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SUMMARY RECORD OF THE 45th MEETING

Chairman: Mr. GAVIRIA (Colombia)

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The meeting was called to order at 11.10 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. QADEERUDDIN AHMED (Pakistan) said that as his country was not a member of the International Law Commission, he felt bound to refer to the late stage at which his delegation had been able to review the work of the twenty-ninth session of the ILC. His delegation would, however, follow the suggestion made by Sir Francis Vallat in his statement at the thirty-first meeting to the effect that it would be more helpful, as matters stood, to express views on principles rather than on matters of detail.

2. On the subject of the ILC's methods of work, his delegation, while recognizing that the Commission had done detailed research on theory, decisions of tribunals, practices of States, and fully and partly accepted international practices, found it striking that the Commission not only presented its drafts in bits and pieces but did not always disclose in advance the scheme adopted by it for the study of various topics. That was not helpful to those who were expected to scrutinize the draft articles.

3. Moreover, the Commission itself often seemed not to be quite clear in its own mind as to what the whole architectural plan of its drafts was going to be. For example, it had so far avoided a decision on whether the draft articles on State responsibility were to begin with an article giving definitions or an article enumerating the matters excluded from the scope of the draft. The reasons given by the Commission in paragraph 24 of its report (A/32/10) could not be that the draft articles were only tentative, since the same might apply to the definitions and the preliminary clauses. As the Commission had said in paragraph 52 of the report, with reference to its draft articles on the succession of States in respect of matters other than treaties, the form to be given to the codification "cannot be determined until the study of the subject has been completed"; it therefore appeared that the Commission had not yet studied, even tentatively, the whole of the subject of one of its series of draft articles. It was surely desirable that the Commission should first survey a topic in its entirety and tentatively prepare a structure of codification before beginning its detailed work. That method would increase the speed of work and enable those who were called upon to give their views on draft articles to bear in mind the final end of the work.

4. On the subject of the form of the report under consideration, his delegation believed that the Commission should try to set out in a few sentences the positive ideas it was seeking to embody in each article. That purpose was not served by the learned commentaries in the report which, while they justified the language of a proposed article, sometimes lost sight of the original intention. Moreover, in order to make the interpretation of individual articles easier, the authors of the report might sometimes have found it useful to replace long explanations by a few specific examples, as in the case of the distinction between obligations

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"of conduct" and "of result". In his delegation's view, that distribution was not so subtle as to require the matter to be referred, in the event of difficulties of interpretation, to international tribunals.

5. On the subject of succession of States in respect of matters other than treaties, his delegation believed that division of State property was an important aspect of succession to State property and should be codified comprehensively in a separate section of the draft articles.

6. His delegation believed that the principles governing the subject of State responsibility needed to be codified in the clearest terms so as to remove all ambiguity about the circumstances which rendered States responsible for the violation of an international obligation. That was of special importance for developing countries because of the absence of efficient administrative infrastructure. The imputability of State responsibility should be precisely defined and illustrated, with objective formulas being found to safeguard the interest of the State which suffered loss and the interest of the State against which claim was preferred. In that connexion, the action of an enemy of the State, as in the case of political or external insurrection, should not be allowed to become a cause of action.

7. The law of the non-navigational uses of international watercourses was of the utmost importance to his country because it was a lower riparian country and its resources were heavily dependent on the use of such watercourses. His delegation accordingly submitted the following principles for consideration by the Commission with a view to improving friendly relations among States: (i) the waters of an international river should be equitably apportioned among the riparian States, having due regard to the heavy dependence of particular riparian States on water and traditional uses of such water; (ii) exercise of rights by a riparian State within its territory should not result in reducing the normal flow of water or in ecological changes liable to cause damage in the territory of another riparian State; (iii) each riparian State should exercise the utmost care within its territory to prevent the pollution of water; (iv) where the utilization of water by a riparian State was likely to cause damage to another riparian State, prior agreement of the latter State should be required; (v) any right of a riparian State that could be exercised in more than one way should be exercised in such a way as not to cause damage to another riparian State; (vi) an aggrieved riparian State should be adequately compensated for any loss suffered by reason of the violation of its rights by the other riparian State; (vii) riparian States should be under legal obligation to settle their disputes peacefully. If a friendly settlement could not be reached, they should be required to approach international forums available for that purpose.

8. In conclusion, his delegation emphasized that all the draft articles prepared by the Commission should ultimately be based on principles of justice and equity

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and not merely on practice and precedent, since there was no permanent point of reference for developing international law other than justice and equity. However, the distinction between primary and secondary sources of obligations could not be maintained if progressive development and codification of international law were to go hand in hand.

9. Mr. BAVAND (Iran) said, with regard to the draft articles on State responsibility, that the provisions of article 19, concerning the distinction between two separate categories of internationally wrongful acts, inevitably inspired the substance of the following articles - articles 20, 21 and 22. For instance, the express reference made by the Commission to some of the most characteristic violations of international obligations of essential importance for safeguarding the human being, such as those concerning genocide and apartheid, had a special bearing on the possible extension of the rule of exhaustion of local remedies to all private individuals, including nationals of the State directly involved.

10. Under article 20, the adoption by an administrative or judicial authority of a State of conduct different from that specifically required by the international obligation might be deemed to be an immediate breach of that obligation. According to article 21, the State's choice of the means to be employed could in no way constitute a breach of the obligation. There was no breach unless the State had failed to achieve the required result by the means available to it. Under paragraph 2 of that article, the State might not only achieve the required result by subsequent conduct but also achieve an "equivalent result". The latter expression, by its flexibility, would facilitate international relations, but at the same time it opened the door to various interpretations of the meaning and scope of the concept of required result and, moreover, allowed the State to claim the realization of one aspect of the required result rather than the other. The State might claim, for example, that the realization of a certain degree of economic and social development was tantamount to the realization of the objectives of human rights and for that reason reject any accusation of a serious breach of an international obligation of essential importance for safeguarding human rights.

11. Article 22, which was a logical consequence of the articles preceding it, stated the principle of the exhaustion of local remedies, thus laying down an additional condition of the violation of obligations "of result" for a special category of obligations, those designed to protect alien individuals and their property. It was in the light of that obligation that it would be possible to determine whether a State had breached its obligation. It should be noted that a large proportion of international obligations concerning the treatment to be accorded to private individuals allowed the State to achieve by stages the result required of it or to achieve it by subsequent conduct.

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12. His delegation believed that during the second reading of the articles under consideration, particularly article 22, some thought should be given to extending the application of the principle of exhaustion of local remedies to the treatment accorded by the State to its own nationals. The international community was gradually assuming responsibility for the protection of certain fundamental rights and most of the existing conventions on the subject, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and the Optional Protocol thereto, expressly imposed the requirement of exhaustion of local remedies.

13. With regard to chapter III on the succession of States in matters other than treaties, his delegation was gratified by the fact that parallelism had been maintained between the provisions concerning the passing of State debts and the passing of State property. The most important point in the commentaries on articles 17 and 18 was the distinction they made between State debts and debts of local authorities. In cases in which the latter had not been the responsibility of the predecessor State, logic and justice required that the successor State should not be responsible for them. However, there was no legal ground for the distinction that some had sought to make in recent years between State debts and régime debts. In conclusion, his delegation agreed with the Commission's proposal to postpone its consideration of the question of "odious debts".

14. Still referring to the definition of State debt, he said his delegation favoured including the word "international" in article 18, which should cover only financial obligations chargeable to a State vis-à-vis another State, an international organization or another subject of international law. Financial relations between States and private individuals, whether natural or juridical persons, including private international organizations, were adequately covered by article 20. Furthermore, that kind of debt should be governed solely by the internal law of States.

15. Article 20, paragraph 1, reaffirmed the basic principle already enunciated in part I of the draft, namely that the succession of States did not as such affect the rights and obligations of creditors. The purpose of that provision was to stipulate that the debt-claims of a third State must not cease to exist or suffer as a result of territorial change. According to paragraph 2, the predecessor State was not automatically freed of responsibility with regard to its debt to a third State unless the latter so consented. Another important element in that paragraph was the fact that it referred also to international organizations and other subjects of international law, as indicated in paragraph (12) of the commentary.

16. Part II, section 2, of the draft, which contained articles dealing with every type of succession of States, followed the same methodological approach as part I. Article 21, paragraph 1, dealing with the transfer of part of the territory of a State, provided that the passing of the State debt was to be settled by agreement between the predecessor and successor States. Paragraph 2 posed a delicate problem by invoking the concept of equity, which was not in itself a legal principle. The problems raised by so vague a concept were further complicated by the fact that in

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order to determine what constituted "an equitable proportion", it was necessary to take into account the property, rights and interests which passed to the successor State in relation to the State debt. His delegation considered that the Commission should take a closer look at those problems.

17. Mr. OMAN (Somalia) observed that articles 20 and 21 on State responsibility drew a distinction between the breach of an international obligation "of means" and a breach of an obligation "of result" which, although of fundamental significance, was nevertheless unsatisfactory from the standpoint of both form and substance. As the Commission itself acknowledged in paragraph (3) of the commentary on article 20, the adoption of such a distinction was likely to cause some uncertainty, for it was not always easy to draw a demarcation line between obligations "of conduct" or "of means" and those "of result". Nevertheless, it seemed that there had been general agreement in the Commission that the distinction should be maintained because of its "normative and practical importance" for the codification of the general rules covering international responsibility. However, what might at first sight seem to be an obligation of result might on other occasions prove to be an obligation of conduct. The Commission should therefore undertake an in-depth review of those provisions in the light of the comments made in the debate in the Sixth Committee.

18. Although article 22, on the exhaustion of local remedies, embodied a rule which was essentially a matter of substance, its application likewise entailed procedural problems. His delegation considered that the concept of the exhaustion of local remedies should not exceed the confines of international law or go beyond the limits of the purpose of the draft articles, namely the codification of the general rules governing the international responsibility of States for internationally wrongful acts. His delegation supported the view expressed in paragraph (60) of the commentary on article 22, to the effect that the text adopted should be confined to a general statement on the principle as provided for by international law, which should be flexible enough to be able to be adapted to the various situations that arose in practice, as was shown by the criteria of "effectiveness" and genuine "availability" of the remedies open to private individuals which appeared in the text of the article itself. In that connexion, he recalled that the Commission had already spent several years preparing the articles on State responsibility and expressed regret that it would not be able to complete that draft for several years more. It would ultimately take the Commission more than 10 years to complete that assignment, a time-span which his delegation found excessive.

19. With regard to succession to State debts, it should be noted that article 17 limited the scope of part II of the draft. The definition of State debt had presented major difficulties. There had been a divergence of views on the issue of whether that concept should be limited to the debts owed to third States and international entities or whether it should cover debts owed to natural and juridical persons. The same problem had arisen in connexion with article 20, dealing with the effects of the passing of State debts with regard to creditors. His delegation considered that the word "international" in article 18 should be retained, for otherwise the expression "financial obligations" could be construed as meaning any obligation assumed vis-à-vis natural or juridical persons, which

would constitute a flagrant interference in the internal affairs of States. In so far as international law was essentially concerned with international relations, it was essential to make it clear that the financial obligation should arise at the international level.

20. His delegation welcomed the provisions of article 22, which were in effect based on the clean slate principle, and considered that special attention should be paid to the principle of the permanent sovereignty of a newly independent State over its natural resources.

21. With regard to the draft articles on treaties concluded between States and international organizations or between two or more international organizations, he observed that the Commission had followed the pattern of the Vienna Convention on the Law of Treaties. The major difficulty which had arisen in that connexion was whether international organizations which were parties to treaties could be placed on the same footing as sovereign States in that regard. It should be noted that according to paragraph (1) of the commentary on article 19, the draft articles laid down "different rules on the formulation of reservations by international organizations according to whether the reservations are to treaties between international organizations or to treaties between States and one or more international organizations". His delegation, which was seriously considering the question, would submit its comments at a later stage.

22. Turning to chapter V of the report, he welcomed the fact that in the near future the Commission planned to complete the second reading of the draft articles on the most-favoured-nation clause and expected to receive the first report on the non-navigational uses of international watercourses. He was also pleased to note that two equally important questions, the status of the diplomatic courier and the second part of the topic "Relations between States and international organizations", were currently being studied by a Working Group.

23. With regard to the Commission's programme and methods of work, the practice of establishing a Planning Group at each session should facilitate the work. The Commission had adopted a long-term programme of work which was perhaps too ambitious. In another connexion, while the order of priority of the work to be undertaken could be laid down by General Assembly resolutions, it was also desirable that the Commission itself should take appropriate initiatives to speed up the work on certain topics, in particular by requesting special rapporteurs to prepare preliminary studies. The Commission had sometimes been criticized for dissipating its efforts and it was, for example, desirable that it should complete in final form chapters I, II and III of the draft articles on international responsibility before taking up other issues in that field.

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24. Every year there were complaints that the Commission's report, which was very voluminous and detailed, had been submitted to Governments too close to the time when it was to be considered by the Sixth Committee. It had been suggested in that regard that the report should be reduced in size and submitted in instalments. An increase in the staff of the Codification Division would certainly help to improve the situation.

25. On the whole, the Commission deserved praise and admiration for the way in which it performed its functions. But since the Commission was an international institution its work should be evaluated realistically. It was an old organ which tended to concern itself with the codification rather than the progressive development of international law, and it was influenced primarily by the philosophies and doctrines of classical international law. The conservatism of its solutions resulted not only from its composition, which was not based on the principle of equitable geographical representation, but also from the fact that it had always sought, at least until its most recent session, to apply the consensus principle. Unanimity was of course desirable but if the Commission could not submit a unified text it should submit more than one text among which the Sixth Committee could choose and which would reflect the division between those who wished to maintain the status quo and those who wished to establish a new just and equitable legal order.

26. Mr. KRISHNADASAN (Swaziland) observed that the Commission had devoted a very large part of its session to the formulation of draft articles 20 to 22 on State responsibility.

27. In articles 20 and 21 it had drawn a distinction between obligations of conduct and obligations of result which in his view was of fundamental importance for determining how a breach had been committed in each specific case. Unfortunately that distinction was extremely difficult to make in practice and he cited several examples of obligations which could be considered either as obligations of conduct or obligations of result, depending on one's point of view. It might therefore be wondered whether those two articles did indeed represent a step forward or whether they tended to confuse a situation which article 16 made perfectly clear. However, the Commission stated in its commentary that the distinction between obligations of conduct and obligations of result would be of normative and practical importance when it came to determining the time and duration of the breach of an international obligation (tempus commissi delicti), a question it intended to study at a later stage, and his delegation might then change its position.

28. Article 22 embodied a generally accepted rule of international law and the Commission seemed to subscribe to the principle that it was a substantive rule which would also have procedural implications. It was perhaps not very important whether it was a substantive or procedural rule, since the sole purpose of article 22 was to make it possible to determine whether a breach of an international obligation existed. What was important from a practical point of view, however, was to determine the time from which the damage must be taken into consideration in

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order to calculate the amount of the reparation. In that regard, paragraph 32 of the commentary on article 22 seemed to indicate that, in the view of the Commission, the obligation to make reparation originated at the time of the injury caused to the alien victim. The Commission stated that the breach of the international obligation "results from the whole series of successive acts of State conduct ... so that the injury suffered by the individual, which may eventually be used as a criterion for assessing the amount of reparation which the State in its capacity as diplomatic or judicial protector may demand, is the injury caused to the individual by the aggregate of State conduct conflicting with the internationally required result". However, that was not made clear in the rule set out in article 22.

29. In concluding his comments on article 22, he stressed that remedies must exist which were effective and truly accessible, that was to say that they should, among other things, not be too onerous, and that, as the Commission had stated, it would be unacceptable to extend the provisions of article 22 to the treatment accorded by a State to its own nationals.

30. Referring to succession to State debts, he said that there was a lack of parallelism between the definition of State debt (article 18) and the definition of State property (article 5). Perhaps the word "predecessor" should be inserted before the word "State" at the end of those draft articles. Furthermore, his delegation was not yet convinced that the word "international", in brackets, was necessary. Article 18 related to external debts of the predecessor State, which included all debts contracted by that State with other States or with alien natural or juridical persons. Although some might say that the rights of an alien individual creditor were sufficiently protected by article 20, paragraph 1, might it not be worth while confirming that protection by omitting the word "international"?

31. For the same reason, the brackets round the words "or against a third State which represents a creditor", in article 20, paragraph 2, should be deleted. The scope of the draft articles should be expanded, and the protection afforded to creditors could not be confused with an infringement of State sovereignty. That was well protected by articles 20 and 21, which required an agreement, subject to the provisions of article 21, paragraph 2. Furthermore, the retention of the word "international" in article 18 would run counter to article 11 under which debts owed to the predecessor State, which unquestionably included debts owed by foreign debtors, should pass to the successor State.

32. Article 20 was of extreme importance, and paragraphs 1 and 2 (a) presented no difficulty. On the other hand, paragraph 2 (b) would seem to suggest that a creditor third State, or international organization, or third State which represented a creditor could find themselves being made subject to an agreement which they had not accepted and to which they were not parties. It was necessary to determine when the consequences of an agreement were "in accordance with the other applicable rules of the articles in the present Part". No agreement between the predecessor and successor States should have the consequence of automatic substitution of the latter for the former in respect of a third party; in that regard, the provisions of the Vienna Convention on the Law of Treaties should be used as a basis.

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33. Article 21, paragraph 1, adopted the best solution, in the absence of well-established international practice, by providing for the conclusion of an agreement. However, the introduction of the rule of equitable proportion in paragraph 2 could create difficulties. That provision was one of those which would make it necessary to establish effective machinery for the settlement of disputes in a future convention.

34. Article 22 was obviously an historic step in the progressive development of international law. It related not only to States which were not yet independent, but also to those which were newly independent and which might not have been able to solve the problems inherent in the succession of States in respect of matters other than treaties. As in the case of treaties, it would obviously be advantageous for newly independent States, if the draft articles became a convention, to implement its provisions retroactively. Article 22 was a blend of justice and realism. Paragraph 1 provided for the application of the clean slate principle, except where an agreement provided otherwise. Since it was almost impossible for the States concerned to negotiate on an equal footing when acceding to independence, there was a good chance that agreements concluded in such circumstances would fall within the category of devolution agreements.

35. According to paragraph 66 of the commentary on article 22, the purpose of paragraph 2 was to ensure that such agreements did not ignore the financial capacity of the newly independent State or infringe the principle of the permanent sovereignty of every people over its wealth and natural resources. Perhaps that provision did not go far enough. It would seem preferable to delete the word "fundamental". As had been proposed, the best solution would be to decide that no State debt could pass from the predecessor State to the newly independent State, except where an agreement between the two States provided otherwise.

36. With regard to the question of treaties concluded between States and international organizations or between two or more international organizations, the Commission had stated in its report that international practice was still very limited in that field, and practically non-existent with regard to such aspects as reservations. As treaties were based essentially on the equality of the contracting parties, and as international organizations were assimilated to States for the purposes of article 9, it was necessary to determine whether organizations should be treated like States, as far as reservations were concerned. The Commission rightly accorded international organizations the same rights as States in the case of treaties between several international organizations (article 19). However, in article 19 bis, it limited the rights of organizations whose participation was essential to the object and purpose of a treaty. It might be advisable to reproduce the provisions of the Vienna Convention on the Law of Treaties in that regard and to make provision for the formulation of reservations, except when such reservations were incompatible with object and purpose of the treaty. Furthermore, it was perhaps superfluous to draft a complete set of articles on the question, and it would be tragic if, in doing so, the Commission undermined the work accomplished in the Vienna Convention.

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37. The Commission's programme of work was already extremely full and the Commission should concentrate on quality rather than speed. However, questions such as the status of the diplomatic courier, the law of the non-navigational uses of international watercourses and possibly jurisdictional immunities of States and their property should continue to be considered or should be taken up in the fairly near future. In that connexion, it would be useful to strengthen the staff of the Codificiation Division.

38. In conclusion, he thanked those countries, notably Kuwait, whose contributions had made possible the holding of the international law seminars.

39. Mr. FLALA (Norway) thanked the members of the Sixth Committee for their condolences on the death of Ambassador Hambro.

The meeting rose at 12.55 p.m.