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SUMMARY RECORD OF THE 35th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/10, A/45/437)

1. Mr. DLAMINI (Swaziland), referring to the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed certain crimes, agreed with the International Law Commission that the establishment of such a mechanism was more feasible than ever. He also shared the opinion of certain delegations that the final creation of the court must await the entry into force of the draft Code of Crimes against the Peace and Security of Mankind, or at least that it should be established at the same time as the Code entered into force. In any event, it would be fitting if both were established by 1995 at the latest.

2. There was indeed no reason to wait until all international crimes against the peace and security of mankind were defined in the Code before applying it. The Code could be enforced in stages if necessary, even if that meant progressively incorporating certain other crimes against the peace and security of mankind which, although internationally recognized as serious, were not yet sufficiently clearly defined to be included in the Code. It would be unfortunate, however, if a decision had already been taken to delay adoption of the Code until an exhaustive list of international crimes was drawn up.

3. His delegation endorsed the proposed treatment of international illicit traffic in narcotic drugs and psychotropic substances as a crime against the peace and security of mankind and shared the views expressed in paragraphs 77 and 78 of the Commission's report, whereby such traffic was detrimental to the peace and security of mankind and constituted a scourge and grave threat to mankind. It doubted, however, that there was sufficient basis for a twofold characterization of the crime, as proposed by the Special Rapporteur. The mere intervention of the State in draft article Y (crime against humanity) did not appear to justify the dual characterization, because ultimately only individuals would be held responsible for that offence. It would be better to adopt a single draft provision treating the offence as a crime against the peace and security of mankind, as had been proposed by one member of the Commission, because the twofold characterization might in practice give rise to a splitting of charges if two counts arising out of the same offence were preferred against the same defendant.

4. With regard to the draft articles relating to complicity, conspiracy and attempt, his delegation, while appreciating the Special Rapporteur's endeavours to improve on the original versions, felt that the new versions were not without some inherent difficulties of their own. Both complicity and conspiracy were defined in terms of "participation" in the commission of a crime, but the text contained no definition of the latter concept. If attention was to be focused on the acts which

(Mr. Dlamini, Swaziland)

constituted a crime of complicity or conspiracy, there was no longer any reason to make "participation" the key element of the definition. Hence, the draft article relating to attempt read comparatively better; it defined the crime of "attempt" in terms of attempt and then proceeded to define the word "attempt".

5. The reason for the separate treatment of preparatory acts of complicity and conspiracy would appear to be a desire to charge and punish an accomplice less severely than the perpetrator of the substantive offence. Thus, acts of participation constituting crimes of complicity and conspiracy would amount to less than actual perpetration of the offence. However, the draft article did not describe acts of "participation" sufficiently clearly to bring out the element of degree apparent in the definitions. One was therefore left to wonder why, if A helped B to climb a wall in order to commit a burglary, A should get off more lightly than B. Why, in other words, charge a person for only part of a crime if in fact the whole crime was committed with his participation?

6. The draft articles relating to complicity and conspiracy could make it more difficult to prove the offence and consequently accord an unfair advantage to the defence. An accomplice was usually a person who participated in the commission of a crime and not simply a person who participated only partially. The article on complicity changed that customary understanding by defining an accomplice as a person who could not be charged and convicted of the substantive crime but only of a secondary participatory offence.

7. It might perhaps be more prudent, if it was impossible to lay down a simple definition for crimes of complicity and conspiracy, to allow the court itself to determine the degree of criminal responsibility of A and B, in a case where A helped B to carry out a crime, and to reflect the distinction, if any, in the sentences imposed rather than in the offences with which they were charged. If, on the other hand, no crime other than certain preparatory acts had actually been committed, the situation would be equivalent to that of attempt, as specified in draft article 17.

8. The difficulty with incomplete crimes of that sort was no doubt due to a desire to distinguish between: (1) mere preparatory acts; (2) the commencement of execution; and (3) the crime itself. The need clearly to define all offences was appreciated, but that concern should not be taken too far. The definitions of complicity and conspiracy could be left at the level of general principle, because there might be cases in which an accomplice, in the terms of draft articles 15 and 16, should be punished more severely than the actual perpetrator of an offence. One was entitled to wonder in such cases why the law would prevent that possibility, despite the fact that justice required it, by minimizing in advance the role of the accomplice.

9. Furthermore, conspiracy (draft article 16) was not defined as a crime in the same way as complicity or attempt. It did not seem right that a simple conspiracy to commit a crime should be treated as equivalent to the crime itself. That draft article might have to be reformulated.

(Mr. Dlamini, Swaziland)

10. Returning to the question of an international criminal trial mechanism, the plan might require some internal readjustments but would be unlikely to cause serious disruption to national trial systems. The system of universal jurisdiction for the prosecution of international crimes had probably been tolerated because it was the only system available. It was true that an international court would have the advantage of pronouncing more objective and uniform decisions than national courts. The question of whether it should be a chamber of the International Court of Justice - in which case it might be necessary to amend the Statute of the Court - or an independent institution should depend not so much on the recommendation of the Court as on considerations of a practical nature.

11. The future court should be composed in such a way that its members, rather than simply representing the main legal systems of the world as at the International Court of Justice, were drawn from the broadest possible field. On the other hand, the judges, while permanent, should not have to reside permanently at the court's headquarters. They could sit as and when their services were required.

12. The proposed court should not curtail the sovereignty of States. If the draft Code of Crimes was incorporated into national criminal law and the international court was recognized as an extension of the national judicial system, there should be no reason to fear any loss of sovereignty. Moreover, at a time when many national judges were subject to extreme pressure and threats of violence from very powerful international criminal networks, from their own Governments or from Government-sponsored elements, an international court would be less susceptible to such eventualities and therefore offer a better mechanism. A single centralized jurisdiction would be preferable to the multiple trial systems which might exist under national arrangements, all purporting to promote international justice and the peace and security of mankind.

13. With respect to the nature of the court's jurisdiction, the first of the options set out in paragraph 130 of the report was the most fitting. The court would be established following the adoption of the Code of Crimes. There would be no point in having a court with only nebulous jurisdiction to hear international criminal cases brought before it on a case-by-case basis or pursuant to bilateral arrangements between States. Countries were generally reluctant to submit their disputes to strangers who were not parties to an agreement with those in dispute. A convention was therefore the most appropriate instrument by which to establish the court and to adopt the Code. However, if the convention procedure would delay adoption of the Code, his delegation would have no objection to its being adopted - and to the inclusion of new crimes and establishment of the court - by means of a resolution of the General Assembly.

14. It was to be expected that the Commission would have difficulty when trying to extend the jurisdiction of the court to States. Even in the best of democracies it would be very difficult to punish the State as such for a criminal offence, except by identifying the individual officials closely connected with the perpetration of the crime. It followed that only States parties could submit cases to the court.

(Mr. Dlamini, Swaziland)

That would also obviate the problem of the enforcement of judgements handed down by the court without incurring the additional expense of establishing an international police force and prison service. It would also follow that intergovernmental organizations of a universal or regional character, as well as non-governmental organizations and individuals, might report to the court or another associated body any alleged contraventions of the Code which were ignored or improperly investigated by a State party. The Court would then have to carry out an investigation with a view to persuading the State in question to submit the case to it, if there was a case, in accordance with that State's obligation under the Code.

15. If a State party had difficulty in carrying out an investigation, it might call for assistance from neighbouring States parties not connected with the alleged crime. Convicted offenders might serve their terms of imprisonment in other countries if their own Governments would have difficulty in enforcing the sentence of the court. Moreover, such an arrangement would be cheaper than an international police force and prison service.

16. The creation of alternative international trial arrangements outside the ambit of the proposed court might undermine the usefulness of the court and make its existence questionable. It might be desirable for the statute of the court to include a provision authorizing it to hear international criminal cases which had not been dealt with under some other arrangements made by States. However, the court should have the option of refusing to hear such cases if it thought that its intervention would serve no useful purpose or that the case was not of an international character bearing on the peace and security of mankind.

17. As to whether the court should also provide advisory services by way of legal opinions, his delegation thought that such services should be provided only on the basis of recognition of an exclusive original jurisdiction of the court to determine the guilt of persons charged under the Code. Advisory services might then be provided in respect of international crimes remaining outside the Code or crimes whose international character was in dispute. However, the advisory or review services of the court should not be extended to States which did not recognize its exclusive jurisdiction under the Code.

18. The court and the Code of crimes should be established in the same instrument. If funds allowed, the court should be independent and have a permanent panel of judges and prosecuting attornies. His delegation could accept a court established under the Charter of the United Nations, for the important thing in the final analysis was to establish an efficient and cost-effective mechanism. But the structure of the court and its relationship with the United Nations required further study. Where the legal force of judgments was concerned, the judgments of the court should take precedence over those of other courts. The court should have full discretion in determining sentences. However, the death penalty should be excluded from the Code, although its omission would in no way detract from the seriousness of the crimes covered by the Code or from the determination of the international community to put an end to the cancer of international criminality.

(Mr. Dlamini, Swaziland)

19. The problem of the breach of a treaty designed to ensure international peace and security, dealt with in paragraphs 89 to 92 of the report, might be profitably handled at the level of general principle without reference to any specific treaty.

20. Mr. DEL POZO CARAFA (Bolivia) said that, with regard to draft articles 15, 16 and 17, submitted by the Commission in paragraphs 33 to 76 of its report, his delegation shared the view stated in paragraph 35: Complicity, conspiracy and attempt were only punishable in connection with the principal crime and were therefore of an accessory character. Consequently, they should be placed in the part of the draft Code dealing with general principles.

21. With regard to complicity, his delegation proposed a new wording for paragraphs (a) and (c) of the new version of draft article 15 submitted by the Special Rapporteur (footnote 27). The paragraphs should read as follows:

"The following are acts of complicity:

(a) Aiding or abetting in any way the commission of a crime, even if it would otherwise still have been committed;

(c) Furnishing aid or assistance after the commission of a crime by virtue of promises made prior to its commission."

Paragraph (b) was perhaps drafted in excessively general terms.

22. Where conspiracy was concerned, his delegation shared the view of the member of the Commission referred in paragraph 65. It also agreed with the distinction drawn by the Special Rapporteur in paragraph 66 between conspiracy and complicity. However, to make matters clearer, it proposed that paragraph 2 of the new version of draft article 16 submitted by the Special Rapporteur (footnote 29) should read as follows:

"Conspiracy means any agreement between two or more participants to commit jointly a crime against the peace and security of mankind."

23. With regard to attempt, his delegation proposed that the words "independent of the perpetrator's intention", which appeared at the end of the second paragraph of the new version of draft article 17 (footnote 31), should be replaced by "alien to the perpetrator's intention".

24. The chapter of the report concerning international illicit traffic in narcotic drugs was of vital importance. It was a cause for satisfaction that the efforts of the Committee and the Commission had resulted in draft articles X and Y (footnote 34), which made illicit traffic in narcotic drugs a crime both against peace and against mankind. However, while it was true that the Special Rapporteur on the topic had taken into account inter alia the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988, it was regrettable that he had not given an adequate summary of

(Mr. Del Pozo Carafa, Bolivia)

the provisions of its article 3. While the need to include traffic in narcotic drugs in an instrument such as the draft Code could not be denied, it should not be forgotten that the international community already had the 1988 United Nations Convention, which would shortly enter into force, and should make a concerted effort for its universal application.

25. With regard to the creation of an international criminal jurisdiction, it should be asked whether the international community was ready to assume full responsibility for that undertaking, whether the court would be capable of standing above the political contingencies and the specific considerations of each State and whether the moment was right for the creation of a tribunal of that nature. Those questions still had not been clearly answered. Of the three options proposed in paragraph 130 for the nature of the court's jurisdiction, Bolivia would prefer the second, establishing concurrent jurisdiction between an international criminal court and national courts. Under that option, the States parties to the court's statute would not have to renounce their national jurisdictions and would be able to decide, on a case-by-case basis, whether to institute an action before the international criminal court or to exercise their own jurisdiction. The institutional structure of the court could be established by a separate convention between the States parties.

26. Finally, his delegation urged the Commission to make efforts to reconcile the different views on the inclusion in the draft Code of crimes against the peace and security of mankind of the breach of treaties designed to ensure international peace and security, such as arms control and disarmament treaties, as such breaches would, by definition, endanger the peace and security of mankind.

27. Sir Arthur WATTS (United Kingdom) said that recent events in the Persian Gulf demonstrated all too clearly the relevance of the topic of the draft Code of crimes against the peace and security of mankind. The catalogue of the international legal obligations which had been violated was endless. It must be made clear that individuals were personally responsible for crimes of that nature, since the responsibility of the State, if there was such responsibility, was not in itself a sufficient response.

28. With regard to the possible establishment of an international criminal court, his delegation wished first of all to thank the Commission for its swift and helpful response to the General Assembly's request. The report under consideration set out lucidly the issues involved and the various questions which needed to be answered. The undertaking was of great importance at the legal, political and practical levels. The establishment of a standing international criminal court would mark a significant step forward, but if serious thought was to be given to a code of crimes, equally serious thought should be given to the machinery for its implementation. His delegation had five observations on that subject.

29. The first was that, if an international criminal court was to be established, its existence should not in any way affect the jurisdiction of national criminal courts, particularly with regard to the finality of their judgements, where those courts already had jurisdiction under existing treaties. Relevant examples could

(Sir Arthur Watts, United Kingdom)

be found under the Geneva Conventions and under various international conventions which provided for jurisdiction on the principle aut dedere, aut judicare.

30. The second was that it would be better to continue to consider the undertaking in the context of the implementation of the Code, and not as a separate matter. The third was that the international court should not be considered as the only way to deal with international crimes: national criminal jurisdiction could provide more appropriate and more effective ways of dealing with many international crimes. The traffic in narcotic drugs was a case in point: it was doubtful whether an international court would be a useful ally in the war against drugs. The primary justification for an international criminal jurisdiction must be that there were international crimes, such as waging aggressive war, crimes against humanity, etc., which could not be dealt with by other means.

31. The fourth point was the widespread assumption that the proposed court would be a court of first instance, such as the Nürnberg Tribunal, and not an appeal court or a court of review. It would be easier, as the Commission had acknowledged, to make the court an appeal court than to give it the task of actually conducting trials.

32. Finally, and, once again, as the Commission had pointed out, the prosecution of serious international crimes might require prior authorization. Careful consideration should be given to that question, in view of the nature of certain high crimes and the status of those most likely to be accused of committing them. One possibility was for the decision to prosecute them to be taken by a body representing the international community, such as the Security Council.

33. His delegation had certain reservations concerning the Commission's work on the draft Code. First, the conceptual problems to which many delegations had already drawn attention had still to be addressed. The Commission should concentrate on the most serious and widely recognized international crimes. The debate on the concepts of complicity, conspiracy and attempt had also been difficult. Those questions were technical and invited controversy. In any event, it was impossible to comment in detail on the draft articles without seeing them in the context of the Code as a whole, and that was not yet ready.

34. His delegation welcomed the attention given by the Commission to the question of illicit traffic in narcotic drugs. It looked forward with great interest to proposals which could contribute to the suppression of that traffic. It remained to be seen whether the inclusion of an express provision in the Code would have any practical benefit. The best way of tackling that problem might perhaps be through the better enforcement of national criminal law, combined with improved international co-operation.

35. Draft article 16 on international terrorism, which had been provisionally adopted (note 27) was rather surprising. It was worrying that the article appeared to exclude the majority of terrorist acts, including such acts as crimes of terrorism, which were already covered by several international conventions. The war against terrorism was as important as the war against drugs; they must both be given the same attention.

36. Mrs. BELLAMINE-DLIMI (Tunisia) said that the draft Code of crimes against the peace and security of humanity was a valuable reference instrument, as it expressed the teachings of the most highly qualified publicists of the world's different legal systems and schools. As such, it could already be applied by the International Court of Justice, since the Statute of that Court stipulated, in Article 38, paragraph 1, that the Court should apply: "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

37. The planned instrument should contain, on the lines of criminal law, a preventive dimension and a punitive dimension. The Code would therefore be incomplete if it did not stipulate the punishments applicable to the crimes which it covered. It should also follow the terminology of international treaties. Finally, it should give greater space to the question of State responsibility, particularly with regard to crimes against peace, which were usually committed by States, as well as to certain crimes against humanity, such as genocide and apartheid.

38. Turning to the "related offences" of complicity, conspiracy and attempt (paras. 33-76), she made two observations of a methodological nature: first, a precise definition of those three concepts was needed, while the task of deciding on their applicability should be left to the competent court; second, the Code could refer to those concepts in the part dealing with general principles and define them subsequently in a specific part.

39. With regard to the concept of complicity, her delegation noted with satisfaction that the new version of draft article 15 (note 27) covered both physical and intellectual acts and addressed the question of the temporal succession of acts of complicity. Thus, aiding the direct perpetrator after the commission of the crime could constitute an act of complicity, provided the intentional element was established. It would also be necessary to specify in paragraph (c) that, in order to constitute acts of complicity, acts occurring after a crime must have been committed on the basis of an understanding or an agreement, entered into before or after the commission of the crime.

40. Secondly, with regard to conspiracy, the Special Rapporteur had rightly included a separate provision on that notion in the draft Code. The original version of draft article 16 (note 28) seemed preferable to the new version (note 29) in that it was more explicit about the question of responsibility and, in the two alternatives in paragraph 2, highlighted both the individual and collective dimensions of responsibility. In other words, each participant in a conspiracy was responsible not only for the acts he personally committed but also for all the acts committed collectively by all the parties to the conspiracy. Only the degree of culpability and the penalty imposed would vary according to individual participation. Furthermore, conspiracy differed from complicity in that, in the case of conspiracy, no distinction was made between direct perpetrators and indirect perpetrators.

41. Lastly, with regard to attempt, it was a concept that was not included in the charters of the international military tribunals or in the Principles of

(Mrs. Bellamine-Dlimi, Tunisia)

International Law Recognized in the Charter of the Nürnberg Tribunal, nor was it in the 1954 draft Code. Her delegation agreed with the definition of attempt given in the new version of draft article 17 (note 31) but considered that that concept should be reserved for crimes against humanity, since it was difficult, in the case of crimes against the peace and security of mankind, such as aggression, to distinguish between commencement of execution and the act itself.

42. With regard to the breach of a treaty designed to ensure international peace and security (paras. 89 to 92), her delegation considered that a separate draft article should not be included in the draft Code, for various reasons: the draft article unjustifiably focused on treaty obligations; it violated the principle of universality which must underlie the concept of crimes against the peace and security of mankind; it discriminated against States which had entered into those treaties as compared to States which had not done so; and finally, it raised fundamental questions of treaty law, e.g., in the area of validity and interpretation of treaties.

43. On the subject of international illicit traffic in narcotic drugs (paras. 77 to 88), her delegation supported the Special Rapporteur's initiative in submitting two draft articles, one treating international traffic in narcotic drugs as a crime against peace and the other treating it as a crime against humanity, in that it threatened the health and well-being of mankind as a whole and thus of humanity.

44. Referring to the question concerning the establishment of an international criminal jurisdiction (paras. 93 to 157), she said that developments in international relations and the scale reached by organized international crime contributed to making the idea increasingly feasible. The misgivings of those who pleaded national sovereignty and the régime of universal jurisdiction of national courts could be countered by the argument that an international court had the recognized advantage of uniform application of the law. With regard to the subject-matter of such jurisdiction, out of the three options presented by the Special Rapporteur (para. 123), her delegation preferred option (i), according to which the court would exercise jurisdiction over the crimes defined in the Code, namely the most serious crimes as agreed to by the international community. To those who might object that that option would delay the establishment of the international court until the Commission's work on the draft Code had been completed, it could be contended that before establishing the court it was necessary to define the subject-matter on which it would be required to give judgement.

45. On the subject of submission of cases to the court, her delegation considered that all States parties to the court's statute should have the right to submit cases, in view of the gravity of the crimes it would have before it. As to penalties, the solution would be to draw up a general description of applicable penalties, leaving it to the judge to apply the appropriate penalty in each specific case. From the point of view of structure, the court should be a permanent body established by an amendment to the Charter of the United Nations as an organ of the Organization, and composed of judges representing the main legal systems of the world.

46. Mr. KEITA (Mali) said that a favourite maxim of the late lamented Paul Reuter had been: "The law is made to ensure the peace and progress of States in order and justice". From that point of view, the establishment of the international criminal court giving judgement on the basis of a code of crimes against the peace and security of mankind would be a salutary initiative, since it would fill a gap in the international legal order. The Code and the court would foster the development of law and the improved functioning of the judicial system, placing international society to an even greater extent under the rule of law.

47. Referring more specifically to the provision on international terrorism (article 16 of the draft articles provisionally adopted so far by the International Law Commission, para. 158), he would be in favour of supplementing the definition given in the draft articles by adding the direct or indirect effects of an act of terrorism on the security of mankind, irrespective of whether the perpetrator was an individual or a State and of whether there was any intellectual, physical or other form of complicity. "Aggression" (article 12), "threat of aggression" (article 13) and "intervention" (article 14) were considered crimes against peace, but situations arising after the commission of the act of aggression must also be punishable, since they were illicit. In the cases of State terrorism directed against another State or another people, ensuing situations took the form of massacres and occupation, annexation and succession of States. Each of those three successive but closely-linked phases - threat of aggression, aggression and effect of aggression - should therefore be condemned as crimes against the peace and security of mankind, all three being illicit acts to be included in the draft.

48. There was, however, another aspect of the threat to or a breach of peace which raised difficulties. That was the deliberate refusal by some States to respect and implement the binding decisions of the Security Council when they were aimed at putting an end to an act of aggression and to its illicit consequences. Should that henceforth be regarded as a crime against peace?

49. Turning to draft article 18, entitled "Recruitment, use, financing and training of mercenaries", he pointed out that a mercenary was an outlaw motivated by his ideology or desire for gain, if not both. Mercenarism was indeed a crime against peace that warranted inclusion in the Code. His delegation therefore agreed with that draft article, which tied in with General Assembly resolution 44/34. With regard to draft article X, concerning illicit traffic in narcotic drugs, his delegation considered that such traffic definitely came into the category of crimes against mankind.

50. With regard to the possible establishment of an international criminal jurisdiction to judge crimes against the peace and security of mankind, his delegation was of the view that the proposed court should have exclusive jurisdiction over the crimes against peace defined in the Code, and concurrent jurisdiction over crimes against the security of mankind, to be defined in the same Code.

(Mr. Keita, Mali)

51. However, the draft concerning the "breach of a treaty designed to ensure international peace and security" was not advisable. The provision would be virtually inapplicable in view of the countless exceptions that would have to be allowed for, which would limit its scope. There were already many other relevant texts in treaty law and concerning the responsibility of States. Jurists might well be reminded of the wise Latin maxim: "Too many laws are harmful".

The meeting rose at 4.25 p.m.