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SUMMARY RECORD OF THE SECOND PART OF THE 16th MEETING

Chairman: Mr. LEHMANN (Denmark)

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The meeting was called to order at 10.25 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. de SARAM (Sri Lanka) said he thought the form used by the Chairman of the International Law Commission to present his report had been particularly helpful. In 1996, as the representative of Austria had suggested, it would also be timely for the Commission to devote more time to a review of its working methods.

2. With regard to the draft Code of Crimes against the Peace and Security of Mankind, he said that although the Commission was currently giving the draft its final reading, two serious difficulties remained. The first was the considerable divergence of opinions on the general nature and purpose of the Code. Some thought that it should be a declaration by the international community that certain actions were of such enormity as to merit characterization as international crimes. Others were of the view that the Code should contain clear provisions to be used in criminal trials against individuals, where the object was to determine their guilt or criminal intent. It was difficult to understand how those two approaches, which appeared to be mutually exclusive, could be reconciled. It was imperative that the provisions of the Code should be sufficiently precise to be applied in individual prosecutions.

3. The second major difficulty was the specific subjects to be included in or excluded from the substantive scope of the Code. The Special Rapporteur had indicated that the determining consideration should be the consensus. However, the Code should not be considered as a definitive or immutable legal instrument. The fact that it could be changed or amplified should be made clear in the Convention establishing the Code, in the Code itself or in an accompanying General Assembly resolution.

4. It had rightly been said that when a treaty in force, such as the Convention on the Prevention and Punishment of the Crime of Genocide, had established that certain acts were crimes against the peace and security of mankind, it should be relatively easy for the Commission to incorporate such provisions into the Code.

5. It had also been pointed out that when the Commission prepared the final draft of the Code, it should have before it all the documentation relating to the draft statute for an international criminal court, given the need to coordinate the two instruments.

6. Lastly, concerning international terrorism, he said that Sri Lanka's special concern was terrorism directed against cities and villages in small developing countries. It was clear that aggression and terrorism could not easily be defined in a way that was generally acceptable. It might therefore be better to abandon the search for a definition and deal primarily with clearly identifiable acts of terrorism which could be condemned.

7. With regard to human rights, attention had thus far been concentrated primarily on the relation between the public authorities and citizens. It was nevertheless clear that human rights could be violated not only by the authorities, but also by other groups in society, such as terrorists, and that the time had come to examine that question. There was in fact a solid body of legal norms which provided the opportunity to include acts of terrorism in the category of crimes against humanity. It should be remembered that the International Tribunal for Rwanda had also referred to terrorism. Sri Lanka supported the Special Rapporteur's proposal that acts of terrorism should be considered as crimes against humanity.

8. Mr. VARGAS (Chile) said that at its forty-seventh session the Commission had made significant progress in the examination of the draft Code of Crimes against the Peace and Security of Mankind, thanks in particular to the commendable efforts of the Special Rapporteur, who had proposed that a limited number of crimes should be included in the draft Code.

9. Chile considered that six principles should be applied in order to decide which crimes should be included in the draft: the gravity of the conduct; the conduct must offend universal sensibilities and constitute a serious threat to the peace and security of mankind; the definitions of conduct must be formulated with the precision and rigour required for criminal law, so that the principle nullum crimen sine lege could not be ignored; the conduct must be covered by existing rules of international and customary treaty law; the code must confine itself to defining crimes whose perpetrators were directly responsible by virtue of existing international law; and the crimes must relate primarily to the area covered by international crimes of States where individual criminal responsibility would be a legal consequence of the unlawful conduct attributable to the State, although the criminal responsibility would be incurred only by individuals. There would be exceptions to the last principle, as in the case of illicit drug trafficking, where the unlawful conduct of the criminal was divorced from State activity.

10. Chile agreed with the Special Rapporteur that some unlawful acts should not be included. First, the threat to peace, whose inclusion would create theoretical and practical difficulties. Second, intervention, which might be armed, in which case it would be covered by aggression, or unarmed, in which case it would include many acts which were difficult to define rigorously for many reasons, one being the fact that, according to the new norms of international law, not every act of intervention was unlawful, as might happen in the field of human rights. Naturally, the opposition to including intervention in the Code should not be interpreted as disregard for the principle for non-intervention, which was one of the fundamental principles of international law. Third, colonial domination, since colonialism was virtually extinct and had not been defined with precision. Last, the recruitment, use, financing and training of mercenaries, which presupposed an armed intervention and would therefore be covered by the crime of aggression.

11. On the other hand, Chile did not agree that the crimes of apartheid and wilful and severe damage to the environment should be excluded from the draft.

12. With regard to aggression, its definition involved many problems, which explained the Drafting Committee's decision to eliminate most of the paragraphs which the Commission had included in the text, relying on the definition adopted by the General Assembly in resolution 3314 (XXIX). That definition should serve as a guide for a political body, the Security Council, but not necessarily as a basis for instituting criminal proceedings before judicial bodies. However, the definition proposed by the Special Rapporteur was too succinct and general, and posed other problems. It should therefore be added to a non-exhaustive list of cases of aggression which could be based on certain paragraphs of General Assembly resolution 3314 (XXIX).

13. Concerning the crime of genocide, his delegation supported its inclusion in the Code, and agreed that it should be defined on the basis of the Convention on the Prevention and Punishment of the Crime of Genocide.

14. His Government was particularly interested in article 21, dealing with systematic or mass violations of human rights. The previous title was more precise than "Crimes against humanity", proposed by the Special Rapporteur. The article should cover, first and foremost, the most serious violations of human rights such as wilful killing, torture and enforced disappearance, provided those acts were committed by individuals acting as agents or representatives of a State or acting with its authorization or support. The seriousness of the crime would derive precisely from the fact that the perpetrator enjoyed the protection or authorization of the State. The other requirement for defining such crimes was that they should involve systematic or massive violations of human rights.

15. Chile considered it important that forced disappearance should be characterized in the Code as a crime against humanity. It was, however, a difficult thing to define since it was based on information in respect of which no evidence could be brought. Nevertheless, there were previous examples of definitions of forced disappearance as in General Assembly resolution 47/133 or the definition given by the Inter-American Convention on Forced Disappearance of Persons of 1994 according to which forced disappearance is considered as the deprivation of liberty of one or several persons, committed by agents of the State or by persons acting with the authorization or support of the State, followed by lack of information or refusal to recognize that deprivation of liberty or to give information on the whereabouts of the disappeared person.

16. The draft article on systematic or mass violations of human rights, should also include establishing or maintaining over persons a status of slavery, servitude or forced labour, institutionalization of racial discrimination and the deportation of or forcible transfer of population on social, political, racial, religious or cultural grounds. Chile considered that the gap which had been left by the deletion of apartheid from the list of crimes should be filled by adding to it the "institutionalization of racial discrimination".

17. Deportation or forcible transfer of population on social, political, racial, religious or cultural grounds, which constituted a violation of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, should also be characterized as a crime. It should nevertheless be noted that certain involuntary transfers of population were

legally acceptable; for example, when based on considerations of health or a country's economic development, to protect a population against military attack.

18. The inclusion of war crimes in the draft Code was fully justifiable. In his opinion, it would be appropriate, in that regard, to be guided by the Geneva Conventions of 1949 without prejudice of the right to update certain criteria contained in the Statute of the International Tribunal for the former Yugoslavia.

19. International terrorism, or simple terrorism, should be characterized in the Code as a crime against the peace and security of mankind. Nevertheless it would be very difficult to draft a general definition which was detailed enough for the purposes of criminal law. Therefore, the International Law Commission should try to reach a consensus on the matter at one of its forthcoming sessions.

20. Illicit traffic in narcotic drugs should also be classified as a crime against the peace and security of mankind. That was also a difficult subject. The essential requirement for drug trafficking to be classified as a crime of that nature should be the constant and massive flow of such drugs.

21. Finally, his delegation considered that certain forms of wilful and grave damage to the environment, such as damage caused by nuclear explosions, deliberate contamination of rivers, lakes or seas or the dumping of chemical or radioactive waste in a State's territory or territorial waters could constitute a crime against the peace and security of mankind. In the case of nuclear testing, it was also necessary to point out that by the time the Code entered into force, there would probably also be a comprehensive test-ban treaty which would make it easier to adopt an article on that subject.

22. Mr. MOMTAZ (Islamic Republic of Iran) expressed concern at the fact that the Special Rapporteur had decided to limit the list of crimes against the peace and security of mankind to crimes which were incontrovertible. It was regrettable that the majority of developing countries had failed to submit comments on the draft articles adopted on first reading and that the Special Rapporteur had therefore been obliged to take a decision on the basis of the reservations or position of a small number of States which were not representative of the views of the international community. It remained to be seen what importance the Commission would attach to the written comments of Governments, bearing in mind that, as was well known, Governments preferred to express their opinions in the Sixth Committee.

23. In any event, there was no doubt that the Commission needed to strike a balance between legal idealism and political realism, bearing in mind that the Special Rapporteur, in adopting a minimalist approach, had leaned towards the latter.

24. It was interesting to note that States which, in recent years, had considered the establishment of an international criminal court as a priority, were now justifying excluding certain crimes from the Code on the grounds that they did not wish to overburden the Court and that it was necessary to omit crimes which could not be punished at the national level. As far as that was

concerned, the difficulties could be avoided by supplementing the list of crimes set forth in the Code with a list of violations characterized as international crimes under treaty law and customary international law, without prejudice to the competence ratione materiae of the international criminal court.

25. While there might, indeed, be reasons for withdrawing certain violations from the jurisdiction of the Court, that did not justify omitting them from the Code since the latter might be used by the criminal tribunals to characterize certain acts as crimes and punish the perpetrators. Consequently, the minimalist criterion adopted by the Special Rapporteur made it necessary to give a general definition of the concept of crime, which would constitute the common denominator of the crimes to be retained in the Code and allow the exclusion of others. Such a decision should be based on objective criteria that took into account the nature and consequences of the acts in question.

26. The decision to exclude some crimes from the draft code because they had not been defined with the precision required by criminal law was ill-founded since it threatened to trivialize certain acts.

27. For example, it was disturbing to see that intervention had been excluded. Non-intervention, a corollary of the principle of sovereign equality of States was one of the fundamental principles of international law and had been recognized as such by the International Court of Justice in its ruling relating to the military and paramilitary activities in Nicaragua. The Court had determined that States had the sovereign right to choose their political, economic, social and cultural systems and that intervention was unlawful when, to prevent such a choice, coercive means such as an embargo or the breaking off of economic and trade relations were used. That was undoubtedly a definition of intervention that could scarcely be considered as vague. It was incumbent on the Commission to supplement and elaborate on the definition.

28. With respect to aggression, he cited the same ruling of the Court to refute the argument that the definition of General Assembly resolution 3314 (XXIX) was a political one. On the contrary, in its ruling, the Court had referred expressly to that resolution saying that its definition of armed aggression could be considered as an expression of customary international law. For those reasons, he was in favour of retaining the previous wording of draft article 15 with some amendments, in particular the deletion of paragraph 5, which violated the principles of the separation of powers and the independence of the judiciary, since, by means of the veto, it allowed a political organ such as the Security Council to obstruct the regular functioning of a judicial organ.

29. Similarly it should be borne in mind that, according to the new version of that provision, acts such as the bombing of a State's territory, the blockading of its ports or coasts or attacks on its armed forces did not constitute aggression if authorized by the Security Council in accordance with Chapter VII of the Charter of the United Nations. Paragraph 7 of the earlier version of article 15 should be retained because it constituted a safeguard clause.

30. Although apartheid had ended, that did not mean that racism and discrimination had disappeared. The Code should maintain a provision which would classify as crimes any acts of that nature carried out by persons in the

exercise of their functions and based on legal provisions. In his view, it would be appropriate to include in draft article 21 a reference to the "institutionalization of racial discrimination".

31. Regarding the new draft article 22, he considered that the title "war crimes" would be preferable to "exceptionally serious war crimes", since it would cover more cases.

32. He regretted that the paragraph concerning the use of unlawful weapons had been deleted, since that undermined the international community's efforts to prohibit the use of weapons of mass destruction, which had led to the signing of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, and which were expected to culminate in a ban on the use or threat of nuclear weapons. His Government would also support inclusion of a provision regarding the use of toxic and other weapons intended to cause unnecessary suffering, and which would include weapons having indiscriminate effects.

33. Finally, he emphasized the importance his Government attached to the codification and progressive development of international criminal law. Although he was gratified by the progress achieved in drawing up procedural rules of law, he considered that the International Law Commission should give priority to formulating substantive rules of law.

34. Mrs. FLORES (Mexico) said that she would have liked the International Law Commission to issue its report earlier, thereby allowing States to engage in a more fruitful discussion.

35. She was pleased that the Special Rapporteur had decided to restrict the number of crimes to be included in the Code of Crimes against the Peace and Security of Mankind, since a practical approach of that nature facilitated the work of the Committee. The Code should include only those acts that were so serious that they would unquestionably fall into the category of crimes against the peace and security of mankind.

36. One of the aims of the Code was to provide clear definitions which not only reflected current rules of international law, but also demonstrated the stringency demanded by criminal law. In that connection, the highly simplified definition of aggression was a positive achievement. None the less, further clarity and precision were required. It was indeed possible to define aggression in legal terms.

37. She emphasized the importance of basing the definition of genocide solely on the International Convention on the Prevention and Punishment of the Crime of Genocide.

38. The definition of the crime of systematic or mass violations of human rights raised many problems. The existing definition should be further refined, in order to avoid any ambiguity in its practical application. The definition should contain objective elements by which it could be established without any doubt when that crime had been committed. She agreed in principle with the Special Rapporteur's proposal that the term "crimes against humanity" should be

employed, although the definition should make specific reference to the systematic and massive nature of such acts.

39. The International Law Commission's new draft article 22 was a major step forward in the definition of war crimes, which should be based on the Geneva Conventions of 1949. However, certain elements in the definition should be further clarified, for example by including an exhaustive list of the relevant acts, in order to safeguard the nullum crimen sine lege principle.

40. She was not convinced that the Code should include either international terrorism or illicit traffic in narcotic drugs, which were basically different from the other crimes included in the Code. Their exclusion would in no way affect the determination of States to take decisive action to combat such crimes.

41. Sir Franklin BERMAN (United Kingdom), referring to the difference between the Commission's "old" programme and the "new", said that considerable progress had been made with the new topics, while the only achievement on the old topics was that the draft on the non-navigational uses of international watercourses had been completed. A great deal remained to be done on other topics.

42. The draft Code of Crimes against the Peace and Security of Mankind appeared to be on the right track, and he was gratified that the Commission was in the process of scaling the list of crimes down to a basic core of four. However, the fact that they were very similar to those embodied in the statute for the eventual international criminal court prompted him to wonder whether it served any purpose to have a Code of Crimes if the crimes in it were already an integral part of the statute of a permanent court. Further thought should be given to whether a Code of Crimes was in fact necessary.

43. One answer might be to agree on the criteria for deciding whether particular unlawful conduct should constitute an international offence of that kind. His delegation considered that there had never been any sensible rationale for a Code of Crimes unless it were part of a policy to facilitate international prosecution where national jurisdiction did not suffice. Therefore, it was clear that if negotiations were proceeding regarding establishment of a court, then a Code was not necessary. In addition, the problem arose of what would happen if the International Law Commission, a body composed of independent experts, were to draw up a draft Code that differed in any material respect from the statute of a court which had been painfully negotiated by Governments. His delegation had pleaded with the Commission in the past not to waste its valuable energy and its scarce time on an idea which had been overtaken by events, and he took the opportunity to renew that plea.

44. The United Kingdom was dismayed by the International Law Commission's report on State responsibility. How should a Government respond when the year's product consisted of two commentaries to articles not yet formally submitted to the General Assembly, plus a provisional annex, and a decision taken on a divided vote? His delegation had decided to employ a method which had been used previously in the Sixth Committee, causing a written paper to be circulated containing comments on the provisional draft articles dealing with countermeasures.

45. The chapter of the report on State responsibility was a great disappointment. It was not apparent that it represented a great codification project nearing completion. The dismay engendered by the report was caused by the unresolved issue of State crimes which had become a gaping wound infecting the whole draft. His delegation shared the opinion of some members of the International Law Commission that there was no point in expecting the drafting Committee to remedy the situation. It was not a question of drafting; it had to be recognized that the concept had proved wanting, for which reason it had not gathered the broad assent of States, had split the Commission, and brought endless trouble in its wake.

46. He urged the Commission to show restraint in its commentaries to draft articles and bear in mind that the resources and time of Governments were limited. The Commission should be encouraged by the Sixth Committee to adopt a flexible and realistic approach to article 20 of its Statute, along the lines of paragraphs 511 and 512 of the report.

47. He had a more optimistic view of the Commission's work on the new topics, such as State succession and its effect on the nationality of natural and legal persons, and the topic of reservations to treaties. In that connection, he was particularly pleased that the Commission was dealing with questions attending reservations to human rights treaties. Chapter VII of the report mentioned two other new topics: rights and duties of States for the protection of the environment, and diplomatic protection. His delegation did not believe that international environmental law had yet developed sufficiently to sustain the proposed study, but it supported the idea of taking on board the second topic, which was more closely defined in paragraph 505 of the report. The Commission could perhaps broaden the title of the topic, which appeared somewhat laconic in its current form.

The meeting rose at 12.45 p.m.