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SUMMARY RECORD OF THE 35th MEETING

Chairman: Mr. ESCOVAR-SALOM (Venezuela)

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/177 and Add.1-5, A/51/178, A/51/332 and Corr.1, A/51/358 and Add.1, A/51/365)

1. Mr. CROOK (United States of America), referring to the issue of State responsibility, said that while there was much in the draft articles adopted by the International Law Commission at first reading which could make a lasting contribution to the law, the text had serious flaws which, unless they were corrected, would make it unacceptable to his Government.

2. The very concept of State crimes did not find support in State practice and gave rise to confusion. Moreover, in practical terms, the provisions on reparation for State crimes did not make sense. For example, they would appear to permit all States to seek reparation from Cambodia for the Khmer Rouge's failure to safeguard human lives, or to seek reparation from a State that damaged its own "human environment". However, in neither case did State responsibility law seem to provide an effective instrument for remedying the underlying problem. Thus, it was both inappropriate and unproductive for the Commission to try to weave new rules regarding supposed international crimes by States into the fabric of State responsibility law. The Commission must therefore delete that controversial and unhelpful feature from the draft articles.

3. Another flaw of the draft articles was that they proposed inflexible and impractical dispute settlement provisions. Indeed, there was an infinite variety of legal and factual circumstances and disputes potentially implicating State responsibility. That was why it was not possible or responsible to decree any particular rigid form of settlement. Moreover, the form of settlement envisaged by draft articles 54 to 60 could be burdensome and costly for the parties. For all those reasons, the Commission must take a more realistic position regarding dispute settlement during the second reading of the draft articles. At most, the Commission should propose only alternative voluntary mechanisms which States might use.

4. The treatment of countermeasures under the text of the draft articles adopted at first reading created serious and unnecessary difficulties. While countermeasures must be used carefully, they could be an important means to encourage international legality. Indeed, a State might need to take immediate steps to induce compliance by a violating State and to avoid further injury to itself. But, the draft articles placed unjustifiable limits on an injured State's ability to protect itself in that way. For example, article 48 required that prior to taking countermeasures, an injured State must fulfil its obligation to negotiate provided for in article 54, without stipulating how much time must be spent on such negotiations. Thus, if a State violated a treaty commitment, the injured State apparently could not withhold a proportionate benefit to the wrongdoing State under the same or a different treaty without some months of prior negotiation; it must accept continued injury to itself. Moreover, article 48 did not specify the nature of interim measures of protection which were necessary for the injured State to preserve its rights, or

how such measures differed from the proportionate countermeasures prohibited by the article. In other words, the Commission's approach neither conformed to State practice nor was sound. The Commission must respect the legitimate and important role of proportionate countermeasures in assuring international legality.

5. The standard of compensation for violations of State responsibility unjustifiably departed from established customary international law, in that an injured State was entitled to obtain for itself, or for the national for whom a claim was brought, full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition (article 42). However, that standard of full reparation was badly undercut by the provision that in no case should reparations result in depriving the population of a State of its own means of subsistence. Obviously, that qualification to the rule of full reparation was highly subjective and vulnerable to abuse. It offered an easy escape for potential expropriators or others who had committed wrongful acts and who sought to avoid responsibility for their actions.

6. It was well established in international law, and confirmed in the recent practice of States and decisions of international tribunals, that full reparation (particularly in the case of expropriation), must be prompt, adequate and effective. Responsibility could not be qualified by the means or asserted lack of means of the State that committed a wrongful act.

7. Lastly, the draft articles cast unnecessary doubt on the central role of interest as part of compensation. Article 44 provided that compensation covered any economically assessable damage sustained by the injured State, and might include interest and, where appropriate, loss of profits. Indeed, modern tribunals that had considered the matter had consistently held that interest was a part of compensation.

8. The Commission must correct those flaws if its work was to receive acceptance and have a chance of usefully influencing the future behaviour of States.

9. Mr. MIKULKA (Czech Republic), referring to the issues on which the Commission requested the views of Governments, noted with respect to the distinction between international delicts and international crimes, that care should be taken to treat the issue of the choice of terms (delicts or crimes) separately from the substantive problem, namely, the existence of two categories of wrongful acts which, however they were characterized, fell under two qualitatively different regimes. Indeed, he feared that the purely academic controversy surrounding the distinction between the two categories of wrongful acts based on the choice of such terms, would hold up progress in the consideration of the draft articles as a whole.

10. In his delegation's view, it must be borne in mind that responsibility under international law was neither civil nor criminal, but purely international and, consequently, specific. Therefore, in its second reading of the draft articles, the Commission should consider the possibility of either choosing other, more neutral terms, or avoiding the use of specific terms to refer to two

different types of wrongful acts and making the distinction by other means, such as by dividing the text of the draft articles into different sections dealing separately with the consequences of wrongful acts as such and wrongful acts which threatened the fundamental interests of the international community as a whole. The Commission should confine itself to the use of the term "internationally wrongful acts", which was uncontroversial. That would ensure that the draft articles used neutral terminology, while giving State practice and doctrine enough latitude to devise, at a later date, terminology that would be acceptable to all.

11. The essential need with respect to the draft articles on State responsibility was to decide whether there were, in fact, two different types of wrongful acts and, if so, to determine the consequences of an internationally wrongful act which adversely affected the fundamental interests of the international community as a whole. In sum, it was necessary to set forth the secondary rules brought into play by the violation of primary rules. The characterization of crimes in article 19 implied that it was, above all, the nature of the primary rule that determined which violations constituted crimes, thus reinforcing the impression that the definition of crimes depended on the codification of primary rules, which went beyond the Commission's mandate. However, it was widely felt that the question of whether the violation of a rule of international law came under a specific responsibility regime depended not so much on the nature of the primary rule as on the extent of the violation and of the negative consequences it entailed. Therefore, in its second reading of the draft, the Commission should carefully re-examine that aspect of the problem of the distinction between international crimes and international delicts.

12. His delegation believed that the distinction between the two types of wrongful acts and, consequently, between the two responsibility regimes should be maintained, though the current terminology should be reviewed.

13. His delegation regretted that the commentaries to the articles in chapter IV were very brief and that no details were given on the enforcement of the articles in chapters II and III of part two of the draft articles in cases of international crime, since article 51 expressly stipulated that an international crime entailed all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as were set out in articles 52 and 53.

14. Lastly, it was inconceivable that a viable regime governing criminal responsibility could fail to include an appropriate enforcement mechanism that would come into play before States resorted to countermeasures. While, in the current circumstances, it was unrealistic to entrust to international bodies the task of taking all the necessary decisions and measures to enforce the legal consequences of crimes, his delegation suggested that the Commission, in its second reading of the draft articles, should set forth general principles in that area.

15. With respect to countermeasures, his delegation felt that, in view of the rudimentary nature of the centralized mechanism for enforcing international law, individual means of constraint or coercion remained an indispensable component

of international law. It would be senseless to ignore reality and to claim that countermeasures had no place in the law of State responsibility.

16. The draft articles on countermeasures showed that the Commission, far from seeking to maintain the status quo in the law on the use of countermeasures, had undertaken to set out clear and precise rules designed to strengthen guarantees against the abuses which could arise from countermeasures. Thus, for example, countermeasures were seen not as a right of an injured State, but only as a circumstance that precluded the wrongfulness of an act of a State.

17. Moreover, recourse to countermeasures was not a direct and automatic consequence of the commission of an internationally wrongful act. It was subject to the definition, in advance, by the injured State of the behaviour considered as wrongful and to the presentation of a request for cessation and reparation. Furthermore, it was not available until after the State having committed the infraction had failed to respond to such a request in a satisfactory manner. Those conditions were intended to reduce the risk of premature, and therefore abusive, recourse to countermeasures.

18. Nonetheless, the injured State's obligation, in taking countermeasures, to fulfil its obligations in relation to dispute settlement (article 48, para. 2) seemed to prejudge the issue of whether part three of the draft articles, which concerned the dispute settlement regime, was mandatory. The Commission should therefore re-examine the content of articles 47 and 48 very carefully in the second reading.

19. The proportionality of countermeasures, dealt with in article 49, was one of the basic determinants of their legitimacy. That principle was all the more important in that the effects of a crime could impact the community of States to varying degrees; it should therefore apply individually to each injured State.

20. With respect to prohibited countermeasures (article 50), his delegation strongly supported the prohibitions listed in subparagraphs (a) to (e) of that article, most of which came under jus cogens.

21. Lastly, with respect to the provisions of part three of the draft articles, which concerned the settlement of disputes, his delegation preferred that the procedures envisaged should be optional, inasmuch as the draft articles covered the entire issue of State responsibility and, therefore, most of the disputes that could arise between States. In that connection, he regretted that the Commission had not yet found a way to avoid the risk of conflict between the procedures set forth in part three of the draft and those which might be applicable under other instruments in force between States which provided for means of dispute settlement that differed, inter alia, in terms of their hierarchy or the conditions for their implementation.

22. Ms. CONNELLY (Ireland) said that, although it was now universally recognized that individuals could bear criminal responsibility under international law for certain conduct, the notion that criminal responsibility should attach to States was, however, of a different order altogether. As a theoretical construct, it was certainly possible to conceive of the breach of an international obligation by a State as an international crime, give a general

definition of such a crime and identify some examples, as the Commission had done in draft article 19. There were undoubtedly core values of international law, such as the maintenance of international peace and security and respect for the intrinsic worth of each human being, and the infringement of those values not only by individuals but also by States should be viewed in the most serious light. She questioned, however, whether it served any useful purpose to designate such infringements as crimes attributable to a State as opposed to an individual.

23. This was due to a number of reasons. First, the question of enforcement posed much greater problems at the international than at the national level because institutions for the enforcement of obligations were, generally speaking, much more developed nationally than internationally. Indeed, not only did domestic criminal codes provide for the trial of suspected wrongdoers and for the punishment of those found guilty of an offence, but, at the national level, institutions, courts and tribunals also existed for the holding of such trials as well as detention facilities and institutions for the investigation of suspected criminal behaviour. No comparable institutions existed as yet in the international order. While there was indeed a plethora of international institutions designed to facilitate negotiation and cooperation among States, they fell far short of what was required for the effective enforcement of obligations the breach of which might give rise to criminal responsibility on the part of the State. It was true that the Security Council had been granted the competence to take such action as might be necessary to maintain or restore international peace and security. It was doubtful, however, whether, in the absence of the conferral of comparable competence upon an international body in relation to international crimes, States would ever be held to account in any meaningful way for the commission of international crimes.

24. Secondly, reparation for the breach of an international obligation was one of the principal features of civil liability in domestic law. While, in some systems, a duty to make reparation might also attach to criminal responsibility, it did so out of concern for the victim of the crime and as ancillary to the penal sanction which was imposed by way of society's condemnation of the affront to communal values. In retaining reparation at the heart of the schema of the legal consequences of an international crime, the Commission might be regarded as having paid too much attention to the injury suffered as a consequence of the wrongful act and too little attention to the societal dimension of the wrong. The question to be asked was whether the concept of an international crime signified not only that the international obligation breached was one of a particularly important kind but also that it was an obligation owed to the international community of States as a whole. In other words, the fact that under paragraph 3 of draft article 40 all States were to be regarded as injured States in relation to the commission of an international crime and that therefore all States could seek reparation from the wrongdoing State did not adequately address the collective nature of the wrong.

25. Accordingly, her delegation did not altogether agree with the statement by the Commission in its commentary to draft article 51 that it was immaterial whether a category of especially serious wrongful acts was called "crimes" or "exceptionally grave delicts". The concept of a crime had connotations which other forms of legal wrong did not have and the choice between the two terms

should be made by reference to the purpose of the categorization. Thus, if the categorization was meant to signify that some forms of internationally wrongful acts were so subversive of international order or morality that the collective interest of States required their prevention and suppression, then the term "international crimes" might be appropriate. If, however, the categorization was intended as an acknowledgement that some internationally wrongful acts were by their nature or by virtue of their consequences significantly more serious than other acts of that kind and that that distinction should be reflected in the scope of the entitlement of an injured State to reparation, then some such term as "exceptionally grave delicts" would seem to be more appropriate.

26. There was the further question of whether a categorization of wrongful acts, such as that proposed by the Commission, irrespective of what the categories were called, was meaningful and workable. It was true that, while the legal consequences of an internationally wrongful act were essentially the same, irrespective of whether the act was described as a delict or a crime, a number of additional consequences flowed from the categorization of the act as a crime. Indeed, even though the same forms of reparation applied to both categories of wrongful acts, namely restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, in the case of an international crime, some of the limitations on the entitlement of an injured State to obtain restitution or satisfaction were lifted. Moreover, the commission of an international crime by a State gave rise to a number of obligations for all other States, including an obligation not to recognize as lawful the situation created by the crime and to cooperate with other States in the application of the measures designed to eliminate the consequences of the crime which were set out in draft article 53.

27. The delegation of Ireland remained convinced that the question of the removal of the limitations on the entitlement of an injured State to obtain restitution in kind must be treated as a consequence of the categorization of a wrong rather than as a question of the equity of requiring restitution in kind in a particular case. With regard to the limitation on the entitlement of an injured State to obtain satisfaction, the impairing of the dignity of the wrongdoing State seemed to be such a vague and subjective concept as to be of dubious value whatever the categorization of the wrongful acts. As to the obligations listed in draft article 53, a case could be made that they should flow from the commission of any internationally wrongful act and not only from an international crime or an exceptionally grave delict. The international criminal responsibility of States was clearly one of those cases where the transposition of domestic law concepts into the international field required careful reflection.

The meeting rose at 4 p.m.