of the draft could be overcome.

20. With regard to State responsibility, he noted the close relationship between some of the articles adopted during the current year, and those projected for the future; that was the case, for example, with the articles on force majeure and distress, and also with the article on state of emergency.

21. With respect to the question of treaties concluded between States and international organizations, or between two or more international organizations, a number of complex problems were raised by some of the draft articles, especially articles 45, 46 and 36 bis. But, although the Commission's first drafts of those articles recognized the profound differences between States and international organizations, there was reason to believe that, despite those differences, there was no impediment to the efficient participation of organizations in treaty relationships.

22. With regard to international watercourses, the account of the scientific background to the topic presented by the various Special Rapporteurs, describing water as a resource of finite and unchanging magnitude in the world, showed that the implications of the topic were not confined to the particular situation of States with a common land boundary.

23. To conclude, he wished to point out that the Commission would soon begin its work on new topics reflecting the contemporary preoccupations of States. That circumstance lent special relevance to the comments contained in paragraph 209 of the Commission's report, and illustrated the need for the Commission to be given the support it required in research and other fields.

24. Mr. CALERO RODRIGUES (Brazil) said that the International Law Commission had obtained excellent results during its thirty-first session. He whole-heartedly supported the conclusion in chapter VIII of the report (A/34/10) that the techniques and procedures provided for in the Statute of the Commission, as they had evolved in practice, were well suited to the tasks entrusted to the Commission by the General Assembly. The international community could consider itself fortunate in the quality of the individuals elected to the Commission. Their skill in reflecting in technically sound legal texts the changing needs of a changing international community facilitated the work of the Sixth Committee, whose main task was to review the Commission's work and infuse into it, when the need existed, the elements of political thought which were indispensable to a proper development of international law.

25. Referring to specific questions dealt with in the report of the Commission, he noted that the draft articles on succession of States in respect of matters other than treaties seemed in general to be well-structured and satisfactory. The decision to follow as far as possible the structure of the Vienna Conventions on

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the Succession of States in Respect of Treaties and on the Law of Treaties had produced good results, although the intended parallelism should always take into account the difference in subject-matter. In that regard, the Commission had been well advised to keep open the scope of the proposed articles, as they might have to be expanded to cover matters other than State property, State debt and State archives.

26. In his view, the question of State archives had a special importance, particularly for newly independent States, and warranted separate treatment. The definition proposed in article A was adequate, provided that the expression "documents of all kinds" was given a sufficiently wide meaning. At all events, he hoped that the Commission would be able to improve the definition. Draft article 16 defined a State debt as being, on the one hand, any financial obligation of a State towards another State, an international organization or any other subject of international law, and, on the other hand, as any other financial obligation chargeable to a State. He believed that, although theoretically only the first category could constitute a State debt for the purpose of the draft articles, the second category should also be mentioned for practical reasons. Its suppression might have detrimental effects in relation to the availability of external financing, especially for developing countries. It was also to be hoped that the Commission would consider further the question of "odious debts", given the importance of that question.

27. With regard to State responsibility, he considered that the draft articles so far prepared were an impressive achievement, which must be largely credited to Professor Roberto Ago. At its thirty-first session, the Commission had adopted five draft articles dealing with delicate questions. Although there were good grounds for establishing State responsibility in the cases covered in paragraphs 1 and 2 of draft article 28, his delegation had some doubts with respect to paragraph 3, which maintained the international responsibility of a State which was subject to the power of direction or control of another State, or subjected to coercion. Such responsibility could be admitted in some cases, but should be excluded in others; and he hoped that a more precise solution would be found in part II of the draft articles.

28. With regard to draft article 30, and the consequences of wrongful acts, there was a unanimous opinion that the State which was a victim of the wrongful act was entitled to have the act made good through restitution, moral satisfaction or compensation. On the other hand, opinions were divided as to whether or not the wronged State had a right to apply sanctions against the State which had committed the wrongful act. Draft article 30 did not seem to take any position on that question. Yet, in accepting that measures adopted by a State which were not in conformity with an international obligation did not constitute a wrongful act if they were applied in consequence of a wrongful act against that State, it was in fact recognizing that the State had a right to apply sanctions. Although, in its commentaries, the Commission did not explicitly qualify such an act as a sanction, reserving the use of that word for countermeasures determined by competent international organizations, it admitted that there were no differences of substance between measures institutionally decided by the international community and measures

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decided by States themselves. The question therefore arose as to whether international law allowed States against which a wrongful act was committed to "take the law into their own hands". The present state of international law tended towards the centralization of the application of sanctions, including the use of force in all its aspects. He therefore believed that article 30 deserved further consideration, and could not be considered final in its present form.

29. With regard to the question of treaties concluded between States and international organizations, or between international organizations, dealt with in chapter IV of the report, his delegation was of the view that the basic difference between States and international organizations should be kept in mind at all times. The capacity of States to enter into treaties was general, and existed for all States; by contrast, the capacity of international organizations was much more limited, and was conditioned by their own internal rules. Although the Commission had been aware of that basic problem, he was not sure that the method of applying the provisions of the Vienna Convention on the Law of Treaties to the new draft articles mutatis mutandis produced entirely satisfactory results. The basic problem of capacity posed questions which were left unsolved; that was the case in some of the draft articles 39 to 60, especially those dealing with invalidity, termination and suspension of the operation of treaties.

30. With respect to the law of the non-navigational uses of international watercourses, he felt that, in view of the complexity of the problem, it should be studied with the utmost caution if useful results were to be obtained. There were no simple answers in a field which encompassed so many diverse interests and situations. The basic views of the Brazilian Government on the subject were well known. He felt that it would be useless at the present stage to give a view on the preliminary results included in the report; it would be more appropriate to comment when the Special Rapporteur had presented further articles and the Commission had had an opportunity to consider them. At all events, he agreed with the observations made in the Commission and in the Sixth Committee concerning the definition of "user States" contained in article 2 as proposed by the Special Rapporteur. His delegation felt that the acceptance of the concept that a "user State" was any State which contributed to or made use of the water of an international watercourse implied acceptance of the concept of the international drainage basin. However, the Commission itself had decided not to adopt the latter concept as a basis for its work, and serious difficulties would be created if the issue was not clarified. Finally, he noted with satisfaction that general opinion in the Commission favoured further reflection on the subject before seeking a definitive solution.

ORGANIZATION OF WORK

31. After a procedural debate, the Committee decided by 41 votes to 3, with 28 abstentions, to hold meetings on Friday, 23 November from 10.30 a.m. to 1 p.m., and from 6.30 to 9.30 p.m.

The meeting rose at 4.30 p.m.