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Chairman: Mr. BOJILOV (Bulgaria)

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The meeting was called to order at 11 a.m.

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

1. Mr. YAÑEZ-BARNUEVO (Spain) said that his delegation was not entirely satisfied with the results of the work of the International Law Commission on State responsibility. The Commission had adopted only three articles and his delegation feared that at that pace and given the complexity of the questions which it still had to examine, such as participation by other States in the internationally wrongful act of a State and circumstances precluding wrongfulness and attenuating or aggravating circumstances, the Commission would not be able to complete the first reading of part 1 of the draft articles, relating to the origin of responsibility, in 1979 as planned.

2. With regard to the question of circumstances precluding wrongfulness, he recalled that the Codification Division of the Office of Legal Affairs of the Secretariat had prepared an excellent study on "force majeure" and "fortuitous event", which in his view should be issued in all the working languages of the Organization. His delegation found it hard to understand why the Commission wished to complete the second reading of part 1 of the draft articles before the conclusion of its five-year term of office. It would in fact be more logical for it to examine first the articles of part 2 of the draft (content, forms and degrees of international responsibility), which was in certain respects closely linked to part 1.

3. With regard to articles 20, 21 and 22, relating to the consequences of the nature of an international obligation for the conditions of its breach, which the Commission had adopted at its most recent session, his delegation acknowledged that they formed a harmonious whole but felt that the Commission should have added provisions on the breach of an international obligation the purpose of which was such that, for it to be breached, an external event must be added to the conduct of the State, and on the various problems relating to determination of the time and duration of the breach of an international obligation, i.e. what was called the tempus commissi delicti. In the absence of such provisions it was difficult to express a view on the three articles before the Sixth Committee. Generally speaking, the dual distinction which the Commission had established in draft articles 20 and 21 between international obligations "of conduct" and international obligations "of result" and, among the latter, between those which gave the State an initial freedom of choice of means and those which allowed the State to achieve the result required of it or an equivalent result by subsequent conduct, was acceptable. It was true that those were theoretical distinctions, but as the Commission itself had observed in its commentary on article 20, account must be taken of the differences in the nature of international obligations in so far as it proved necessary for the purposes of the draft articles.

4. Those distinctions between international obligations would certainly have practical consequences, the first of which was already to be found in article 22, which limited the application of the principle of the exhaustion of local remedies available to individuals to cases involving the breach of an obligation "of result"

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by giving the State an opportunity to achieve the result required of it or an equivalent result by its subsequent conduct. His delegation hoped that the following draft articles would shed light on the other practical consequences of those distinctions.

5. In practice it was very difficult to determine whether a given obligation was an obligation "of conduct" or an obligation "of result", and in the case of the latter category whether a given obligation required a State to achieve a specified result by a means of its own choice or offered a State which did not achieve the result required of it, by the first means chosen, the opportunity to resort to another means of achieving that result. Some of the examples given by the Commission in the commentaries on articles 20 and 21 were questionable. The practical application of those distinctions between international obligations would therefore certainly create problems which must be taken into account when devising machinery for the settlement of disputes in the context of part 3 of the draft, concerning the "implementation" ("mise en oeuvre") of international responsibility.

6. With regard to the well-established principle of international law concerning the exhaustion of local remedies, his delegation approved of the Commission's decision to apply it in part 1 of the draft by providing in article 22 that a breach of an international obligation "of result" relating to the treatment of individuals - and hence an internationally wrongful act - occurred only if the individuals concerned had exhausted the available local remedies. However, it felt that the fact that the Commission had embodied that rule in that part of the draft should not prevent it from studying the means of implementing it when it took up part 3.

7. With regard to the wording of article 22, he questioned the use of the word "aliens", which seemed to indicate either that the State was automatically responsible with regard to individuals who were its own nationals, i.e. that it was not necessary for the latter to exhaust local remedies for it to be recognized that the State had breached an international obligation "of result" in their regard by failing to treat them as it should, or else, which was unfortunately more probable, that the field of application of the principle of the exhaustion of local remedies was limited to the treatment to be accorded to "aliens", i.e. that it did not encompass the treatment which a State undertook to accord to "national" individuals.

8. With regard to State succession in respect of matters other than treaties, almost all the articles submitted by the Commission dealt with questions relating to State debts, which gave grounds for hope that the Commission would complete the first reading of the draft articles on the succession of States to State property and State debts in 1978 and could begin considering a series of articles concerning State succession to other public property and public debts before the expiration of its current five-year term of office.

9. With regard to the articles relating to succession to State debts adopted by the Commission at its twenty-ninth session, the Commission had clearly sought to

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establish a parallel between those articles and the articles on State succession to State property, the aim in both cases being to determine the "assets" and "liabilities" which the predecessor State passed to the successor State at the same time as responsibility for its international relations.

10. His delegation considered that the articles defining the scope of the draft remained too vague regarding the various legal relationships to be regulated by the draft and in particular that they did not clarify sufficiently the legal nature of the rights and obligations which they regulated. In its commentary the Commission stressed that State debts fell within the category of personal obligations. However, according to article 5, in part I, "State property" meant not only property but also rights and interests, including personal debt-claims. Thus, in that case, the parallel between the two parts was not respected.

11. He also noted with regret that the concept of a third State was not defined with sufficient precision. Some members of the Commission wished to retain the term "international", which was currently placed between square brackets, in article 18, so that the concept of a State debt would apply only to financial obligations chargeable to a State vis-à-vis other subjects of international law. However, article 5, in part I, which defined State property, did not provide for such a limitation and even mentioned the internal law of the predecessor State, which implied that State property included debt-claims of the predecessor State vis-à-vis individuals. Thus on that point, too, there was a lack of parallelism between the two parts. The Commission should therefore review the draft articles with a view to maintaining the greatest possible parallel between the various parts, as it had said it would do.

12. His delegation considered that it would be possible not only to define more clearly the scope of the draft but also to improve the wording of its provisions. While acknowledging that the Commission had made considerable progress in a field where international practice was not always coherent, he could not refrain from expressing regret that it had made abusive use of such vague concepts as "equitable proportion", "equitable compensation" and "economic equilibria". On the other hand, he was gratified to note that article 21, paragraph 2, contained a clarification that would make it possible to determine more easily what was meant by "equitable proportion". If it was desired to give such provisions a more or less normative character and prevent the arbitrator or, more frequently, the stronger of two parties to a dispute from using them as a veritable blank check, it was essential to specify in each case the meaning of "equitable proportion".

13. The Commission had made considerable progress in preparing its draft articles on treaties to which international organizations were parties. Despite the precedent provided by the 1969 Vienna Convention, the Commission had encountered technical difficulties, but had succeeded in finding a compromise solution based on a series of categories and subcategories which formed a very complete set of draft articles. While his delegation had no objection to the provisions formulated by the Commission, it felt bound to question their practical value, since in its commentary the Commission cited only a few relevant treaties and not a single case of reservations formulated in those circumstances. It would therefore be desirable for the Commission to render the text as a whole less cumbersome.

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14. Article 27, paragraph 2, concerning the rules of the organization and observance of treaties, was probably more important from the standpoint of both theory and practice. The addition to the end of the paragraph did not seem felicitous, for it was unacceptable to draw such a radical distinction between the internal law of a State party and the rules of an organization party with regard to the observance of treaties, especially since, as the Commission itself recognized, the provisions of article 27, paragraph 2, could also apply to treaties between States. Neither the 1969 Vienna Convention nor article 27, paragraph 1, provided for that exception. It would therefore be desirable for the Commission to review the text adopted provisionally, which in its existing form could clearly endanger the fundamental principle "pacta sunt servanda".

15. Chapter V of the report showed that the Commission, whose membership had recently been renewed, had reviewed the question of its programme and methods of work. In that sphere, it was essential that the Commission, a body of limited membership composed of experts acting in their personal capacity, and the Sixth Committee, in which all States Members of the Organization were represented, should pursue a productive dialogue. It was encouraging that the Commission thought it would be able to attain the objectives set in 1975 and complete its consideration of certain questions before the end of its current five-year term of office. Its programme of work should be drawn up on the basis of the survey of international law prepared by the Secretariat in 1971.

16. His delegation endorsed the International Law Commission's conclusion that in the present circumstances it was preferable not to keep on its agenda the questions relating to historic waters and to the right of asylumn, which were already being dealt with by other bodies, and to take up questions which had aroused the interest of the General Assembly or Member States, such as those of objective responsibility, the jurisdictional immunities of States, and offences against the peace and security of mankind (a question closely linked to that of the establishment of an international criminal court). On the other hand, his delegation was not convinced that it would be useful to take up again the study of relations between States and international organizations so long as the Vienna Convention of 1975 had not been generally accepted.

17. It was therefore desirable to keep the aforementioned questions provisionally in the programme of work, in order that the Secretariat might begin the necessary preliminary research, and in that connexion, his delegation supported the Commission's recommendation to strengthen the staff of the Codification Division of the Office of Legal Affairs.

18. The report also contained some interesting considerations on the Commission's methods of work. The distinction made by the Commission between ordinary and special methods was justifiable, and it could be said that the Commission's methods of work were judicious, appropriate and effective. But it was rather surprising that the Commission should think that there was no reason for amending its statute, since the latter provided for totally different methodologies depending on whether codification projects or projects for the purpose of development of international

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law were concerned. Amendment of the statute was perhaps not indispensable, but the possibility of reviewing and updating it should not be disregarded. That was a task which could be undertaken by the Planning Group of the Enlarged Bureau of the Commission, which had been in existence for 30 years.

19. Mr. SUCHARITKUL (Thailand) said that the International Law Commission had made considerable progress with regard to State responsibility, to succession of States in respect of matters other than treaties, and to treaties concluded between States and international organizations or between two or more international organizations.

20. State responsibility, as viewed by the Commission, was no longer limited to the classical concept which had related only to the treatment of aliens or to international demands for compensation following the nationalization of property belonging to aliens. It included all spheres of State responsibility, beginning with the responsibility of a State for its internationally wrongful acts. The Commission's draft article 16 stated that there was a breach of an international obligation by a State when an act of that State was not in conformity with what was required of it by that obligation. Article 20 stated that there was a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State was not in conformity with that required by that obligation. The expression "not in conformity", which served to determine the existence of a breach of an international obligation, should be understood in the light of the commentary on article 20. An act of a State over and above what was required of it by a given obligation did not indicate absence of conformity.

21. Unlike article 20, which related to conduct that could constitute a breach irrespective of its results, article 21 related to a breach by a State of an international obligation requiring it to achieve a specified result by means of its own choice. However, when it was clear from the obligation that that result or an equivalent result could be achieved by the State's subsequent conduct, there was no breach unless the State also failed by its subsequent conduct to achieve the result in question.

22. The Special Rapporteur's reaffirmation of the fundamental norms on State responsibility was clearly reflected in the dichotomy between articles 20 and 21, since article 20 related to an obligation specifying conduct or means and article 21 related to an obligation specifying a result. A specific course of conduct might be not only positive or active, in which case it was manifested by an act or commission, but also negative or passive, whether by omission or inaction on the part of the State concerned. Similarly, the specified result could be positive or active in substance and negative or passive in form, or vice versa. In any case, the time factor played a decisive role in ascertaining the occurrence of a breach. The provisions of article 21 had therefore introduced into the concept of a breach a new element, that of time: the State concerned was allowed a time-limit to achieve the result. As to article 22, his delegation believed that it was explained with sufficient clarity by the Commission's commentary.

(Mr. Sucharitkul, Thailand)

23. With regard to succession of States in respect of matters other than treaties, he said that the Commission had adopted draft articles 17 to 22 of part II, which dealt with succession to State debts, and the accompanying commentary. While article 17 limited the scope of part II to the matter of succession to State debts, article 18 defined a State debt as a financial obligation which, at the date of the succession of States, was chargeable to a State. Thus, the scope of that part of the draft articles was also limited by the financial nature of the obligation, whereas part I related to all State property, financial or otherwise. Accordingly, there seemed to be a slight imbalance between part I and part II, and the question of succession to non-financial obligations would have to be considered separately in another part and at a later date.

24. Unlike articles 19 and 20, which stated the principles of succession to State debts, articles 21 and 22 related to different types of succession of States. Enshrined in those provisions was the prinicple that third States remained outside the process of succession and that their rights and obligations as creditors should not be affected by the succession. An element of consent of the third State had been introduced, so as to render the effect of succession less automatic even when there was a valid agreement between the predecessor and successor States. The solution adopted with respect to newly independent States appeared to be fairly well balanced and took account of the financial situation of such States. Succession to debts or obligations of States should be in equitable proportion to succession to State properties or rights. The ideal would be to make them completely equal, but more lenient conditions should be allowed to the least developed countries whose attainment of independence might be more or less recent. His delegation was glad to see that the Special Rapporteur's report contained nothing inconsistent with that line of thought.

25. With regard to the question of treaties concluded between States and international organizations or between two or more international organizations, he said that the Commission had used as the basis for the structure and formulation of the draft articles the Vienna Convention on the Law of Treaties. In an endeavour to achieve exact symmetry, repetitions and recurrences of long and difficult expressions had been retained after the first reading. To make the draft articles exhaustive, a series of combinations and permutations of terms had to be adopted in a number of articles.

26. Article 27 deserved special attention in the absence of a parallel between the internal law of a State and the rules of an international organization. In article 2, paragraph 1 (j), the expression "rules of the organization" was defined as meaning, in particular, "the constituent instruments, relevant decisions and resolutions, and established practice of the organization". The question was further complicated by the fact that the rules of the United Nations, so defined, might in fact be determinative of the legality or illegality of a failure to perform a treaty obligation.

27. With regard to chapter V of the report, his delegation welcomed the Commission's decisions and conclusions, particularly those relating to the draft articles on the most-favoured-nation clause, to the continued study of the topic of the law of the non-navigational uses of international watercourses, to the further

(Mr. Sucharitkul, Thailand)

study of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and to further study of the second part of the topic "relations between States and international organizations".

28. His delegation endorsed the current programme and methods of work of the Commission and believed that the Commission could, as it recommended in paragraph 110 of its report, undertake the study on the topic "Jurisdictional immunities of States and their property", both because of its day-to-day practical importance and because of its suitability for codification and progressive development. The recent entry into force of the European Convention on State Immunity of 1972 and the Foreign Sovereign Immunities of the United States Act of 1976 gave reason to believe that the time had come for the United Nations to authorize the International Law Commission to undertake its own study on the topic Jurisdictional immunities of States and their property".

29. His delegation also welcomed the Commission's practice of co-operating with other regional bodies such as the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the European Committee on Legal Co-operation.

30. In conclusion, he recalled that the International Law Seminar had held its thirteenth session during the Commission's session, with several Commission members volunteering their services as lecturers. He hoped that such seminars would continue to be organized during future sessions of the Commission, so as to promote the dissemination and teaching of international law.

31. Mr. RASSOLKO (Byelorussian Soviet Socialist Republic) said that he would confine himself to some comments on the most important questions dealt with by the International Law Commission in its report.

32. First of all, with regard to State responsibility, the Commission had adopted draft articles 20 to 22 of chapter III at its twenty-ninth session. The first three chapters of the draft articles enunciated fundamental principles, defined acts of States in conformity with international law and examined the various aspects of breaches of international law. Article 20 dealt with the breach of an international obligation requiring the adoption of a particular course of conduct, and article 21 dealt with the breach of an international obligation requiring the achievement of a specified result. Article 22 related to the exhaustion of local remedies.

33. In the case of article 20, it was necessary to determine the exact nature of the State's conduct and the conditions in which an obligation had been breached. In other words, both the existence of a certain course of conduct and that of an obligation had to be demonstrated. That article should be left as it stood, since it was in conformity with draft article 16.

34. In the case of article 21, a breach arose from the fact that the State had not performed its obligation to achieve a specified result. Paragraph 1 of the article stated the general criterion, and paragraph 2 provided for an exception: a State could acquit itself of its obligation by securing the specified result through its subsequent conduct, but it should be emphasized that the result had to be achieved in any case.

(Mr. Rassolko, Byelorussian SSR)

35. Article 22 dealt with local, in other words State, remedies; in each specific case, such remedies must be feasible and effective. Article 22 was a useful provision governing relations between the State and alien natural or juridical persons, in accordance with the domestic law of the State. In the light of all the articles so far adopted on the subject by the Commission, it could be said that ILC was working on the right lines; however, it should accelerate its work, since the question of State responsibility was of considerable interest to the international community and should be given priority.

36. On the subject of succession of States in respect of matters other than treaties, the Commission had made noteworthy progress and had already adopted 22 articles, the last of which dealt with succession to State debts. Its work had been facilitated by the existence of complete draft articles on succession of States in respect of treaties. But the question currently under study by the Commission posed special problems which were not covered by the law of treaties, such as succession to State property, succession to debts and other similar problems.

37. The Commission should display the greatest caution in drafting articles, and it should be remembered that the wording so far used was in no way final: for example, article 18, which gave an essential definition of State debts, should specifically indicate what were the financial obligations in question and should explain that they had to be international in character. Otherwise the article would be meaningless, since it could also be applied to local debts, which were governed solely by domestic law. With regard to article 20, paragraph 1 was essential, stating the principle that the succession of States did not affect the rights and obligations of creditors; however, paragraph 2 should be improved, because in its existing form it did not answer the question posed and was difficult to accept. Articles 21 and 22 were acceptable on the whole. In continuing its work on the question, ILC should take into account the principle of the national sovereignty of States and should produce a draft which would be favourable to all States and not only to certain groups of States.

38. With regard to the question of treaties concluded between States and international organizations or between two or more international organizations, the Commission had drafted articles concerning reservations, entry into force and provisional application of treaties, observance, application and interpretation of treaties and their effects on third States and third international organizations. In general, the draft articles were based on the 1969 Vienna Convention. But the question was posed in different terms, since international organizations were both different from States and different from each other. Their legal status, functions and structure differed from one organization to another. Unlike States, the rights of international organizations were determined and limited by their rules. There were also differences between treaties concluded between international organizations, on the one hand, and States, on the other hand, and treaties concluded only between organizations. Consequently, the articles of the 1969 Vienna Convention could not be applied automatically.

39. It could be seen from the ILC report and from a study of draft articles 19 to 23 that some wanted to give organizations the right to formulate reservations.

(Mr. Rassolko, Byelorussian SSR)

Yet only the State, a subject of international law, could formulate reservations with no restrictions. International organizations, not being subjedts of inte international law, did not enjoy that unrestricted right. An international organization could express servations only if the treaty made explicit provision for such reservations and if the parties agreed to accept them. That basic difference between States and international organizations was not sufficiently brought out by the Commission in draft articles 19 to 23.

40. The other draft articles considered at the twenty-ninth session did not give rise to objections of principle, with the exception of article 27, which should state more clearly that the treaty took precedence over the rules of the international organization and that the rules could under no circumstances justify non-performance of the obligations derived from a treaty to which the organization was a party.

41. The question of the most-favoured-nation clause had not been considered at the twenty-ninth session: the draft articles adopted in first reading had been transmitted to States and would be considered again in 1978. It was to be hoped that they would be able to take the form of a final instrument which would facilitate international co-operation not only in trade relations but also in economic relations in general, by giving full effect to the principle of non-discrimination which derived from the principle of the sovereign equality of States.

42. His delegation welcomed the fact that the Commission, in pursuance of General Assembly resolution 31/76, had included in its agenda a question entitled "Proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". A working group had already been established and work should be very actively pursued, since the protocol was to complete the task undertaken in the Vienna Convention on Diplomatic Relations and to contribute to the strengthening of friendly relations among States.

43. Lastly, with regard to its future work, the Commission should abide strictly by the resolutions of the General Assembly and give priority to the tasks assigned to it by the Assembly: State responsibility, most-favoured-nation clause, succession in respect of matters other than treaties, treaties concluded between States and international organizations or between two or more international organizations, and status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It should refrain from including on its agenda new questions which it would in any case not have time to study. As could be seen from paragraphs 112 *et seq.* of its report, the Commission had already embarked on the task of improving its methods of work, but it still had to plan its sessions better, so as to be able to produce more draft articles. By the quantity and quality of its work, the Commission should contribute to the establishment of a legal structure which would provide the basis for peaceful coexistence and for the achievement of the purposes of the United Nations Charter and would be of definite interest to all States. In conclusion, he expressed satisfaction with the existing form of the ILC report.

44. Mr. ŠAHOVIĆ (Yugoslavia) thanked the Chairman of the Commission for his clear and comprehensive introduction of the report of ILC on the work of its twenty-ninth session. That report, which contained a number of new draft articles on subjects which the Commission had not finished considering - State responsibility, succession of States in respect of matters other than treaties, and the question of treaties concluded between States and international organizations or between two or more international organizations - was in fact an interim report. The Sixth Committee had always endorsed the Commission's approach and the results of its work on those questions at its previous sessions; the Commission should now endeavour to complete the study of those three subjects as speedily as possible.

45. His delegation was not opposed to the idea of a discussion of the Commission's role and methods of work. It insisted, however, that the role assigned to the Commission in its statute should be preserved: the Commission should continue to be an organ composed of specialists in international law, representing the principal legal systems of the world and the main forms of civilization and responsible for the codification and progressive development of international law. It was thanks to the studies made by ILC that the principal sectors of contemporary international law had been codified and that the codification was based on the principles contained in the United Nations Charter. Because of its composition, the Commission was the organ best suited to draw the right conclusions from the general evolution of State practice and theory and to formulate rules which met the current needs of the international community, in the light of the new political, economic, and social trends. Taking as its starting-point the present state of international positive law, the Commission should respect the interests of the entire international community, paying special attention to the decisions and recommendations of the General Assembly and the other organs of the United Nations. The Sixth Committee had always given its full support to the Commission and would no doubt continue to do so in the future.

46. The Yugoslav delegation endorsed the ongoing work programme proposed by the Commission and the inclusion in its long-term work programme of the question of "jurisdictional immunities of States and their property" and the "Draft Code of Offences against the Peace and Security of Mankind". However, since ILC would probably not be able to embark actively on the study of those questions before the expiry of the mandate of its present members, it should review the current state of international law as a whole and, after consulting the Sixth Committee and the regional legal committees, should draw up a new general programme reflecting the needs of the international community and the general trends in international law.

47. There was an urgent need to expand the staff of the Codification Division of the Office of Legal Affairs, but it was also necessary to improve the working conditions of the Commission members, by providing them constantly with information on United Nations activities concerning legal matters.

48. With regard to the new draft articles reproduced in the ILC report, he expressed his delegation's support for the solutions proposed by the Commission.

(Mr. Šahović, Yugoslavia)

49. On the subject of State responsibility, although article 16 already gave a definition of a breach of an international obligation, articles 20 and 21, dealing respectively with breach of an international obligation requiring the adoption of a particular course of conduct and requiring the achievement of a specified result, were useful. Article 20 affirmed the primacy of international legal obligations, while articles 21 and 22 recognized the right of States to safeguard their legitimate interests. That balance illustrated the growing interdependence between the domestic law of States and international law.

50. In connexion with the question of succession to State debts, the Yugoslav delegation favoured a broad definition of State debts, in view of the varying forms which State indebtedness could take, and was therefore opposed to the retention of the word "international" in article 18. It particularly welcomed article 22, paragraph 2, which was designed to ensure respect for the economic sovereighty and the fundamental economic equilibria of the newly independent State.

51. The question of treaties concluded between States and international organizations or between two or more international organizations gave rise to major difficulties, particularly with regard to reservations. The Commission should nevertheless continue to consider that question.

52. The Committee should endorse the Commission's report and ask it to continue its work in accordance with the programme of work which it had proposed.

The meeting rose at 12.45 p.m.