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SUMMARY RECORD OF THE 14th MEETING

Chairman: Mr. LEHMANN (Denmark)

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The meeting was called to order at 10.35 a.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Mr. CHEN Shiqiu (China) said that the adoption of norms to prevent and punish international crimes against the conscience and survival of mankind was an extremely important and politically sensitive task, since the different criminal law theories and practices of various countries had to be borne in mind and since it was essentially a question of the progressive development of international law.

2. The first task at hand was to define the scope of the crimes to be included in the draft Code of Crimes against the Peace and Security of Mankind. His Government had always felt that only the most serious international crimes should be included, and therefore appreciated the fact that the International Law Commission appeared to be reaching a consensus in that regard. In order to overcome disagreement as to the specific crimes that should be included, objective criteria must be applied: the crimes should be those that were directed against the fundamental interests of the international community and the conscience of mankind and consequently threatened peace and security; they should also be sufficiently serious to justify the concern of the entire international community.

3. In the light of those criteria, he believed that the Code ought to include genocide, although the definition of that crime needed to be improved taking into account the views of various countries. As for the crime of aggression, its inclusion depended on whether agreement could be reached on its definition, a question which was closely linked to the provisions of the Charter of the United Nations relating to the mandate of the Security Council. Since the Code would probably be used by the international criminal court, it might be necessary to include the relevant provisions either in the definition of aggression or in the general principles of the Code. The problem of harmonizing the Code and the draft statute of the court would arise in the future.

4. The question of whether the Code should include systematic or massive violations of human rights or crimes against humanity needed to be studied in greater depth. The definition of those crimes was, in fact, rather vague. Moreover, if the definitions contained in the draft adopted on first reading were used, many acts which did not have grave consequences for the world and could be dealt with by domestic law courts would be included in the Code. Lastly, crimes against humanity were generally linked to wars and armed conflict, and there were insufficient grounds for extending their application to times of peace.

5. Crimes which constituted serious violations of the rules and conduct of war could be included. As to the inclusion of other crimes, such as international terrorism and drug trafficking, a full exchange of views on the question was necessary.

6. Mr. YAMADA (Japan) said that his Government followed with interest the work on a draft Code of Crimes against the Peace and Security of Mankind, which would be an essential part of the international criminal law that was to be applied by the proposed international criminal court.

7. With regard to the crimes to be included in the draft Code, he felt that it had been a wise decision to limit the list. A restrictive approach would increase the acceptability of the Code and contribute to its universality, which would be of great importance when the draft Code was adopted as a treaty.

8. Bearing in mind the maxim nullum crimen, nulla poena sine lege, every effort must be made to ensure that the definition of each crime conformed to the standards of precision and rigour required by domestic criminal law. In defining crimes such as genocide, it was necessary to refer to the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 1949 and other treaties. His Government was disturbed by the fact that the Code used such vague wording as "all other inhumane acts" in discussing the crime of violations of human rights and that it did not define the scope of war crimes precisely enough.

9. He recalled that it had been difficult to reach agreement on the concept of "aggression". It was necessary to elaborate a precise definition of individual criminal responsibility, since the definition adopted by the General Assembly in its resolution 3314 (XXIX) referred to aggression by a State and was not relevant. Under Article 39 of the Charter of the United Nations, the Security Council had responsibility for determining whether an act of aggression had been committed and, in the view of his Government, a determination by the Council that an act of aggression had taken place was a prerequisite for the commencement of trial proceedings relating to the crime of aggression.

10. Concerning applicable penalties, the Commission seemed to prefer the adoption of one set of maximum and minimum penalties applicable to all crimes. However, the matter should be studied further since, in accordance with the principle of legality, the type and content of punishment must be determined in the light of the constituent elements of each crime.

11. Turning to the subject of general principles, he said that the principle of non bis in idem merited further study, since the current wording of draft article 9 might contradict the constitutional provisions of some Member States. Other principles, such as complicity and attempt, which appeared in article 3, and culpability requirements, referred to in articles 11 to 13, must also be given serious study.

12. In principle, the reference to domestic law and international law in draft article 1, paragraph 2, and the wording of draft article 6, on the "obligation to try or extradite", article 8, on judicial guarantees, and article 10, on non-retroactivity, were acceptable to his Government. Further consideration was necessary, however, to keep those principles in line with the draft statute of an international criminal court, the International Covenants on Human Rights and the world's various legal systems.

13. Last, referring to the relationship between the draft Code of Crimes and the draft statute of an international criminal court, he said that the former was meant to provide substantive international criminal laws so that the latter could determine individual criminal responsibility for those crimes. If the crimes were defined in both instruments, not only would the work of the General Assembly be duplicated, but there might be discrepancies between the two instruments, which would hamper the effective functioning of the international criminal court. The principles of non bis in idem and non-retroactivity must also be identical in both instruments.

14. Mr. BIGGAR (Ireland) recalled that on 21 November 1947, the General Assembly, in its resolution 177 (II), had directed the International Law Commission to prepare a draft Code of Offences against the peace and security of mankind. Forty-eight years later, it could not be denied that the international legal community had laboured on the draft Code, but neither could it be denied that its efforts had thus far been in vain.

15. In international life acts were committed which were so heinous that their perpetrators must be brought to justice. International law should pronounce on such matters, not only to ensure that justice was done but also to highlight the universal recognition of their extreme seriousness. That process was fraught with obstacles and difficulties and therefore called for a positive and cautious approach in order to balance principle with the practical and to avoid the production of one more document for the archives of jurisprudence.

16. The Code would establish a new system of penal law and must therefore include definitions of the crimes covered, jurisdiction to try the accused, mechanisms to bring him to trial, provisions for trial proceedings, safeguards for the rights of the accused and norms to govern the imposition of penalties in the event of conviction. All of those matters presented difficult problems. In that connection, his Government felt that it would be appropriate to study the relationship between a convention for a code of crimes and the establishment of an international criminal jurisdiction.

17. In principle, his delegation was satisfied with the general direction taken by the work of the Commission. The decision to deal with only 6 of the 12 crimes originally considered was a realistic one.

18. With regard to aggression, some delegations doubted that it would be appropriate for the Security Council to determine, under article 39 of the Charter, whether an act of aggression had taken place. They would rather base their approach to the definition of aggression on General Assembly resolution 3314 (XXIX). On that matter, his delegation felt that, apart from the primacy of the Charter in international law, the realities of international life must be taken into account. The international community could not, therefore, ignore the role and work of the Security Council.

19. In the future it might be necessary to add to or amend the list of crimes. Doubts had been expressed regarding the inclusion of illicit traffic in narcotic drugs. His Government had taken strong measures to fight that crime and would press strongly for its inclusion in any future Code.

20. Mr. ZAIMOV (Bulgaria) welcomed the progress made in the work on the draft Code of Crimes against the Peace and Security of Mankind. The Code was proof that the Commission was capable of meeting the urgent demands of the international community for legal expertise on that question.

21. Bulgaria, which had always supported the establishment of an efficient international mechanism for trying the most serious violations of international law, was committed to the fight against those crimes and was confident that the international criminal court would, in the foreseeable future, become an instrument for deterring the potential perpetrators of such acts.

22. Bulgaria had always stressed the importance of formulating a precise international criminal code that could be applied, not by ad hoc tribunals, but by an international criminal court. The Code should take the form of a draft convention containing provisions that were sufficiently precise to ensure its effective application in the prosecution of individuals.

23. With regard to specific points in the draft text, his delegation could in principle accept the limitation of the list of crimes as proposed by the Special Rapporteur. However, it believed that there were strong arguments for maintaining draft article 26, entitled "Wilful and severe damage to the environment". Such offences might well become a fact of life and, in view of their serious consequences, there was no doubt that they could be characterized as crimes against the peace and security of mankind. His delegation therefore supported the establishment of a working group to prepare a suitable text before the forty-eighth session of the Commission with a view to its inclusion in the draft Code.

24. The Commission should continue to seek broad agreement on objective criteria for defining not only serious international crimes, but also those which qualified as crimes against the peace and security of mankind. Such criteria should be reflected in the Code and should include the extreme seriousness of the crimes and the general agreement of the international community regarding their character as a crime against the peace and security of mankind. There should be consistency between the criteria used to determine such crimes in the draft statute of an international criminal court and those used in the draft Code of Crimes against the Peace and Security of Mankind. It would therefore be useful to establish mechanisms for harmonizing the provisions of the draft Code and the draft statute.

25. Bulgaria shared the opinion that the crime of aggression should be included in the Code and that the definition of aggression contained in General Assembly resolution 3314 (XXIX) was too political and lacked the necessary legal precision. It therefore felt that greater efforts should be made to produce as precise as possible a definition of that term.

26. With regard to draft article 21, Bulgaria agreed in principle with the Special Rapporteur's proposal to revert to the earlier title, "Crimes against humanity", instead of "Systematic or mass violations of human rights", since that term was used in both international and domestic law and was supported by legal doctrine and precedents.

27. With regard to the delicate and important question of penalties, it was important to stress that the Code would be effective only if it included three elements: penalties, crimes and jurisdiction. Accordingly, the best way to proceed would be to establish a scale of penalties and to leave it to the court to decide on the severity of the penalty based on the seriousness of the crime.

28. Mr. VUKAS (Croatia) said that, despite the progress achieved on the draft Code of Crimes against the Peace and Security of Mankind, neither States nor the Commission itself had as yet reached agreement on the main issues, namely, which crimes should be defined as "crimes against the peace and security of mankind", whether the number of such crimes should be limited or increased, and what the legal nature of the document in its final form should be.

29. With regard to the last of those points, his delegation felt that, as in the case of the statutes of the international tribunals for the former Yugoslavia and Rwanda, the Code should be adopted by a resolution of the Security Council, which was the competent body in the matter, since aggression, genocide, crimes against humanity, war crimes and international terrorism were threats to international peace and security.

30. Turning to the crimes defined in the draft Code, he said that although the new, shorter version of the article on aggression proposed by the Special Rapporteur was acceptable to Croatia, his delegation felt that the general definition of the concept set forth in paragraph 2 of article 15 could be accompanied by a non-exhaustive enumeration of acts of aggression. However, it preferred the earlier version of paragraph 1 of that article, since the new one did not include individuals who themselves committed acts of aggression.

31. If it was decided to delete apartheid as a crime, broader provisions should be inserted into the draft Code to cover all forms of institutionalized racism.

32. He supported the Special Rapporteur’s proposal to consider individuals acting in their own capacity as possible perpetrators of war crimes, and he firmly supported the inclusion of enforced disappearances in that category of crimes given that Croatian families had suffered from that phenomenon in recent years.

33. With regard to the article on war crimes, Croatia accepted the new title, "war crimes", and preferred a reference to "international humanitarian law" rather than to the Geneva Conventions of 1949.

34. Lastly, Croatia felt that the question of wilful and severe damage to the environment should be dealt with in an article separate from those concerning aggression, war crimes and international terrorism. In order to study the wilful damage done to the environment in Croatia, his Government had organized a conference in Zagreb in 1993 on the effects of war on the environment and had reported on that conference within the framework of the United Nations Decade of International Law.

35. Mr. KOCETKOV (Bosnia and Herzegovina) said that since its independence, his country had been exposed to brutal aggression unprecedented in Europe since the

end of the Second World War. Paramilitary and para-police forces of the Karadzic regime that had the support of the so-called Federal Republic of Yugoslavia (Serbia and Montenegro) and its terrorist gangs, such as the Seselj and Arkan forces, and other organizers and executors, would have to be punished for the crimes they had committed. On the other hand, it was important to note that Karadzic was not supported by all Bosnian Serbs and certainly not by patriotic and democratically oriented Bosnian Serbs.

36. With regard to the draft Code of Crimes against the Peace and Security of Mankind, his delegation felt that the definition of war crimes in draft article 22 should include certain acts that had been perpetrated against Bosnia and Herzegovina. The first such act should be the long-term siege of populated places, a situation which still existed in Sarajevo, Gorazde, Srebrenica, Zepa and Bihać, all of which had been declared safe areas by the Security Council. The sieges of the above-mentioned cities had led to the deaths of thousands of civilians, many of them women and children, interruptions in the supply of humanitarian and medical aid, the cutting off of utilities, blocking of roads, railways and telecommunications services, threats against the security of troops of the United Nations Protection Force (UNPROFOR) and restrictions on their freedom of movement. All those acts, which had been condemned under international law, should be considered a crime under draft article 22.

37. The second act which should be so classified was the mass and systematic rape of women and girls, which had constituted part of the practice of ethnic cleansing directed against the non-Serb population. That crime was not merely a case of imposing measures intended to prevent births within that group but constituted an outright war strategy.

38. Mr. PFIRTER (Observer for Switzerland) said that the work of the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind had had two main thrusts: the definition of crimes and the establishment of a scale of penalties. In its analysis of the two problems, the Commission should bear in mind as guidelines the relationship between the draft Code and the Commission's draft articles on State responsibility on the one hand and progress in its work on the establishment of an international criminal tribunal on the other.

39. With respect to the first issue, it should be noted that the relationship between article 19 of the draft articles on State responsibility and the Code was less obvious than the relationship between that article and the peremptory norms of international law. Article 19 dealt with the responsibility of States, while the Code dealt with individual criminal responsibility. Therefore there was no reason why the lists of offences appearing in the two texts should be identical, even though there might and should be some degree of overlap between them. For example, it could be said that the definition of aggression would differ in the two cases: in the context of article 19, which dealt with the responsibility of States, it would cover acts of aggression as a whole, while in the Code, under the Nürnberg Principles individual responsibility might be limited to wars of aggression.

40. The second question - that of the relationship between the Code and the future statute of an international criminal court - was more complex. The first objective of the Code was to formulate a series of norms of international law that could be applied by States and particularly by States' courts. The second objective was to apply those rules internationally, and for that purpose the Code should be used by the international criminal tribunals and above all by the future international criminal court. It should be noted that the Code and the future court shared a common purpose: that of enabling national courts or an international body to punish particularly abhorrent crimes committed by States or individuals. Thus the two drafts should correspond as closely as possible, especially with respect to the definition of crimes and the nature and degree of punishments, and all the more so since, given the current status of work on the establishment of an international criminal court, national tribunals and the court should be complementary.

41. As to agreement on the definition of crimes, his delegation welcomed the fact that the Ad Hoc Committee on the Establishment of an International Criminal Court, had preferred to take into account only the most serious crimes punishable under general international law, namely aggression, genocide, grave breaches of humanitarian law, war crimes and crimes against humanity.

42. If the Commission decided to retain individual criminal responsibility for the crime of aggression, in order for that responsibility to have a solid legal basis, it might be necessary to limit it to the case of wars of aggression.

43. With respect to genocide, he noted that the International Court of Justice, as indicated in its 1951 advisory opinion on reservations to the Convention for the Prevention and Punishment of the Crime of Genocide, had declared that the provisions of the Convention were a part of customary international law. In defining genocide, then, it would be appropriate to make that definition consistent with those provisions.

44. With regard to systematic or mass violations of human rights, he shared the view of the Special Rapporteur that it would be appropriate to list them under the heading "Crimes against humanity" and to ensure that the list included acts which had not been committed in the context of an armed conflict.

45. He agreed that war crimes, covered in draft article 22, should include references to the Geneva Conventions of 1949 and the laws or customs of war and pointed out that it would be necessary to refer to Additional Protocols I and II, or at least to common article 3 of the Geneva Conventions.

46. He appreciated the reservations that might arise if wilful and severe damage to the environment was included in the list of crimes contained in the draft Code; currently, however, acts of that type committed in situations of armed conflict or in times of peace could constitute a threat to the peace of mankind which might not be covered, or covered inadequately, under the other categories. Consequently, his Government reserved the right to raise that issue on a subsequent occasion.

47. One of the most difficult problems posed by both the draft Code and the draft statute of an international criminal court was that of penalties. The Code was to be applied both internationally and nationally and, clearly, the statute should specify the penalties applicable to the crimes defined in the draft Code. Yet, the latter might refer, for example, to the scale of penalties established by the internal law of the State in whose territory the act had been committed, which implied that that State would have enacted appropriate legislation on the matter.

48. With regard to the remaining categories of crimes and crimes which would not fall within the competence of the proposed international criminal court, it was essential that appropriate legislation should be enacted under the draft Code. Various solutions had been proposed for that purpose: one would be to set a maximum penalty and allow the national court to hand down the punishment at its discretion without exceeding that limit, which would be contrary to the principle of nulla poena sine lege. Another possibility would be to make States responsible for establishing effective penal provisions in their legislation, which would make it possible to solve the problem at both the national and the international levels. However, to avoid wide disparities, it would seem advisable for the Code itself to set maximum and minimum penalties.

ADDRESS BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

49. Mr. BEDJAOUI (President of the International Court of Justice) said that history showed that justice had made progress only when there had been a consolidation of the social order which it was required to pacify; what applied to national judicial systems applied equally to the international judicial system. However, States had always invoked the sacrosanct principle of national sovereignty to ward off any attempt to structure international society along the lines of national societies in which the judge heard and determined cases on the basis of a corpus juris enacted by a legislator and he could count upon the intervention of the police to enforce his decisions.

50. The system devised 50 years previously in San Francisco had not ushered in any real revolution in that regard as it was based upon a schema comprising an international executive function, deliberative function and judicial function devolving respectively upon the Security Council, the General Assembly and the International Court of Justice. As a general rule, neither the General Assembly nor the Security Council was invested with the capacity to create rules that were legally binding upon Member States. Article 94 of the Charter provided that the Security Council could decide upon measures to be taken to give effect to the judgments of the Court, but that mechanism was governed by criteria of expediency which only the Council was able to assess. The lack of any real international legislature and police force accordingly ruled out any conclusion that there was an international judicial power in the true sense of the term.

51. The Court, once relegated to the sidelines, was now in the forefront of the maintenance of international peace and security. Currently no less than 10 contentious cases were pending before it, and two requests for advisory opinions. Those were not minor matters, but crucial issues, including the

question of nuclear weapons, and other important issues such as the application of the Convention on the Prevention and Punishment of the Crime of Genocide.

52. The Court had been criticized on the grounds that its record of activities, in quantitative terms, appeared to be less impressive than that of the Permanent Court of International Justice. However, over a period of 50 years, the Court had handed down 60 judgments and 21 advisory opinions.

53. The optional clause of the Court's Statute had had less success than that of its predecessor, the Permanent Court of International Justice, but currently one third of the States parties to the Statute had accepted the compulsory jurisdiction of the Court. However, it should be noted that the greater or lesser degree of acceptance of the compulsory jurisdiction of the Court was not the only criterion for evaluating the extent to which States were prepared to have their disputes settled by it. The actual volume of cases before the Court was a great deal larger than it had been 30 years previously.

54. The significance of the number of declarations of acceptance of the Court's compulsory jurisdiction was also relative, first because of the reservations that frequently accompanied them, and secondly because of the preliminary objections made by States which had made such declarations.

55. An important factor should be mentioned which helped to explain the greater extent to which the Permanent Court of International Justice had been favoured by States. The peace treaties concluded at the end of the First World War had entrusted the Permanent Court with some specific responsibilities which had enhanced its activity. However, the settlement of the questions arising from the Second World War had been entrusted to organs specially created for that purpose.

56. Moving on to factors linked to the international context, it was necessary to bear in mind the greater enthusiasm for judicial settlement in the era of the Permanent Court. Nor should it be forgotten that the society of nations at that time had been culturally and politically more homogenous than the international society resulting from the Second World War, which had been caught up almost immediately in East-West dissension and then riven by the upheavals of decolonization and the difficult North-South dialogue.

57. The defiant attitude of the newly independent countries with regard to international law, in whose formulation they had not participated, had been accompanied by suspicion directed against the Court itself. Indeed, the judgment delivered in 1966 in the South West Africa case had shaken the confidence in the Court of a large section of the international community, which had seen in it an instrument in the service of a conservative brand of international law. That had also led to a hardening of the position of the third world countries regarding the legal settlement of disputes.

58. The experience of the Permanent Court and of the International Court had shown that there was more recourse to legal settlement during periods with little international tension, and that the opposite was true during periods of increased international tension. For example, the Court's role had been minimal

during the periods of great international tension during the cold war. It should also be noted that the international community had taken many years to heed the appeal made by the General Assembly in resolution 171 (II) of 14 November 1947, in which it had encouraged Member States and the United Nations system to make greater use of the Court's services. From 1970 onwards the Court had succeeded in regaining some of the confidence of the third world countries, which represented over half the members of the international community.

59. The greater willingness of States to have recourse to the Court was also mirrored by the new attitude of the States of the former communist bloc, most of which had withdrawn the reservations they had made to provisions relating to the Court's jurisdiction which formed part of numerous multilateral treaties. Some of those States had also accepted the compulsory jurisdiction of the Court.

60. It could be said that a new phase had started in the life of the Court. First, because there was every indication that the international community had vested the Court with a not inconsiderable part of the primary responsibility for the maintenance of international peace and security, a task formally conferred by the Charter upon the Security Council, and second because, on many occasions, the Court's decisions or the mere fact that recourse had been made to the Court had made a decisive contribution to maintaining or restoring peace among parties, as had occurred, for example, in the case of the frontier dispute between Chad and Libya. Lastly, the Court's contribution to the maintenance of international peace and security was demonstrated by the implementation of the Court's decisions by the parties concerned.

61. It could be said that the confidence placed in the Court and the considerable increase in its activity augured well for the future. In that respect, the fear was unfounded that the recent proliferation of mechanisms for the judicial settlement of disputes, such as the International Tribunal for the Law of the Sea, the Central American Court of Justice, the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe and the International Criminal Tribunal for the Former Yugoslavia, combined with the relative narrowness of the Court's jurisdiction rationae personae and rationae materiae, could marginalize the Court or undermine its future work. Instead, that proliferation of bodies could enable the Court to focus on disputes of major political importance.

62. Contrary to what was often asserted, all political conflicts included legal elements on which the Court could make pronouncements. States should therefore consider entrusting particular aspects of disputes to the Court in order to facilitate the resolution of overall disputes between them. It was to be hoped that States would heed that appeal on the Court's fiftieth anniversary.

63. The CHAIRMAN said that while the Committee was concerned with the formulation of norms of international law, the application of those norms was the task of the International Court of Justice. That was an important function which must be supported by all States, particularly in view of the clear trend of current activities in the legal sphere to concentrate on the application of existing norms. For example, that had occurred at the Fourth World Conference

on Women, and had been reflected in the plan of action. That trend reflected the feeling that there was no scarcity of norms, but a lack of the means to implement them.

64. The simultaneous presentation of the reports of the International Court of Justice and of the International Law Commission at the current session was a positive aspect. It was not always possible for both reports to be introduced simultaneously, but, in future, an effort would have to be made to ensure that, as far as possible, they were introduced together, preferably towards the end of October.

The meeting rose at 12.35 p.m.