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SUMMARY RECORD OF THE 47th MEETING

Chairman: Mr. AZZAROUK (Libyan Arab Jamahiriya)

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The meeting was called to order at 3.05 p.m.

AGENDA ITEM 135: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-NINTH SESSION (continued) (A/42/10, A/42/429 and A/42/179)

AGENDA ITEM 130: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (continued) (A/42/484 and Add.1)

1. Mr. BROWN (Australia) welcomed the constructive work and the progress achieved by the International Law Commission on the draft Code of Offences against the Peace and Security of Mankind. Australia had no objection to the replacement of the word "offences" with the word "crimes" in the title of the draft Code, provided that there was no assimilation of the kind of criminality arising from the gross and exceptional acts targeted in the draft Code with criminality of the kind usually dealt with in municipal systems of law. The Code should be limited in scope to acts of individuals and should list punishable offences before stating the underlying principles which characterized those offences. The questions of intent and whether crimes should be specified as crimes under international law would thus be more easily dealt with. The presence of criminal intent was not, however, of minor importance. On the contrary, it was essential to the establishment of individual responsibility for a criminal act.

2. With regard to article 2, the characterization or determination by the draft Code of what constituted a crime against the peace and security of mankind should be entirely independent of internal law, in accordance with the Nürnberg Principles. In that connection, the second sentence of the draft article was also useful. His delegation did wonder, however, whether such an article was necessary, given that article 1 specified that the crimes concerned were crimes under international law. His delegation also wondered why in the second sentence of that draft article the wording of Nürnberg Principle II, referred to on page 24 of the Commission's report (A/42/10), had not been retained.

3. With respect to draft article 3, his delegation had some concern about the reference to "motives". Responsibility would require intent; once such intent had been shown, responsibility would not depend on motive. Paragraph 2 of draft article 3, dealing with the relationship between individual and State responsibility, was very important, as was draft article 5, which provided for no statutory limitation regarding crimes against the peace and security of mankind.

4. Regarding draft article 6, it was important that it should spell out the judicial guarantees which were part of basic human rights, particularly in view of the nature of the Code. With respect to draft article 7, which provided for the principle non bis in idem, Australia supported the proposal by the Special Rapporteur to add a second sentence providing that the principle might be taken into consideration by an international criminal court, if justice so required (A/42/10, para. 39).

(Mr. Brown, Australia)

5. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he expressed his delegation's regret that some members of the Commission had sought to frustrate progress on a topic that was clearly of importance to the peoples of all nations. Australia endorsed the criteria which the Special Rapporteur had incorporated in draft article 1 regarding the scope of the draft articles as a whole, namely, that there should be a transboundary element, that the activity should give rise to a physical consequence and, that those physical events should have social repercussions. In particular, proof of a cause-and-effect relationship between the activity and the injury was essential in establishing liability.

6. Regarding the question whether it was appropriate for the Commission to consider the issue of liability in such cases, there was a clear basis in State practice for work to be done in formulating principles in that regard. Numerous bilateral and multilateral treaties imposed on States the obligation not to damage the territory, environment or interests of other States, and recognized the need to take measures to prevent injury by one State to the environment of another State. Nevertheless, the Commission's function was to promote the progressive development of international law and it would be essential to fill gaps in areas such as injury resulting from the use of nuclear energy. Much international law-making in recent years had been undertaken by other bodies and by diplomatic conferences. The Commission should grasp the opportunity which existed for it to contribute to such work.

7. The question of strict liability, mentioned in paragraph 186 of the report, was very important. There was indeed a connection between strict liability and prevention: to discourage a person contemplating a certain activity from carrying it out by making him aware of the direct consequences that would follow. Moreover, the general principle set forth in paragraph 194 (d) of the report provided a solid basis for the next stage of work on the topic. Australia hoped that at the Commission's next session, members would give more attention to finding common ground, rather than defending traditional positions.

8. With regard to relations between States and international organizations, his delegation was pleased that only three meetings had been devoted to that topic during the Commission's most recent session, because the subject would better not be dealt with at all. Prospects for a single multilateral convention on the privileges and immunities of international organizations were dim when one considered that each international organization, its members and its host Government had, where it had been deemed necessary, signed a headquarters agreement or a general agreement on privileges and immunities. Those agreements could be modified according to circumstances. His delegation therefore did not see the need for another multilateral convention on the subject.

9. Regarding the Commission's working methods, he commended to Commission members document A/CN.4/L.410, in particular the sections dealing with the Commission's working methods and related topics, which contained useful suggestions. His delegation was pleased that the Commission had given serious attention to the General Assembly's request that it should thoroughly consider its methods of work

(Mr. Brown, Australia)

in all their aspects. In that connection, it was alarming to learn that the principal law-making body of the United Nations was so lacking in ordinary office resources. The Secretary-General should rectify the situation.

10. It was also surprising to note the serious understaffing of the Codification Division. Even in a period of financial crisis, such a situation was unjustifiable and his delegation again called on the Member States that had not yet fulfilled their financial obligations to do so in order to enable the Legal Counsel to make all necessary assistance available to the ILC.

11. As for the planning of the Commission's activities, he commended the efforts made by that body and particularly the schematic outline submitted in the annex to its report. The question arose as to what topics the ILC might best take up for codification and development.

12. The proposals of the representatives of Canada and the Netherlands on ways of making current treaty-making activities available to members of the ILC deserved to be considered. Without making a full survey of international law, the Secretary-General could ask the specialized agencies and other relevant bodies to prepare a brief survey of their past and present activities in that area and to establish a guide for the members of the ILC as well as for States Members wishing to make suggestions concerning future work.

13. The Secretary-General could also invite Member States to express their views on the subject. It should be recalled that there were several topics that had been identified but not taken up by the Commission following the 1948 and 1971 surveys. They included the recognition of States and Governments, the recognition of acts of foreign States, extraterritorial questions involved in the exercise of jurisdiction by States, extradition and the right of asylum, domestic jurisdiction and the treatment of aliens.

14. Mr. EDWARDS (United Kingdom) said in connection with the Code of Offences against the Peace and Security of Mankind that his country's doubts on the subject had in no way been allayed, notwithstanding the efforts made by the Commission. Nevertheless, the United Kingdom was prepared to accept the proposal made by ILC to replace the term "offences" with the term "crimes", if that was generally acceptable and if it could learn more about the history underlying the original adoption of the term "offences". The existing terminology had not caused difficulties for many years and his delegation was cautious about introducing a change, particularly since a change to "crime" laid emphasis on some very difficult issues about the nature of an international crime and the punishment of the offender.

15. As for the five draft articles provisionally adopted at the thirty-ninth session, the United Kingdom wished to reserve its detailed comments until it could see the complete shape of the draft articles. It was particularly concerned that, in relation to draft article 1, the Commission had decided not to continue trying to establish the essential elements of the concept of a crime against the peace and security of mankind and instead had decided to draw up a list of crimes. Although

(Mr. Edwards, United Kingdom)

it had emphasized in very broad terms that the crimes were those "which affect the very foundations of human society", there were always grounds for concern to the extent that the single test of extreme seriousness, while essential for the kind of offence being dealt with, was not in itself enough. Until proper criteria were established, there was bound to be considerable disagreement as to whether or not any particular activity should be regarded as an offence against the peace and security of mankind. As in the case of the draft articles on international watercourses, one must first identify the basic concept involved.

16. As for draft article 11 concerning the criminal responsibility of Heads of State or Government, consideration would have to be given to the relationship between that provision and the immunity from jurisdiction that usually protected such people.

17. As to whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals, it was clearly of little use to prepare a code of crimes, whether crimes against the peace and security of mankind or ordinary crimes under national law, if it could not be effectively implemented. The preparation of a code of crimes against the peace and security of mankind must therefore involve the establishment of a competent judicial body to implement it. The Commission should take up that task.

18. Mr. AL-ADHAMI (Iraq) said that, given the importance which Iraq attached to the question, his delegation had warmly welcomed the initial draft articles of the Code of Offences against the Peace and Security of Mankind. The texts could not be evaluated definitively until the Commission had completed the entire draft. Iraq nevertheless wished to make a number of preliminary observations concerning fundamental points that had been raised during the discussion and particularly those on which its opinion had been requested.

19. First of all, it welcomed the results achieved during the consideration of draft article 4 (A/42/10, para. 36). The question raised in draft article 4, that of the establishment of an international criminal jurisdiction, could not be dealt with definitively until the Commission had received from the General Assembly the opinions it had requested in subparagraph 69 (c) (i) of its report on the work of its thirty-fifth session (A/38/10). At the present stage of its work, the Commission should take a flexible approach to the question. As for the expression "under international law" placed in square brackets in draft article 1, it was clear that the disagreement over the retention or elimination of that reference or its insertion in another paragraph in fact reflected a disagreement about the legal source to be reflected in the draft Code and about its scope. That was therefore not merely a question of form but a question of substance, which could not be dealt with at the present stage of the Commission's work.

20. In connection with draft article 7, under which it would be impossible to judge a person twice for the same crime (the non bis in idem rule), his delegation endorsed the opinion of the Special Rapporteur on the subject (A/42/10, para. 37).

(Mr. Al-Adhami, Iraq)

21. As for paragraph 67 c of the ILC report, requesting comments from Governments concerning the conclusions contained in paragraph 69 (c) (i) of the report of the Commission on the work of its thirty-fifth session (A/38/10), his delegation referred the Commission to the opinion which Iraq had expressed in the Sixth Committee on 9 November 1983 at the thirty-eighth session of the General Assembly.

22. Iraq endorsed the Commission's recommendation to change the title of the topic in English in order to achieve greater uniformity between the different versions (A/42/10, para. 65).

23. As for the question dealt with in chapter III of the report, "The law of the non-navigational uses of international watercourses", Iraq commended the way in which the work of the ILC had been directed and expressed the hope that under the enlightened stewardship of the new Special Rapporteur the Commission would soon be able to draw up an instrument which was of crucial importance for many members of the international community. The Commission had already spent many years considering that difficult question. At the current stage, however, it had ample data and should be able to complete the draft articles quite quickly. The theoretical debate, which had been necessary at the beginning, should now give way to a search for specific solutions acceptable to States.

24. As for the content of the draft articles - both those considered at the previous session of the Commission and those adopted provisionally - Iraq had already made preliminary observations in earlier debates. It would nevertheless like to examine a number of essential points that had been referred to in the report before the Committee.

25. He wished first of all to make it clear that he endorsed the "framework agreement" method and associated himself with the views expressed in paragraph 93 of the report (A/42/10).

26. As for draft article 10 concerning the general obligation to co-operate, Iraq was astonished to hear the doubt expressed by certain States in that connection (A/42/10, paras. 95-99). It was difficult to see how there could be any progress in considering the question if States did not feel any obligation to co-operate with other States. The real point was the urgent need to codify the non-navigational uses of international watercourses. In that area, the interests of States must be taken into consideration rather than geography. In that connection, his delegation endorsed the opinion of the Special Rapporteur concerning the obligation to co-operate (A/42/10, para. 98). That was a fundamental commitment designed to facilitate respect for the more specific commitments set forth in the draft articles.

27. Iraq agreed with the view of the Special Rapporteur that procedural rules were necessary in order to give effect to the substantive provisions in the draft and in that respect wished to make a number of general comments.

28. In the first place, with regard to paragraph 1 of draft article 12, Iraq preferred alternative B because it found it more in conformity with the procedure

(Mr. Al-Adhami, Iraq)

laid down in the previous articles. With regard to draft article 13, Iraq would like to see it include a more specific provision which would prevent consultation and negotiation being used to upset the necessary balance between the rights and the interest of States. Iraq attached great importance to the compulsory settlement of disputes for that was an imperative need for the effective implementation of the draft articles. It did not share the opinion of the Special Rapporteur for whom it sufficed to mention the means laid down in Article 33 of the Charter. The application of that Article would not lead to the rapid settlement of disputes between the watercourse States and might give rise to international problems involving economic and social interests which it would be later difficult to solve.

29. With regard to draft articles 2 to 7 which the ILC had adopted provisionally at its previous session, Iraq had one new observation to make. It concerned the return to the term "system" or "systems" to designate international watercourses. He recalled what he had already pointed out on 7 November 1984, at the thirty-ninth session of the General Assembly, when he had supported the Special Rapporteur's proposal to delete that word: the use of the word "system" added nothing to the clarity of the text and the fact that such a term was not being used did not mean that the Commission was confining itself to the consideration of surface waters, and neglecting other elements of the resources in question.

30. With regard to the question of international liability for injurious consequences arising out of acts not prohibited by international law (A/42/10, chap. IV), Iraq had already made a number of preliminary comments during previous sessions. In any case, his delegation unreservedly supported the conclusions set forth in paragraph 194 of the report (A/42/10), for they fully reflected the views of his country. His delegation also expressed the hope that ILC would begin as soon as possible consideration of draft articles on the subject and would rapidly progress in the right direction.

31. The question of relations between States and international organizations (A/42/10, chap. V), was still at a very early stage. Moreover, paragraph 219 of the report appeared to suggest that ILC was still far from being able to submit draft articles on that topic. It would perhaps be useful to devote sufficient time to the preparation of the studies requested. His delegation hoped that the methodology proposed would make it possible to complete a text during the present term of office of the members of the Commission.

32. Iraq welcomed the serious manner in which the Commission had considered its procedures and working methods. Everyone fully realized the importance of that question. The discussions which had taken place on the subject in the Commission had given rise to the formulation of a large number of useful views which should make it possible to improve the operation of the Commission. The most valuable result of the discussion had been the preparation of a programme of work covering the whole duration of the Commission's mandate and providing all the guidelines necessary to ensure the necessary progress. The discussion was continuing, for the Commission had not concluded its consideration of such problems as the Drafting Committee, its role, its methods, the time allocated to it and the best way of

(Mr. Al-Adhami, Iraq)

linking its discussions with those of the Commission itself and the supervision of its work by that body. Another question still under consideration concerned the Special Rapporteur, his functions, the help he needed to facilitate his task and the importance that should be given to the examination of the various subjects on the agenda of the Commission.

33. With regard to the plans concerning the activities of the Special Rapporteurs, mentioned in paragraph 231 of the report (A/42/10) and which were annexed to that document, Iraq expressed the hope that the activities described could be concluded successfully during the present term of the office of the members of the Commission.

34. Mr. AL-BAHARNA (Bahrain) supported the ILC's recommendation that it should be authorized to hold again sessions of 12-week duration. With regard to the planning of its activities for the term of office of its members, he considered that the agenda described in paragraph 232 of the report (A/42/10) was quite satisfactory. On the question of staggering the consideration of some topics, he shared the views of the ILC set forth in paragraph 234 of the report and hoped that it would consider that idea annually. His delegation was also gratified to note that the Commission intended to improve the procedures of the Drafting Committee. If computers could increase the efficiency of the Commission, then they should be used.

35. The Draft Code of Offences against the Peace and Security of Mankind should deal only with such offences as threatened the very foundation of modern civilization and the values it embodied. No practical purpose would be served by including in the Code offences that either were not grave or had already been covered by other international instruments. The elaboration of both substantive and procedural rules should be based upon the principles of all the main legal systems of the world so that it was as widely acceptable as possible. That was all the more necessary because the Code dealt with offences that were committed by individuals, unlike other topics that generally bore directly upon States qua States. That fact might influence the conduct of States when the proposed Code came up for ratification. He urged the Commission and the Special Rapporteur to be very circumspect and to take into account the various relevant factors.

36. The Commission's progress on that topic was quite satisfactory.

37. The words "under international law" appearing in the square brackets in draft article 1 must be included because the offences enumerated in the draft Code constituted crimes in international law by virtue of the Code. The sense of article 1 would be even clearer if it were reformulated in the following manner: "The crimes against the peace and security of mankind, enumerated in this draft Code, constitute crimes in international law".

38. His delegation fully agreed with the underlying idea in draft article 2 but found the expression "internal law" somewhat misleading especially when it was juxtaposed to the term "international law". It should be replaced by the expression "national law".

(Mr. Al-Baharna, Bahrain)

39. His delegation agreed with the view of ILC that the draft Code should rely on the International Covenant on Civil and Political Rights for guidance as to its provisions on judicial guarantees (ibid., para. 2 of the commentary on article 6). However, it had some difficulty in understanding the purport of the qualifying words "minimum guarantees" in draft article 6. While their use in article 14 of the International Covenant was understandable, reference to them in draft article 6 would create expectation that there could be other guarantees also. His delegation therefore suggested that "minimum" should be deleted. It also suggested that the words "have the right to" in the English text of paragraph 1 should be deleted as the words would only confuse the application of the presumptive rule of innocence. For the same reason, the word "right" should be deleted from paragraph 2. Finally, his delegation suggested that article 6 should be entitled "Legal safeguards" instead of "Judicial guarantees".

40. Bahrain also had reservations on article 8, paragraph 2, which made the offences against the peace and security of mankind seem imprecise and ambiguous.

41. Both the ILC and the Special Rapporteur should examine more carefully article 9 and eventually formulate each of the exceptions as a separate article defining its content.

42. His delegation recognized the importance of procedural rules in the development of a legal régime for the non-navigational uses of international watercourses and in principle supported the theory that the procedural rules would help watercourse States to avoid committing any breach of the substantive principle of the reasonable and equitable use of the waters.

43. The text of article 10 was too vague and abstract. It should be redrafted so as to relate to the principle of reasonable and equitable use of international watercourses on the one hand, and the principle of optimum utilization on the other. It should be transferred to part II, concerning general principles.

44. Articles 11 to 15 should be so formulated as to balance the conflicting uses of the waters by the watercourse States. By no means should they constitute an obstacle to the reasonable and equitable, or optimum, use of the waters of international watercourses. As they stood, they appeared to be slightly tilted in favour of the State which had to be notified about proposed uses. In particular, the first sentence of paragraph 1 of article 14 appeared unduly severe on the notifying State. It was gratifying to note that the Commission had agreed to delete paragraph 3 of that article, which sought to impose a sanction on violators of article 11. It was to be hoped that the Special Rapporteur would revise articles 11 to 15 so as to make them more precise, balanced and equitable. The interests of the watercourse States were divergent, and every effort should be made to produce draft articles that were most likely to be politically acceptable.

45. On the question whether customary international law recognized the concept of international liability for injurious consequences arising out of acts not prohibited by international law, he noted that a similar question had arisen in the Commission during the discussion of the concept of jus cogens in the law of

(Mr. Al-Baharna, Bahrain)

treaties. That had not prevented the Commission from codifying and developing the rule of jus cogens. In the current case, it should not allow itself to be dragged into theoretical questions of that nature. In that connection, his delegation agreed with the Special Rapporteur that there were sufficient treaty and other forms of State practice to provide an appropriate conceptual basis for the topic (ibid., para. 143). Moreover, as the topic dealt with an aspect that entailed the development of international law, the question of customary international law was of little importance.

46. His delegation agreed with the Special Rapporteur that the concept of strict liability was known in most domestic legal systems, not only in the common-law systems (ibid., para. 186), although there might be variations in the practical application of the concept. However, the Commission might consider it expedient to rely on the general principles of law recognized by nations, rather than on a single legal system. It might also lay down the factors to be taken into account in the determination of the extent of liability and measure of damages.

47. His delegation was convinced that both prevention and reparation came within the scope of the topic, and that a link should be established between them. In that connection, he referred to the statement in paragraph 179 of the report concerning the linkage which already existed in terms of rules of evidence, as was seen in the Corfu Channel case. It was equally important to find a basis in substantive provisions for the linkage between prevention and reparation. Otherwise, the criticism concerning the excessive importance attached to procedures would remain unanswered.

48. His delegation hoped that the word "jurisdiction" would be added after "territory" in article 1, as well as in articles 3 and 4, so as to put beyond controversy the identity of the entity to which liability was attributed.

49. Bahrain welcomed the fact that the new Special Rapporteur on the second part of the topic of relations between States and international organizations had accepted the validity of the outline prepared by the previous Special Rapporteur. His delegation shared the view that a few problems should be selected for consideration during the first stage, such as those concerning international organizations, and that much more delicate problems, such as those relating to international officials, should be left till later (A/CN.4/401, para. 30). It was also in agreement with the Commission's decision to codify the existing rules and practices in the various areas indicated in the outline, and to identify the existing lacunae of specific problems that called for progressive development of international law (A/42/10, para. 219). The Secretariat studies of 1967 and 1985 should be useful in that connection.

50. Draft article 1 presented by the Special Rapporteur in 1985 (A/40/10, note 213) was somewhat narrowly conceived. The words "to the extent compatible with the instrument establishing them" appeared to be restrictive. The attributes mentioned in subparagraphs (a), (b) and (c) of paragraph 1 gave the impression that international organizations could have no other attributes. His delegation was also somewhat intrigued by the words "under the internal law of their member

(Mr. Al-Baharna, Bahrain)

States"; such internal law was hardly relevant. His delegation agreed with the Special Rapporteur's proposal to make paragraph 2 a separate article - article 2. It might be useful, however, to add the words "and international law" at the end of the paragraph.

51. The outline submitted by the Special Rapporteur (A/42/10, note 147) appeared to be well conceived. It was hoped that the Special Rapporteur would soon propose draft articles for consideration by the Commission.

52. His delegation shared the Commission's concern regarding the understaffing of the Codification Division (ibid., para. 248). It urged the Secretary-General to remedy that situation, for the research carried out by the Division was more essential than ever to the success of the Commission's work.

53. Mr. EL BASHIER (Sudan) said that the draft Code of Offences against the Peace and Security of Mankind must define crimes precisely so as to leave no doubt. The provisionally adopted solution, namely, to define the crimes by enumeration, was satisfactory. It would be useful, however, to return to the conceptual definition and include among the criteria the intent and the serious nature of the act.

54. The Commission should subsequently consider extending the draft Code to include the responsibility of States.

55. Mercenarism and terrorism should be included in the list of crimes against the peace and security of mankind.

56. His delegation hoped that in future the Commission would give all due priority to the important topic of the law of the non-navigational uses of international watercourses. The Sudan welcomed the approach suggested by the Special Rapporteur in his second and third reports (A/CN.4/399 and Add.1, and A/CN.4/406 and Add.1 and 2). It was important to strike a balance between the different rights and interests of riparian States on the one hand, and issues of sovereignty of States and their right to benefit from the natural resources within their territories, on the other. While acquired rights must be taken into consideration, the interests of the riparian States did not necessarily conflict with such rights. The interests were usually dealt with in bilateral agreements and should not be affected by a framework agreement.

57. As to the choice between the terms "international watercourse" and "international watercourse system", he said that the term "system" was preferable because it was more accurate and better reflected the geographical situation. It was very important to reach a consensus on that point. The best course was to seek the assistance of experts in working out a clear, concrete and scientific definition.

58. His delegation favoured a balance-of-interests approach that took into account both the concept of equitable use and the concept of shared natural resource. In that connection, all the relevant factors should be taken into consideration, not only the demographic factor.

(Mr. El Bashier, Sudan)

59. It was hard to imagine that all States would want to bind themselves by a convention governing a matter which might not directly affect all of them. Besides, the use of rivers did not pose the same problems everywhere. The most sensible approach was to prepare a framework agreement comprising residual rules whereby the States concerned might find the necessary guidance.

60. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, it was important to preserve the sovereignty of all States. Efforts must be made to reconcile a State's right of action within its own territory and its right not to be harmed in its own territory by acts of other States. The principles of good-neighbourliness, co-operation and good faith should afford the basis for agreed procedures entailing the obligation to give notification of activities and of their possible consequences and, when consequences occurred, to negotiate in good faith.

61. His delegation was pleased to note that, in planning its future programme of work, the Commission had complied with General Assembly resolution 41/81.

62. Lastly, it stressed the importance of the International Law Seminars for the developing countries and trusted that all States would contribute generously so that they could continue in the future.

63. Mr. GØRØG (Hungary) said that the Commission had come no closer to completing the draft Code of Offences against the Peace and Security of Mankind than it had a decade earlier, because its members were divided on a few theoretical issues although the majority were of the same mind regarding several basic questions such as the content ratione personae and the content ratione materiae of the draft. While his delegation reserved the right to take a formal position later, when privy to the full text of the draft Code, it provisionally accepted draft article 1 and the commentary concerning the Commission's option for the second solution. An enumerative definition seemed more advisable for both theoretical and practical reasons, whereas a conceptual definition of the essential elements of crimes against the peace and security of mankind would open the way to differing intepretations and leave little hope for the elaboration of a broadly acceptable text.

64. The expression "under international law", in square brackets, might introduce some confusion into the interpretation of the draft article. Since, however, those who favoured its inclusion had put forward some interesting arguments, the expression should be left in brackets for the time being and the matter should be decided at a later stage.

65. His delegation had no difficulty in accepting draft article 2 as worded, but was of the view that the substance of the provision was expressed in the first sentence, the second being merely a development of the first. It also accepted draft articles 3 to 5 together with the commentaries thereto.

(Mr. Górog, Hungary)

66. His delegation deemed it necessary to retain draft article 7 as worded, but its reasoning differed from that set forth in paragraph 37 of the report (A/42/10). It shared the view of those members of the Commission who maintained that universal jurisdiction was contrary to the principle of sovereignty and that effect should be given to the territorial principle as applied and laid down in the Charter of the Nürnberg Tribunal. In other words, in the current circumstances, his delegation could not agree to the establishment of an international court of criminal jurisdiction which would be essentially a supranational court for trying crimes against the peace and security of mankind. The draft article should be retained, however, because such a provision could apply not only in the case of conflict between universal and national jurisdiction but also when application of the territorial principle involved the jurisdiction of two or more States. It followed logically that there was no need for a second paragraph, as suggested by the Special Rapporteur in paragraph 39 of the report (A/42/10). The Latin title of the article should be replaced by another title, since it was difficult to find the exact equivalent of the term non bis in idem in certain legal systems not based on the classical tradition.

67. With regard to paragraph 67, subparagraph (c), of the report (A/42/10), the mandate conferred on the Commission by the General Assembly did not extend to the preparation of the statute of an international court of criminal jurisdiction competent to try individuals. Accordingly, while it accepted paragraph 1 of draft article 4, as proposed by the Special Rapporteur, it considered paragraph 2 unnecessary because it presupposed the existence or establishment of a universal jurisdiction, to which it was opposed, and at the same time weakened the territorial principle laid down in paragraph 1. Finally, he noted with satisfaction that the Special Rapporteur had also proposed the deletion of paragraph 2 of draft article 8. He agreed with those members of the Commission who considered that the reference to the "general principles of law recognized by the community of nations" might allow room for interpretations that were too broad and would be at complete variance with the principle nullum crimen sine lege.

68. The question of a Code of Offences against the Peace and Security of Mankind was of such relevance, politically and for international law, that it should continue to be the subject of a separate agenda item.

69. Mr. KOZUBEK (Czechoslovakia) said that the general definition laid down in article 1 of the draft Code of Offences against the Peace and Security of Mankind was sufficient, because the crimes in question would be expressly defined in subsequent sections. With regard to the term in square brackets, it would be advisable to specify, in the body of the article, that the offences covered by the Code were crimes under international law. There was no reason for abandoning the wording adopted by the Commission as early as 1950 in connection with the formulation of the Principles of International Law as recognized in the Charter and Judgment of the Nürnberg Tribunal and in 1954 in the first draft Code of Offences against the Peace and Security of Mankind.

(Mr. Kozubek, Czechoslovakia)

70. Draft article 2, which provided that the characterization of an act as a crime against the peace and security of mankind was independent of internal law, was also acceptable to his delegation, as was draft article 3 which was based on generally recognized principles of international criminal law. His delegation wondered, however, whether the wording of paragraph 2 of draft article 3 should not conform to that of the draft articles on State responsibility, and whether, in the French version, the words "la responsabilité en droit international d'un Etat" should not be replaced by "la responsabilité internationale d'un Etat".

71. With regard to draft article 5 on the non-applicability of statutory limitations to crimes against the peace and security of mankind, Czechoslovakia had been one of the first States to ratify the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. It favoured the reaffirmation of that rule in the draft Code, and saw no justification for the agruments of those who questioned that provision on the ground that it might be difficult to establish proof when many years had passed since the crime had been committed. Such fears had proved baseless in the cases of, for instance, Klaus Barbie, Andrija Artukovic, Ivan Demyanyuk. Czechoslovakia opposed any attempt to cast doubt on the rule stated in draft article 5. It also had no difficulty in accepting draft article 6 relating to judicial guarantees.

72. With regard to those draft articles submitted by the Special Rapporteur which had still not been adopted by the Commission, it was essential to adopt measures to guarantee that offenders against the peace and security of mankind would be prosecuted no matter where, or in which State, they happened to be. For that reason draft article 4 should provide for a system based on universal jurisdiction for the prosecution of those who had committed such crimes. The principle of territoriality should be given precedence, so that the State in whose territory the crime had been committed should be the first to exercise justice provided that it had requested the extradition of the offender. In that connection, it should be expressly provided that, for the purposes of extradition, crimes against the peace and security of mankind were not to be regarded as political crimes and that extradition of a person who had committed such a crime could not be refused. His delegation further considered that the draft Code should not preclude the possibility of establishing an international body of criminal jurisdiction.

73. No major problems had emerged with regard to draft article 7, probably because it was very close to article 14, paragraph 7, of the International Covenant on Civil and Political Rights. His delegation considered, however, that it called for a more detailed explanation so as to avoid any ambiguity. The non bis in idem principle was a rule of internal law and general international law did not impose on States an obligation to recognize as valid judgements delivered by the authorities of another State in criminal cases. That could have implications conflicting with the force of res judicata if the States concerned were not bound by an international agreement on the matter. Draft article 7, as presented by the Special Rapporteur, seemed to imply that, by adopting the Code, the international community would be authorizing any State to prosecute the perpetrators of crimes against the peace and security of mankind. His delegation was not sufficiently convinced that that would be the case.

(Mr. Kozubek, Czechoslovakia)

74. With regard to non-retroactivity, which was the subject of draft article 8, his delegation's position had remained unchanged since the forty-first session of the General Assembly. He would therefore simply refer back to the statement he had made in 1986.

75. Draft article 9, concerning exceptions to the principle of responsibility, was one of the draft articles which had given rise to most questions and doubts. His delegation found it difficult to adopt a clear position on circumstances precluding criminal responsibility in cases of crimes against the peace and security of mankind until a more detailed analysis had been undertaken. With regard to an error of law and the order of a Government or of a superior, his delegation believed that they could constitute, at best, mitigating circumstances but certainly not circumstances precluding criminal responsibility altogether. Such had been the stipulation of article 8 of the Charter of the Nürnberg Tribunal, and his delegation saw no reason why that position should be abandoned or modified.

76. His delegation endorsed draft articles 10 and 11, although it considered that the commentary on the latter draft article unduly reduced its impact by referring only to the official position of Heads of State or Government.

77. With regard to the general principles underlying the draft Code, his delegation wished to stress that the Commission had so far paid almost no attention to prohibition of the granting of asylum to those suspected of having committed crimes against peace, crimes against humanity or war crimes. A provision on that issue had been included in the Declaration on Territorial Asylum, adopted by the General Assembly in its resolution 2312 (XXII), as well as in the draft Convention on Territorial Asylum prepared for the diplomatic conference held at Geneva 10 years ago. It should nevertheless be emphasized that the asylum problem could have considerable impact on the possibility of effective prosecution of the perpetrators of crimes against the peace and security of mankind, as far too many examples during the post-war period had demonstrated. His delegation was deeply convinced that the Rapporteur and the Commission should pay due attention to the problem of asylum in relation to crimes against the peace and security of mankind.

78. His delegation attached particular significance to elaboration of the draft Code of Offences against the Peace and Security of Mankind, since it was in keeping with efforts to establish a comprehensive system of international peace and security. It was most hopeful that the Sixth Committee would continue to pay due attention to the draft Code, to consider the question as a separate agenda item and to accord it priority.

79. Mrs. MULINDWA-MATOVU (Uganda) noted that, despite the work already accomplished on the draft Code of Offences against the Peace and Security of Mankind, progress had been slow. With regard to the title of agenda item 130, her delegation shared the view of delegations which favoured the retention of the original English title, using the word "offences", as it believed that the word "crime" would limit the impact of the Code.

(Mrs. Mulindwa-Matovu, Uganda)

80. In draft article 1, relating to the definition of offences against the peace and security of mankind, her delegation believed that the seriousness of such offences was an essential element. The characterization of an offence should be independent of internal law in order to guard against perpetrators' hiding behind internal legislation. In that respect, it would be appropriate to ask States to bring their national legislation into line with the Code once it was completed and adopted by the General Assembly. With regard to responsibility and punishment, covered by draft article 3, her delegation believed that the draft Code should include a provision on responsibility irrespective of motive and that the punishments laid down for perpetrators would strengthen the effect of the Code. On judicial guarantees, it was of the view that the principles of natural justice should be applied in the legislation of any progressive society.

81. Since her country was situated at the source of the Nile, the tributaries of which flowed through a number of African countries, and also shared several lakes with neighbouring countries, her delegation took particular interest in the work of the Commission on the law of the non-navigational uses of international watercourses. Uganda was party to various agreements regarding the use of international watercourses. It was a member of the Kagera River Basin Organization and was currently in the process of negotiating other agreements with other riparian States, with a view to avoiding conflicts over the use of such watercourses. Her delegation believed that general rules and principles should be drafted, to serve as guidelines for negotiations on future agreements. Given the diversity of watercourses, the Commission should exercise caution and confine itself to the formulation of generally acceptable guidelines and principles.

82. While recognizing the need for co-operation among riparian States, her delegation believed that the Commission should take due account of the sovereignty of States over their natural resources and of their territorial integrity.

83. In the view of her delegation, draft articles 10 to 15, in stipulating that other riparian States must give their consent, imposed excessively strict limitations on any new use of watercourses which involved a potential risk. While reflecting the need to show moderation and restraint, the rules should be made more flexible in order to allow States to exercise their sovereign rights over their natural resources. The draft articles should be objective and should take into consideration the practical interests of all the States concerned.

84. Mr. ROUCOUNAS (Greece) said that the list enumerating crimes against the peace and security of mankind should be accompanied by a definition of concepts if the scope of the Code was to be delimited even more precisely. Care would also have to be exercised to ensure that there was no conflict with the treaties in force. His delegation believed that the reference to international law between square brackets in draft article 1 should be retained, as it would dispel doubts over the content of the article and strengthen the justification for including it in the text. Once the offences were defined in the text, the wording of draft article 5 on the non-applicability of statutory limitations to crimes against the peace and security of mankind would have more meaning.

(Mr. Roucounas, Greece)

85. With regard to relations between the Code and internal law, it was important to ensure that States parties, when incorporating the Code into their internal legislation, made provision for the imposition of corresponding penalties. With regard to judicial guarantees, the implicit reference in draft article 6 to the International Covenant on Civil and Political Rights constituted a satisfactory solution, since it avoided the proliferation of texts addressing the same subject and strengthened the Covenant itself.

86. His delegation reaffirmed its support for the establishment of an international criminal court. By considering that question, the Commission would overcome the difficulties arising, for example, from incorporation of the non bis in idem rule, which was still widely recognized in internal legal systems.

87. Lastly, the Commission should avoid giving the impression that it was basing itself on two working hypotheses at the same time - the hypothesis of a parallel jurisdiction and the hypothesis of an international criminal jurisdiction. It should establish norms applicable in all cases as a first stage, and nothing would prevent it from subsequently preparing the statute of an international criminal jurisdiction.

88. With regard to the law of the non-navigational uses of international watercourses, the Special Rapporteur had proposed a series of rules of conduct based on the fundamental concept of co-operation. The obligation to co-operate, which was so necessary in today's interdependent international community, was already stated explicitly in various instruments on the use of international watercourse systems.

89. In the draft articles under consideration co-operation worked in two directions: in draft article 10, which should be brought closer to article 6, paragraph 2, co-operation served to support the application of the principle of equitable and reasonable utilization; and in articles 11 to 15 the principle of co-operation was embodied in procedural rules designed to preserve the balance between the rights and obligations of the riparian States. In his delegation's opinion, it was less a question of spelling out the content of the notion of equitable utilization than of providing for an exchange of notifications and information in order to achieve a common purpose, namely optimal utilization and the preservation of a natural resource, the prevention of risks and the rational utilization of watercourses in the light of the essential needs of the riparian States.

90. As in the past, the Greek delegation feared that the term "appreciable harm" might cause difficulties of application. In its view, it would be better to use the term "adverse effect" suggested by the Special Rapporteur in paragraph 103 of the report. The notification envisaged in draft article 11 would be fully effective only if it was given promptly for any new use or activity, with a view to preventing pollution and harmful effects of any kind which might result in acts or omissions by both States and by individuals under the jurisdiction of those States. Furthermore, the notification procedures proposed in draft articles 11 to 15 should not be confused with the general obligation to exercise due care,

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which had a broader scope than the obligation to notify. His delegation supported draft articles 11 to 15, but it was convinced that the Commission should consider at a later stage, the preparation of an appropriate system for peaceful settlement of disputes along the lines suggested by the representative of the Netherlands.

91. At its thirty-ninth session the Commission had adopted in first reading draft articles 2 to 7 on the 1980 working hypothesis, which represented the fundamental guideline applicable to any codification operation. His delegation thought that the kind of framework agreement envisaged in paragraph 93 of the report ought to reflect the existing rules of international law drawn from the practice of States and international jurisprudence and thus form the basis for any instrument on the topic.

92. His delegation had noted the use in draft article 2 of the terms "uses" and "measures of conservation", which had the merit of taking into account the diversity of possible situations. However, it would have preferred to say "measures of conservation, protection and development".

93. Draft articles 3, 4 and 5 indicated a desire to balance the interests of all the States of a watercourse system, regardless of whether they were parties to a given agreement. Draft article 6, which set out the fundamental rights and obligations of the States concerned, made equitable utilization the cornerstone of the regulations and was based on the two concepts of rationalization and participation. Lastly, the factors to be taken into consideration in the assessment of equitable utilization, which were listed non-exhaustively in draft article 7, constituted a good starting point for the further work on the draft article.

94. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that his delegation appreciated the subtlety of the Special Rapporteurs' approach, which was to apply a régime of reparation for harm caused by a State to the persons and property of another State when the harm could not be linked to the violation of a norm of conduct or a primary rule. The process was to establish legal links between the harm and the reparation and to make a distinction between traditional responsibility and objective responsibility (liability), inserting an obligation of prevention between the dangerous activity, or the harm, and the reparation. The work on the question was useful, for a legal framework must be established for doubtful cases in which there was no line of demarcation between the lawful and the unlawful. With regard to a possible system of prevention, the draft moved beyond reparation as such towards new forms of international co-operation to combat the dangers inherent in scientific and technological progress.

95. However, if that line of thinking was pursued, the prevention régime drew closer and closer to the traditional régime of State responsibility. Once there was a mechanism based on the obligation to exercise due care, any violation of that obligation would itself constitute a violation of a primary rule and therefore an unlawful act triggering liability. That meant that the Commission would be

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building a residual and sometimes interim régime applicable to lawful activities which, by violating the obligation of prevention, might generate unlawful consequences.

96. In the past year the international community had been enriched by three important international instruments dealing with co-operation and prevention in the technological field: the two 1986 Vienna Conventions on the advanced warning system and on assistance in the event of nuclear or radiation accidents and the 1987 Montreal Protocol on the ozone layer. The adoption of those instruments indicated a development in collective thinking which might make the Commission's task even more important, and his delegation thought that the Commission's approach should not be too restrictive. It might deal with activities other than "transboundary" activities or with an indicative list of activities involving risks and, most importantly, with the area of geographical application in the light of the jurisdiction and control of a State within and outside its territory, studying in greater detail the possible content of draft articles 2, 3 and 4 in order to obtain a general picture of the topic. Lastly, the concept of "physical consequences" should not overshadow other situations mentioned during the Commission's debates.

97. Mr. CRUZ (Chile) said that it was his Government's policy to support the draft Code of Offences against the Peace and Security of Mankind in so far as it was a unanimously accepted instrument containing effective procedures for actual implementation and the rules contained therein made political interests subordinate to law and justice.

98. Draft article 1 showed the Commission's preference for a definition by an enumeration referring to a list of crimes defined in the draft. In its present wording, it clearly meant that only the crimes specified in the text fell in the category of crimes against the peace and security of mankind, and it thus avoided situations in which crimes of that type would have to be qualified by a subjective and lengthy interpretation of the notion of crime against mankind which disregarded the universal principle of criminal law according to which any offence must be defined precisely in all its constituent parts. In those circumstances, and without prejudice to possible changes in the wording, his delegation wished the text to remain as it was, without the expression in square brackets ("under international law"), which might cause confusion in the interpretation of the provision by raising the question of relationships between international and internal law.

99. Because of the enumerative nature of the definition of crimes against the peace and security of mankind, the real scope of the first article would depend on the content ratione materiae of the Code, in other words, of what it would qualify as crimes against the peace and security of mankind. Chile would prefer to confine itself in that connection to the most serious crimes, that was to say those which aroused the greatest horror because of their cruelty, savagery and barbarity. It believed, in particular, that international terrorism, which was so frequent and so ruthless in modern times, should be on the list to be included in the draft Code.

(Mr. Cruz, Chile)

100. Concerning draft article 3, his delegation pointed out that ILC had been unable to reach consensus on the international responsibility of States, despite a lengthy debate. Only the criminal liability of the individual had been included at that stage, without prejudice, however, to future consideration of the application of the idea of the international criminal responsibility to the State, in light of the opinions which Governments would express. Paragraph 2 of the article mentioned the international responsibility of the State and thus departed from the idea of limiting the draft, at that stage in the work, to the criminal liability of individuals. However, for the time being, international law had not evolved sufficiently and there did not seem to be sufficient consensus in the international community to permit settling the theoretical and practical difficulties that adopting a régime of criminal responsibility of States would involve. It therefore seemed unlikely, to put it mildly, that draft article 3, paragraph 2, would have to be kept.

101. Concerning draft article 5, his delegation pointed out that many criminal legislations established the contrary principle to that of the non-applicability of statutory limitation and provided for statutory limitation on criminal actions and on punishment. However, the characteristic gravity of crimes against the peace and security of mankind would justify, in the case of certain countries, the rule set forth in the draft article. Notwithstanding that comment, his delegation agreed that it was necessary to make a distinction between war crimes, which were subject to statutory limitation, and crimes against the peace and security of mankind, in respect of which greater strictness could apply from the point of view of the non-applicability of statutory limitations.

102. His delegation had no objection to the content of draft article 6. It noted that draft article 7 gave effect to a principle of law which was recognized in many countries but which none the less gave rise to controversy over whether the principle non bis in idem could be invoked in the event of the establishment of an international criminal court, since by virtue of the pre-eminence of international law, such a jurisdiction would, in principle, only have competence to deal with the crimes referred to in the draft. Noting that there was no consensus on the establishment of an international jurisdiction and in order to prevent the possibility that, in the case of there being more than one jurisdiction that was competent to deal with the same violation, the person being prosecuted might incur several successive sentences, his delegation deemed it desirable to maintain the principle set forth in the draft article. It felt, furthermore, that ILC should, before discussing the proposal to add a second paragraph as proposed by the Special Rapporteur (A/42/10, para. 39), it was first necessary to settle the question of the establishment of an international criminal jurisdiction. On that point, his delegation felt that it would be preferable, in the mean time, for ILC to continue its work on the elaboration of a draft code and, once agreement had been reached on the substance, for it to seek consensus on the study by the international community of a system of criminal jurisdiction which would have competence only in respect of individuals.

(Mr. Cruz, Chile)

103. Concerning the draft articles on the law of the non-navigational uses of international watercourses, his delegation would prefer to see the term "international watercourses" used in article 2 rather than the term "international watercourse systems" which seemed excessively vague in an article which was supposed to define the scope of the entire draft articles. The same applied to article 3.

104. The proposed text of article 4 seemed to be flexible enough to cover the many situations to which it would apply. Finally, in respect of draft articles 6 and 7, his delegation thought it necessary to take into account the principles and recommendations adopted by the United Nations Conference on the Human Environment and the various international agreements in effect on the issue, which demonstrated very specifically to what extent specific circumstances had shaped the bilateral and multilateral norms established in that complex field. Considering that the aim was to establish a body of rules which would serve as a "framework" and which would be defined more precisely in specific agreements, his delegation looked favourably on the work carried out by ILC.

105. With respect to international liability for the injurious consequences arising out of acts not prohibited by international law, he stressed that the issue must include prevention and reparation in the context of general principles which were very well summarized in paragraph 194 of the report (A/42/10).

106. Finally, he looked forward with interest to the comments and observations of Governments on the draft articles concerning the régime of jurisdictional immunity of States and their property and to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. He hoped that with the co-operation of Governments, ILC would quickly come to a final agreement. He also wholeheartedly supported the comments of ILC on its programme, procedures and working methods (A/42/10, p. 126 ff).

TRIBUTE TO THE MEMORY OF H.E. MR. SEYNI KOUNTCHE, PRESIDENT OF THE SUPREME MILITARY COUNCIL AND HEAD OF STATE OF THE REPUBLIC OF THE NIGER

107. At the invitation of the Chairman, members of the Committee observed a minute of silence in tribute to the memory of His Excellency Mr. Seyni Kountché, President of the Supreme Military Council and Head of State of the Republic of the Niger.

108. Mr. PHIRI (Malawi), on behalf of the group of African States, Miss AL-ALAWI (Bahrain), on behalf of the group of Asian States, Mr. KAKOLECKI (Poland), on behalf of the group of Eastern European States, Mrs. AGUIRRE (Argentina), on behalf of the group of Latin American and Caribbean States, and Mr. GIACOMINI (France), on behalf of the group of Western European and other States, paid tribute to the memory of His Excellency Mr. Seyni Kountché and asked the delegation of the Niger to convey their condolences to the Government and people of the Niger and to the late President's family.

109. Miss RAKIATOU (Niger) thanked the Chairman and all the delegations for their condolences on the occasion of the death of President Seyni Kountché, one of the most highly respected Heads of State in Africa. She would convey their sympathy to the Government and people of the Niger and to the late President's family.

The meeting rose at 6 p.m.