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at 3 p.m.
New York

SUMMARY RECORD OF THE 34th MEETING

Chairman:	Mr. NEDELCHEV (Rapporteur)	(Bulgaria)
later:	Mr. AFONSO (Chairman)	(Mozambique)

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In the absence of the Chairman, Mr. Nedelchev (Bulgaria), Rapporteur, took the Chair.

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

AGENDA ITEM 131: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued) (A/C.6/46/L.9)

1. The CHAIRMAN announced that Bulgaria had joined the sponsors of draft resolution A/C.6/46/L.9, which contained a Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10 and 405)

2. Mr. Afonso (Mozambique) assumed the Chair.

3. Mr. NATHAN (Israel), referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that it would appear from the title of the topic that the Commission had set out to make new law rather than to codify existing law, since there would otherwise have been no point in using the term "acts not prohibited by international law" in respect of injurious consequences; in other words, at the current stage, the acts causing injury were not prohibited by international law. As the object of the draft articles would be to lay down principles relating to liability for the injurious consequences in question, the Commission might consider adopting a different title for the proposed articles which would reflect that object. His delegation concurred with the statement on that point by the representative of the United Kingdom.

4. At least some of the harmful activities to be prohibited by the intended instrument were governed by the principle sic utere tuo ut alienum non laedas, the natural application of that principle, as the Commission had rightly pointed out in paragraph 225 of its report, being that the innocent victim should not be left to bear the burden of his loss. As to the scope of the topic, the proposed instrument might well deal with activities involving risk of causing harm as well as with those actually causing transboundary harm and the duty of reparation due from the author State to the victim injured by the harmful activity.

5. With regard to the duty of prevention of harmful activities, while the proposed instrument might lay down the general duty of prevention of transboundary harm, it was doubtful whether the instrument should specify in detail the preventive measures to be taken by States; such matters would be better included in model rules to be annexed to a binding instrument. As the Commission had rightly stated, the proposed instrument should strike a balance

(Mr. Nathan, Israel)

between, on the one hand, allowing States their legitimate freedom of action on their territory and, on the other hand, ensuring that States would exercise due care to prevent harmful transboundary results from such activities.

6. On the issue of liability for the results of harmful activities, absolute or strict liability of States should be ruled out, if only because harmful activities would in many cases be conducted not by States but by private operators. On the other hand, the State could still be held liable when the State itself, its organs or agents, were conducting the activity causing the harmful results, or where the State failed in its duty to take the necessary measures to prevent the harmful result. Such duty included the taking of such measures, by way of legislation, administration, supervision and enforcement, as were required in order to prevent or reduce to a minimum the risk of causing transboundary harm.

7. It should be recognized that it would be very difficult to set out an elaborate system for the civil liability of the operator in view of the different treatment of that matter under the domestic law of the various States. In so far as claims against private operators were concerned, individual claimants should first exhaust local remedies before resorting to the international remedies to be provided in the proposed instrument. Lastly, it was doubtful whether the time was ripe to include the issue of the "global commons" in the framework of the topic.

8. On the topic of "Relations between States and international organizations", dealt with in chapter VI of the Commission's report, there should be general agreement, as indicated in paragraph 284 of the report, that the main criterion to be applied in granting privileges and immunities to international organizations was "functional necessity". That functional test was borne out, inter alia, by article 13 of the draft articles, which provided for the free circulation and distribution of the publications of international organizations "necessary for their activities".

9. In draft article 15, the first clause would appear to be covered by article 12, paragraph 1; the second clause might be superfluous.

10. Draft article 16 would be contingent on any of the relevant provisions of the convention on the diplomatic courier and the diplomatic bag that might be applicable to the diplomatic bag of international organizations.

11. In article 18, dealing with tax exemptions, the more general term of "charges" might be more appropriate than the term "taxes". That would be more in line with the latter part of section 7 (a), of the Convention of 1946 on the Privileges and Immunities of the United Nations, which referred to "charges" in contradistinction to "taxes", which were transferred to the treasury of the State. Lastly, in article 21, paragraph 1, the words "in principle" had no legal effect and might be replaced by the words "as a general rule".

12. Mr. FARRUKH (Pakistan), referring to chapter III of the Commission's report which dealt with the law of the non-navigational uses of international watercourses, said that his delegation attached great importance to the topic. In Pakistan, agriculture was the mainstay of the national economy, as about 70 per cent of the population was engaged in farming and agro-based activities. Pakistan therefore believed it was necessary to develop rules for the equitable utilization, conservation and protection of international watercourses. There must be an equitable balance between the rights of lower and upper riparian States, and watercourse States must cooperate with each other in order to solve water-related hazards, eliminate harmful conditions and protect watercourses.

13. On the question of whether to include groundwater in the definition of a watercourse, the debate as reflected in the report indicated divergent views. While some members favoured the inclusion of groundwater, particularly "free" groundwater, in the definition, others did not. He had noted with interest the observations of the United Kingdom representative indicating some difficulty in determining the extent of obligations of States if groundwater was included in the definition of a watercourse. With underground water, the location and size of the resource and its interaction with the watercourses of other States might not be known. It was true that such questions could - with time, money and expertise - be investigated, but States - particularly developing States - might have other, prior calls on their resources. It was therefore important for the Commission to address that issue in more detail.

14. His delegation had noted with interest the principle underlying article 10, "Relationship between uses", and believed that special attention must be paid to equitable utilization, protection and conservation of water resources.

15. With regard to articles 26, 27 and 28, dealing respectively with management, regulation and installations, he noted that in recent years there had been increased cooperation among watercourse States for the optimal utilization, management and protection of international watercourses. The idea of establishing a joint management mechanism embodied in article 26 was an interesting one. The term "mechanism" was preferable to "organization" since it provided for less formal means of management. The need for management of international watercourses on an agreed basis could not be overemphasized, and the consultations and cooperation between watercourse States provided for in article 26 were important. However, in the event of a conflict of socio-economic interests between watercourse States, the concept of consultation as envisaged by the Special Rapporteur should also include an obligation to negotiate in order to reach a just and equitable solution. Article 26 could be improved and required further consideration by the Commission.

16. With regard to article 27, his delegation was aware of the importance of the regulation of international watercourses and the need for cooperation between States in that field, both to prevent dangers such as floods and erosion and to maximize the benefits that might be obtained from the

watercourse for the watercourse States on a just and equitable basis without any significant change in the flow of water to the lower riparian State. The Commission should therefore discuss article 27 further with a view to its elaboration.

17. As to articles 28 and 29, it should be obligatory for watercourse States to do their utmost to maintain and protect international watercourses and related installations, facilities and other works from wilful or negligent acts and from the forces of nature. Article 28 should not only oblige States to prevent contamination of water resources but should also prohibit any efforts to cut the water supply of watercourse States, dry up springs, or divert rivers from their course. The liability for such wilful or negligent acts must be a strict liability so that the State responsible for causing harm to other watercourse States was made liable for the consequent damage.

18. Turning to the question of jurisdictional immunities of States and their property, he noted that the debate on the subject in the Commission had revealed a divergence of views between those States in favour of absolute immunity and those in favour of restrictive immunity. His own country's law departed from the traditional doctrine of absolute immunity and restricted immunity to sovereign acts.

19. On the question of State responsibility, his delegation welcomed the fact that the Special Rapporteur had been able to introduce his report, which dealt with the "instrumental" consequences of an internationally wrongful act or "countermeasures", namely with the legal regime of the measures that an injured State could take against a State which committed an internationally wrongful act, notably, in principle, with the measures applicable in the case of delicts. He hoped that the Commission would make progress on the topic at its future sessions.

20. Turning to the draft Code of Crimes against the Peace and Security of Mankind, and specifically the question of penalties, he said that the view that a penalty should be specified for each crime was reasonable. Each crime had a specific and individual nature, and the gravity of the penalties would depend on the nature of the crime and the circumstances under which it had been committed. It should not be left for the judge to decide the question, and the Code itself should set a minimum and maximum penalty for each crime. However, the Commission should give more extensive consideration to the subject after obtaining the views of Governments.

21. With regard to article 3, paragraph 2, he felt that abetment should be dealt with in a separate article. In the same connection, the use of the word "abetting" in the definition of complicity was incorrect. Abetment was an offence in itself, like conspiracy and attempt. In criminal law those offences did not come within the purview of complicity.

22. With regard to article 15 on aggression and article 16 on the threat of aggression, he noted that intention was not one of the constituent elements of

(Mr. Farrukh, Pakistan)

aggression and that, consequently, the provision concerning the responsibility of individuals for the crime in question was ambiguous. It left excessive discretion to the courts and, as the courts would be those of the country which had been the victim of aggression, even if justice had been done, it would not have been seen to be done. There could also be conflicting interpretations of an alleged act of aggression, if nationals of the country alleged to have committed aggression were tried in different courts, as was possible under the draft articles.

23. With regard to article 17 on intervention, he felt that the use of arms should not form part of the definition of intervention and the word "armed" inside square brackets in paragraph 2 of the article should be deleted.

24. In article 19 the definition of genocide should be amended to cover all reasonable possibilities and the words "national, ethnic, racial or religious group" should be replaced by "national, ethnic, racial, religious or other groups".

25. He welcomed the fact that colonial domination and other forms of alien domination had been included in the draft Code. At the forty-fourth session of the General Assembly, his delegation had supported the inclusion in the draft Code of the crime of forced massive expulsion of population from an occupied territory aimed at changing the demographic character of that territory, and he was pleased to see that it had been included in article 21 on systematic or mass violations of human rights. His delegation had also supported the wording of the definition of "exceptionally serious war crimes", which had now been included in article 22, paragraph 2.

26. On the issue of the Commission's future work, his delegation believed that the Commission should complete its work on the unfinished topics before it. Specifically, it should expedite its work on the subject of State responsibility so as to complete its first reading of the draft articles. It should also proceed to the second reading of the draft Code of Crimes against the Peace and Security of Mankind and the draft articles on the law of the non-navigational uses of international watercourses, after receiving the observations and remarks of Member States.

27. Mr. PAZARCI (Turkey), referring to chapter II of the report, on jurisdictional immunities of States and their property, said that his delegation supported the Commission's recommendation to the General Assembly that a diplomatic conference on the subject should be convened at a date to be determined by the Assembly. The draft articles adopted by the Commission were satisfactory and balanced and offered a sound basis for discussion. Nevertheless, there was room for further improvement. For example, draft article 11 on contracts of employment did not take account of the nature of administrative contracts in connection with immunity from jurisdiction. Admittedly, paragraph 2 of the article recognized the possibility of invoking immunity from jurisdiction in cases where the employee had been recruited to perform functions closely related to the exercise of governmental authority,

(Mr. Pazarci, Turkey)

but that provision was not sufficient to cover all categories of administrative contracts which should benefit from immunity.

28. Similarly, draft article 17 on the effect of an arbitration agreement was wrong to consider that the fact of submitting to arbitration (probably international arbitration) a contract concluded between a State and a foreign individual person was tantamount to the waiver by that State of its immunity from the jurisdiction of a court of another State in proceedings relating to the validity or interpretation of the contract, the arbitration procedure or the setting aside of arbitral awards.

29. Regarding the draft articles on the law of the non-navigational uses of international watercourses, his delegation believed that, while not without merit, they were not satisfactory in every aspect. In fact, the draft focused on the damage which could be caused to watercourses and their ecosystems, and failed to take sufficient account of the economic development requirements of watercourse States. The imbalance between the place accorded to development and that accorded to protection gave rise to a further imbalance, namely between the interests of upstream States and those of downstream States. In their current state, the draft articles could be used to maintain the status quo, causing difficulties or delays to those upstream States which wished to develop their watercourses by obliging them to obtain the approval of the downstream State or States on each occasion.

30. Furthermore, the Turkish delegation had doubts regarding the admissibility of the concept of watercourses which the Commission had finally retained. In fact, by using a relatively broad wording which encompassed canals, glaciers and, above all, underground water linked to an international watercourse, the Commission had enlarged the scope of rules normally formulated for surface waters. In so doing, not only was the Commission exceeding its mandate, but it was making it still more difficult to formulate draft articles on a subject which was already extremely complex by its very nature.

31. Regarding the draft Code of Crimes against the Peace and Security of Mankind, his delegation felt that it was most important to avoid any risk of dispute regarding the categories of crimes included in the draft articles and to ensure that they were well-defined. It was equally important to characterize crimes not in terms of political and subjective considerations, but in terms of the general legal interest of the overall international community. Given the diversity of international documents and the varying legal force of such instruments, one had to be wary of characterizing as crimes in the legal sense acts which, hitherto, had been regarded solely in political terms, and of attributing to individuals responsibility for acts hitherto attributable to States. The risk increased if, in addition, the crimes in question were defined in general terms. Some concepts, intended more for use by political organizations, ran the risk of failing to exhibit the precision and rigour normally demanded of legal concepts.

(Mr. Pazarci, Turkey)

32. Draft article 15 on aggression was a good example. The text contained a provision which had no place in a legal document intended to characterize a crime. The provision in question was subparagraph (h) of paragraph 4, which characterized as a crime "any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter". The provision, which empowered the Security Council to characterize the act in question as a crime once it had been committed, did not have the legal precision required in order to punish the perpetrator of the act. Moreover, the Turkish delegation doubted whether the provision respected the well-known principle in penal law expressed in the phrase nullum crimen sine lege. Draft article 16 on the threat of aggression also left wide scope for subjective appraisal. He read out paragraph 2 of the draft article, and said he did not believe that such subjective criteria, which were liable to be exploited for political purposes were truly adequate to condemn individuals as criminals. Such criticisms were equally valid with regard to other provisions of the draft articles.

33. Mr. SOLIMAN (Egypt) said that his delegation approved the Commission's recommendation to convene an international conference of plenipotentiaries to examine the draft articles on the jurisdictional immunities of States and their property and to conclude a convention on the subject. It believed that, given the technical nature of the draft articles, such a conference would be better able to settle pending questions, and it did not therefore favour the creation of a working group in the Sixth Committee for that purpose.

34. The law of the non-navigational uses of international watercourses was an issue - extremely important for Egypt - which should be settled in such a manner as to ensure cooperation between States and avoid prejudicing the interests of other States, since that would have repercussions for stability and good-neighbourly relations between watercourse States. The formulation of a framework agreement on the subject should take into consideration the following fundamental points: the question was not purely legal and had extremely delicate political aspects; it would be difficult for a convention which was too detailed to take into consideration the nature of relations between the States of a given watercourse and the specificity of undertakings related to the use of watercourses; each international watercourse had its own features and by considering only their shared features, nothing but general principles regarding the administration and management of international watercourse systems could be set forth. For that reason, his delegation believed that one would have to be content with a framework agreement, otherwise the legal regulations would not permit States to manage such vital resources. Regarding the joint management mechanism which could be established, there were already numerous precedents, some of which had been mentioned during the Commission's debate on the draft articles provisionally adopted.

35. As for international liability for injurious consequences arising out of acts not prohibited by international law, the rapid progress achieved in scientific and technical fields had increased the activities which threatened

(Mr. Soliman, Egypt)

to result in transborder harm. Justice demanded that the innocent victims of such harm should not be forgotten, but the codification of liability should not impede scientific and technical progress.

36. The question should be examined in the light of conventions already adopted in that area in order to create a set of general provisions which States should respect when undertaking activities that involved risk. The provisions should clearly define the concept of risk. Moreover, in drawing up the provisions on burden of proof - proof of the occurrence of harm entailing liability and giving rise to the right to compensation or proof that there was no liability, the limited technical capacities of the developing countries must be taken into account.

37. His delegation believed that the aim was to achieve a framework agreement containing key provisions which should be respected by those undertaking an activity involving risk. As for the concept of "risk", the Egyptian delegation thought that it could be useful to define the nature of the preventive measures which should be taken when undertaking a potentially dangerous activity. It could also serve as a compulsory criterion for determining the amount of compensation. Liability should arise from harm and one of its constituent elements was the fact that the necessary preventive measures had not been taken. It was also possible to provide for criteria for harm which would allow the corresponding compensation to be determined.

38. Regarding activities carried out by specific entities in a State, the State should assume its responsibilities and compensate the victims. The national laws should specify the relations between the State and the said entities by determining who, in the last resort, was responsible for compensation. Cooperation played a vital role in that respect and the draft articles should, in particular, specify the obligations regarding notification and consultation which could help determine liability in cases of harm or take preventive measures, which was essential for determining the amount of compensation. The provisions of the framework agreement should prevail over those contained in instruments on particular fields. Furthermore, it was important to state clearly that such provisions did not affect international law regarding military occupation.

39. In conclusion, he stated that the subjects proposed for inclusion in the Commission's long-term work programme were not, with one or two exceptions, priority matters, having already been studied by other organizations or already dealt with in the context of conventions on similar themes or within another legal framework. Given that the Commission still had much to do regarding the subjects currently included in its work programme, it should take stock of its achievements and propose subjects which would allow it to fill potential loopholes or which had high priority in the contemporary world.

The meeting rose at 4.15 p.m.