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Summary record of the 44th meeting
Held at Headquarters, New York, on Thursday, 13 April 2023, at 3 p.m.

Chair: Mr. Leal Matta (Vice-Chair) . . . . . (Guatemala)

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23-07043 (E)

In the absence of Mr. Afonso (Mozambique), Mr. Leal Matta (Guatemala), Vice-Chair, took the Chair.

The meeting was called to order at 3.05 p.m.

Agenda item 78: Crimes against humanity (*continued*)

1. **The Chair** invited the Committee to resume its exchange of views on the draft articles on prevention and punishment of crimes against humanity adopted by the International Law Commission.

Draft articles 5, 11 and 12 (*continued*)

2. **Mr. Kanu** (Sierra Leone) said that, with reference to draft article 5 (Non-refoulement), his delegation supported the absolute nature of the rule. It noted with satisfaction that the International Law Commission had not introduced exceptions to the principle of non-refoulement under customary international law and that it had addressed the concerns raised by his delegation regarding the text that had been adopted by the Commission on first reading. His delegation also welcomed draft article 11 (Fair treatment of the alleged offender), noting that, far too often, the rights of suspects and defendants were not emphasized in international criminal law. To ensure clarity and consistency in a future convention on crimes against humanity, it would be useful to follow the approach taken in the Rome Statute of the International Criminal Court, in which the distinction between the rights of suspects and the rights of accused persons had been drawn. For example, article 55 of the Rome Statute addressed the rights of persons during an investigation, while the presumption of innocence and the rights of the accused were set out separately in articles 66 and 67, respectively.

3. The rights of victims under international law were of paramount importance. His delegation noted that, in draft article 12 (Victims, witnesses and others), the Commission had formulated a broad provision that addressed participation and reparation for persons alleged to be victims of crimes against humanity. A future convention on crimes against humanity could, at the bare minimum, set out minimum standards for the treatment of victims. His delegation remained concerned, however, that draft article 12, paragraph 3, imposed too stringent an obligation on States to ensure that the victims of a crime against humanity had the right to obtain reparation for material and moral damages, on an individual or collective basis. While the Commission had inserted a welcome caveat by adding the wording “consisting, as appropriate, of one or more of the following forms” of reparation and by providing further explanations in the commentary, the experience of Sierra Leone with regard to the mass commission of crimes against humanity suggested that the provision could still be problematic, since it might place a disproportionate burden on fragile States or States affected by conflict. The Commission was therefore encouraged to give further consideration to that paragraph, taking into account the Rome Statute model and the evolutionary development of the jurisprudence of the International Criminal Court. The Commission might also consider inserting a new paragraph 4 in draft article 12, which might loosely be based on article 4, paragraph 1, of the International Covenant on Civil and Political Rights.

4. Crimes against humanity and the issue of reparation could not be discussed without addressing slavery and the transatlantic slave trade – the gravest crimes against humanity to have been committed in human history – for which reparation was still being resisted. There was a need to achieve reparatory justice for the victims of genocide, slavery, slave trading and racial apartheid. Nevertheless, as had been noted in the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (A/74/321), there remained serious political opposition to reparations for colonialism and slavery among those countries that had benefited the most from them. Conventional analysis of international law, including by former colonial nations, had identified a number of legal hurdles to the pursuit of claims for reparations for slavery and colonialism, among them the intertemporal principle, codified in article 13 of the articles on responsibility of States for internationally wrongful acts. According to that principle, a State was responsible for violations of international law only if, at the time of the violation or its continuing effects, the State had been bound by the legal provisions it had transgressed. Numerous States had appealed to the non-retroactive application of international law to deny their legal obligation to provide reparations. However, some States that had previously emphasized that principle to bar claims of international responsibility for genocide and for reparations, for example, were now addressing the issue of reparation owing to political considerations.

5. From a legal perspective, as explained in the report of the Special Rapporteur (A/74/321, para. 49), the intertemporal principle was subject to exceptions, including when an act was ongoing and continued into a time when the act was considered to be a violation of international law or when its direct ongoing consequences extended into a time when the act and its consequences were considered to be internationally wrongful. Thus, racial discrimination rooted in or caused

by colonialism and slavery that occurred after they had been outlawed could not be subject to the intertemporal bar. Moreover, the intertemporal principle did not apply to the present-day racially discriminatory effects of slavery and colonialism, which States were obligated to remediate, including through reparations. The intertemporal principle therefore did not bar all claims for reparations for racial discrimination that was rooted in the events and structures of slavery and colonialism.

6. His delegation agreed with the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance that more needed to be done to explore the application of exceptions to the intertemporal principle, especially as a mechanism to overcome legal hurdles to the pursuit of racial justice. As the Special Rapporteur had indicated, States must recognize that the very same international law that provided for the intertemporal principle had a long history of service to slavery and colonialism. International law had played an important role in consolidating the structures of racial discrimination and subordination throughout the colonial period, including through customary international law, which was co-constitutive with racism.

7. Member States had now been presented with a legal opportunity to articulate ways to overcome the aforementioned hurdles to the pursuit of racial justice and justice for slavery. The study by the Commission of the topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law", which was currently in its long-term programme of work, would be helpful in developing further understanding on the issue.

8. **Mr. Nyanid** (Cameroon) said that his delegation welcomed the statement just made by the representative of Sierra Leone, in particular concerning questions of reparation and non-retroactivity with regard to slavery, the legacy of which had traumatized the African continent. With reference to the comments made by the representative of Ethiopia at a previous meeting, slavery – and not just sexual slavery – should be viewed as a form of trafficking, the after-effects of which were still being felt by the people of Africa.

Briefing on the recommendation adopted by the International Law Commission on the occasion of the adoption of the draft articles on prevention and punishment of crimes against humanity (*continued*)

9. **Mr. Košuth** (Slovakia), commending the Secretariat for the comprehensive briefing given at the previous meeting, said that his delegation would support issuance of that presentation as a note by the Secretariat or in another appropriate form. His delegation had been interested to note that, after a thorough debate, the Commission had opted to recommend the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles, rather than to follow its more recent practice of issuing a two-step recommendation, as it had done for the draft articles on responsibility of States for internationally wrongful acts, whereby the Commission had first invited the Assembly to take note of the draft articles and had further recommended that the Assembly consider, at a later stage, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic.

10. **Ms. Dakwak** (Nigeria) said that her delegation appreciated the information provided by the Secretariat and welcomed the fact that the recommendation of the International Law Commission was not binding, which meant that Member States therefore had the opportunity to continue their negotiations with regard to the draft articles and the Commission's recommendation.

11. **Mr. Pronto** (Office of Legal Affairs), welcoming the interactive discussion that had been held during the current and previous meetings, and commending the delegation of China for its role in suggesting such an initiative, said that consideration could be given to issuing the briefing as a document, if Member States so wished.

12. Responding to the questions raised at the previous meeting, he said that, of the 44 recommendations that the International Law Commission had made to the General Assembly to date, in 27 it had proposed the adoption of an international convention as an immediate or possible future outcome. Of those 27 recommendations, 14 had been followed by the Assembly, resulting in the adoption of a number of treaties and protocols, among them the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Rome Statute of the International Criminal Court; 8 recommendations remained on the agenda of the Committee, including the draft articles currently being considered; and 1 recommendation, concerning the draft Code of Crimes against the Peace and Security of Mankind, had included the adoption of a convention as one of several possible options and had ultimately been subsumed under the Commission's work on the Rome Statute.

13. Four recommendations had not been pursued. The draft articles on arbitral procedure had later been adopted as the Model Rules on Arbitral Procedure. In

the case of the draft articles on most-favoured-nation clauses, the Assembly had decided, by its decision 46/416, to bring them to the attention of Member States and interested intergovernmental organizations for their consideration. With regard to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and draft optional protocols thereto and the articles on the effects of armed conflicts on treaties, the Assembly had established, by its decision 50/416 and its resolution 72/121, respectively, a legal basis upon which to revisit those issues at a later date. Many of those issues would also be addressed in the context of the report of the Secretary-General on all procedural options based on precedents regarding action taken on other products of the International Law Commission, which was being prepared in relation to the articles on responsibility of States for internationally wrongful acts and a first draft of which would be shared with the Committee at the seventy-ninth session of the General Assembly.

14. Concerning the draft articles on prevention and punishment of crimes against humanity, the Commission had discussed, but ultimately decided against, making a two-step recommendation; it had been sufficiently confident in the text of the draft articles to opt for the traditional approach of recommending the elaboration of a convention.

The meeting rose at 3.35 p.m.