United Nations
GENERAL ASSEMBLY
FORTY-FIRST SESSION
*Official Records**

SIXTH COMMITTEE
41st meeting
held on
Wednesday, 12 November 1986
at 10 a.m.
New York

SUMMARY RECORD OF THE 41st MEETING

Chairman: Mr. JESUS (Cape Verde)

CONTENTS

86-57387 0192S (E)

Distr. GENERAL
A/C.6/41/SR.41
24 November 1986
FRENCH
ORIGINAL: ENGLISH

/...

19 P

The meeting was called to order at 10.05 a.m.

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-EIGHTH SESSION (continued) (A/41/10, A/41/406, A/41/498)

AGENDA ITEM 125: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (continued) (A/41/537 and Add.1 and 2)

1. Mr. ABADA (Algeria) said that his delegation had, from the outset, advocated the position that wars of aggression, the denial of the right to self-determination to peoples subject to foreign domination, the usurpation of the economic sovereignty of States even without apparent detriment to their political sovereignty, genocide, mercenarism, apartheid and any use at all of nuclear weapons should be declared offences against the peace and security of mankind and punished as such. It had likewise maintained that the establishment of a dual régime of responsibility applying both to private individuals, as physical persons, and to States, as juridical persons, would be the best way of investing the future legal instrument with the requisite credibility and effectiveness. While the Commission had deferred consideration of the criminal responsibility of States, that question should nevertheless continue to be borne in mind. Subsequent developments in international relations had done nothing to alter his delegation's position.

2. The distinction drawn by the Special Rapporteur between a crime against humanity and a war crime was a fundamental one. There was, however, no clear-cut dividing line between the two concepts since the same act could, at the same time, constitute a war crime and a crime against humanity. Those constituent elements that gave crimes against humanity their specific character should be more strictly defined. Of all the criteria set out in paragraphs 82 to 86 of the report of the International Law Commission (A/41/10), only one, that of motive, had been unanimously accepted, and it had to be acknowledged that a single such element was, of course, inadequate. Three criteria, whenever found in combination, should make it possible to characterize an offense as a crime against humanity: seriousness, the mass element and motive. The crime of apartheid, one of the most heinous of crimes committed against humanity, should be included in the draft Code.

3. With regard to the terminology problems raised in connection with the concept of war crimes (A/41/10, paras. 104-107), hi's delegation preferred the second alternative for draft article 13. The reference in the first alternative to the "laws and customs of war" was a self-contradiction and-seemed to legitimize actions and conduct not in conformity with the law. As for problems of methodology (A/41/10, paras. 110-114), his delegation favoured the intermediate method consisting of a general definition illustrated by a non-exhaustive enumeration. Care should nevertheless be taken to include in the draft Code only those crimes whose inclusion was approved by the majority of States. The same approach should also apply to the selection of the'criteria to be used in defining crimes against humanity.

(Mr. Abada, Algeria)

4. The use of nuclear weapons had such catastrophic consequences that it clearly involved a crime against humanity. The question should nevertheless be asked whether the distinction between first use and response should be embodied in the draft Code. For the international community, the consequences of a nuclear response to nuclear aggression were as disastrous as those of the initial attack. The Commission should take that point into consideration in its deliberations and should endeavour to dissuade States from using nuclear weapons or, even better, from possessing such weapons at all.

5. His delegation welcomed the inclusion of complicity, conspiracy and attempt as separate offenses (A/41/10, paras. 115-132). Such notions from criminal law, appropriately defined, might prove useful in identifying all the perpetrators of an offence against the peace and security of mankind.

6. With regard to general principles (A/41/10, paras. 133-182), it seemed unavoidable that the Commission should accept the fact that an offence characterized as a crime under international law was conceptually autonomous. It should also endorse the principle relating to the jurisdictional guaranteea to which the author of such a crime had a right. In the context of the application of the criminal law in time, the principle of the non-retroactivity of criminal law was widely accepted in international conventions and internal laws and should therefore appear in the draft Code. With regard to exceptions to criminal responsibility, it did not seem necessary to place too much emphasis on the notions of force majeure and superior order since both could be covered by the wider notion of coercion, one that the Commission might perhaps study in greater depth. Of the three systems mentioned in connection with the implementation of the Code (A/41/10, para. 146), the establishment of an international criminal jurisdiction seemed to he the most coherent. While the universal system would have the advantage of flexibility, it might, in view of the diversity of national jurisdictions, undermine the unity of the Code. An international criminal jurisdiction, on the other hand, would be competent to judge all. offenses falling within its scope.

7. Ms. CHOKRON (Israel) said that even if the divergence of views on the jurisdictional immunities of States and their property remained as wide as ever, the work carried out by the Special. Rapporteur on the topic was very useful. Countries contemplating legislation on the point, as was Israel, would find in it extremely useful guidance, particularly with regard to the difficulty Of distinguishing between the actions of the State jure imperii and its actions jure gestionis. Since it considered it desirable that he draft articles should leave room for the Further development of law in that area, her delegation favoured the inclusion of the words in square brackets at the end of article 6. In the title of Part III, it had a slight preference for the words "limitations on", since the law was developing from the idea of absolute immunity towards that of relative immunity and in order to take account of the fact that that development had yet to be completed. FOK the same reason, it supported the deletion of the square brackets in article 18, the residual character of which it. noted with sat isfaction. It favoured the deletion of the square brackets in articles 21, 22 and 23. Two of the four convent ions mentioned in the draft articles were not in force, a fact that should he taken into account.

(Ms. Chokron, Israel)

8. Her delegation, which had already made its position known on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplanatic courier, would subsequently add to its observations in writinq.

9. Her delegation was still undecided as to the usefulness of a convention on State responsibility. The reservation?) it had previously expressed with reqard to Part Two of the draft articles, and particularly article 5, remained valid. Since the articles thus far proposed for Part Three (A/41/10, note 71) were linked with the substantive rules of Part Two, which had, for the most part, not yet been considered by the Drafting Committee, any comment on them was premature. Her delegation nevertheless wished to stress that the reservations it had previoualy entered with reqard to Part Two of the draft articles applied mutatis mutandis to Part Three. In connection with Part Three, articles 3 *and 4,* it would like to recall that it still held to the principle of the freedom of the parties to choose the means for the peaceful settlement of disputes. That principle had ultimately been the major factor in the adoption of article 287 of the United Nations Convention on the Law of the Sea. It was interestinq, in that connection, to recall the essential role played at that time by Mr. Riphaqen, the Special Rapporteur on the topic of State responsibility, in formulating the compromise that had made it possible to resolve the situation. The Commission should re-examine the provisions on the settlement of disputes and eluc date its intentions.

10. The Commission, while deciding that the draft Code of Offences against the Peace and Security of Mankind should only cover the most serious international crimes, had failed to define the constituent elements of those crimes or the criteria that had served as a basis for the selection of one crime rather than another. That element of seriousness had been adopted meant that the projected Code would not be an ordinary international criminal code but a code of an exceptional nature, which made it all the more necessary that characterizations of offences as criminal should be accurate and concise. A number of the proposed characterizations *were* given in general terms ok by reference to documents Of a political character intended for political organs. Their transfer to a jurisdictional organ miqht lead either to their non-applicability or to a politically oriented application.

11. In order to illustrate the difficulties that it encountered with the legal coherence of the topic, her delegation would like to stress that, while the Commission had decided to limit the draft Code to the responsibility of individuals at the current staqe, almost all of the offences included referred to acts committed by "the authorities of a State". Terrorism had been included in the list of crimes, and the proposed definitions and descriptions of terrorist acts were far from exhaustive and did not satisfy her deleqation. In the current state of the draft Code, it seemed that isolated terrorists ok qroups of terrorists not established an a State would be outside its scope. The Commission's clarification of that point would be welcome.

(Ms. Chokron, Israel)

12. Given the exceptional nature of the proposed Code, the basic principles of criminal law had to be rethought. Thus, for example, offences against the peace and security of mankind should be considered imprescriptible and the principle of the non-retroactivity of criminal law should be incorporated in the Code. The problem lay in the need to make jurisdictional guarantees available to the accused while at the same time ensuring that offences against the peace and security of mankind did not go unpunished. The notion that an offence against the peace and security of mankind had an international character and had its own régime independent of the internal order surely had its place in an exceptional code of that type, but should be linked with the question of the Code's implementation by national jurisdictions or any international jurisdiction.

13. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, her deleqation agreed with the Special Rapporteur that the topic related primarily to the duties of the source State to avoid, minimize or repair any appreciable or tangible physical transboundary loss or injury caused by an activity involving risk. However, the fact that an activity involved risk did not necessarily imply strict liability; strict, or absolute, liability was not, in principle, recognised as such under international law, and to the extent that it had been subject to conventional rules under a specific treaty relating to a specific activity, the liability - in the sense of reparations for damages - had in most cases ended up being quite limited in so far as it related to the damage and had led to a system of compensatory insurance, a concept worth retaininq.

14. With regard to the law of the non-naviqational uses of international watercourses, her deleqation would find it easier to give its views on the question of whether there should be set forth a list of factors to be taken into consideration in determining what amounted to a reasonable and equitable use if a limited, indicative list of general criteria had been proposed. It would also facilitate things if the Commission would provide a text on the relationship between the obligation to refrain from causing appreciable harm and the principle of equitable or reasonable utilisation. On the whole, negotiation and the conclusion of agreements between the parties concerned constituted the bent solution. The proposed articles might be useful in that respect by providing a guide for interested States in the conclusion of co-operation agreements.

15. Many of the observations made by the representative of Sweden (A/C.6/41/SR.33) regarding the Sixth Committee's methods of work and its relationship with the International Law Commission merited consideration. Her own delegation deplored the late appearance of the Commission's report and hoped that that situation could be corrected in the future. Her deleqation also hoped that the Commission's yearbooks would be issued as quickly as possible.

16. Mr. BOSCO (Italy) recalled that, 10 years earlier, when the International Law Commission had taken up the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation had already been of the view that great caution must be exercised in touching the Vienna Convention on Diplomatic Relations. Nevertheless, it was possible that the

(Mr. Bosco, Italy)

intensification of diplomatic relations and international communications justified a more detailed regulation of questions relating to the courier and to the hag. The nature of the new instrument and the form it ought to take - a protocol to the Vienna Convention or a new convention - remained open to question. In any event, his delegation hoped that the Commission would, on second reading, take the utmost care in formulating as clear and concise a text as possible.

17. With regard to article 32, the problem of the relationship between the articles and existing bilateral and regional agreements was a familiar one and had inspired article 30 of the 1969 Vienna Convention on the Law of Treaties; that article had been repeated almost word for word in the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organixatfons, which demonstrated its usefulness.

18. In view of the problems rained by the first two versions of former article 42, the Commission had probably been right in deciding to delete it. He wondered, however, whether draft article 32 - the new solution - was the correct one. Since the new text stated that "The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them", it might be argued that they did affect multilateral conventions, and especially the Vienna Convent ion on Diplomatic Relations, whose integrity must be preserved. The problem was indeed complex, and it was to be hoped that the written observations of Governments would lead to a solution.

19'. Draft article 28 was one of the most controversial, as evidenced by the large number of brackets it contained. Preventing the improper use of the diplomatic bag was a problem as old as diplomacy itself. Violations of the bag today were occasionally quite serious and must be discouraged, since the security of *the* receiving State was at stake. It was for that reason that the Italian Government had decided to subject diplomatic bags to radiogenic inspection; that was fully consistent with article 27, paragraphs 2 and 3, of the Vienna Convention because such inspections were limited to the detection of metallic masses and did not permit the reading of correspondence. His delegation was convinced that that position was sound and did not infringe contemporary international law. The rule that the diplomatic bag should not be opened or detained was well established and thus relevant to the codification process, while the use of radiogenic inspections was related to progressive development - current events had demonstrated the need for it. His delegation therefore hoped that, once the bracketed words had been deleted, draft article 28, paragraph 1, would remain fully compatible with the Vienna Convention, since it was identical to article 27, paragraph 3, of that instrument; it therefore ought to read: "The diplanatic bag shall not be opened or detained". That wording was sufficient.

20. His delegation favoured the deletion of the brackets around the word "transit" in draft article 28, paragraph 2. It was hard to understand why some members of the Commission could not accept the extension of the rights accorded to the receiving State in that paragraph to the transit State. A weapon could he extracted from a bag in a matter of seconds, and that could also be done in a

(Mr. Bosco, Italy)

transit airport. It seemed only fair to give the transit State a chance to defend itself. His delegation also wished to suggest that the following words should be deleted: "that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving State, they may further request ..... That suggestion was not in conflict with his delegation's position on radiogenic inspections; such inspections were merely intended to detect objects and did not violate general international law as embodied in the Vienna Convention, and there was consequently no need to mention them explicitly.

21. Another bracketed word that should be deleted was the word "consular", in the second line. Since the purpose of the draft articles was to make rules regarding couriers and bags uniform, there was no reason why paragraph 2 should apply only to the consular bag. Any valid solution must balance the interests of the States concerned, as his delegation had already observed two years previously, when it had recommended the extension of the régime in article 35, paragraph 3, of the Vienna Convention on Consular Relations to all types of bags.

22. Mr. SANGSOMSAK (Lao People's Democratic Republic) said it was a genuine realization of the dangers of conflicts and the threat of a nuclear holocaust that had led the General Assembly in 1977 to take the courageous decision to reconsider the Question of the draft Code of Offences against the Peace and Security of Mankind and request the International Law Commission to resume its work in that area. Since that time, a growing number of countries had called attention to the usefulness of and the need for such a code. They had welcomed the progress made over the years. The adoption of the Code as an instrument of restraint would encourage States to behave in a manner consistent with the rules and principles governing relations between States.

23. The fourth report of the Special Rapporteur had been prepared in accordance with General Assarbly resolution 40/69, which had invited the International Law Commission to elaborate an introduction and a list of offences for the draft Code, taking into account the progress made in the Commission and in the Sixth Committee. His delegation wished to address the question of the content ratione personae of the draft Coda at that stage. The International Law Commission had decided for the time being to limit the draft's scope of application to the criminal responsibility of individuals. Not only had the first alternative of article 2, contained in the third report, been omitted from the fourth report, but its spirit and letter had not been faithfully reflected in draft article 3 entitled "Responsibility and penalty". In the French text, the word "auteur" was not specific enough; it was subject to various interpretations, thereby introducing an element of confusion. Consequently, his delegation would prefer a return to the original term, "les individus", in place of the word "auteur"; it was in fact individuals - whether acting in their personal capacity or representing a State - who could be found guilty of an offence. The main point was that individuals having a specific legal status, and not the States they represented, were the ones who must be accused.

(Mr. Sangsomsak, Lao People's Democratic Republic)

24. On the subject of draft article 11, defining acts constituting crimes against peace, many delegations had voiced opposition to the use of the expression "by the authorities of a State", which appeared in brackets in draft article 4, section A of the third report by the Special Rapporteur. It was unfortunate that the expression, being so highly controversial, had not been dropped. Its retention in draft article 11 increased the doubts regarding the scope of application of the eventual code, especially as draft article 3 did not explicitly define the persons whom the code would cover. At the present stage there could be no question of the future code's establishing criminal liability for a State. Moreover, such a régime would run counter to State sovereignty, which entitled a State to deny an international court jurisdiction over its sovereign integrity. His delegation would therefore prefer wording which specified activities by individuals whose consequences would entail material liability for the State those individuals represented.

25. On other aspects of draft article 11, in addition to aggression, threatened aggression and economic coercion, his delegation applauded paragraph 3 on interference in the internal affairs of another State, in particular subparagraph (a) which incorporated fomenting or tolerating, in the territory of a State, the fomenting of civil strife or any other form of internal disturbance or unrest in another State, into the category of crimes against peace. It also endorsed the designation as crimes, in the same draft article, of State terrorism, the breach of treaties on disarmament, nuclear testing in certain territories or in space, and the maintenance of colonial domination.

26. His delegation supported paragraph 8, on the *crime* of employing mercenaries. However, the definition of *mercenary* given in that paragraph did not go beyond that given in Additional Protocol I to the 1949 Geneva Conventions. Without being opposed to such a renvoi, his delegation believed that the definition of the term should also reflect the opinions voiced in the Sixth Committee and in the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The Ad Hoc Committee had devoted two articles to the definition of "mercenary" in the context, respectively, of armed conflict and peace time. On the other hand, it was the opinion of some that there was no need to include a clause on the nationality of mercenaries.

27. Turning to draft article 12, he expressed approval of paragraph 1 on genocide and the second alternative of paragraph 2, on apartheid, for those crimes were strongly condemned by virtually all States. Regarding draft article 13, his delegation would prefer the second alternative of the definition of war crimes. On the matter of whether to stipulate that the use of atomic weapons was a war crime, his delegation felt that if the code was to be a truly effective instrument, it undoubtedly must deal with the currently topical issue of preventing nuclear war; it should, therefore, explicitly state that any State which took the initiative of embarking on nuclear war would be committing the gravest of crimes against humanity. His delegation therefore fully subscribed to the provision of paragraph (b) (ii) and called for the removal of the brackets therein. It also added its voice to the call for the Sixth Committee to continue its discusston of that important point as a separate item on its agenda.

28. Mr. GUILLAUME (France) said that his delegation would have no objection if the International Law Commission, as suqqested in paragraph 252 of its report, decided not to take up all the items on its aqenda at every session and thus made faster progress on topics which were closest to completion and on which there appeared to be sufficient agreement among States. He added that the financial circumstances of the United Nations must not lead to the discontinuation of the Commission's summary records. The summary records, if not strictly speakfnq the travaux préparatoires of conventions, did show the train of thouqht among the eminent lawyers on the Commission and could therefore help in the interpretation of texts which had not been adequately clarified before adoption.

29. On the jurisdictional immunities of States and their property, he commented that the subject was a highly legal one of obvious practical importance to States, particularly the developing countries. The topic was a difficult one for two reasons: first, international customary law in that area was fairly limited, and existing conventions had not been a resounding success; second, national law was diverse and, as in his country, often the outcome of jurisprudence in courts where views were susceptible to change. Comments by States would be of great importances in his view, it was essential for the Commission, setting aside purely doctrinaire considerations, to take the fullest possible account of those comments and apply itself to identifying the solutions which were likely to command general agreement. The Commission should also take care not to draw on just one of the existing legal systems, for otherwise there was a risk that the final text would be of theoretical value only.

30. Regarding the various draft articles adopted by the Commission at its most recent session, he said it was unfortunate that during its discussion of article 2, paragraph 2, the Commission had not revised the definition of a commercial contract given in paragraph 1 (b) of the same article. Defininq any contract or aqreement of a commercial nature as a *commercial contract' had not really shed any Liqht on the problem, any more than article 3, paragraph 2 had. The latter text did stipulate that in determining whether a contract was commercial, reference must be made not only to its nature but also to its purpose if that purpose was relevant in the practice of the State concerned. The Commission added in its commentary (para. (7)) that the latter expression referred exclusively to the State claiming immunity and not to the State of the forum, but he wondered whether allusion solely to the practice of the State invokinq immunity was satisfactory, and whether the wording selected miqht not be too elliptical.

31. Paragraph 1 (b) of draft article 3 could be improved. The difference between the English and French versions of the text was perhaps because of a fundamental division: one could maintain either that only the political subdivisions of States which performed acts in the exercise of sovereignty (in other words, the federated States in federations or confederations) should enjoy jurisdictional immunity at the international level, as the English version would suggest, or that immunity extended to the autonomous territorial collectives which in unitary States exercised the prerogatives of public authority, a notion close to the French text, and one which his delegation would prefer. His delegation also felt that the text of draft article 6 should allow for possible change in what Mr. Riphaqen had described as the "grey zone" and, in that right, it might be preferable to keep the phrase "and the relevant rules of general international Law".

(Mr. Cuillaume, France)

32. On Part IV of the draft art icles, dealinq with measures of constraint, his delegation continued to wonder whether it was appropriate to try in the convent lon to regulate State immunity in respect of execution! its doubts were based hoth on considerations of principle and on practical concerns. If one referred to the first draft article, it waa clear that it applied to immunity in respect of jurisdiction; in his delegation's view, immunity in respect of execution was different in scope. Moreover, as soon as one nought to def ine the exceptions that should apply to immunity in respect of execution, one found oneself in a sensitive area of relations between States; it was particularly awkward to establish in the abstract general rules to be followed in practice, and he wondered whether, in seeking to do so, the Commission was not running the risk of delaying completion of its work on the main topic. The provisions proposed also seemed to raise certain difficulties.

33. According to draft article 21, immunity in respect of execution would cover property in the control of a State or property "in which it has a leqally protected interest". both formulations were extremely vague, and while it might be clear what was meant by an interest, it was harder to see what was meant by the legal protection of such an interest. According to the same article, moreover, immunity in respect of execution would not apply in two cases, one covering the use of certain property for commercial purposes, and the other, the allocation of State property for the eatiefaction of a claim, whatever the nature of that claim. The second case did not appear to pose any problems, but the first needed to be rigorously circumscribed. The current wording of aubparagraph (a), which stipulated no more than "a connection" with the claim or the agency concerned, was too loose. The text should not go beyond cases in which the property seized had been used in the economic and commercial activity under private law which had given rise to the claim.

34. His delegation still wondered whether it was wise in draft article 23 to list the propertv permanently immune from enforcement measures - unless otherwise expressly agreed by the State concerned - and to run the risk of forqetting to include certain categories of property in the list; perhaps the list should be offered as indicative of "public property earmarked for public service" and thereby entitled to thr status in question.

35. The texts proposed by the Commission on jurisdictional immunity in the strict sense were scrupulously balanced and met with his approval on the whole. Some additional refinements, however, had to be made; particularly in the French version which was sometimes clumsy; and presumably the Commission would rapidly draft a satisfactory text in the light of comments by States.

36. Concerning the status of the diplomatic courier and the diplomatic haq not accompanied by diplomatic courier, his delegation had serious doubts about the perspective from which some aspects of the topic had thus far been studied. It was clear from draft articles 1 and 3, and still more so from the commentary on draft articles 32 and 33, that the text sought basically to establish a consistent and uniform r'qime for the status, of baqs and couriers. whether the haq in question was the dip.omatic baq qoverned by the 1961 Vienna Convention or the consular hag

(Mr. Guillaume, France)

governed by the 1963 Vienna Convention, or the bags used by special missions or reprerentations of States to international orqanizations.

37. In the first place, the aim should not be to make the applicable law uniform, but rather to fill the few possible gaps in the law. His delegation saw no particular reason to adopt uniform measures with regard to the diplomatic baq and the person entrusted with it, when such uniformiration was not and could not be envisaged in the other areas of diplomatic law.

38. Furthermore, such unification might cause serious problems for States which, like France, were parties neither to the Convention on Special Missions nor to the Vienna Convention on the Representation of States and their Relations with International Organizations of a Universal Character. In fact, it would be illogical if the draft articles led States which had not ratified those Conventions to accord privileged treatment to the bags and couriers of missions and representations covered by those Conventions, when they were not obliged to grant much treatment to the institutions themselves.

39. Cognizant of those difficulties, the Commission had provided in draft article 33 for an optional declaration rystem that allowed a State to specify any category of diplanatic bag to which it would not apply the draft articles. That provision certainly gave the draft a useful Clexihility, but it was not a satisfactory solution, for it was liable to introduce great confusion in the applicable law. Under such ,a system, the statue of the diplomatic bag would in each case depend on the position adopted by the sending State, the transit State and the receiving State, and that status could vary in the course of a single transmiaeion, which miqht seriously complicate diplomatic communications. That was why France would like the Commission to limit itself, in second reading, to a study of the status of the diplomatic courier stricto sensu and of the diplomatic bag not accompanied by diplomatic courier. The mission ahould take care in so doing not to prejudice the rules laid down by tne Vienna Convention on Diplomatic Relations and to restrict itself to expandinq them only in so far an seemed strictly necessary.

40. With regard to the protection of the diplanatic bag dealt with in draft article 28, he noted that article 27, paragraph 2, of the 1961 Vienna Convention was clear on that- point, and shared the view of several members of the Commission that the diplomatic baq was "inviolable wherever it might be", but since that wording was not used in the Vienna Convention on Diplomatic Relations or in the Vienna Convention on Consular Relations, it would be imprudent to insert it in a new text that might not be so widely accepted and was liable to create doubts about the scope of the existing law.

41. Electronic examination of diplomatic bags seemed to be excluded a priori by the 1961 Vienna Convention as far as the diplomatic baq was concerned, because it could only result in the openinq or the return of the bag and would thus appear to violate article 27. Beyond that, while the current state of technology did not allow such examination to jeopardize the confidentiality of diplomatic correspondence directly, there was no guarantee that the situation would hold good in a not so distant future.

/...

(Mr. Guillaume, France)

42. Still, the guarantees thus accorded diplomatic communications must be reconciled with the right of the receiving State to protect itself against possible abuses which although sometimes spectacular, had still been marginal, and any change in the law in that field must aim to prevent abuses by the few without affecting the legitimate activities of the great majority. That was the point of view that his Government would take in studying the proposals made to extend to the diplomatic bag the conventional rule in force for the consular bag, since the law on that specific point was not necessarily immutable.

43. Concerning State responsibility, his delegation could not support all the principles put forward in the Special Rapporteur's draft. That was particularly true of the place given to the concept of jus cogens, on which France had again recently had to express the same disagreement as 20 years earlier. Nor could France support the notion of an international crime ascribable to States, as proposed in draft article 19, or consent to its consequent introduction into other provisions, some of which had been reviewed in the current year. Lastly, his delegation could not subscribe to the provisions of draft article 4 of Part III, stipulating the compulsory referral to the International Court of Justice of any dispute involving the supposed jus cogens or the notion of an international crime.

44. With regard to the draft Code of Offences against the Peace and Security of Mankind, the Special Rapporteur seemed to have given up trying to provide a general definition of such crimes and preferred to give an enumeration of them: his delegation was not opposed to that method but thought that, in order to establish a definitive enumeration with a minimum of consistency, the Commission would at some point have to determine the one single concept underlying the various offences of that category. From that standpoint, the Commission should be forewarned that, if it multiplied the assumptions of crime against the peace and security of mankind by including in that category all acts that might be deemed politically or humanly reprehensible according to the various schools of thought represented in the Commission, it would run the risk of debasing the value of the concept. France, for instance, could not accept a condemnation in one way or another of the use of nuclear weapons, because that could undermine deterrence and, consequently, peace itself.

45. The Commission should think carefully about the consequences that should flow from characterizing offences against the peace and security of mankind. Traditionally, such offences had been imprescriptible and their perpetrators had been brought before international courts. The Special Rapporteur was thinking of dispensing with that rule and replacing it with the universal competence of States. France was not opposed to such a development, but its consequences should be carefully weighed, because many serious offences, such as counterfeiting, hijacking aircraft and certain terrorist acts committed in the air, were already international crimes entailing universal competence, without thereby being offences against the peace and security of mankind or imprescriptible. The two concepts were different, and the possibility of establishing an international judicial body, through an extension of the Commission's mandate as proposed by the representative of Brazil, should also be studied.

(Mr. Guillaume, France)

46. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation shared the view expressed by the representative of Morocco at an earlier meeting and held that the concept of the abuse of a right could serve as a guiding thread for the Commission's work. As to the law of the non-navigational uses of international watercourses, his delegation noted with satisfaction that the Special Rapporteur was envisaging the drafting of a simple framework convention that would be proposed to States, and believed that such a convention should cover not watercourse systems but international watercourses, without reference to the concept of shared natural resource.

47. Mr. AL QAYSI (Iraq) observed that the comments of a number of delegations, notably the Philippines and Sweden, reflected a profound feeling of uneasiness and dissatisfaction regarding both the Commission's programme and methods of work and the Sixth Committee's conduct of the debate on the Commission's report.

48. The fundamental point to be grasped was that the annual consideration of the Commission's report was not a mere routine task, but a very important phase in the process of the codification and progressive development of international law. It also provided an opportunity to engage in the dialogue and consultations characteristic of multilateral diplomacy. The codification and progressive development of international law constituted a democratic process taking place within a democratic international community, through which all States ought to participate in the technical elaboration and political adoption of any instrument intended to govern international relations.

49. That being so, in order to achieve the desired goals the functional structures for the Commission's operation and for the debate of its report in the Sixth Committee should be kept under constant review. The need to improve those structures, however, was balanced by the need to enable the widest and most detailed dialogue and consultations possible to take place both in the Commission and between it and Member States. There should be no weakening of the links between the Commission and Member States in the Sixth Committee and their Governments which ensured the complementarity that was one of the vital components of the process of codification and progressive development of international law.

50. It was obvious that, after 38 years of existence, the changes in international life and the financial constraints that weighed upon the Commission's work called for a comprehensive review and assessment. The Committee must take the initiative in the search for improvements. In that connection, when considering the Commission's choice of topics, methods of work and degree of success, it must be borne in mind that the Commission, which was under its Statute an organ of the General Assembly, normally followed the directives laid down in the resolutions adopted each year by the Committee. Article 16 of the Statute allowed the Commission to select topics for codification and submit recommendations to that effect to the General Assembly. In fact, the proposals for the progressive development of international law were not initiated by the Commission but referred to it by the General Assembly and, in accordance with article 17, by Member States or other authorized organs, agencies or bodies.

(Mr. Al Qaysi, Iraq)

51. The Commission's significant accomplishments during the 38 years of its existence must not be disregarded. It had produced fundamental texts which had been adopted by States and, with the assent of the General Assembly, had not hesitated to combine elements of lex lata and lax ferenda in the preparation of draft articles on particular topics in response to the changing needs of the international community. If the Conventions elaborated by the Commission had not all entered into force or had not all been widely accepted, it was not the Commission's fault. It was for the General Assembly to encourage Member Staten to become parties to those Conventions in the formulation of which they had themselves part icipated.

52. In conaiderinq the Commission's methods of work, trying to compare it with other governmental or non-governmental institutions was of little value, given the differences in the nature of the process of elaboration and of the subject-matter. The Commission itself had made many suggestions for enhancing the process, including requests for more time and more resources. Moreover, during the Commission's term of office, the Planning Group of the Enlarged Bureau had addressed itself in depth to questions of methods of work each year and had considered various proposals. Clearly, the Commission had not been insensitive t ' the need to consider the functional modalities of its work. It had itself drawn attention to points where there were shortcomings. In that connection, the Sixth Committee should readily acknowledge that management of the Commission would not be efficient unless the Camnittee itself was *ready* to improve, change or even discard some of the established traditions, if necessary.

53. The various interrelated questions involved ranged from the circulation of documentation and the availability of sufficient Secretariat resources to priorities for the consideration of the various topics, the manner in which the various members of the Commission responded to the reports of the Special Rapporteur, and the format of the report to the Committee.

54. Given that situation, there was absolutely no reason why the various topics should be pitched against each other or why a certain topic should be allowed to mushroom at the expense of the time allotted to the consideration of another topic which had been lagging for years. Similarly, changing the Special Rapporteur should not automatically involve a conceptual change of gears, particularly when consideration of the topic was conceptually sufficiently mature. Nor was there any reason why every topic should be discussed at every session; that should not be the criterion for determining the seriousness with which the Commission viewed a topic or the work of a Special Rapporteur. Similarly, the Commission and the special Rapporteurs should not refer draft articles to the Drafting Committee until they had received sufficient in-depth consideration) that was how the backlog In the Drafting Committee wan created. In that connection, it was perhaps regrettable that the Commission had abandoned the practice whereby its Chairman summed up the debate and whereby the summing-up became instructions to the Drafting Committee. That was what had transformed the Drafting Committee into a negotiating group that required more time than was normally needed for a drafting exercise.

(Mr. Al Qaysi, Iraq)

55. Furthermore, the Commission would aoon have to be reconstituted and the financial crisis of the Organization would definitely have an impact on its work. It was time to encourage the Commission to consider the questions referred to, very early in its session and in plenary, on the basis of a paper prepared by the Secretariat setting out the various suggestions made by the Planninq Group of the Enlarged Bureau durinq the Commission's previous term of office and those presented in the Committee durinq the same period. The Commission should then seek to establish a plan of work for the total duration of its term of office, in the liqht of what it perceived to be achievable targets and of the reaolutione of the General Assembly. The draft resolution on the Commiaaion'a report should be framed in the appropriate language and set out the proposals that had been made. The adopt ion of such a draft resolution would be a first step towards constructive change.

56. Such a construct ive change in the Commission's methods of work would introduce a constructive change in the form of the annual debate on the Commission's report in the Committee. His delegation attached special importance to rationalization of the Committee's procedures and had made an important contribution in that area. Among other things, it had worked with the Asian-African Legal Consultative Committee to that end, and the work produced had been recorded in documents A/C.6/38/8 and A/40/726, circulated in 1983 and 1985, respectively. His delegation whole-heartedly endorsed moat of the obaervatlone made on the subject by the representat ive of Sweden. It recognized, in particular, that the manner in which the Committee debated the Commission's report did not provide sufficiently clearly the detailed political and leqal guidance that the Commission needed in order to produce results within a reasonable span of time. If a real debate was desired, In which dialogue and consultations took the place of statement-making, certain prerequisites must be fulfilled.

57. To begin with, the Commission should perform the pivotal role of considering the proposed improvement of its methods of work so that it could bring into sharper focus the questions on which it desired concrete political and legal guidance. In that connection, it would be useful to include in future reports a special section on the questions raised with regard to each topic on which views and guidance were sought.

58. With regard to the Sixth Committee, the planninq of the debate was essential, as was restraint in the length of statements. The United States proposal that the Commission's report be considered chapter by chapter, with deleqatione making more frequent but shorter statements, was particularly intereetinq. The Swedish proposal that, before the end of each session of the General Aaaembly, written aubmiaaiona on opinions of a more technics\ or detailed nature should be presented was attractive, but he doubted its feasibility given the time needed by Conference Services to produce documents. His delegation welcomed the Swedish proposal to ban debate on any topic on which draft articles had already been adopted in f irst reading and recommended to Governments for comments. It also welcomed the proposal to compile a comprehensive document in such instances to facilitate the task of Governments in making their comments. One ahoul l not, however, lose night of the fact that a general exchange of views in the Sixth Committee would help delegations

(Mr. Al Qaysi, Iraq)

from developing countries to gain a feel of the overall situation and consequently to submit written views of a more technical and detailed nature before the deadline. It was not iceablc that even countries with highly-developed legal services expressed difficulties in attending to their legal tasks. The question of the costs involved in that procedure must also be scrutinized.

59. Lastly, once the Sixth Committee had completed its taek, the Codification Division must make the necessary effort to report the results back to the Special Rapporteura and the Commiaaion. That was the least of his delegation's worries, for the Codif ication Division and the Office of the Legal Counsel had always shown a high standard of competence and efficiency.

60. Mr. VARGAS (Colombia) pointed out that contemporary international law tended increasingly to safeguard the rights and fundamental freedoms of the individual. The protection and safeguarding of human rights were provided for in the United Nations Charter and those rights were themselves set forth in many instruments, in particular the International Covenant on Civil and Political Riqhta, the International Covenant on Economic, Social and Cultural Rights, the Inter-American Convention on Human Rights and the African Charter on Human and Peoples' Rights. Those instruments showed how high human rights had risen in the hierarchy of contemporary international law, when until fairly recently they had been the subject of only marginal references and had been accompanied by no guarantees or obligations. In that connection, it should be noted that the 1948 Universai Declaration of Human Rights provided the frame of reference for the d velopment of norms in that area.

61. That development had gradually led to the confirmation of so-called "f irst generation" rights, namely, civil and political rights, and then "second generation" rights, namely, economic, social and cultural rights. A third generation of human rights wan now emerging, which included the right to peace, the right to a safe environment, the right to development and the right to the enjoyment of the common heritage of manklnd. The rights in the first two generations would remain incomplete unless they were guaranteed by the third generation rights, foremost among which was the right to peace which was an essential pre-condition for the exerc ise of the other rights.

62. The preamble to the future Code of Offences against the Peace and Security of Mankind should set forth the right to peace, which embodied all the fundamental rights of the human person, as a legal norm. That Code would fall within a different theoretical framework purely by virtue of the fact that its preamble mentioned the right to peace not only as a desirable objective but also a8 a subjective right, without which it would be difficult to guarantee the exercise of the other rights. To define offences against the peace and security of mankind precisely, it was first essential to recognize that peace was not simply an ideal, or even the raison d'être of the United Nations, but the content of a veritable subjective right and the supreme value to which not only positive law but also the activities of all the organizations of the international community must be devoted.

(Mr. Vargas, Colombia)

63. To include the right to peace in the preamble to the future Code would not only be in keeping with the spirit of the Charter but would also show clearly that until peace was elevated to the rank of a legal norm and an individual and collective subjective right, efforts to promote and safeguard human rights would remain incomplete. That was true also for other United Nations instruments and declarations, and the inclusion of the right to peace as a positive norm in the preamble to the Code could become a criterion applicable to other international declarations. In order to define offences against peace, it was eaeential to recognize that peace was not only a form of existence of peoples but an essential pre-condition for mankind's survival which justified the preparation of a code of offences aqainnt the peace and security of individualu and nations.

64. Mr. AL-KHASAWNEH (Jordan), noting that the Commission was basing its preparation of the Code of Offences on the assumption that its content ratione personae should be limited at that stage to the criminal responsibility of individuals without prejudice to the later possibility of applying it also to the criminal responsibility of States, said that as work progressed and provisions were adopted, the possibility of including the concept of the criminal responsibility of States would become increasingly remote. Many delegations, including his own, had expressed support for incorporating that concept at the thirty-eighth session of the General Assembly. The Commission might therefore wish to assess the extent to which and the modalities through which it might still be possible to Include that concept in the draft.

65. The Commission's exercise of codification and progressive development was at the same time an exercise in penal leqialation and the established rules and drafting techniques applicable in that area should be adhered to, especially in view of the gravity of the characterization "offences against the peace and security of mankind" and the political implications of such crimes. Fortunately, such rules as the need to establish criminal intent, the presumption of innocence, the need for judicial quarantees, and the inadmissibility of pleas of superior order, to name but a few, were well established and should not lead to too much controversy. Some of them should perhaps be amplified in the draft, in order to reflect the more specific régimes in other relevant conventions and to guard more effectively against the possibility of abuse.

66. That point was illustrated by two examples; if draft article 6. which reaffirmed a general rule, was read together with draft article 4, which established an obligation to extradite, it became evident that there was a need for a more precise definition of a fair trial and of situations in which extradition should not be granted. Furthermore, the obligation to extradite had been limited in recent conventions by provisions for an alternative, namely "extradite or punish". Moreover, the establishment of a universal jurisdiction was bound to give rise to disputes regarding the interpretation and application of the draft, especially in view of the fact that beyond a general recognition of the primacy of territorial jurisdiction, there was no clear hierarchy governing the basis on which jurisdiction could be eetablished. It would therefore be advisable for draft article 4 to draw on the models provided in those recent conventions, and to endeavour to minimize the possibility of conflicting jurisdictional claims by providing some indication as to that hierarchy.

(Mr. Al-Khasawneh, Jordan)

67. With regard to the application of criminal law in time, his delegation considered that the rule nullum crimen sine lege, nulla poena sine lege, which was firmly established under international law, must be maintained in the Code. Furthermore, with regard to exceptions to criminal responsibility, his delegation shared the view expressed by the Special Rapporteur on pages 36 and 38 of his Fourth report, to the effect that a broad interpretation of the word lex in the maxim nullum crimen sine lege would take care of the problem.

68. The precision required in penal legislation would, of course, have a limiting effect on the content of the draft ratione materiae. However, that did not imply that apartheid should not be included in the Code as an offence. On the contrary, with the exception of actual genocide, it was the most serious crime, and qualified as such in terms of the definition because it did involve a "mass element" as well as a "systematic design". Moreover, from the point of view of "human dignity", no crime could be worse, because the victims of apartheid were doomed at birth - and even before they were born - to suffer from that crime.

69. Despite the tentative definition contained in draft article 7, international terrorism was too broad a concept to be included as such in a penal code, except for cases in which specific manifestations of the phenomenon could be isolated, and cases which were were characterised by a "mass element".

70. With regard to the division of crimes against the peace and security of mankind into three categories, overlapping was unavoidable, but it should be manageable provided that the consequences of the various crimes were dealt with in a similar manner. However, humanitarian law - which punished war crimes - and the law of human rights - the infringement of which constituted a crime against humanity - were two different bodies of law, in terms both of their sources and of their judicial elements. Indeed, humanitarian law was based on the concepts of power and protection, whereas the law of human rights was based on rights and duties. In citing examples from those two bodies of law, the report to some extent overlooked those difficulties and the Commission might therefore wish to consider whether such differences were immaterial for the purposes of elaborating a draft code, or whether they should, in one way or another, be reflected in the draft.

71. Another point worth considering was whether the relativity of the concept of war would not make the strict distinction between crimes against peace on the one hand, and war crimes on the other, unrealistic. First, the expression "laws and customs of war' did not refer to a well-defined concept. Secondly, although it was unfashionable, the word "war" was still used in legal parlance, for example in the expression "non-acquisition of territory through war". Thirdly, the terminology problem would, in ths final analysis, prove to be a matter of legal taste rather than one of established legal technique and, in that matter, de gustibus non disputandum est.

72. Lastly, considering that the Code would be ineffective unless it was accompanied by penalties and supported by a competent international criminal court, his delegation believed that the mandate of the Commission should be expanded to extend to the preparation of the statutes of such a court.

73. Mr. BENNOUNA (Morocco), referring to the draft Code of Offences against the Peace and Security of Mankind, supported the emphasis which the Special Rapporteur had placed on motive, as the main criterion in the definition of a crime against humanity; indeed such crimes were primarily characterized by a deliberate will to undermine a common set of values constituting part of the common heritage of mankind.

74. However, despite that general definition, the question of the enumeration of the crimes concerned had yet to be settled, and if - as was implied by the saying "nullum crimen sine lege" - there could be no punishment without a prior rule to that effect, it might be useful to consider the advisability of embarking upon an enumeration of the crimes in question. Apart from the fact that some of the acts envisaged, such as terrorism, mercenarism or drug trafficking, were still being discussed or in the process of being codified, international law was needed to be able to evolve in response to the threats to and violations to the peace and security of mankind that arose. In the circumstances, it would perhaps be wiser to work out a general renvoi to the law already in force, in line with the approach adopted in the Vienna Convention on the Law of Treaties in respect of the definition of jus cogens.

75. The same methodological difficulty arose in connection with war crimes, which would be more suitably covered by a simple renvoi to the law already in force, as set forth in the Conventions of 1949 and additional Protocols of 1977. Moreover, the debates which had taken place in the Commission on the question of the prohibition of nuclear weapons did not appear to be very realistic.

76. As to the concepts of complicity, complot and attempt, his delegation considered that a restrictive interpretation was required if the rights of the persons involved were to be protected. If complicity and attempt were punishable on the same basis as the crime itself, complicity should not be taken to extend to events occurring after the crime, and an attempt - to qualify as such - would require the action to have already begun.

77. Lastly, the Special Rapporteur should further expand his elaboration of the general principles, which could serve as the main body of the future code. Among the basic principles laid down, the autonomous nature of the concept of a crime against the peace and security of mankind and its corollary, universal jurisdiction, were of considerable importance. The concept of territoriality was immaterial in respect of crimes against humanity, which by defintion, transcended the boundaries of States because they involved universally shared values. Furthermore, experience had shown that the principle of universal jurisdiction offered the only effective means of dealing with such crimes. Exceptions to criminal responsibility must also be considered restrictively, taking into account the nature of the crime in question. Lastly, his delegation considered that, if the Code was to provide all States with a common basis for punishing the offences, it was not imperative - as had been asserted earlier - that it should be supported by penalties and a competent criminal court to be fully operative. Given the existing state of international relations, a commitment on the part of all the members of the international community to apply the Code in good faith would constitute a considerable accomplishment in the current state of international relations.

The meeting rose at 12.55 p.m.