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SUMMARY RECORD OF THE 27th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

CONTENTS

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued)

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The meeting was called to order at 10.20 a.m.

AGENDA ITEM 142 a REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10 and A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. MAWHINNEY (Canada), referring to international liability for injurious consequences arising out of acts not prohibited by international law, said that his delegation preferred to see separate treatment of activities involving risk and activities with harmful effects. In that connection, he was of the opinion that appreciable harm, not risk, must be the primary factor triggoring liability. Risk should, rather, be a factor stimulating preventive measures. If the concept of risk were to be retained in determining liability, the scope of the draft articles would be reduced, since damage, even when considerable, would be excluded when it resulted from low-risk activities, The Committee must not lose sight of the primary objective, namely, compensation for damage incurred independently of the concept of risk.

2. The inclusion of a list of dangerous substances in article 2 of the proposed outline gavs rise to some difficulties, since it might narrow the scope of article 1. If tho list was included and the concept of risk adopted as a criterion to trigger liability, the convention to be adopted might limit liability and depart from the objective of regulating international liability for injurious consequences from acts not prohibited by international law. As a consequence, greater emphasis should be placed on paragraphs (g), (h), (i), (j) and (n) of article 2, by putting them at the very beginning of the article. Should it be decided to include a list of dangerous substances, which did not seem to be advisable, it could be added as an indicative annex.

3. His delegation did not feel that the State of origin should be able to evade its international liability for harm caused by individuals under its jurisdiction, since, as correctly noted by the Special Rapporteur, an innocent victim must not be left to bear the loss. The Special Rapporteur was also to be commended for his work on protecting areas beyond national jurisdiction, namely, the "global commons".

4. His delegation supported the overall content of the draft articles and was of the view that the international community was justified in adopting the principle of strict liability of States for the activities carried out under their jurisdiction.

5. Mr. (Japan), referring to the topic of State responsibility, said that the International Law Commission must carefully consider the concepts of "material injury or damage", "moral injury or damage", "legal injury" and "reparation by equivalent", contained in chapter V of its report (A/45/10). In particular, so as to distinguish moral damage to the State from damage to be compensated for by

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(Mr. Yamada, Japan)

reparation by equivalent, the Commission would have to define the concept of "legal injury", which constitutetl moral damage to the State and was broad enough to cover almost all types of internationally wrongful acts.

6. The Commission should consider the question of injury to the expectations of States caused by violations of treaties relating to the environment, disarmament and trade and other activities, since such injury did not necessarily lead to pecuniary compensation. In that connection it should be noted that the Special Rapporteur, taking a realistic approach, had expressed the view that injury to "expectations" should not necessarily be covered by the general rules under discussion but could be covered by specific treaties.

7. There was general agreement among members of the Commission that consideration of article 8 must be based on the principle that' the result of reparation in a broad *sense* should be the wiping out, to use the Chorzów Factory case dictum, of all the legal and material consequences of the unlawful act in such a manner as to m-establish, in favour of the injured party, the situation that would have existed if the wrongful act had not been committed. Since there was *no* unanimity as to whether the principle should be concretized in more detailed rules, the Commission should undertake further exhaustive examination of the matter.

8. Moral damage to individuals should be treated differently from moral damage to the State, since they were concepts having different dimensions. On the other hand, the Commission should further consider the criteria of pecuniary compensation by, for example, clarifying the meaning of the phrase "any economically assessable damage".

9. While satisfaction had frequently been granted as an autonomous remedy, it was necessary for the Commission tc consider the possibility of describing the nature of that remedy in the draft articles or of listing its modalities in concrete terms. Moreover, the Commission should bo careful in introducing the concept of fault into the convention, since that would affect the basic idea underlying the topic of State responsibility. The Commission members should hold consultations on the question, even if the concept of fault was limited to one of the elements to be taken into account *in* the consideration of the effect of an internationally *wrongful* act.

10. With regard to chapter VII of the report, relating to international liability for injurious consequences arising out of acts not prohibited by international law, he wondered whether there was any formal agreement to the effect that the objective of drafting a convention of a general nature was to establish a basic "framework" in the same sense in which the *Commission* undsrstood the term "framework" in the draft articles in chapter IV of the report. If so, it did not *seem* that the Commission had made a clear decision as to whether to formulate an instrument containing guidelines for the drafting of specific agreements, or one establishing minimum standards which would be legally binding on parties to the convention. Consequently, it was necessary to clarify those points before specifying the scope of activities covered by the convention. In the view of his delegation, it was

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(Mr. Yamada, Japan)

necessary to classify clearly the activities covered by the convention in terms of risk end harm. The Commission should then undertake an in-depth examination of the content of the obligation of prevention as well as that of liability for reparation corresponding to each classified activity.

11. With a view to defining the term "activities involving risk", the Special Rapportour had taken the realistic approach of introducing the concept of dangerous substances in the convention and of enumerating them. In that connection it would be desirable for there to be an exhaustive list of dangerous substances, subject to periodic review.

12. The principles set forth in chapter II of the proposed outline related to a number of controversial issues, such as the relationship between the obligations to take preventive measures and to make reparation, and the principles of prevention and of liability for reparation. In that connection it was not appropriate to treat the general rules of strict liability as general principles of international law in that area. Accordingly, he hoped that the Commission would take a realistic approach to those questions and take into account the provisions of national legislation in various countries. Considering that there was no unanimity of views on the extent to which the State was liable for damage arising from activities performed by private persons, he hoped that the Commission would intensify its consideration of the problems to be dealt with under an international civil liability régime, distinguishing them from those to be dealt with under a State liability régime.

13. In view of the vagueness of the concept of harm to the "global commons**, it should be left outside the scope of the convention for the time being. Al though there was no doubt that the protection of the "global commons" was a mattes of growing importance, it appeared premature to establish new legal principles to regulate international liability in that field. The Commission should examine the possibility of establishing a mechanism for international co-operation in the management of the "global commons".

14. Mr. TREVES (Italy) said that the differences of opinion regarding States responsibility, expressed in the report of the Commission, were clue to the fact that the Special Rapporteur had insisted on "progressive development" of the law whenever, in his opinion, mere "codification" would have produced rules lacking the necessary clarity. The Special Rapporteur'a logic was particularly apposite in the case of the issues considered in his second report, since the domestic law of countries in matters of tort included very complex concepts for addressing problems which, at least structurally, were the same as those arising in international law, Certain proposals of the Special Rapporteur had met with difficulty because some members of the Commission believed that it was not advisable to make the provisions of international law relating to matters such as reparation by equivalent or satisfaction too precise. Clear examples of that problem were to be found in article 8, paragraph 4 and in article 9, to which objections had been raised based on the concern for maintaining a certain degree of flexibility, which would reflect the existing situation in practice.

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(Mr. Treves, Italy)

15. That divergence of views clearly demonstrated that, in order to meet the needs of the international community, the Commission needed to find an appropriate balance between "progressive development" and "codification". Progressive development added dynamism to international law and helped to make it consonant with current needs; nevertheless, excessive progressive development could be unacceptable to States and might ultimately contribute to the failure of projects.

16, In some other cases, differences of opinion among the members of the Commission were based more on terminology than on substantive issues; that seemed particularly clear when using the term "punitive damages" to reflect the "punitive nature" of satisfaction. It was inappropriate to contend that the concept of "punitive damages" might be inconsistent with sovereign equality of States. It seemed evident that, although in some cases "satisfaction" took the form of the payment of a sum, that sum should not be labelled as compensation. Similarly, it might be inappropriate to use the word "punitive". Nevertheless, it seemed clear that, to a certain extent, "punishment" or "retribution" were simply the other side of the coin of "satisfaction": the injured State was satisfied in seeing the wrongdoing State suffer as a result of its act. Thus, to prevent abuses, a provision existed according to which satisfaction should in no case include "humiliating demands" on the State which had committed the wrongful act.

17, With respect to international liability for injurious consequences arising out of acts not prohibited by international law, the Commission already had a complete outline of the draft articles, which allowed each provision to be seon in perspective and permitted a comparison of the draft articles with related Commission projects on international watercourses and international responsibility. With that in mind, he reitorated his opinion that it would be useful to have some co-ordination between the topics considered in chapters IV and VII of the Commission's report., because in many ways the respective projects were concerned with the same problems. Furthermore, it seemed the right time for deciding whether the articles on liability should encompass only general principles or include many details. The current trend seemed to be towards the latter alternative. For that reason, the Italian delegation could not respond positively to one of the specific questions raised by the Commission on that topic, namely, whether the concept of significant risk should be clarified by the introtluction of a list of dangerous substances. That type of list was appropriate for conventions on particular subjects, but might create conflicts in a general convention.

18. Article 16 demonstrated clearly the difficulty of drawing a line between its topic and that of international responsibility. If a convention were to include the obligations of prevention, there was no reason why failure to comply therewith should not constitute a wrongful act and entail responsibility.

19. With regard to the second question to which Governments had been asked to respond, his delegation considered that payment for damage resulting from the activities referred to in the draft articles should be as complete as possible and that the burdens borne by States and private parties should complement each other. That would mean that the rules in chapters IV and V should be interpreted as parts

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(Mr. Treves, Italy)

of a whole. Damage imputable to private operators and paid to the injured persons in accordance with domestic law should not be paid by States, In that context, schemes for compulsory insurance and the creation of compensation funds would be useful. States should be liable for payment of those damages which could not be recovered through domestic law mechanisms. In any case, the principle of residuary liability should be applied with a certain amount of flexibility.

20. The speaker expressed his satisfaction at the fact that the Special Rapporteur had considered the question of liability for harm to the environment in areas beyond national jurisdiction (global commons). That analysis was a stimulating exploration of uncharted territory, which raised highly complicated issues and merited in-depth study.

21. Mr. CRAWFORD (Australia) said, with respect to the topic of State responsibility, that it was difficult to aomment on articles 8 to 10, discussed by the Commission earlier in 1990, without considering them in the overall context of Part II of the project. In 1989, his delegation had made some comments on that subject, in particular on draft article 7, and had called for a greater degree of flexibility in the formulation of the principle of restituoTin ihtegrum. s e comments had some bearing on the draft articles under consideration. Against that background, he would make two general and two specific comments.

22. The first general comment related to the issue o" fault. His delegation believed that, in principle, the concept of fault did not play a major role in determining the consequences of an internationally wrongful act. Once it had been determined that there had been a breach of an international obligation, there was little room for attenuating the obligation of restituo in integrum and its alternatives. It was therefore difficult to elaborate general rules for determining the impact of fault in the remedial context; it was better to subsume it under the broad notion of appropriateness or reasonableness, which could not be excluded from that field. The second general comment related to the slightly uneven approach taken in draft articles 8 to 10, in which the issues were stated at times in terms of the obligation of the wrongdoing State and at other times in terms of the rights of the injured State.

23. With respect to specific artlclee, he had a mild preference for alternative (a) in draft article 8, paragraph 1, as it appeared to be more flexible. Also, draft article 8, paragraph 5, should use the wording "may be reduced** rather than **shall be reduced'*. With respect to draft article 9, in addition to the inadvisability of deleting paragraph 1, it was difficult to understand why the award of interest was limited to compensation due for loss of profits, since in principle any amount due and unpaid could earn interest.

24. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he welcomed the comprehensive outline of the draft articles provided by the Special Rapporteur. With respect to the matters on which the views of the Sixth Committee were sought (para. 531 of the report of the Commission), he made the following observations.

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(Mr. Crawford, Australia)

First, with respect to subparagraph (a), on the question as to whether the draft articles should aontain a list of harmful substances, his delegation was not convinced of the appropriateness of the proposal. The list was intended only to assist in defining significant risk and not in defining harmful effects. Furthermore, a more fundamental difficulty was the fact that the draft articles were concerned with acts, not with substances. With respect to eubparagraph (b), the issue as to whether a State or a private operator bore liability raised a basic difficulty. In Australia's view, a State had an international obligation to prevent appreciable transboundary harm which, if breached, would entail liability. For that reason, his Government endorsed tho approach of including in the articles a clear statement of the obligation to pay compensation, rather than merely an obligation to negotiate. In any statement of intornational law, it was the obligation and liability of the international actor, the State, that was in question. In customary law, the more general position was that the State had certain responsibilities and liabilities and that it was for the State, by means of its internal law, to settle the matter of responsibility between itself and its private operators.

25, While it would be premature to comment in detail on individual articles, considerable progress had been made in distinguishing between prevention and liability. On the other hand, a breach of the procedural obldgations in articles 11, 13 and 14 should be regarded as a breach of an international obligation for which a State could seek redress independently of any harm. The fact that those provisions were procedural in character did not make them any less of an obligation. Part III, which might better be entitled "Assessment, Notif icatfon and Prevention", therefore needed further refinement. In particular, it was desirable to distinguish between prevention and notification and to make it clear that draft article 16 was without prejudice to other international obligations.

26. Although 'the principle stated in draft article 20 was acceptable, he agreed with those members of the Commission who were concerned about the appropriate threshold to trigger that provision. It was by no means clear that the courts of the injured State provided the appropriate forum to determine disputes arising under the draft articles, at least where the defendant was the State of origin itself, as referred to in drak't articles 29 (c) and 31. There was a need for consistency between that provision and draft article 13 of the draft articles on jurisdictional immunities of States and their property. He welcomed the initial work on the treatment of harm done to the global commons and recommended its continuation.

27. Mr. HEROUY (Ethiopia), referring to the draft Code of crimes against the peace and security of mankind, and particularly to draft articles 15, 16 and 17, dealing respectively with complicity, conspiracy and attempt, said that one of the main issues involved the question of methodology, namely, whether those offences should be treated separately, as belonging to the special part, or as general principles, belonging to the general part of the draft Code. His delegation preferred the second alternative. With regard to defining the concept of complicity, conspiracy

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(Mr. Herouy, Ethiopia)

and attempt, it might be prudent to avoid a detailed definition which could lead to controversy over interpretation and the scope of application, The determination should be left to the judge in each specific case.

28. In connection with illicit drug trafficking, the two texts submitted by the Special Rapporteur were designed to make international traffic in narcotic drugs a crime against peace and a crime against humanity (arts. X and Y). His delegation was interested in the two-pronged approach of the Special Rapporteur, especially in the light of the discussion it had generated in the Commission, It also saw the merit of a single provision, as suggested by some members of the Commission who had argued that drug trafficking should be treated only as a crime against humanity (para. 80 of the report).

29. Regarding the intractable problem of including in the Code a provision dealing with a breach of a treaty designed to ensure international peace 'and security, he shared the concern of those members of the Commission who opposed the idea. Such a provision could undermine the principle of universality, on which the concept of crimes against the peace and security of mankind was based and could give rise to questions relating to the relatively settled area of treaty law. It would be far more desirable either to drop the subject totally or, at the very least, defer it indefinitely to be re-examined only after consideration of the other draft articles had been completed.

30. Regarding the establishment of an international criminal jurisdiction, his delegation noted with satisfaction that. in its in-depth examination of the question, the Commission had adopted the practical approach of taking account of previous United Nations efforts in that field. Since the concept of international crime was broader in scope and application than that of crimes against the peace and security of mankind, Ethiopia was in favour of limiting the jurisdiction of the court to the crimes under the Code. In accordance with basic principles of international law, cases should be brought before the court by States parties to the statute. His delegation therefore maintained that to be bound by the decision of the court, or indeed even to accept its jurisdiction, required the consent of the State concerned.

31. Turning to the law on the non-navigational uses of international watercourses, his delegation noted that further progress had been made in the study of the topic and was heartened by the reassurance that there was general agreement on the meaning of the term "framework agreement", as succinctly stated in paragraph 257 of the repot t . It was in favour of that approach, which increased the chances of accepting the instrument. As for specific draft articles, Ethiopia had no difficulty with the principle enunciated in article 24, paragraph 1, because the absence of priority among uses of watercourses reaffirmed the principle of permanent sovereignty of States over their natural resources. However, in addressing itself to conflict situations and venturing into the field of dispute settlements, article 24, paragraph 2, went beyond the scope of the draft and beyond the Commission's competence (pare. 265 of the report).

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(Mr. Herouy, Ethiopia)

32. With respect to article 25, the term "regulation" was too vague to warrant any observation or comment at the current stage. He hoped to see a definition of the term in due course. He also found the formulation of article 26 a fundamental departure from the framework agreement approach and favoured recommendations of a general nature which left room for, and took account of, each specific situation. As a general observation, he endorsed the view expressed in the second part of paragraph 278 of the report. The wording of article 26, paragraph 1, was hardly acceptable. While consultation was desirable in principle and was the corner-stone of co-operation among riparian States, the obligation of consultation should be contingent upon and subject to specific conditions. The obligation to start consultations at the request of any State was going too far. The formulation of paragraph 1 did not serve the objective that it tried to attain, namely, the establishment of a joint organisation for the management of an international watercourse. The Commission should look further into the problems posed in that paragraph.

33. Ethiopia agreed with the general thrust of article 27 but shared the concern that reference to the protection of watercourses as distinct from installations might broaden the scope of the provision which should be limited to installations. It would, however, be prepared to consider other criteria and would return to the subject later. So far as article 28 was concerned, there was no point in embarking on the delicate theme of armed conflict, which was beyond the scope of the draft articles.

34. Regarding implementation of the draft articles, the commitments in the annex were more appropriate for a small closely-knit group of States and some of the commitments might require changes in national laws and go beyond the limits of a framework agreement. At all events, questions concerning implementation in general and the provisions in the annex in particular should be dealt with after completion of the work on the remainder of the draft articles.

The meeting rose at 11.25 a.m.