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SUMMARY RECORD OF THE 49th MEETING

Chairman: Mr. AZZAROUK (Libyan Arab Jamahiriya)

later: Mr. MIKULKA (Czechoslovakia)

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

AGENDA ITEM 135: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-NINTH SESSION (continued) (A/42/10, 429 and 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. TANOH (Ghana) said that his delegation was in favour of adopting a conceptual formulation providing a common thread and basis for the designation of acts that constituted crimes against the peace and security of mankind. Any definition must take into account the seriousness of the act and of its effects. His delegation hesitated to endorse a specific reference to the elements of intent and motive because, in its view, the subjectivist psychological predisposition of the offender was inherent, indeed evident, in the nature and serious consequences of the acts in question. Further, intent and motive would seem to preclude State criminality, an issue which was not yet settled and was the subject of controversy.

2. His delegation was, of course, mindful that the scope of the draft articles, as evidenced by article 3, was confined to individual responsibility. However, to the extent that offences such as aggression, apartheid and colonialism were the acts of States exercising their sovereignty in the form of laws, institutions and policies, the exclusion of State culpability at the current stage would not be a sufficient basis to include elements such as intent in a definition that could prejudice the emergence of State criminality as squarely within the scope of the conceptual underpinnings of the present draft Code.

3. The use of the phrase "under international law" in article 1 posed little difficulty for his delegation. Indeed, the substance of article 2, whereby acts or omissions falling within the category of crimes against peace and security were independent of their characterization by internal law, seemed to validate the concept of crime under international law.

4. The content of articles 5 and 6 was eminently satisfactory to his delegation. Likewise, it had no difficulty with the formulation of the non bis in idem rule proposed for draft article 7. However, the proposal made by the Special Rapporteur in paragraph 39 of the report to add a second paragraph presumed that all States subscribing to the statute of the future international criminal court would accord it the necessary jurisdiction to determine matters regulated by the Code. His delegation had doubts as to the validity of such an assumption, as well as to the discretionary application of the rule limited only to the sentencing of offenders. Indeed, the issue of conflicting jurisdiction as between internal courts and an international criminal court suggested that questions of jurisdiction would, in practice, evolve somewhat unevenly, with the consequence that the determination of the competent court for the trial of offences regulated by the Code would not be simple. The proposal in paragraph 39 did not take cognizance of that reality.

(Mr. Tanoh, Ghana)

5. On the question of the law relating to the non-navigational uses of international watercourses, his delegation applauded the approach taken by the International Law Commission in formulating general, residual rules applicable to the right of States to use such watercourses. However, the formulation of general and residual rules to be adopted by watercourse States within the framework of specific arrangements and agreements should proceed from certain principles which stipulated obligations where such obligations were requisite for the rational, beneficial and orderly use of watercourses in their unitary whole, in the interest of all the States concerned.

6. His delegation was extremely sensitive to the notion of sovereign use and its political and legal implications. However, in so far as the physical expression of watercourse systems was such that specific uses had clear consequences for the rights of other States situated along the watercourse, it was exceptionally important to evolve international standards of use that gave concrete expression to interdependence and co-operation not merely as politically desirable but also as legally mandated. Accordingly, his delegation welcomed the stipulations in draft article 10 as proposed by the Special Rapporteur. As the draft article stood, however, it was not clear what responsibility was established by the failure to co-operate or indeed what constituted "good faith", the absence of which incurred responsibility.

7. The use of terms such as "appreciable harm" (draft art. 9), "adversely affect" (art. 4, para. 2) and "affected to an appreciable extent" (art. 5, para. 2) unfortunately created uncertainty about the magnitude of the damage or harm which gave rise to the obligation to consult or notify the affected States or indeed the nature of the types of use prohibited by article 9.

8. Moreover, within the terms of article 9 there seemed to be a tension between prohibited use that might cause appreciable harm and the inclusion of such use in a watercourse agreement. It was not clear how, within the standards to be established by the draft articles, a type of use that might cause appreciable harm became none the less legal by reason of its incorporation in a watercourse agreement. Such a likelihood rendered ineffectual any attempt to establish minimum standards of use, as outlined in article 6 on equitable and reasonable utilization and developed in article 7. Consequently, it was his delegation's understanding that, for the minimum standards to have legal force, the application and adjustment by watercourse States of the residual general principles (as provided for in art. 4, para. 1) should not do violence to the minimum standard of reasonable and equitable utilization.

9. In conclusion, his delegation agreed on the need for balance in the formulation of the draft articles in a context where the exercise of sovereign rights could create conflicts. It would be unfortunate if the procedural safeguards for notified States and the elements of consultation and co-operation were to be formulated in such a way that they could serve as a pretext for unjustified litigation and the frustration of sovereign rights of use.

10. Mr. SOBOLEV (Byelorussian Soviet Socialist Republic) said that the drafting of the Code of Offences against the Peace and Security of Mankind was one of the most important issues before the United Nations in the field of the codification and progressive development of international law: the completion and speedy adoption of such a Code would strengthen the peace and security of peoples. At its thirty-ninth session, the International Law Commission had expended considerable effort on examining the question and the draft articles submitted had been reworded in the light of the discussions in the Sixth Committee and the written comments of Governments to the Commission. The new texts submitted by the Special Rapporteur were more in keeping with the Code's objectives and more successfully reflected trends in the evolution of international law. However, some provisions would gain by being examined in greater depth and being made more specific.

11. The Code should more clearly reflect the concept of criminal responsibility of individuals for the most serious and dangerous crimes against peace and mankind. It should contain a general definition of those crimes, with criteria relating to their chief characteristics. Those criteria might be, for example, the fact that the acts in question constituted a threat to the survival of mankind and civilization, a violation of the most fundamental of human right, namely the right to life, or a violation of the fundamental principles of international law.

12. Crimes against the peace and security of mankind were special in character because of their seriousness or of the danger which they posed, the extent of their consequences, the cruelty and monstrous nature of their motives or because they threatened the foundations of human comedy. Those were indeed crimes and not offences.

13. Articles 9, 10 and 11 of the draft Code seemed to provide a number of reasons which would permit the perpetrators of crimes against the peace and security of mankind to escape responsibility. Bearing in mind articles 7 and 8 of the Charter of the Nuremberg Tribunal, provisions must be drafted which would completely preclude that possibility. The Code must ensure that persons guilty of such crimes were punished. To a certain extent that was achieved in article 3, which provided for responsibility regardless of motive, and article 5 regarding non-applicability of statutory limitations. Those two provisions should be further strengthened.

14. Article 4 required more detailed discussion. His delegation considered that the perpetrators of crimes against the peace and security of mankind should be tried and punished in the countries where they had committed the crimes. In addition, States should undertake to extradite such individuals to those countries. That solution had been adopted in several international instruments, for example in the 1943 Declaration of Moscow, in the 1945 London Agreement, in the Convention on the Prevention and Punishment of the Crime of Genocide and in the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the General Assembly on 3 December 1973 on the proposal of the Byelorussian SSR.

(Mr. Sobolev, Byelorussian SSR)

15. In order to strengthen the effectiveness of the Code, States should also adopt appropriate legislative, judicial and administrative measures for the pursuit, extradition, trial, and severe punishment of persons guilty of crimes against the peace and security of mankind. Finally, his delegation considered that preparation of the draft Code should be accelerated and that the item should remain on the agenda of the General Assembly as a separate item.

16. Mrs. LENGALENGA (Zambia) said that her delegation generally supported draft articles 1, 2, 3, 5 and 6 of the draft Code of Offences against the Peace and Security of Mankind which had been provisionally adopted. The words "under international law", within square brackets in article 1, should be deleted since the crimes dealt with in the Code had already been defined and did not need to be characterized as "crimes under international law". The Code should enumerate the crimes against the peace and security of mankind so as to distinguish them from ordinary crimes which did not call for such heavy punishment. Article 6, on judicial guarantees, was particularly welcome as it provided an essential protection for the accused. The non bis in idem rule incorporated in article 7 was a fundamental rule of criminal justice. The Special Rapporteur's approach to possible difficulties which that rule might create was satisfactory. It was to be hoped that the Commission would find a way to ensure that the rule was not abused. Her delegation favoured the establishment of an international criminal jurisdiction and the extension of the Commission's mandate to include preparation of a statute for such a jurisdiction.

17. The law of the non-navigational uses of international watercourses was of particular interest to Zambia. Articles 2 and 7, which had been provisionally adopted, were generally satisfactory. The expression "international watercourse" was preferable to the expression "international watercourse system", which was too broad. The principle of equitable and reasonable utilization and participation set out in article 6, as well as the principle of co-operation set out in article 10, should be based on respect for the sovereignty, territorial integrity, equality and mutual interest of all watercourse States. The duty to co-operate was a necessary foundation for the law governing the relations of watercourse States and no state should be allowed to prevent another from protecting its interests in relation to a watercourse. Her delegation supported the drafting of a framework agreement.

18. Mr. VENKATRAMIAH (India) said that article 1 of the draft Code dealing dealt with the definition of crimes against the peace and security of mankind, was generally acceptable to his delegation. The enumerative approach adopted by the Commission had resulted in a more realistic definition than the conceptual approach. Every offence, according to a fundamental principle of criminal law, must be precisely characterized as to all its constituent elements; a conceptual definition might lead to subjective interpretations and should therefore be avoided. The words "under international law", which appeared in square brackets, might be retained until a final decision could be taken.

19. Under article 2, the determination of what constituted a crime under the draft Code was independent of internal law. That provision strengthened the draft Code

(Mr. Venkatramiah, India)

in that it did not allow an accused to invoke internal law in his defence. Paragraph 1 of article 3 was a replica of a well-established principle of criminal jurisprudence in all legal systems: the motives of an accused were irrelevant.

20. Paragraph 2 of article 3 preserved the international responsibility of the State for acts or omissions attributable to the State by reason of offences of which individuals were accused. The State remained responsible and was not permitted to exonerate itself of responsibility by invoking the prosecution of the individuals who had committed the crime. His delegation supported that provision. It also endorsed article 5, which incorporated the principle of non-applicability of statutory limitations to the offences prohibited by the draft Code and thus enhanced the Code's deterrent effect.

21. Draft article 6 drew heavily on article 14 of the International Covenant on Civil and Political Rights and ensured minimum judicial guarantees for an individual charged with a crime against the peace and security of mankind. That article enhanced the acceptability of the draft Code to States and his delegation supported its adoption. It also approved the inclusion of the non bis in idem rule in draft article 7, in view of the principle of universal jurisdiction stipulated in the draft Code. Nevertheless, the second paragraph of that draft article exposed an accused to a second trial in spite of his conviction or acquittal. That provision should therefore be thoroughly examined before its incorporation in the draft Code.

22. Concerning the law of the non-navigational uses of international watercourses, draft articles 2 to 7, which had been provisionally adopted by the Commission, constituted a step forward in the direction of the progressive development and codification of international law. The approach adopted by the Commission for the solution of that complex issue was noteworthy. Draft article 4, which had been provisionally adopted, reflected what was known as the framework agreement approach. It preserved the freedom of States to apply and adjust the provisions of the draft articles to the characteristics and uses of a particular watercourse or part thereof. The general principles contained in the framework agreement were undeniable and the legal régime envisaged would serve as a model for the negotiation of future agreements. His delegation reserved its right to comment at a later stage on the draft articles proposed by the Special Rapporteur.

23. Concerning international liability for injurious consequences arising out of acts not prohibited by international law, his delegation noted that the Commission had reached conclusions regarding the development of norms pertaining to transboundary physical consequences adversely affecting persons or things.

24. His delegation appreciated the Commission's efforts to propagate international law through its International Law Seminar arranged with the voluntary contributions of Member States. It was to be hoped that the Seminar would be continued in the future.

25. Mr. RICALDONI (Uruguay) said that as far as chapters II, III and IV of the report under consideration (A/42/10) were concerned, the discussions on whether certain of the draft provisions came under codification or the progressive development of international law were of little interest from the practical point of view. What mattered most was the quality and effectiveness of the articles proposed. Solutions that consisted both in laying down general principles and in drawing up lists of situations should not be mutually exclusive. As such lists could never be exhaustive, the general rules or principles should make it possible to determine whether a given provision was applicable in situations that were not expressly provided for.

26. Article 1 of the draft Code of crimes against the peace and security of mankind should contain a second paragraph highlighting certain of the specific characteristics of such crimes, such as their seriousness, the extent of their effects and the motive of their perpetrator (ibid., para. (2) of the commentary to art. 1). Then, crimes that did not involve a serious violation of an essential international obligation would not be considered as falling within the scope of the Code.

27. Noting that according to paragraph (2) of the commentary to article 2, that article "is without prejudice to internal competence in regard to ... criminal procedure, the extent of the penalty etc. ...", he expressed concern that, if such were the case, the practical utility of the Code might be greatly compromised, because national laws could provide for procedures or penalties that would flout moral standards and international law.

28. The rule on statutory limitations in article 5 was justified, provided that the Code defined the crimes; otherwise, the rule might legitimize indefinitely legal proceedings before national courts for reasons completely alien to the concerns to which the Code sought to respond.

29. His delegation was in favour of extending the Commission's mandate to include the drafting of a statute for an international criminal court competent to try and punish individuals.

30. The draft articles on the law of the non-navigational uses of international watercourses raised two essential questions.

31. The first question concerned the nature of the rules that the future instrument would contain. His delegation shared the view that they would have to be residual rules applicable in the absence of bilateral or multilateral agreements. It should, however, be made clear that in the absence of such agreements, the rules would be binding. The framework agreement should also state that the provisions of bilateral or multilateral agreements would not take precedence over those of the framework agreement if the first-mentioned provisions affected States that were not parties to those agreements.

(Mr. Ricaldoni, Uruguay)

32. The second question concerned the need to protect the interests of all States that might be affected by the use of an international watercourse. The success of such a general instrument would inevitably depend upon a body of provisions similar to those set forth in draft articles 11 to 15. In the absence of such provisions, account would not be taken of the correlation between the rights of States and the obligation to co-operate and to negotiate - which derived from international interdependence - an obligation highlighted in article 10 and article 13, paragraph 4.

33. His delegation preferred alternative B of article 12, which provided specific mechanisms for resolving the main problems that notification of new uses might pose.

34. An expression such as "water basin", instead of the expressions "international watercourse" and "international watercourse systems" proposed as alternatives in article 2, would have enabled the scope of the draft articles to be better delimited. If, however, a choice must be made between the two latter expressions, the concept of "watercourse systems" as defined in the working hypothesis adopted in 1980 (ibid., para. 72) was preferable.

35. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation did not agree with the approach adopted, in so far as it was based on a concept of liability which presupposed fault and which numerous recent international conventions had rejected. That emerged in particular in the wording of article 4, according to which the State of origin was liable only if "it knew or had means of knowing" that the activity "creates an appreciable risk of causing transboundary injury". In view of the nature of the injury that might be caused by activities that were lawful from the standpoint of international law, it would have been preferable to opt for absolute liability. In addition, the concept of "appreciable risk" did not take sufficient account of the seriousness of the injury that might result from the activity in question.

36. It was regrettable that article 1 did not specify that the scope of the draft articles was restricted to "activities that are not prohibited by international law".

37. His delegation also had reservations about article 2. The definition of the "affected State" in paragraph 4 might be interpreted as applying in cases where persons in a State other than the State where the activity was carried out were affected by that activity, but where there had been no transboundary effect. That would be along the lines of the "protection of nationals" concept, which Uruguay rejected if it was not the subject of specific agreements. The phrase "any matter in respesct of which a right is exercised or an interest is asserted" in article 2, paragraph (2) (c), was dangerously ambiguous: the liability of the State of origin should be absolute only if there was certainty about the activities that originated in that State.

(Mr. Ricaldoni, Uruguay)

38. It was not excluded that it "might be better for States to focus on particular types of activity and to avoid drafting a general treaty" (ibid., para. 138), but it was essential to draft some provisions setting forth general criteria for the interpretation work that the implementation of legal rules inevitably entailed.

39. Mr. TUVAYANOND (Thailand) said that any law that failed to take fully into account the reality of life in the society that it purported to regulate would be condemned to become a dead letter. Unfortunately, contemporary international relations had seen a proliferation of instruments which were too ambitious and too idealistic and which States had brandished against other States for political reasons. The Commission's work could be effective and acceptable to Member States only if it were based on objective realities.

40. For Thailand, an agricultural country dependent upon international watercourses that crossed or bordered its territory, the question of the law of the non-navigational uses of international watercourses was vital. Although, from the standpoint of international law, States had the permanent right, which was an attribute of sovereignty, to decide matters concerning their natural resources, that right had certain limits; it was widely recognized that in exercising it within its territory, a watercourse State had the obligation not to cause substantial injury to other watercourse States. Hence, any draft articles on the question must reflect those realities, the concept of historical use and the special dependence of the international watercourse States concerned.

41. Thailand preferred the term "international watercourse" to "international watercourse system", which was far too broad and ambiguous. The expression "appreciable adverse effects" was also too vague. It invited divergent interpretations and, hence, the controversy and disputes that the draft articles professed to avoid. It would be preferable to replace the expression with more explicit wording, such as "substantial injury" or "serious harm".

42. Thailand had serious doubts about the advisability of endorsing the principle formulated in draft article 11, namely, that watercourse States contemplating a new use were obligated to notify all co-watercourse States and furnish them with the relevant technical data and information required for an evaluation of the potential risk of the proposed new use. The principle was virtually impossible to enforce. On the contrary, certain States might exploit that obligation for purposes that were alien to the objectives of the draft articles. The obligation might ultimately give veto power to each watercourse State by allowing it to withhold its consent to a new use contemplated by another State.

43. Referring to draft article 4 on watercourse agreements, he said that only when an agreement was applicable to the entire international watercourse could all co-riparian States of that watercourse ask to participate in its negotiation and its conclusion. Otherwise, that opportunity should be offered only to those States which were directly concerned or were likely to sustain substantial injury from the application of such an agreement.

(Mr. Tuvayanond, Thailand)

44. In draft articles 11 to 14, it would be premature and unrealistic to impose rigid procedures leading to compulsory settlement of disputes. Besides, failure to comply with articles 11 to 13 per se should not entail State responsibility, except in the case of serious injury caused by a new use of an international watercourse.

45. In draft article 12, the Special Rapporteur's proposal to provide for a "suspensive effect" of the period for the reply to a notification would be acceptable only if it required the co-watercourse States which felt threatened to establish by objective evidence that the projected use would truly impair their use of the watercourse and that it would cause them irreparable harm.

46. Thailand accepted in principle draft articles 3, 5 and 6 of the draft Code of crimes against the peace and security of mankind. However, the words "under international law" in article 1 should be deleted, as they raised the complicated issue of the relationship between international law and domestic law. That wording would create a loophole by which certain States could allow offenders to go unpunished, as crimes "under international law" were not defined ipso facto as crimes under domestic law. Moreover, if the régime of universal jurisdiction over that type of offence was to be established, the principle of non bis in idem should apply in all cases, so that the offenders could be tried and punished only once, unless there were still other charges against them. Finally, it was doubtful that the principle of imposing harsh punishment on a State would be universally accepted in practice.

47. Mr. Mikulka (Czechoslovakia) took the Chair.

AGENDA ITEM 128: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES AND NORMS OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER: REPORT OF THE SECRETARY-GENERAL (A/42/483; A/42/354-E/1987/110)

48. Mr. FLEISCHHAUER (Under-Secretary-General, The Legal Counsel), introducing the report of the Secretary-General on the progressive development of the principles and norms of international law relating to the new international economic order (A/42/483 and Add.1), said that, in response to the General Assembly's request in its resolution 41/73, States had submitted their views and comments to the Secretary-General on the most appropriate procedures for completing the elaboration of the process of codification and progressive development of the principles and norms of international law relating to the new international economic order. The General Assembly could thus decide at its forty-second session on the forum that would be entrusted with the task and make a final decision after taking into account the proposals and suggestions made by Member States.

49. Mr. CRUZ (Chile), referring to the Secretary-General's report, said that his country endorsed the measures to create a world economic environment that was more stable and conducive to just and equitable development; to integrate economic growth and international trade in the light of the growing interdependence of the world economy; to find a comprehensive solution to financial, monetary and international-trade problems; to promote international economic co-operation and

(Mr. Cruz, Chile)

the exploitation of opportunities offered by multilateral and regional economic organizations; to consolidate the right to growth and development through an ongoing dialogue which would ultimately lead to the recovery of the world economy and burden-sharing with regard to the external debt, particularly among debtors, creditors, multilateral financial institutions and private banks; to establish a direct link between debt, trade and development; and to increase financial flows to debtor nations and establish a stable, equitable monetary system conducive to development.

50. A greater number of States must submit their views and comments in order to provide a broader picture of the situation. In any case, progressive development of the principles and norms of international law in question must begin with the principle of requiring genuine co-operation among States, with a view to deriving a concept of international economic security through a consideration of the legal mechanisms to attain that end and of the real economic problems encountered by the developing countries. A realistic approach was in order, for there was no point in adopting or codifying legal norms which were nothing more than an exercise in wishful thinking. The advent of a new international economic order would depend on the ability of States to find practical solutions to a number of serious and pressing problems which they would have to face together. Those problems ranged from the external debt and international monetary and financial instability, to the rise of protectionism and restrictive trade practices, the quasi-stagnation of international trade and the selfish economic policies of certain developed countries. Only when those problems were addressed would it be meaningful to consider how the proposed solutions could be consolidated under international law and shaped into principles and norms that would benefit all countries.

51. Mr. ROBINSON (Jamaica), speaking on behalf of Mr. Francis, thanked all the representatives in the Sixth Committee who had shown their confidence in Mr. Francis by supporting his nomination to the International Law Commission.

The meeting rose at 4.30 p.m.