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SUMMARY RECORD OF THE 48th MEETING

Chairman: Mr. AZZAROUK (Libyan Arab Jamahiriya)

CONTENTS

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The meeting was called to order at 6.05 p.m.

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

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. ABADA (Algeria), referring to article 1 of the the draft Code of Offences against the Peace and Security of Mankind, said that his delegation was in favour of an enumerative definition as a preliminary step and endorsed the Commission's decision to return later to the question of the conceptual definition. By that decision, the Commission implicitly acknowledged the importance of certain elements which, taken together, would precisely delineate a crime against the peace and security of mankind. The words "under international law", currently in square brackets, should be deleted.

2. Draft article 2 as currently worded established the principle of autonomy of characterization and was therefore satisfactory. To the extent that the criminal responsibility of States had been set aside for the time being, draft article 3 called for few comments other than the observation that an international crime committed by an individual exercising State authority, if it inevitably involved individual criminal responsibility on the part of the perpetrator, must logically also involve responsibility on the part of the State. It would be quite indefensible in principle to exclude persons acting ex officio from the scope of the draft Code by virtue of the exoneration of States. With regard to draft article 6, the Commission had rightly upheld the principle, reflected in a number of international instruments, of entitlement to judicial guarantees.

3. To the extent that the Commission had not yet taken a decision relating to the competent judicial body, his delegation had no difficulty about including the non bis in idem rule in the draft Code, and could support the inclusion of a second paragraph, such as that reflected in paragraph 39 of the Commission's report. Since an international court would circumvent the pitfalls stemming from the differences between national courts, his delegation was in favour of preparing the statute of a competent international criminal jurisdiction for individuals.

4. Mr. STEPANOV (Ukrainian Soviet Socialist Republic) said that the early completion of the draft Code of Offences against the Peace and Security of Mankind should be a priority task for the Commission, particularly in view of the current threats to peace posed by nuclear weapons, continued regional conflicts, acts of aggression, terrorism and apartheid.

5. Although the text of several articles proposed by the Special Rapporteur would improve the draft Code, the provisions called for further consideration in order to reflect States' current views. The Commission's deliberations at its thirty-ninth session had rightly taken account of existing law, including the provisions of relevant international instruments.

(Mr. Stepanov, Ukrainian SSR)

6. Draft article 1 was of a general nature; it ou to embrace criteria for the crimes in question, including, in the first place, those which posed a threat to human existence and contemporary civilization, and violated the basic principles of international law. The article should clearly state that crimes against the peace and security of mankind were deemed such under international law. The opposition voiced by some members, according to paragraph (5) of the commentary, was entirely unconvincing.

7. His delegation welcomed the Commission's decision to include the concept of criminal responsibility of individuals. Care must be taken throughout the draft articles to avoid wording that would impute responsibility to States alone. As was rightly shown in article 2, the characterization of an act or omission as a crime against the peace and security of mankind was independent of internal law. The wording of draft article 2 belied the idea that the expression "under international law" could lead to confusion between international and internal law. Indeed, the article as drafted made matters much clearer and was more closely aligned with the other articles. His delegation shared the view of those members who, in referring to the question of penalty, had recalled the 1954 draft Code and the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal.

8. In connection with draft article 3, the Commission had rightly considered, as noted in paragraph (2) of the commentary, that an offender could not invoke any motive as an excuse. Unfortunately, as noted in paragraph (3), some members had again raised questions about the criminal responsibility of States, even though that matter was already covered by another instrument in course of preparation by the Commission. The tenor of the draft Code was clearly that responsibility rested with the individual perpetrator, regardless of any international responsibility on the part of States.

9. His delegation welcomed the formulation of draft article 5. The fact that the rule concerned already existed in a number of legal systems, as noted in paragraph (1) of the commentary, was all the more reason for its inclusion in the draft Code.

10. With regard to draft article 4 on the "aut dedere aut punire" principle, it must be stated that instances abounded of avoidance of extradition, under the most diverse pretexts, and that it was therefore essential to establish a principle of extradition for trial in the country where a crime had been committed. Draft article 9, concerning exceptions to the principle of responsibility, and the closely allied draft articles 10 and 11, did not preclude the possibility that perpetrators might escape responsibility for the offences concerned. In order to avoid such a shortcoming, the text should be formulated along the lines of the Charter of the Nürnberg Tribunal, particularly articles 7 and 8 thereof. The provisions relating to motives should be noted in particular.

11. Virtually from the time it was established, the Commission had been entrusted with the task of drafting a code of offences against the peace and security of mankind, and the pace of its progress was not commensurate with current requirements. A speedy completion of the text would unquestionably enhance the Commission's prestige and authority.

12. Mr. TUERK (Austria) welcomed the continued dialogue between the International Law Commission and the Sixth Committee, which, as the representative of the Netherlands had stated, should act as a clearing-house for the Organization's many legislative activities. The Commission's annual report to the General Assembly should be circulated to Governments as soon as possible, even if in provisional form, so as to allow more time for its consideration. It was a pity, moreover, that no decision had been taken at the Commission's thirty-ninth session to circulate to Governments, immediately following the conclusion of the session, an introduction to the report by the Chairman along the lines of his oral presentation.

13. His delegation hoped that, as recommended by the General Assembly, the Commission could stagger the consideration of some agenda items, so that subjects could be discussed in more detail. It noted the Commission's disquiet about the understaffing of the Secretariat's Codification Division and regretted the departure of Mr. Johnson, the Division's Senior Legal Officer. With regard to the draft Code of Offences against the Peace and Security of Mankind, his delegation welcomed the Commission's adoption in first reading of draft articles 1, 2, 3, 5 and 6 and the decision to use the term "crimes" in all languages. It proposed acceptance of the Commission's recommendation, in paragraph 65 of the report (A/42/10), to amend the English title of the topic to read: "Draft Code of crimes against the peace and security of mankind".

14. Generally speaking, the draft articles provisionally adopted were acceptable. With regard to draft article 1, the Commission had rightly opted for an enumerative rather than a conceptual definition. His delegation would prefer to include in that article the expression "under international law" but to place it after the words "constitute crimes". With regard to draft article 2, it shared the view that the second sentence was not strictly necessary.

15. Regarding the problem of non-applicability of statutory limitations, dealt with in draft article 5, he felt that, although it was often difficult to draw a line between war crimes and crimes against humanity, a distinction should nevertheless be attempted in the draft Code. The distinction made in the Charter of the Nürnberg Tribunal, referred to in paragraph (4) of the commentary, could serve as a basis. It might seem doubtful from a legal standpoint whether the particular circumstances of the commission of an offence constituted a sufficient criterion for war crimes to become crimes against humanity. The fact that the Special Rapporteur envisaged a different timetable to deal with the respective articles suggested that he intended to maintain a distinction between the two categories.

16. With respect to draft article 4, his delegation supported the suggestion made by several members of the Commission to change its title to "Duty to extradite or prosecute", which better reflected the content of the provision. The final formulation of draft article 7 would depend on developments. If an international criminal court was established, the suggestion made by the Special Rapporteur, as reflected in paragraph 39 of the report, would seem appropriate. His delegation, however, felt that the further proposal made by the Special Rapporteur - that the rule non bis in idem might be taken into consideration in sentencing - gave too

(Mr. Tuerk, Austria)

much discretionary power to the international criminal court. The Commission should therefore consider a provision stipulating that the international criminal court must take into account a sentence already rendered by a national court for the same crime.

17. In connection with paragraph 67 (c) of the report, his delegation reiterated its view that the Commission's mandate logically did extend to the preparation of the statute of a competent international criminal jurisdiction for individuals, since without such an international jurisdiction, the Code probably would not be very effective. At the current stage of international relations, however, a certain scepticism might be evinced regarding the possibility of establishing such a court in the foreseeable future.

18. Regarding the proposed use of the term "penal procedure" in draft article 7, it was clear that the Code would have to contain stipulations relating to the competence of one or more States for the prosecution of crimes against the peace and security of mankind. After discussing four hypothetical instances in which conflicts of jurisdiction might arise between States, he said that those instances illustrated why provisions should be inserted in the draft Code, namely to regulate certain matters of competence and procedure. Furthermore, a provision should be made, either in the future statute of the international criminal court or in the draft Code, for States to grant legal aid in proceedings against alleged perpetrators of crimes against the peace and security of mankind.

19. With respect to the law of the non-navigational uses of international watercourses, his country's basic position was that the right balance must be struck between the interdependence of riparian States, on the one hand, and their sovereign independence and right to benefit from the natural resources in their territories, on the other; between upper riparian States and lower riparian States; and between the various uses of the waters. The framework approach was the only method which could eventually lead to rules that would be accepted by the entire international community.

20. His delegation was gratified to note the provisional adoption by the Commission of draft articles 2 to 7, and considered it wise to leave aside the question of the use of terms, including the term "international watercourse system", until such time as a set of basic rules had been elaborated by the Commission.

21. Concerning the commentary to draft article 2, his delegation did not believe that it was appropriate to define an international watercourse as also including the waters thereof. A framework agreement should deal with the diversion of waters from an international watercourse which adversely affected other States, but not with the diverted water itself. His delegation, agreed, however with the broader interpretation of the reference to "measures of conservation related to the uses of" international watercourses, as set forth in the commentary to draft article 2, and felt it would be appropriate to include express stipulations on the subject in the draft articles.

(Mr. Tuerk, Austria)

22. The formulation of paragraph 2 of draft article 5 might give rise to problems. His delegation felt that such a rigid stipulation was neither generally acceptable nor practicable. A more realistic solution would be to provide for an obligation of States parties to the original agreement to engage in negotiations with third States, should they so wish, for the safeguarding of the interests of those States.

23. The interpretation set forth in the commentary to draft article 6 seemed to go beyond existing principles of international law, and a clarification was therefore called for. The enumeration of factors relevant to equitable and reasonable utilization in draft article 7 seemed highly appropriate. The commentary to draft article 7, however, was too sweeping in its interpretation of subparagraph 1 (f), referring to other means of compensation not involving the use of water.

24. In connection with draft article 10, his delegation had taken note of the discussion in the Commission as to whether there currently existed in international law a general obligation of States to co-operate. Although such an obligation might be deduced from the United Nations Charter, it would seem useful to insert a reference in the draft article to the principle of good-neighbourliness. The provisions of draft articles 11 to 15, as proposed by the Special Rapporteur, were too detailed for a "framework agreement" and should contain less stringent obligations. Draft article 11, however, was not specific enough in its use of the term "appreciable harm." He therefore agreed with the suggestion by the Special Rapporteur, as contained in paragraph 103 of the report, to substitute the term "adverse effect."

25. Concerning the topic covered in chapter IV of the report, his delegation had consistently advocated the elaboration of a framework treaty which would encourage the conclusion of appropriate bilateral or regional agreements. The ecological catastrophes of 1986 had clearly illustrated the necessity to advance the Organization's work in that field. Although it was encouraging that the Commission had held an extensive discussion on the topic, it was obvious, given the timetable for further discussions, that the international community would need international legal rules for certain types of activities in a much shorter time. His delegation had referred earlier to the question of elaborating an international convention on State liability for damage caused by accidents at nuclear power installations. Clear-cut rules on international liability, together with the generally accepted duty of compensation on the State level, would serve as an important incentive for Governments to promote nuclear safety at the national level. Such State liability should cover not only health and property damage resulting from direct exposure to accidentally released nuclear radiation, but also damages resulting from measures to protect the population from contaminated food-stuffs and other dangerous consequences.

26. His delegation was aware that the concept of an international convention on State liability with regard to nuclear damage did not yet command unanimous support, as some countries favoured the civil-law approach. Such an approach, although it had its merits, was fully applicable only among States with comparable

(Mr. Tuerk, Austria)

legal systems, and furthermore was inadequate in cases of large-scale accidents causing damage not only to a great number of individuals, but also to the environment. It was to be hoped, therefore, that the elaboration of a convention would soon be possible. The 1972 Convention on International Liability for Damage Caused by Space Objects was an excellent example of a widely accepted international instrument.

27. His delegation fully concurred with the statement in paragraph 181 of the report that private-law remedies were not sufficient to exonerate State liability in the absence of any régime. The drafting of international agreements relating to particular types of activities should in no way impede the drafting of a general framework treaty. On the contrary, such a general treaty could draw on elements already contained in existing agreements of a limited scope.

28. The discussion in the Commission of whether there was a basis for the topic of liability in general international law should not affect the practical work of the Commission, whose task was to make proposals for the progressive development of international law. His delegation believed that it would be improper to wait for more disasters and catastrophic accidents to occur so that customary norms could be created and subsequently codified. It therefore concurred with the view set forth in paragraph 146 of the report regarding the need to clearly separate the topic under consideration from that of State responsibility. The scope of the liability topic should be confined to the duty to avoid, minimize and repair physical transboundary harm resulting from physical activities within the territory or control of the State. Going beyond that area to include economic or social activities would lead to insurmountable difficulties.

29. His delegation endorsed the critical remarks reflected in paragraphs 169 and 170 of the report. The definition of "transboundary injury" in paragraph 6 of draft article 2 and the indirect definition of "injury" in draft article 1 were inadequate. Such wording would require third-party settlement in cases of disputes. Since it was doubtful that mandatory dispute settlement procedures would be widely accepted by States ratifying the respective convention, a formulation should be sought allowing for an implementation of the convention in the absence of a provision regarding third-party settlement. His delegation also concurred with the critical observations relating to draft article 4 contained in paragraphs 167 and 168 of the report, although it supported the Special Rapporteur as far as the concept of "strict liability" as a basis for a future convention was concerned.

30. Austria, as one of the host countries of the United Nations and a host country of other major international organizations, was keenly interested in the topic of relations between States and international organizations. However, in view of the Commission's heavy workload, his delegation recommended that the topic should be set aside for detailed discussion at a later date.

31. The sessions of the International Law Seminar for many years had provided an excellent learning occasion for students and junior government officials from many countries. His Government had once again made fellowships available to participants from developing countries, and hoped that the seminar could be continued in the future.

32. Mr. McCAFFREY (Chairman, International Law Commission) said that, generally speaking, the work accomplished by the Commission at its most recent session had met with a favourable response and the Commission's planning of current activities had the endorsement of the Sixth Committee. While some statements reflected a desire to see the Commission deal more boldly and swiftly with the issues before it, the debate had confirmed that many of those issues were approached differently in the Sixth Committee itself. The Commission fully accepted its responsibility in trying to reconcile diverging opinions within the framework of the progressive development and codification of international law. It had also agreed to accelerate the pace of its work and would try to achieve that objective. But if its endeavours were to be of real and lasting value, it must be allowed to discharge that responsibility prudently. It must also be able to count on the guidance of Member States at all the stages of its work, including the finalization of drafts. The deadline of 1 January 1988 had been set for the submission of written comments on the two sets of draft articles provisionally adopted by the Commission at its thirty-eighth session. He urged all delegations to draw the attention of their Governments to the importance of that deadline for the continuation of the Commission's work.

The meeting rose at 7.25 p.m.