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SUMMARY RECORD OF THE 35th MEETING

Chairman: Mr. GAVIRIA (Colombia)

later: Mr. MAKEKA (Lesotho)

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The meeting was called to order at 3.25 p.m.

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

1. Mr. FRANCIS (Jamaica) said that at its twenty-ninth session the International Law Commission had made significant progress in its work. With regard to State responsibility, his delegation was in general agreement with the Commission's conclusions regarding draft articles 20, 21 and 22. Article 20 flowed naturally from the general principle enunciated in article 16, but differed from the latter in that it laid down a specific course of conduct from which a State could not depart without engaging its international responsibility. In other words, to the extent that the relevant international obligation was directed to the pursuit of a particular end, it also specified the means by which that end must be achieved. But important though it was that that end should be achieved, the fundamental consideration that the end must be seen as inseparable from the means was of equal importance. The means of fulfilling an international obligation might consist in an active course of conduct by a State or in an omission. In that connexion, consideration should be given to the possibility of including the prohibitive aspect of State conduct in the structure of article 20; that could be done by inserting the words "or to refrain from adopting" into the text. If that should prove undesirable, the article on definitions could be used to indicate clearly that the conduct of the State also include "a specific conduct of forbearance", a phrase used in foot-note 63 on page 45 of the report (A/32/10).

2. In article 21 emphasis was placed on the end or result of the obligation, rather than on the means by which the result was achieved. His delegation agreed with the Commission's conclusions regarding that article, including its assessment of the factors to be taken into account in determining whether an international obligation had been breached. The general application of the article allowed the State absolute discretion in its choice of means. However, there was a limited category of cases which afforded the State only an initial choice in the application of means needed to achieve the specified result. In the other category of cases, provided the initial choice of means had not rendered impossible the achievement of the required result or an allowed equivalent result, the State could discharge its obligations by its subsequent conduct or choice of means. The application of that article had yet other significant features. First, so far as the achievement of the required result was concerned, even if it were to be achieved through the misplaced intention of the State, the obligation would not have been breached. Second, the simple enactment of legislation calculated to be applied in breach of an international obligation would not generally in itself constitute a breach of the obligation unless the legislation was in fact so applied.

3. All those circumstances led to two closely related conclusions: first, that there was an established measure of international equitable consideration designed to afford a State the opportunity to fulfil its international obligation so as to avoid incurring international responsibility, and second, that the foregoing

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circumstances would in time establish in conventional juridical form the permissive as distinct from the peremptory aspect of the pacta sunt servanda rule.

4. Article 22 set forth the principle of exhaustion of local remedies, and the Commission's formulation of that article showed clearly that the principle was a procedural rather than a substantive rule of international law. The rationale behind the principle was first, to afford the aggrieved party an opportunity to have his wrong redressed at the local level and second, to afford the State the opportunity, by the subsequent choice of means, to avoid incurring international responsibility. His delegation agreed with the Commission that any reference to "jurisdiction" should be omitted from the article, that application of the principle to the treatment accorded by a State to its own nationals should likewise be omitted, and that the applicability of the principle to cases of injury caused by a State to an alien outside its territory and similar cases should be resolved by State practice.

5. With regard to succession of States in respect of matters other than treaties, he observed that the Commission had not yet defined the scope of article 18 in relation to the meaning of "State debt". In resolving that issue the Commission should bear in mind that the draft articles referred to succession in respect of matters other than treaties, and should therefore also embrace arrangements with the predecessor State not derived from agreements with third States or other subjects of international law. However, to recognize as a fact all the practical sources from which State debts derived neither admitted nor suggested that the existence of such debts created obligations for the successor State. His delegation agreed with paragraph 1 and paragraph 2, subparagraph (a), of article 20, but had difficulties with paragraph 2, subparagraph (b), which was clearly inconsistent with the purpose and intent of the preceding portion of the article and also with paragraphs (4) and (5) of the commentary on the article, which constituted the rationale for its formulation. The report stressed that the subparagraph dealt with the consequences of the agreement between the predecessor State and the successor State and not with the agreement itself. In other words, it dealt with substance and not with form. However, the fundamental consideration should not be whether the agreement was in accordance with the other applicable rules in that part of the draft, but whether it was in accordance with the letter and spirit of the Vienna Convention on the Law of Treaties. To the extent that article 20, paragraph 2, subparagraph (b), sought to bind the third State, without its consent, by an agreement between the predecessor State and the successor State, it violated the spirit of articles 34 to 36 of the Vienna Convention, a situation which should be avoided.

6. Referring to the principle of "equitable proportion" established in article 21, paragraph 2, for cases in which there was no agreement between the predecessor and successor States with regard to the passing of the State debt, he observed that that could be beneficial to both parties.

7. Article 22, relating to newly independent States, was of considerable practical importance, for those States were facing monumental problems in servicing their debts,

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part of which derived from succession to debts of the predecessor State, as was accurately noted in the relevant part of the report. Consequently, the rules applicable in that case should be just and equitable not only in theory, but also in their application to the actual situation of the territories concerned. Evaluating the article within that conceptual framework, his delegation was in full agreement with paragraph 1, but had certain reservations about paragraph 2, which made no reference, not even implicitly, to the principle of equitable consideration. In drafting paragraph 1 the special political atmosphere in which agreements between the newly independent State and the predecessor State were concluded had been borne in mind, and consequently the passing of part of the State debt was made subordinate to the fulfilment of specific criteria. Those might be satisfactory in some cases, but for others it would be necessary to include in paragraph 2 other criteria that took into account the disparity in levels of development of the territories. It was not sufficient to include a proviso to the effect that the fundamental economic equilibria of the newly independent State should not be endangered, since that referred only to implementation of the agreement with the predecessor State, and it was essential that that agreement itself should not be disproportionate to the real economic circumstances of the newly independent State. The agreement should have due regard for the new State's capacity to pay, as suggested by the Special Rapporteur in his ninth report (A/CN.4/301, para. 388).

8. Turning to chapter IV of the Commissioner's report relating to the question of treaties concluded between States and international organizations or between two or more international organizations, he said that, inasmuch as international organizations were subjects of international law and could enter into treaty relationships with States, they should be considered as being equal with States for the purpose of participating in the same treaty. Consequently, they should also be considered as equal with regard to the entering of reservations, save when an international organization entered into a treaty relationship with the States constituting its composite membership. However, the need to find solutions which were generally acceptable prevented the Commission from maintaining that equality fully. The main differences were those specified in article 19 bis, paragraph 2, and article 19 ter, paragraph 3. In his delegation's view, the solution proposed by the Commission not only overburdened the linguistic content of the other relevant articles in the section dealing with reservations, but also raised important questions of principle. For example, all international organizations whose participation was essential to the object and purpose of the treaty ought to be treated equally, so that, when one of them entered a reservation, the other's right to object would not be so narrowly circumscribed. That right should be linked not to any necessary consequences of the tasks assigned to the international organization by the treaty, but to the terms of the reservation itself, including its effects on the treaty as seen from the standpoint of the objecting organization. With regard to reservations made by States, it was possible that such reservations might run counter to some decisions taken by a competent organ of an international organization whose participation was essential to the object and purpose of the treaty. Alternatively, such reservations might be inconsistent with the principles and purposes of the organization. In such cases, the right of the organization to enter an objection should not be restricted. The underlying assumption regarding

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the restrictions imposed on international organizations in entering reservations and objections to reservations seemed to be that such organizations were institutions created by the State participating in the treaty. However, that was not necessarily so, as in the case of a regional organization which concluded a treaty with States which were not members of the organization. The organization derived its treaty-making power from the collective sovereignty of its member States, which it represented in factual terms vis-à-vis non-member States while, in a juridical sense, it had an independent existence. Consequently, it should be fully authorized to enter reservations and to object to reservations made by States.

9. In referring to a "treaty between several international organizations" article 19 seemed to exclude the possibility of reservations in treaties between only two international organizations. His delegation considered it premature to foreclose the possibility of reservations in a bilateral sense. Although the Commission had adopted an understandably cautious approach to the whole question of reservations, it should not be forgotten that excessive caution would inhibit the progressive development in that important area of treaty law.

10. Article 2, paragraph 1 (j) transposed to the draft the definition of "rules of the organization" contained in article 1, paragraph 1 (34) of the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 14 March 1975. That transposition was incorrect since the two contexts were very different. Consequently, he welcomed the fact that the Commission had recognized the need to re-examine that point.

11. Referring to article 27, he said that the internal law of the State could not be assimilated to the rules of an international organizations, since the constitutive instrument of an organization was considered as part of those rules, in spite of the fact that it characterizes a multilateral treaty clearly distinguished it from internal law. It would be necessary to distinguish between the constitutive instrument of an international organization and its other rules, including the decisions and resolutions of its organs. For example, if the Security Council decided to apply economic sanctions against a State with which the United Nations had concluded a technical assistance treaty, the United Nations could not be expected to continue providing such assistance in spite of the sanctions. Furthermore, paragraph 2 of article 27 did not achieve its purpose, since all activities of an international organization, and therefore also the performance of a treaty, must be subject to the "exercise of the functions and powers of the organization". Consequently, under that paragraph, an international organization could always invoke its own rules as a justification for failure to perform a treaty.

12. He drew attentinn to the various types of relationship which the draft articles must maintain with the Vienna Conventions on the Law of Treaties. If they were given the form of a convention, it would be a case for the application of the Vienna Conventions. Furthermore, the articles considered thus far by the Commission were adaptations of the provisions of the Vienna Convention, so that

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if difficulties of interpretation arose, reference could be made to State practice in applying the Convention, but only in so far as it dealt with treaty relationships between States and international organizations or between international organizations. The Vienna Convention could also be used to correct any deficiencies in the new instrument.

13. Referring to the other decisions and conclusions of the Commission, he stressed in particular his support for the appointment of Mr. Ushakov and Mr. Schwebel as new Special Rapporteurs for the topics of the most-favoured nation clause and the law of the non-navigational uses of international water courses respectively, and for the proposal of three new topics which the Commission could study following the implementation of its current programme of work. He also expressed satisfaction at the good relations which the Commission continued to maintain with regional bodies, the active participation of fellowship recipients from developing countries in the seminars organized by the Commission, and with the future organization of the Gilberto Amado Memorial Lecture, to be given by Judge Elias.

14. Mr. Makeka (Lesotho) took the Chair.

15. Mr. CHAVEZ (Peru) said that, in his delegation's view, the Commission had made substantial progress in its work, by the adoption at its twenty-ninth session of three articles on State responsibility, six articles on the succession of States in respect of matters other than treaties, and 22 relating to the question of treaties concluded between States and international organizations or between two or more international organizations. It had also dealt with other important questions, such as the most-favoured nation clause, the law of the non-navigational uses of international water courses, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and the second part of the topic "Relations between States and international organizations". His delegation was gratified by the high quality of the Commission's report and by the fact that it had been distributed in good time, and congratulated the Chairman of the Commission, Sir Francis Vallat, on his report on the Commission's work.

16. The distinction between obligations of conduct or of means and obligations of result, as adopted by Professor Ago, Special Rapporteur on the question of State responsibility, and as retained by the Commission, was appropriate since it facilitated understanding of the draft articles. His delegation supported the wording of draft article 20, relating to obligations of conduct, on the grounds that it was based on international practice and case law. Also very important was article 21, paragraph 2, in which it was established that a breach of an obligation of result should not be deemed to have taken place while the possibility of a remedy still existed, in other words, as long as the result in question or an equivalent result might be achieved by subsequent conduct of the State. His delegation firmly supported draft article 22 relating to the exhaustion of local remedies, although its final version might be improved, provided that the basic concepts which it contained were not changed.

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17. The basis of the six draft articles adopted on succession to State debts constituted the definition of State debt contained in article 18, distinguishing it from so-called general or public debt. After considerable debate, the International Law Commission had adopted a simplified definition which departed from the original proposal. It must also be taken into account that there were no universal rules in that sphere determining succession to debt, so that the solution had to be based on agreement among the interested parties and a correct application of principles of equity.

18. He drew attention to the problem of third creditors dealt with in article 20, which incorporated the three articles devoted to the subject by the Special Rapporteur, Mr. Bedjaoui. That article established that the agreement on the passing of State debts would not take effect without acceptance by "third creditors", including in that concept not only States but also international organizations and individuals, provided they were represented by a State. His delegation considered that the phrase in brackets should be "or by a third State which represents a private creditor", in order to emphasize that only a State could consent to or oppose an agreement between the predecessor and successor States, and that the private creditor must in no case intervene.

19. Article 21, concerning the transfer of territory, established as a rule for the passing of the State debt the agreement between the predecessor and successor States, and, in the absence of an agreement, the passing of an equitable proportion, taking into account, inter alia, the property, rights and interests which passed to the successor State in relation to that State debt. In his delegation's view the principle of an equitable proportion, which was based on actual benefit, would be fairer than simply ruling that the successor State should assume the debts connected with the transferred territory, namely localized State debts.

20. Article 22, referring to newly independent States, was based on the tabula rasa principle, which had also been adopted for treaties. The requirement for an express agreement for the passing of State debts sought to protect the newly independent State from being burdened by investments made for the benefit of the metropolis or to favour settlement by the colonizers. His delegation fully approved of the safeguard in article 22, paragraph 2, concerning the criteria governing agreements between the predecessor State and the newly independent State, which must not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor endanger the fundamental economic equilibria of the newly independent State. He also considered that the question of "odious debts", which had been set aside for the time being, should be included in the draft convention under preparation.

21. The draft articles of the International Law Commission on the question of treaties concluded between States and international organizations or between two or more international organizations were complementary to the Vienna Convention of 1969. His delegation agreed with the articles formulated by the Special Rapporteur, Professor Reuter, on reservations (part II, sect. 2), the entry into force and provisional application of treaties (part II, sect. 3), and the observance, application and interpretation of

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treaties (part III). He found reasonable and practical the rules concerning reservations adopted by the International Law Commission, which were based on the liberty of States in all cases, and of organizations when the treaty was solely between organizations or when their participation was not essential to its object and purpose, and on the prohibition against formulating reservations, except with express authorization, when the participation of the organization was so fundamental that the treaty would be ineffective without it.

22. Article 27 merited special reflection, since the corresponding provision of the Vienna Convention established that a party could not invoke its "internal law" as justification for its failure to perform a treaty. That principle, if incorporated as it stood, would be equivalent to maintaining that the rules of international organizations could not be invoked. There were, however, cases where they had to be invoked, as when reference was made to the actual competence to conclude treaties, or in the case of treaties concluded to execute decisions or resolutions of an organization, which treaties were logically subordinate to such decisions or resolutions or to the action taken by the organization which gave rise to them. Because of the delicate problems of interpretation which arose, it would be advisable for the International Law Commission to examine the question in greater depth.

23. In conclusion, his delegation wished to associate itself with the expressions of condolence on the death of Mr. Edvard Hambro, a distinguished lawyer and a member of the International Law Commission, and with the tribute paid to his memory by the Commission.

24. Mr. Gaviria (Colombia) resumed the Chair.

25. Mr. MEISSNER (German Democratic Republic) said that, although the results obtained by the International Law Commission at its twenty-ninth session were less tangible than those of its previous session, further progress had none the less been made.

26. With respect to the topic of State responsibility, the Commission had already established, in draft article 19, a clear distinction between international crimes and international delicts. Continuing the progressive development of the subject internationally wrongful acts by States were also differentiated, in articles 20 and 21, with regard to the specific nature of the obligation undertaken by the State, according to whether the State had undertaken to adopt a specifically determined course of conduct or to secure a certain result, while remaining free to do so by whatever means it chose.

27. With respect to draft article 22, his delegation considered it essential to maintain the rule of "exhaustion of local remedies", as a means to prevent issues that might arise between States in connexion with the treatment accorded to aliens from immediately being raised in the international arena and being used as a pretext for intervention in the affairs of smaller States.

28. The draft articles concerning the succession of States in respect of matters other than treaties had been structured in two separate parts, relating respectively

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to succession to State property and succession to State debts, while maintaining a parallelism between the provisions of each part. That approach was of fundamental importance and was unreservedly supported by his delegation. The formulation of international rules concerning succession to State debts was the most controversial and intricate aspect of State succession, and the definition of "State debt" embodied in article 18 was undoubtedly the key element of that part of the draft. His delegation welcomed the solution that had been found, but considered that the word "international" should stand without brackets, in order to make it clear that reference was made exclusively to State debts of an international character.

29. Equally commendable was the text of draft article 20, in which, since it was worded parallel to article X, concerning the status of third States, it would also be logical to restrict the application of the term "creditor" to States or other subjects of international law.

30. The Commission had also addressed itself to the problem of "odious debts" which should be expressly excluded from article 19, in view of the general character of that provision. He hoped that the Commission would arrive at an appropriate solution to that question.

31. In reference to the draft articles on treaties concluded between States and international organizations or between international organizations, his delegation approved of the Commission's method of work. Of particular importance in that respect was the problem of the relationship between the Vienna Convention on the Law of Treaties and the draft convention under consideration. The use of the Vienna Convention as a methodological basis for establishing a general law of treaties in respect of international organizations had proved to be an effective approach. It was indispensable, however, to take duly into account the differences between States and international organizations. That implied, among other things, distinctions with respect to their importance, their nature and the conditions under which they might formulate reservations, which, in the case of international organizations, should be allowed only as an exception to the general rule, in other words, only when expressly authorized by the treaty in question.

32. Finally, a rule should be established providing that the failure of any international organization to become a party to an international treaty should not be regarded as an obstacle to the entry into force or provisional application of the treaty unless the participation of that international organization was essential to the object and purpose of the treaty.

33. Mr. CASTREN (Finland) said that it was understandable but unfortunate that the International Law Commission had lacked the time to deal thoroughly with the question of the law of the non-navigational uses of international watercourses. The United Nations Water Conference, held in 1977, had emphasized the importance and urgency of that question and the Economic and Social Council, in resolution 2121 (LXIII), had requested the Commission to give it higher priority.

34. In the matter of State responsibility, his delegation was satisfied with the

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wording and content of draft articles 20 to 22 as adopted by the Commission. The definitions of violations of an international obligation in articles 20 and 21 were clear and the rules laid down in those articles were so well-founded that it was difficult to question them. The Commission had appropriately proceeded to confirm that States could, in general, choose the means to perform their international obligations and enjoyed the freedom in such cases to modify their conduct at a later time in order to ensure the required result. A specific application of that rule was contained in article 22, concerning the exhaustion of local remedies.

35. He observed that work on the question of succession of States in respect of matters other than treaties advanced slowly because State practice varied widely and the opinions of authors also differed considerably. For those reasons, several of the rules proposed by the Commission were more in the nature of lege ferenda than of lege lata. The Commission's proposals were on the whole acceptable, although it was difficult to form a final judgement before receiving the wording of the articles to follow.

36. The definition of the expression "State debt" in article 18 was acceptable and his delegation was inclined to retain the word "international", which had been placed between brackets in the article, for the reasons indicated in paragraph 46 of the commentary on that article.

37. It appeared from paragraph 10 of the commentary on article 20 that the term "creditors" in paragraph 1 included not only third States, but also their nationals, which, in his judgement, was a just solution. Similarly, he noted with satisfaction that the fact that paragraph 2 of that article referred only to a creditor State or creditor international organization, without expressly mentioning other subjects of international law, did not mean, according to paragraph 12 of the commentary, that the Commission had intended to exclude the latter from the scope of that article. On the other hand, the content of article 20, paragraph 2 (b), was rather obscure. He favoured retention of the phrase between brackets in that article, for reasons already indicated elsewhere.

38. Article 21, paragraph 2, contained a rule of lege ferenda which his delegation found acceptable, although it feared that the ambiguity of the expressions used might lead to difficulties in their interpretation and application.

39. In reference to article 22, it seemed sufficient to retain only the principal rule, stated at the beginning of paragraph 1, without entering into the details of the agreement that might be concluded between the newly independent State and the successor State.

40. With regard to the draft articles on treaties concluded between States and international organizations or between international organizations, the definition of the "rules of the organization" in article 2 reproduced in full the definition of that expression in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. His delegation found that definition useful and acceptable, since it was as precise and complete as

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possible. It was also in agreement with the substance of articles 19 and 19 bis, whose wording corresponded to article 19 of the Vienna Convention on the Law of Treaties. Article 19 ter had no equivalent in the Vienna Convention, and his delegation felt that the Commission had done well to endeavour to fill that gap.

41. The substance of article 34 was also acceptable, but he felt that it would be preferable, in paragraph 1, to refer only to one State, without qualifying it as a "third" State, since all States had the status of third States under treaties concluded exclusively between international organizations. Similarly, in paragraph 2 of that article, it would be more appropriate to substitute the expression "State not party to the treaty" for the words "third State", a corresponding change also being made in the title.

42. His delegation approved of the proposals formulated by the Planning Group of the Enlarged Bureau concerning the programme and methods of work of the Commission, as set out in paragraphs 96 to 106, 122 and 123 of the report, as well as the suggestions of the Group for the long-term programme set out in paragraphs 107 to 111.

43. Finally, he noted with satisfaction that the United Nations Office at Geneva had successfully held the thirteenth session of the International Law Seminar and announced that his Government was again offering a fellowship of $2,000 for participants from developing countries attending that Seminar, which would in all likelihood be held again the following year.

The meeting rose at 5.50 p.m.