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SUMMARY RECORD OF THE 43rd MEETING

Chairman: Mr. FRANCIS (Jamaica)

later: Mr. JESUS (Cap Verde)

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

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-EIGHTH SESSION (continued) (A/41/10, 406, 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. BOUABID (Tuniaia) said that the conclusive results of the 1986 United Nations Conference on the Law of Treaties between Staten and International Organizations or between International Organizations, which had focused on a set of draft articles drawn up hy the International Law Commission, would certainly qive the Commission a new impetur for its future work. However, the procedure hy which the Sixth Committee annually devoted a good part of its time to considering the Commission's report did not seem to be the most effective way of helping it accomplish its task. The Swedish delegation had shown why the discussions of the report should he rationnlired. Tunisia hoped that the question would receive all the attention which it deserved, and that agreement would be reached on the bent ways for the members of the Commission to benefit fron tha observations made in the Sixth Committee.

2. The Commission had made considerable progress on the draft Code of Offences against the Peace and Security of Mankind at its thirty-eighth session. The Special Rapporteur's fourth report (A/CN.4/398 and Corr.1-3) contained, for the first time, a part devoted to general principles. Since 1982, his delegation had been encouraging the Special Rapporteur to qive primary attention to the draftinq of tha sections concerninq the offencen to he covered hy the draft Code and then to undertake the part dealtnq with qeneral rules and principles.

3. There seemed to be general agreement that the future Code should include as crimes against humanity only the most serious international nffencee. It would therefore be inappropriate to include in that category offences committed against individuals, except in certain cases, which should be ltmitatively enumerated in order to ensure tha selective nature of the draft.

4. Him delegation noted with satisfaction that apartheid had been included in the Special Rapporteur's draft articles am a crime aqainst humanity. The wordinq ohould be such that it would cover apartheid wherever it occurred. The second alternative of article 12, paragraph 2, am contained in footnote 84 to the Commission's report (A/41/10), was thus preferable to tho firflt.

5. With regard to the terminology problems raised by the question of war crimes, it would he useful to replace the term "war" with "armed conflicts", thereby ● xtandinq the scope of application of ths future Code tn all cc imes, whether committed in an international or in a non-international armed conflict.

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(Mr. Bouabid, Tunisia)

6. The substantive prohlem referred to in paraqraphs 108 and 109 of the Commission's report wan not insurmountable. It wan true that a crime committed in time of peace could constitute a crime aqainat humanity if it came within the definition of that cnteqory of crime, and that the same crime committed in time of war could also constitute a war crime. That concurrence of offences was a problem of qualification and classification, mince the crime in question wan in any case punishable. It miqht prove useful to include that type of offence in a separate categary. The question could also he rained, at the point when the Commission undertook to determine the penalties to he included in the draft Code, an to vhether the crime in question would he sanctioned differently dependinq on whether it had been committed in time of peace or in time of war.

7. Au tn the problems of methodology referred to in paraqraph 110, the qenrral definition of war crimes would perhaps not he t.he most appropriate method. The provisions of the future Code should as far an possible he characterised by a degree of precision vhich left no room for confusion. However, a detailed enumeration of crimes in that catngory might be incomplete and miqht freeze international law and hamper the codification of new rules and new offences. The third alternative, a qeneral definition illustrated by a non-exhaustive enumeration, was the least acceptable because it ran the enormous risk of being imprecise, which might have serious adverse conmequencea for the scope of the future Code. Members of the Commission should therefore concentrate on the first two possibilities in order to arrive at a clear definition of that category of crime.

8. Of the three conccptn dealt with in part III of the Special Rapporteur's report, only cnmplnt was a truly autonomous offence and could therefore be included in the section dealinq with crimes against peace, or even in the section concerning crimes against humanity, on the assumption that the extended definition of complot was retained. On the other hand, perhaps the concepts of complicity and attempt belonged in the part ralatinq to general principles. That was an idea vhich deserved further study.

9. Mr. YEPEZ (Venezuela) said that his delegation attached top priority to the topic of jurisdictional immunities *of* States and their property, because the international community lacked a general instrument in that area, and in recent years States had been promulgating lawn vhich restricted jurisdictional immunities. The evolution from the doctrine of absolute immunity towards that of restricted immunity refloctad the interests of devslnped, market-economy countries. In the elaboration of the respective international leqal norms, however, it was important to bear in mind all the factors involved: legislative pcecedentn, traditional practice and the interests of all States, particularly the developing countries. Hi8 doleqation van therefore concerned that the Commission had chosen a system of very extensive exceptions to the sovereign immunity of Staten. Still, it was nnt too late for the devalopirtq countries - in which the State sector, hecaune of a dearth of private capital, had to take on a whole ranqe of activities in the area of international economics and trade relations - to ensure that the instrument beinq drafted was more in accordance with their interests and their ecnnnmic realities.

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(Mr. Yepez, Venezuela)

10. His delegation considered that the Commission ahould merge articles 2 and 3 in second reading. The words in square brackets in article 6 *and the relevant ruler of general international law" ● hould be omitted, because they could be interpreted as aovering customary norms of international law based on State judicial, executive and legislative practice, which, if admitted, would make the codification exercise futile. To provide for the evolution of international lav in that field and for the future concerns of States, the final instrument rhould contain norms on revision and modification.

11. Article 3, paraqraph 1, specified what should he understood hy "State"; there was therefore no justification for repeating the definition in artiole 7, paragraph 3.

12. The Commission might endeavour to soften the provision in article 8 (b) by including one or more exceptions, because there might be a fundamental change in the circumstances that had prevailed at the time a contract had been signed that would make it advisable or necessary to avoid proceedir.gs. In second ceadinq the Commission migh: consider the possibility of making that provision more flexible.

13. The title of part III of the draft articles should be "Exceptions to State immunity".

14. His delegation considered that the reference in article 23, paragraph 1 (a), was to all the property destined for the "purposes of the diplomatic mission of the State', including the general activities of the mission, which might in turn include commercial activities. For that reason, his delegation did not agree with the commentary to that paragraph. The provision should be redrafted. In article 21, the expression in ● uuare brackets "or property in which it has a legally protected interest" ahould be maintained. It provided Cor better ● afeguatda for State property from measures of constraint.

15. Concerning the topia of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, him delegation considered that one the basis of the draft articles adopted in first reading, States could adopt an inatrument that would contribute to clarifying the rules in that area. It wan unfortunate, however, that no definitive decision had been taken concerning article 28 ~ one of the most important provisions in the draft ~ which was full of aquare brackets. It would be difficult to reconcile the divergences of view betwen Staten on that article. In second reading, the protection afforded the diplomatic bag an generally defined in article 3, paragraph 1 (2), ahould be made an extensive as possible. Article 28 should conmurntly he drafted to ensure that there were no restrictions on the protection afforded the bag. In his delegation's viev, the future instrument ahould contain a ahapter on the settlement of disputes arising out Of the interpretation or implementation of itn provisiona.

16. Turninq to tho topic of State responsibility, ha noted that there was a general reference in article 3, paragraph 1, of pact three to the need to seek a ● olutinn thcouqh the means indicated in Article 33 of the Charter of the United

(Mr. Yepez, Venezuela)

Nations, whereas article 4 established other proceducer for the settlement of diaputea. That inconsistency could be avoided if article 3 could specify which of thr means indicated in Article 33 of the Charter would apply. His deleqation had reservations concerning the compulsory nature of the procedures propoaed in article 4. It would prefer the means of conflict settlement to be a matter of choice for Staten. An alternative might he to increase the possibilities in article 5 for fornulatinq reservations to all the provisions of article 4.

17. As to the draft Code of Offences against the Peace and Security of Mankind, he reiterated him deleqation'm position that the Commission should not dismiss the possibility that Staten might incur international responsibility for acts which violated the provisions of the Code, or that their acts or omissions might be included in some of the categories of offenaea against the peace and security of mankind. The Commission should also give further consideration to an international criminal jurisdiction, which should be provided for in the final document.

18. The wording of draft article 8 could be improved, in particular to avoid the unneceaaary repetition of the words "does not relieve the perpetrator of criminal responsibility". The second alternative of article 12, paragraph 2, was preferahle, for it was more comprehensive. Although his deleg tion agreed in principle with including "any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment" among the crimes against humanity, it considered that the word "serious" ● hould not be used in that respect. The meaning of "safeguarding and preservation* should be spelt out so as to leave no room for varying interpretations.

19. The Commission should elaborate the topic in greater detail. It should provide a clear definition of the production of and traffic in narcotic and psychotropic substances, acts which should be included in the category of crimes against humanity. A chapter of the Code rhould establish the various penalties for offenders, without which it would have no practical effect.

20. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the Commission should emphasize much ● naential elements an the ohligation to prevent injury, which should he clearly entahliahed, the obligation to negotiate with neighbouring States concerning activities which might. be injurious, and the obligation of reparation. His delegation considerad the latter obligation essential, though there might he exceptions or Iimitations to it according to the nature of the activities undrrtaken, the risk pored and the injury caused. The position of developing countries should be given special attention, taking into account their needs, their level of development, the difficulty of preventinq and compensating for injury, the effects in their territory of the activities of trans national corporations, and all the relevant facts and circumstances.

21. The draft articles should provide for a broad and flexible dispute-aettlement system, since implementation miqht qive rise to problems that would require

(Mr. Yepez, Venezuela)

peaceful solution hy the parties concerned. It might also he necessary to ● atsbliah an ohjoctive and impartial fact-finding mechanism to be used in determining liability. He urged the Commission to ● xpedit.e its work on the topic, for norms in that area were becoming increasingly necessary.

22 . With respect to the law of the non-navigational uses of international wateraoucses, his delegation considered that the term "international watercourse" must he defined at the current stage of work on the topic. The obl iqat ions would vary according to how the term was defined. The term "international watercourse system" should also be clearly defined. The determination of "appreciable harm" could be a source of conflict among States. It miqht therefore be appropriate to provide that the use of the waters of an international watercourse system should not be detrimental to the other States belonging to the rystem. Agreements concerning the system should provide for its use, determine the harm that miqht be caused and establish rules concerning repsration. "Shared natural resource" wan an ambiguous and unnatinfactory term with which to characterize wateca of an international watercourse system. The provisions could govern the use of the waters of the system without reference to "shared natural resource". The definition of reasonable and equitable use should include 4 list of factors on which much use was based. However, his delegation doubted the appropriateness of using the word "equitable" to limit the use of an international watercourse.

23. The Commission should elaborat s general principles and norms governing non-navigational uses of international watercourses, as well as guidelines for international watercourse management and for future agreements among States.

24. Mr. KULOV (Bulgaria) said that the elaboration of a draft Code of Offences against the Peace and Security of Mankind was an extremely important task, and should be given priority durinq the next mandate of the Commission.

25. His delegation considered that the draft Code should be limited to the criminal responsibility of individuals, although the international criminal responsibility of States for international offences should not necessarily be exoluded. The elaboration of the topic of State responsibility would provide detailed regulation of that question. The object of the draft Code was to brinq individuals to justice. The right to do so should be conferred upon every State, irrespective of where the offence wan committed or the nationality of the of fender. The elaboration of general principles, together with a definition of offences against the peace and security of mankind, would contr ihute to a better definition of ths content ratiooo materiae of the draft Code.

26. The next goal should be to draw up a complete list of acts constituting offences aqainnt the peace and security of mankind, clearly indicating the constituent elements of such offencea. That required an updatinq of the provisions of the draft Cods of 1954 in the liqht of developments since then. His delegation supported the inclusion of aggression in tha list, on the basis of the Definition of Aggression adopted hy the General Assembly in 1974. The threat of aggression and the preparation of aggression against another State must also he included. An

(Mr. Kulov, Bulgaria)

tar 4s terrorist acts were oonaerned, his Oovecnment had oondemned 411 form8 of terrorism, and fully agreod that individual8 who perpetrated such act8 must he prosecuted. Rut as far as the draft Code was aoncecned, it considered that not all terrorist acts should be considered offences against the peace and security of mankind, only those which were assisted by one or more States and were intended to undermine the security of another State.

27. His delegation supported the inclusion of mercenarism in the list of offences, although it had serious reservations with respect to the definition of a mercenary proposed by the Special Rapporteur. Such crimes 4s colonial domination, genocide, apartheid and racial discrimination ● hould be included in the list of the most serious offences. It waS particularly important to include the testing and use of nuclear weapons, since they endangered the very survival of mankind. The text of article 11, paragraph 6, showed that the Special Rapporteur had taken a step in the right direction as far as that was concerned. However, the draft Code should not be merely concerned with the codification of existing norms, but should alw uke a substantial contribution to the progressive development of international law. In the light of the efforts currently being made by the Soviet Union, it would b» a manifestation of good will and sober-minded political thinking to make the complete prohibition of nuclear-weapon teats a peremptory norm of international law. Work on ths draft Code provided such an opportunity. Of no less importance would be the assumption hy all nuc1ear-weapon States of the obligation mt to use nuclear weapons first. The dcnft Code must not fail to ● ncompa8a much acts or provide for the criminal responsibility of individual State leaders.

28. tie considered the attempt to identify the constituent elements of the term "interference in the internal or external affairs of another State" a8 vell as its various manifestations, 8uch as fomenting civil strife and the taking of coercive measures of an economic or political nature, to be an example of Cho progressive development of international law. It was imperative to include such act8 in the draft Coda.

29. The extreme importance of the topic justified it8 inclusion as a separate item in the aqenda of the Sixth Committee.

30. Mr. AL-DUWAIKH (Kuwait) said that, although hi8 Government would submit it8 written observation8 at a later stage, his delegation had one general observation to make on article 6 of the draft articles on jurisdictional immunities of State8 and their property. The topic was indeed a delicate one, since it hinged on tha relationship between the development of international practice in the field and the traditional theory of absolute State immunity. The national legislation of some States and the practice of their courts with regard to the property of other State8 did not take account of the principle of immunity, one which wan, of course, linked with the principle of the sovereign equality of States. In the view of hi8 dnleqation, there wan no need in draft article 6 for the words in square brackets, because of the lack of any precise State practice in the field. 'It was doubtful that a compromise formula could be devised allowing a balance to be struck between new and established practices, particularly in the light of complex problems of a practical rather than a theoretical nature.

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(Mr Al-Duwaikh, Kuwait)

31. With teqard to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, it wan the view of his delegation that the extent of the protection to he accorded to the diplomatic courier in the performance of his functions was linked with the need *for* a just balance between the interest of the ● endinq State in ensuring the confidentiality of its communications and the security interests of the tranmit State. The status of the diplomatic courier could not be the same as that of diplomatic aqents; the privileqes and immunities should be sufficient to enable him tn perform his functions, thus ensuring freedom of communication hetueen the oendinq State and its accredited missions.

32. One crucial aueation was that ofthe relationship hetveen the draft articles and the Conventionr on diplomatic and consular relations. The draft articles had yet to address the topic in a precise manner. Although draft article 29, paraqraph 1, stated that the diplomatic ha9 could not be opened or detained, draft articles 4 and 5 did not establish what consequences might ensue if the nendinq State abused the bag or the receivfnq State opened the haq in a manner incompatible with the object and purpose of the articles. His delegation also questioned the usefulness of draft article 31 and wondered whether there were any clear examples of the non-recognition of the sendinq State or of its Government. Draft articles 21 and 32 were larqely satisfactory to his delegation, and the Kuwaiti authorities would submit written observations on than at a later date.

33. The concept of offences against the peace and security of mankind had begun to occupy an increasingly important position in International law, given the problems of racial discrimination, the possible use o' nuclear weapons, environmental problems, mercenarism and economic aggression. His delegation rupported the procedure followed by the Special Rapporteur in avoiding a precise definition of offences against the peace and security of mankind until such time as general aqrrement could be reached. New draft articles 1, 2 and 3 had taken care to link the definition of such offences vith existing conventions. If some of the formulations contained in the Special Rapporteur's fourth report (A/CN.4/398 and Corr.1-3) were of a general nature, that was because certain principles we e applicable to certain offences more than to others. His delegation endorsed the tripartite division of offences despite their overlapping. It doubted that it was possible to establish such a division on a purely historical basin if precision in the charscterization of such offences was to be achieved.

34. His deleqation roqretted that the Commission had been unable to complete its consideration of part three of the draft articles on State responsibility, and would have welcomed a more analytical discussion. As to articles 3 and 4 of part three, international practice had demonrtrnted that the decisive factor was not dispute-settlement procedures so much as the readiness of the States parties to a dispute to co-operate and show the flexibility necessary for its solution. It was much co-opsration that would lead to a settlement, and compulsory conciliation could he applied only in limited cases. His delegation hoped that the Commission would be successful in reaching agreement on generally acceptable dispute-settlement procedures, and that special priority would be given to the topic of State responsibil ity.

35. Mr. MAKAREVITCH (Ukrainian Soviet Socialist Republic) said that the realities nf the present-day world made it particularly important for thn draft Code of Offences to he completed as soon am possible. The adoption of a well-drafted international instrument an the criminal responsibility of individuals guilty of crimes against the peace and security of mankind would be a major practical step towards preventlnq such crimes and thereby improving the international situation. It was regrettable therefore thrt the Commission at its thirty-eighth • rumion had *not* been ahle to devote • nnuqh time to a detailed consideration of the topic. His Government supported the Commission's decision to limit the content of the draft Code ratione perannae *to* the criminal responsibility of individuals ror the time being, and believed that questions of international criminal responsibility should not be raised in connection with the Coda at any time. The two issues formed clearly distinct categories in law, and any attempt to consider them within the framework of a single topic would doom the draft Code to failure. Am for the auertion whether the draft Code should deal with the criminal responsibility *of* individuals holdinq official positions of authority, or only with private individuals, he remarked that international crimes miqht be committed by persons who used State authority for those ends, or miqht reflect a State's foreign policy; the actual perpetrator in every cane, however, was an Individual, who miqht or might not he a State official.

36. With regard to the content ratione materiae, he stressed the importance of taking into account the criteria established in article 19 of the draft on State responsibility, thus ensur inq a close linkage between the two documents. It was essential that the range *of* offences covered should reflect contemporary trends in international practice and international law.

37. His delrqation considered that the elaboration of a definition of the concept of an offence against the peace and security of mankind, am well am of general principles relating to the criminal responsibility of Individuals for such offences, should be deferred until articles on specific types of offences had been considered. The draft articles submitted by the Special Rapporteur in him fourth report would require much additional work. The objections raised tn the proposed categorization of offences should be taken into account by the Commission. A number of the draft articles proposed were open to serious criticism as being too abstract or *nnt* precise enough. That wan particularly true of paragraphs 2, 3 and 4 of draft article 11 which, despite objections raised in the part, again referred *to* "the authorities of a State" instead of defining actions by individuals or groups of individuals which constituted a specific offence.

38. With regard to the enumeration of *offences* to be included In the drnft Code, ha noted that the members nf *tha* Commission appeared to be nqraed on the need to include aggression, genocide, apartheid, State terrorism and the imposition of colonial rule or its maintenance hy force. Other types of offences, however, still qave rise *to* differences of opinion or to reservations. In that connection, his delegation wished to reiterate its view that the first. use of nuclear weapons should be included in the draft. None of the arquments advanced against such inclusion were well founded or mnvincinq. In particular, it hnd been said that unless the Commission refrained from pronouncing itself upon the issue, it would

(Mr. Makarevitch, Ukrainian SSR)

forfeit its prestige and authority as a legal body. Yet it was precisely in order to preserve its prestige and authority that the Commission should decide to include the first use of nuclear wcaponn in the list of offences against the peace and security of mankind . There could be no doubt that the overwhelming major ity of States regarded the use of nuclear weapons an the qravest crime aqainet peace and humanity. By reflecting that fact in the draft Code, the Commission wauld show that it wns in step with the realities of the aqe.

39. In addition to provisions concecninq the non-applicability of ntatutory limitations to offences aqainet the peace and security of mankind, the draft Coda should make it obligatory for States to include severe penalties for such offences in their national legislations. His delegation hoped that the draft Code would remain one of the most important items on the Commission's programme of work and a separate item on the Sixth Committee's agenda.

40. Mr. BALANDA MIKUIN LELIEL (Zaire) said that the draft Code of Offences against the Peace and Security of Mankind van the most important set of draft articles hefoce the International Law Commission because its aim was to protect and safequard the world's most precious heritage, the human individual. The future Code should provide definitions that were precise but flnxihlt, in order to adapt easily to the complexity and the nature of international life. The Code should avoid takinq doctrinal positions and should seek to establish a basis of generally accepted concepts, bearing in mind the proqresoive development of International law. In that context, he pointed out that before the establishment of the Nürnberq and Tokyo Tr ihunala, only a few authors had defended the concept of the international responsihllity of the individual as such. Today, that idea was no longer questioned. Likewise, it had become possible to envisage the criminal responsibility of the State or other juridical persons. The major difficulty experienced hy opponent8 of such a concept was in the area of penalties, some of which vere obviously applicable only to individuals. There were, however, also methodu of sanction or reparation specific to international law. Experience had shown that juridical persons could commit certain acts considered to he international crimes. Indeed, cc imes such as aggression, apartheid or qenocide could be carried out only hy a State or with its direct or indirect participation. It remained to t determined whether such responsibility was purely political or civil, such as that envisaged in respect of wrongful acts in draft article 19 of the draft articles on State responsibility. The Commission should carry out further studies before taking a final decision to reject the concept of the international criminal responsibility of Stntcs and other juridical persons. Political expedience alone should not in itself dictate the path to be followed.

41. In order to be effective, the future Coda should lay down scales of sanctions applicable to the subjects of the Cods. An international jurisdiction would offer more quacantees that the prescribed penalties would be applied and promote uniformity of legal practice. On the other hand, the principle of universal competence proposed by the Special Rapporteuc would require a hiqh level of co-opernt ton among States, which was far from likely for the time beinq. Before such international jurisdiction, all generally accepted quarantees ensuring a fair trial should be safequarded.

(Mr. Balanda Mikuin Lal (Zaire)

42. As to the general principles underlying the punishment of offences against the peace and security of mankind, the future Code should embody the legality of sanctions, the non-retroactivity of laws and the rule of impresccipti hility. The concepts of complici y, complot and attempt should also be included, hut should he interpreted in a manner compatible with international realities. The theory of extenuating circumstances and justifying facts nhould not ha dinregarded. Likewise, no one should he punished or prosecuted twice for the same act.

43. It was important for the Commission to make an additional effort to establish a list of offences. The criteria should include special intention and extreme seriousness of the acts, but any act aimed at harming the physical, mental OK cultural integrity of the human being should be takrn into consideration. Moreover, for some acts such as genocide, the mass element would he inevitable. Thus, serious damage to the environment, drug trafficking, slavery, colonial domination, apartheid, aggression and other acts meeting the general criteria whose direct OK indirect consequences led to the destruction of the human individual would be included in the list. Moreover, any type of weapon producing effects vhich fitted into the defined categories would obviously be banned. His delegation also shared the Special Rapporteur's view that crimes against humanity should be separated from the concept of belliqetency, as had been done in th1 1954 draft Code.

44. Mr. Jesus (Cape Verde) took the Chair.

45. Mr. LUKYANOVICH (Union of Soviet Socialist Republics) drew attention to his Government's view on the draft Code as set out in documents A/35/210, A/37/325, A/39/439/Add.3, A/40/451 and A/41/537/Add.l. The early elaboration of the draft Code would he a major landmark in the process of workinq towards the prevention of the preparation and unleashing of nuclear war, aggression, State terrorism, genocide, apartheid and other cr imes, a process vhich today more than ever before required the combined efforts of States and peoples.

46. Although it was one of the draft Code's most active champions, the Soviet Union had certain objectlone both to the method underlying the draft's preparation and to a number of specific decisions adapted by the Special Rapport.eur and the Commission on the basis of that approach. The Commission's decision that the content ratione personae of the draft Code should at the present stage be limited to the criminal responsibility of individuals was undoubtedly correct. Any attempt to apply concepts of internat onal criminal responsibility to States would be not only politically harmful hut legally unjustif led. Criminal law, through the methods characteristic of it, punished individuals; a State could not be put in the dock or sent to pr Leon. Its leaders, however, could be judged. An individual was responsible, not for the conduct of a State, but for his Own behaviour. The topic of State responsibility was a separate one and nhould not ha touched *on* in the draft Code.

47. The categorization of offences into crimes against the peace and security of mankind on the one hand and war crimes on the other van legally unfounded since offences in each catcqory could also fall within the scope of the other. The

(Mr. Lukyanovich, USSR)

Special Rapporteur's interpretation of the term "humanity" (pars. 83 of the report) seemed rather narrow, and the question raised in the same paragraph as to whether a crime against humanity should include a mass element or whether any grave attack directed at one single individual van such a crime was surely artificial. There could he no doubt that a mass element had to he involved, directly or indirectly, in the case of! a crime against humanity. On the other hand, his delegation fully agreed with the Special Rapporteur's viev (para. 86) that what characterized a crime against humanity was its motive.

48. Referring to paragraphs 93 to 102 Oe the report, he said that not all of the crimes listed deaerved to be regarded am offences against the peace and security of mankind, it van indisputable, however, that the list should include apartheid, State terrorism and various other international crimes dependinq on such elements as the motives, aims, or results achieved. With regard to terminology problems arising in connection with war crimes (pars. 104 of the report), he said that, slthough var as a means of settling international disputes vaa inconsistent with the Charter of the United Nations and in that sense was unlawful, Article 51 of the Charter recognized the lawfulness of the use of arms in a number of cases. Furthermore, the right of national liberation movements to resort to such use was also recognised. Only aggressive vats vere entirely unlawful. Concepts such as "laws and customs of war" or "war crimes" therefore remained pertinent and should he retained. With regard to problems of methodology (para.110), his deleqation favoured a general definition containing a reference to the lava and customs of war and considered that a non-exhaustive enumeration of war crimes should be included. In that connection, he referred to paraqraph 3 of his Government's moat recent submission concecninq the draft Code (A/41/537/Add.1), criticizing the Commission's decision to establish a list of specific offences aqainst the peace and security of mankind and only then to formulate a definition of such offences and specify the categories of person who could he held cesponsihla for them.

49. In connection with paraqraph 113 of the report, he said that his delegation shared the viev of those memhern of the Commission who held that the first use of nuclear weapons should he banned. In an ideal situation, tho ban would no doubt he extended to the manufacture and possession of such weapons, hut for the pcenent a ban on first use would constitute an important atop towards international détente.

50. With regard to other offences aqainst the peace and security of mankind, his deleqation favoured a more extended interpretation of the concepts of complicity, complot and attempt in international law in view of their exceptionally serious implications in the context of offences sqainst the peace and security of mankind. On the question of qaneral pr inciples, he agreed with the Special Rapporteur 's views as set out in parnqraph 134 of tho report, hut als > drew attention to the opinion of some members of the Commission reflected in paragraph 135. With regard to principles celatinq to the official position of the offonder, his delegation considered that the relevant provisions of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights should be incorporated in draft article 6. On the subject of principles relating to the application of tho criminal law In time, his deleqation took the view that nlthouqh the rule nullum crimen sine lege was widely accepted by Staten, the desirability of

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automatically applying it in the draft Code should be seriously pondered in view of the especially grave nature and consequences of offences against the peace and security of mankind. As a party to the Convention an the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Soviet Union supported the idea of draft article 5, but would prefer a more concise wording such as: "No statutory limitation shall apply to offences against the peace and security of mankind".

51. With regard to draft paragraph 4 dealing with principles relating to the application of the criminal law in peace, he referred to his Government's objections to universal juciadiction set out in paragraphs 9, 10 and 11 of document A/41/537/Add.1. Lastly, with regard to principles relating to exceptions to criminal responsibility, he said that extreme caution was called for in the enumeration of exceptions applicable to offences against the peace and security of mankind.

52. Draft article 1 should provide a general definition of offences against the peace and security of mankind and should clearly relate to individuals. The present article 1, although preferable to old article 3, still failed to meet essential requirements. In that connection, he drw attention to paragraph 4 of his Government's submission in document A/41/537/Add.1. Agreeing with the idea embodied in a-aft article 3, he sugqrmted that it should be amended to read: "Any person is responsible for an offence against the peace and security of mankind and liable to punishment therefor . . In draft article PO, the words "war crimes" should he retained, nnd the wording employed in the relevant conventions should be used in draft article 12 and others dealing vith specific crimes.

53. In its Cuturo work, the Commission should consider including a provision on the ineluctable nature of punishment of individuals Cound guilty of an offence against the peace and security of mankind. It should be made obligatory for States to co-operate in the prevention of much crimes and the punishment of individuals found reeponsihle for committing them. In particular, States should be required to include severe penalties for such crimes in their national legislations.

54. After expressing the view that the question of the draft Code should remain a separate item on the Sixth Committee's agenda and should continue to be given priority, he emphasized the Committee's essential role as an international political law-making body. In the pant yearn, the International Law Commission's productivity had diminished, largely because the process of codification of international law had been completed in many areas - to a considerable extent thanks to the Commission's own efforts - and attention was shifting to the progressive development of international law. That wan a highly complex tank requiring the harmonization of many different State interests and the co-ordination of the political will of States to assume obligations in the interests of the International community as a whole. The Commission, its notahle achievements snd the great competence of its members notwithstanding, could not, as a purely legal organ, perform that tank. It was for the Sixth Committee to do so. The numerous international conventions drafted within the Committee bore witness to the

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Committee's experience in that field. His delegation therefore took the view that the Committee's directly law-making activities in major areas of progressive development of international law mhould be given prominence in the future. The Committee'8 annuel consideration of the report of thn International Law Commission should also be highlighted am a meane of acquainting the Commission's memhere with the positions of Governments and thun helping them to produce drafts of a really viahle nature.

55. In conclusion, his delegation supported the Commission's decisions on the future organisation of its work reflected in paragraph 250 of the report. Despite the shortening of the thirty-eighth session, the Commission had ● ucceeded in achieving more specific results through better organization. In his delegation's view, future sessions should also not exceed 10 weeks.

56. Wk. CULLEN (Argentina) said that in theory, Argentlna would have no problem accepting the concept of the criminal responsibility of States and the consequent need for an international criminal jurisdiction. However, a decision on the question of juriadiction should be deferred for the time being. The Commission had decided to proceed on the assumption thet the draft code related only to individuala, end his delegation agreed that it wee bemt not to be too ambitious. However, when international crimes were perpetrated by the State, the responsibility incurred differed from that for ordinary wronqful acts and the draft Code ● hould reflect that situation. While some crimes petpetreted by individual=, such as war crimes, had consequences only for the individuals who committed them, other crimes committed by individuals were attributable to the State, because they involved a breach of international obltqations of Staten. They were typically State crimes, such an aggression. Consequences arose Cot the State and also for the individuals; the latter consequences could be extremely severe, as had been demonstrated at Nuremberg. The Commission would have to elaborate further on the theory, which would he transformed into practice. While there could be no individual perpetrators of a Stete crime, there would always he reeponnible petsonr.

57. Although there did not appear to he any sound practical reasons for it, his delegation had no objection to the tripartite division of offences into offences against peace, crimes against humanity end war crimes. However, the Commission's report also referred to "other offences". The general heading of thn topic was somewhat unsatisfactory, leadinq to the illogical premise that war crimes affected peace, althouqh by definition they were committed durinq wartime, and therefore in the absence of peace.

58. His deleqation believed that the Special Rapporteur had rightly separated qenocide from the circumstance of war. It agreed that the key to qenocide was the motive: the aim of destroying a national, ethnic, racial or religious group in whole ok in pert. If that was the cane, the mass element wan of secondary importance. With regard to apartheid, his delegation preferred tho second alternative, In order to avoid referring to inetruments outside th· Code itself. It auppocted the inclusion of that terrible crime in the Code. The concept of a serious breach of an international obligation of essential importance for the

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safeguarding and preservation of the human environment was no longer purely theoretical and should be included in the Code, after further elaboration. With regard to war crimes, his delegation preferred the second alternative, because it contained specific definitions and ohviatad the need to refer to other inatcumanta. Pot ceaaona of tradition, his delegation preferred to keep the term "war cc imes". Terrorism, the maintenance by force of colonial domination and mercenarism should also appear in the Code.

59. In view of the extreme seriousness of offences aqainat the peace and secur ity of mankind, Argentina believed that they ahould not be subject to statutory limitat inns. They should have full procedural guara.ntees under article 6. His delegation agreed with the content of article 7, paragraph 1, which established the principle protecting the individual against tho excesses of power. However, paragraph 2 was contrary to the principle that, in order ⇗□□ • n act to be described as cc iminal, it had to correspond precisely to a type defined under the applicable norm. Analogy did not apply in criminal law and a general principle, precisely because it was qenecal, backed the necessary precision. The Special Rapporteur had probably been recalling the Nuremberg eituation when drafting paragraph 2, hut the current situation waa Cortunstely not the same.

60. With regard to article 8, it was necemmary to clarify that the idea of self-defence referred not to the State, but to the attacked individual. It was clear that individuals who w.re subjects of the attacked State could commit any type of international crime against the aggressors, who must be incriminated. Coercion, state of neceeaity ok force majeure must be precisely defined, for exsnple in the commentary, because domestic laws might differ in nuance, or even in important aspects. The stipulation that there must in all cases be a threat of a qrave, imminent and irremediable peril would depend on the definition adopted regarding coercion, state of necessity and force majeuce. The adjectives qualifying the peril seemed to refer particularly to a mtste of necessity in which the permon faced the dilemma of perpetrating a crime ok Sacrificing a legally protected asset, much ma his property or freedom. However, that element seemed to constitute a repetition.

61. With regard to attempt, although his delegation would be able to accept an expended definition, it could nnt accept the ides of 'conspiracy' because that virtually invnlved the concept of collective responsibility. Laatly, Argentina believed that the Commission should consider the concept of ahandonment of action together with that of attempt.

62. Mc. GILLET BEBIN (Chile) said his delegation understood that tha draft articles on State responsibility would he embodied in a convention. The fact that a convention did not enter inot force immediately did not mean that it would not influence the behaviour of Statae and cnnntitute a valuable reference text for international judicial and arbitral tribunals, as well as other organs responaihle for settling diaputem. Chile believed that the de :ision to include an effective and obligatory system for the settlement of disputes would facilitate tha work of the Commission in seeking consensus solutions. It was unlikely that the majority

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Of States would accept a norm such am thmt contained in article 19 in pmrt one of the draft, without having the legal assurance that they would not be ● acu8rd by other States of hmving committed international crimes in the ● bmenca of an independent ● nd authoritative ● ymtmn ♦□ ● mtmblimh the facts and the applicable law. In that respect, there was 8 clear analogy with the treatment of the aonaopt of jus cogens received in the Vienna Convention on the Lmw of Treaties. His delegation was equally concerned about the question of reprisals rnd countermeasures. The adoption of much measures involved the implicit danger of ● oa8lation to illegality, including commission of the most ● erioum of international crimes, the unlawful use of Force.

63. With regard to the topic of the ● tmtuo of the diplomatic courier ● nd the diplomatic bag not ● aaoqmniad by diplomatic courier, him delegation believed thst ♋ ● pecifia instrument on the ● ubjoat would regulate both the procedural and substantive aspects more ● ffoctivoly than the ● ximting texts containing provisions on that subject. His dolegation agreed with the aontent of article 28. Indeed, the ● xaoptionml ● itumtion referred to in paragraph 2 was already regulated hy customary international law, ● ubmeauently incorporated in the conventions on diplomatic and conmulmr relations.

64. Chile wished to highlight the ao-oparation which the Commission had extended to other organirationm dealing with legal matters, whiah significantly contributed to the progressive development and codification of international law.

65. With regard to the annual Geneva ● eminar on international law, Chile commended the efforts of various Governments which had offered fellowships to participants from developing countries, allowing a ● mtimfactory geographical distribution.

AGENDA ITEM 128: CONSIDERATION OF EFFECTIVE MEASURES TO ENHANCE THE PROTECTION, SECURITY AND SAFETY OF DIPLOMATIC AND CONSULAR MISSIONS AND REPRESENTATIVES: REPORT OF THE SECRETARY-GENERAL (continued)

66. The CHAIRMAN announced that Sierra Leone had become a sponsor of draft resolution A/C.6/41/L.8.

The meeting rose at 6.05 p m.