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SUMMARY RECORD OF THE 31st MEETING

Chairman: Mr. GAVIRIA (Colombia)

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The meeting was called to order at 12.05 p.m.

AGENDA ITEM 112: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS TWENTY-NINTH SESSION (A/32/10, A/32/183) (continued)

1. Mr. FERRARI-BRAVO (Italy) said that his delegation was gratified to note from the report before the Committee (A/32/10) that the work done by the International Law Commission at its twenty-ninth session had been fruitful.

2. With regard to the topic of State responsibility, he noted that in 1977, the Commission had adopted three new articles of significance, particularly article 22. State responsibility was in fact the key topic of international law, for the rules adopted on that topic touched on a wide range of other fields; as secondary rules of international law, their impact was felt on all the primary rules which defined the rights and obligations of States in the most diverse areas. Great care was therefore needed in dealing with the topic. It would nevertheless be desirable for the Commission to adhere to the dates indicated in General Assembly resolution 31/97 of 15 December 1976, and to complete the study of the matters covered in part 1, chapter III, of the draft articles, namely the objective element of the internationally wrongful act, and especially the delicate question of the tempus commissi delicti, which was closely linked to the rule regarding the exhaustion of local remedies. It should also complete the study of the questions covered in chapters IV and V, namely participation by other States in the internationally wrongful act and circumstances precluding wrongfulness and attenuating or aggravating circumstances. In that connexion he welcomed the excellent Secretariat document on "force majeure" and "fortuitous event" (ST/LEG/13).

3. Articles 20 and 21 made an important distinction between obligations requiring the adoption of a particular course of conduct and obligations requiring the achievement of a specified result. That was not merely an academic distinction, since cases increasingly arose in contemporary international practice where a State could be held internationally responsible solely by reason of its conduct, even where no results contrary to international law had yet emerged. That situation was the consequence of the increasing development of rules contained primarily in treaties which, in the interests of closer co-operation among States, required them to conduct themselves at the legislative level according to the detailed model provided in the international rule. For example, some international institutions exercised considerable control over the national legislative process: article 93 of the Treaty of Rome, for instance, empowered the Commission of the European Economic Community to intervene in the phase preceding the issue of any national or regional law or ordinance relating to the grant of financial aids to economic sectors or regions of member States of the Community, and to refer the matter to the Court of Justice of the Community if it did not approve them. There were also many international rules of universal scope, for example those requiring States to adopt preventive measures through legislative means, as in the case of air transport. To ensure effective prevention, as required by the international rule, it was often necessary for legislative measures to be promulgated before the occasion to apply the international rule arose. If such measures were not promulgated in time and in accordance with the model provided in the international

rule, the resulting uncertainty itself gave rise to the risk of non-implementation which the international rule sought to prevent. Such obligations were therefore obligations "of conduct".

4. Although the obligation "of result" was the classic model of an international obligation, based on the idea of complete separation between the international legal order and the internal legal order, as that separation diminished and international law encroached on areas previously within the exclusive competence of States the number and scope of international rules establishing obligations "of conduct" tended to increase. That tendency was further intensified by the need for clarity in legal rules. Moreover, the growing mutual confidence of States in their respective legal systems meant that, to an increasing extent, action to ensure that the conduct of a State conformed to an international rule was being taken before that rule was applied in a specific case, by means of the establishment by each State of a system of national rules and procedures that would inspire confidence that the State concerned would apply strictly the international rule in question. In the light of the foregoing considerations, his delegation strongly supported the distinction embodied in draft articles 20 and 21, and the actual wording of those articles, although it did not deny the existence and importance of obligations "of result".

5. Article 22 concerned only obligations "of result", for the rule concerning exhaustion of local remedies was obviously not applicable in the case of obligations "of conduct". There were divided views as to whether that rule should be considered a substantive or a procedural rule. Whatever the fundamental nature of the rule, the local remedies open to individuals must lead to results which conformed to international law. There was no logical connexion between the exhaustion of local remedies and denial of justice, since even the least discriminatory legal treatment of aliens could be incapable of redressing an internationally wrongful act if that act arose from a legislative measure, and the judicial authority was not empowered to abrogate or waive the application of a national law which was contrary to international law. Furthermore, the structure of internal procedural rules could render a local remedy inaccessible to an individual who had suffered injury as a result of a specific internationally wrongful act.

6. The limits of the field of application of the rule of the exhaustion of local remedies emerged very clearly from the text of article 22. The International Law Commission had unanimously decided to make that rule a substantive rule, a decision in keeping with the solution adopted in the countries of continental Europe, including his own. There was, however, a deeper reason for his delegation's support of the opinion of the Commission, as reflected in the text. It seemed contradictory that an internationally wrongful act, concerning the relations between States, could cease to exist because the individual involved failed to take the necessary initiative. It was more logical that, where the interests of an individual were involved, the internationally wrongful act should possess a complex structure, resulting from a whole series of acts on the part of the State concerned, from the original act to the stage at which the internal legal order, whose administrative or judicial remedies had been scrupulously invoked by the individual concerned, revealed themselves to be incapable of ensuring that international law was respected.

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In its commentary on article 22, the Commission had rightly noted that the choice between those two solutions was quite unrelated to the question of the criteria for establishing the amount of compensation and to the distinction between substantive and procedural objections. There was no reason why the calculation of compensation should not be related to the first stage of a complex act, and the most recent practice, especially that of the International Court of Justice, tended towards a less marked separation between the two categories of preliminary objections.

7. In the near future, the Commission would expound its views on the question of the tempus commissi delicti, which although important was not necessarily related to the question of the date on which a dispute arose.

8. The rule of the exhaustion of legal remedies was not a rule of jus cogens, and could therefore be set aside by a treaty provision allowing for swifter protection of the interests involved. The structure of the rule as formulated by the Commission fulfilled the contemporary requirement of a balance between the requirements of the suppliers of capital and those of the countries where the capital was invested. The latter States wanted confidence to be placed in their legal structures, especially since a minimum standard of legal protection could now be considered to exist in every country in the world.

9. With regard to succession of States in respect of matters other than treaties, the series of articles completed in 1977 dealt with succession to State debts. The draft articles were being prepared according to an empirical method, and it was difficult to take a position on them pending the final outcome of the Commission's work. The Commission had not yet reached agreement on the words in square brackets in articles 18 and 20, and it was not yet clear whether the articles were to refer solely to debts between States and debts between a State and an international organization, or whether the classic question of State debts owed to individuals who were nationals of another State was to be covered. He personally would prefer the second solution, but caution should be exercised because of the extreme fluidity which, as a result of decolonization, currently prevailed in State practice relating to succession. It was in fact possible that the new practice which had arisen as a result of decolonization had radically changed the scope of the customary rule on succession. It might also have given rise to the formation of a new rule applying only to newly-independent States, whereas the old rule, although in a modernized form, was still valid for cases of succession not related to the attainment of independence by new States. That being so, his delegation considered it wise to reduce as far as possible the scope of the new rule, since it was impossible to determine exactly the trend of contemporary practice. The articles should therefore refer only to international debts i.e. debts between States or between States and international organizations. He interpreted the formula contained in article 20, paragraph 1, to mean that the group of articles did not affect the application of other international rules in force concerning relations between States and foreign creditors who were not nationals of the predecessor State where such relations were called in question by a case of succession. He took a reserved position with regard to article 20, paragraph 2 (b),

pending determination of the final scope of the rules on succession to State debts.

10. Article 22 was acceptable, given the problems arising from the position of newly independent States, and the relevant General Assembly resolutions, particularly resolution 1083 (XVI). However, he doubted whether the expression "equitable proportion" in article 21, paragraph 2, was viable. It was certainly difficult to find an objective criterion for dividing the debt in the case of transfer of part of the territory of a State, since traditional practice furnished a very wide range of criteria. However, the formula chosen by the Commission was vague, and its viability would depend in the last resort on the effectiveness of the proposed future system for the settlement of disputes.

11. The third topic dealt with by the Commission, treaties concluded between States and international organizations or between two or more international organizations, required little comment, since the draft articles closely followed the Vienna Convention of 1969 and reflected the current state of the law of treaties. The Commission had achieved excellent results in adapting the rules of the Vienna Convention to the requirements of treaties to which international organizations were parties, and had reached a successful compromise on the delicate question of reservations, as could be seen from article 19 bis, paragraph 2. However, his delegation reserved its position with respect to article 27, paragraph 2, which provided that an international organization party to a treaty could not invoke the rules of the organization vis-à-vis other parties to a treaty. That question, on which the Commission had adopted a majority decision, deserved to be studied in greater depth in the light of the undeniable principle that an international organization, as such, was not the master of its internal law to the same extent that States were within the framework of their legal orders. It had been quite rightly observed that the problem was linked to that of international responsibility. But it was necessary to ask whether, in such a case, it was the responsibility of the international organization as such or that of its member States which was involved when a change in the internal rules of the organization occurred which could be invoked vis-à-vis other contracting parties to a treaty. It was well known that any change in the rules governing an international organization, especially amendments to its constituent instrument, was, in the final analysis, attributable to the will of its member States. The question arose, in that regard, whether it might not be preferable to adopt different solutions for organizations with a universal basis and for those more limited in scope.

12. His delegation welcomed the Commission's decision to create a Planning Group, which should become permanent, for it permitted the Commission to adapt itself in the simplest and most flexible way to the requirements expressed yearly by the General Assembly. His delegation felt, however, that the General Assembly should once again consider the most appropriate way of using to the best advantage the wealth of talent and experience represented by the Commission and its members. Although in the case of strictly legal questions the entire task of preparing draft texts in all their detail, could quite appropriately be left to the Commission,

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other methods might be advisable in the case of other areas where the preparation of international texts was likewise required but where the political implications of the underlying problems were much greater. He was referring especially to the past successful co-operation, between the International Law Commission and the Sixth Committee in the preparation of international instruments. A closer collaboration, indeed, a sharing of responsibilities between the two bodies, could only be beneficial to the progressive development of international law and would help to elevate the tone of debate in the Sixth Committee, as the representative of the Soviet Union had suggested.

13. With respect to the future work of the Commission, paragraphs 107 to 111 of its report reviewed a whole series of topics. In addition to the question of international liability for injurious consequences arising out of acts not prohibited by international law, which had already been singled out in General Assembly resolution 31/97 as a necessary follow-up to the current work on State responsibility, there was another topic which, seemed to merit great attention, from both the theoretical and practical points of view, namely the jurisdictional immunities of States and their property. Significant changes had recently occurred in the legal practice of many States with respect to that question, and new instruments were beginning to appear, such as the convention adopted under the auspices of the Council of Europe which had just entered into force. The topic was thus ripe for general review, especially in view of the ever increasing diversification of the activities of States even at the international level.

14. The CHAIRMAN suggested that the Committee might wish to take advantage of the presence of the Chairman of the International Law Commission to put questions or bring up any points requiring clarification.

15. Mr. ROSENNE (Israel) suggested that the Chairman of the Commission might indicate the main points with respect to which the International Law Commission might wish to have the views of the Sixth Committee, as well as his own views concerning the direction which the debate should take.

16. Sir Francis VALLAT (Chairman of the International Law Commission) said that he had profited greatly from the brilliant statements of the representatives of Brazil and Italy. He noted that several members of the International Law Commission were also present in the Sixth Committee, including Mr. Sette-Camara and Mr. Yankov, who would be competent to provide explanations concerning matters discussed by the Commission. It might be useful if he recalled certain points concerning the procedures and methods of the Commission. In accordance with usual practice, the Commission would not immediately resume discussion of the draft articles contained in the current report. In principle, it would only return to those draft articles when that particular set of articles had been completed, when the Sixth Committee had had an opportunity to comment on the complete set, and when Governments had submitted their written observations. The Commission would then return to the articles for a second reading. The comments of the Sixth Committee would be recorded and studied as soon as received by the members of the Commission; they would subsequently have an effect on the drafting of future articles (especially,

for example, with respect to the question of treaties) and would be taken into account during the second reading. Consequently, the effect of comments made by the Committee might not be immediate, but it would, in the long run, be considerable. He felt that, for the time being, comments on principles rather than on details might be more useful.

17. With respect to chapter II of the report, concerning State responsibility, the major point was the exhaustion of local remedies, covered by draft article 22. Although the work done thus far on that question had been remarkable, he felt that it was of the utmost importance for it to be correctly worked out. There were two particularly important aspects. The first was the treatment of the rule as substantive rather than procedural, although the procedural aspect would, of course, be dealt with at a later time. The second was the limitation of that article to the question of aliens.

18. With regard to succession of States in respect of matters other than treaties, it was important that a decision be reached on the issue of whether draft article 18 on succession to State debts should cover only debts owed by one State to another, or whether it should include debts to individuals or artificial persons. That decision involved questions of policy as well as of law, and there were arguments on both sides. The Commission would particularly appreciate detailed comments from the Committee on draft article 20, paragraph 2, and general comments on the use of the concept of equity in draft article 21, paragraph 2, and on the whole of draft article 22, concerning newly independent States.

19. With respect to the question of treaties, the important points requiring comment had been singled out by the representative of Brazil. One important point was the effect to be given to any distinction between international organizations and States in connexion with treaties to which they were parties, especially with respect to reservations. That was perhaps the question which would have the greatest impact on the work of the Commission. Linked with it was the question of the relationship between the new draft articles and the Vienna Convention on the Law of Treaties. He felt it would be tragic if, in drafting new articles, the Commission were to undermine the work that had been done for the Vienna Convention.

20. Above all, the Commission needed guidance with respect to its future work, in the form of decisions by the General Assembly concerning chapter V of its report.

The meeting rose at 1.00 p.m.