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Chairman: Mr, DENG (Sudan)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 134: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTIETH SESSION (continued) (A/43/10 and 539)

AGENDA ITEM 130: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/43/525 and Add.1, A/43/621-5/20195, A/43/666-5/20211, A/43/709, A/43/716-S/20231, A/43/744-5/20238)

1. Mr. LUTEM (Turkey) said that his delegation would limit its statement to chapters II and VII of the Commission's report (A/43/10), because it had already expressed its views on some of the other topics, in particular the law of the non-navigational uses of international watercourses and the draft Code of Crimes against the Peace and Security of Mankind. It considered the last-mentioned topic, as did other delegations, as inherently political and not suitable for the Commission to codify.

2. So far as the question of international liability for injurious consequences arising out of acts not prohibited by international law, it might be wiser to leave the theoretical problems aside. The debates of the past two years showed that there was some crystallization of views, which had enabled the Commission to make real progress at its fortieth session. There was a close relationship between the topic under study, which had been on the agenda of the Commission since 1978, and the threats posed by the advances of technology. All countries, and especially developing countries, could not wait for disasters or accidents to occur so that customary norms could be created and subsequently codified. In a world increasingly exposed to pollution of the atmosphere or sea, actions not prohibited by law, but which caused catastrophic injuries in areas beyond national jurisdiction, could not fail to have legal consequences. The accident which had occurred at the Chernobyl nuclear power plant and at Bophal in India and the pollution of the Rhine by chemical waste could be cited as examples to demonstrate the importance of determining that type of liability. Turkey had recently been seriously affected by pollution caused by unknown vessels which had dumped chemical waste in the Black Sea.

3. Waste disposal had become an expensive business. Some corporations had recently begun to sell their waste in developing countries; that practice should cease. Preventive measures should be devised, liabilities should be determined in the event of injurious consequences, and priority should be given to protect the environment and avoid harmful effects caused by nuclear energy and industrial waste.

4. He agreed with the Special Rapporteur that the general debate on that topic should come to an end. The crystallization of ideas over the past few years could be summed up in the following terms. First, there was linkage between that topic and the new articles proposed concerning uses of international watercourses (chap. III) and State responsibility (chap. VII). Secondly, States had a duty to exercise their rights in a way which should not harm the interests of other States. Thirdly, it was the duty of States to avoid, minimize and, if necessary, repair transboundary harm arising as a physical consequence of an activity within

(Mr. Lutem, Turkey)

their territory or under their control. Fourthly, thr draft articles rhould not be confined to ultrahasardous activities, but aims rhould be kept simple and the focus limited to selected issues . Fifthly, the scope rhould be confined to physical activities giving rise to tranrboundary harm, but the possibility of considering economic and social activities rhould not be overlooked.

5. He then referred to some of the other idea8 apparently derived from the crystallisation process. There rhould be an effective link between prevention and reparation, and reparation rhould even precede prevention because it was the essence of liability. Prevention murt operate on a large scale and be focused not only on activities that actually gave rise to tranrboundary harm but also on activities that miqht give rise to such harm, Special attention should be given to the developing countries, taking into account their needs, their level *of* development, their difficulties in preventing or compensating *for* harm and the affect6 in their territory of the activities of transnational corporations. The Stats of origin should be generous towards the affected State. Las tly, the requirement that the State of origin rhould have known, or have had mean8 of knowing, that a dangerour activity had taken place within it8 area of jurisdiction or control wae soundly based on justice and equity.

6. Referring to paragraph 102 of the report, in which the Commission invited the view6 of States on the role which "risk" and "harm" rhould play in the topic, he stressed thst, if risk wan accepted an the determining criterion, that would limit the topic unduly. A8 stated in paragraph 04 of thr report, a régime of liability could not be based on risk, because, if it were, it would offer extremely limited possibilities for reparation, He shared the view of many other delegation8 that the criterion *of* risk should be limited to the obligation of prevention and that the article6 should apply to all activities causing tranrboundary harm (pars. 49). His views coincided on that point and on other article8 with those expressed by the Canadian representative at the 26th meeting of the Committee. Priority rhould continue to be given to the topic, Theoretical questions nhould not prevent the Special Rspporteur and the Commission from developing and codifying the rules *of* jus cogens . Regard1088 of their final form, the draft article8 would depend on their response to the actual needs of the international community.

7. Turning to chapter VIII of the report, he noted with appreciation that the Commission had implemented paragraph 5, subparagraph (c), of General Assembly resolution 42/156, which would facilitate the Committee's work, He supported the appeal, addressed to the Secretary-General in paragraph 558 of the report, to speed up preparation of the updated version of the Survey of international law.

8. In the matter of documentation, his delegation could not understand why the Commission would find it difficult to circulate in advance the introductory statement of its Chairman; at the last two sessions of the Commission it had been proposed that the Chairman • hould inform the Assembly on the work *of* the Commission in a short but concise document which could be circulated in advance of the report. itself reserving his right to amend it during the oral presentation of the report. He hoped that the Commission and the Secretariat would respond to the wish of

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delegation8 on the matter, In conalurion, he welcomed the co-operation between thc Commission and other bodies, especially thr Asian-African Legal Consultative Committee.

9. Mr. MATHIS (Canada) welcomed the progress achieved at the Commission's fortieth session on the draft Code of Crime8 against the Peace and Security of Mankind as a result of the remarkable *work* carried out by the Special Rapporteur and the spirit of compromise dinplayed by member8 of the Commission. The substantive and drafting problems concerning a number of articles reflected the complexity of the topic and the provisional nature of the article8 approved 80 fur.

10. Three fundamental questions needed to be referred to at the outset: (a) the queetion of how best to • n8uro that the draft Code constituted a constructive contribution to the system of collective security established by the Charter) (b) the type of tribunal that would have jurisdiction over cases brought under the Coder and (c) the relationship between decisions made by such a tribunal and the decisions made by the Security Council under the system *of* the Charter.

11. With *regard* to the question of competent jurisdiction, his delegation had noted the four alternative8 enumerated in paragraph 1 of the aonunentary on draft article 4 (A/43/10, p. 175). That was a crucial question which would ultimately determine the fate of the Code and on which)(♦ war • 88ential that the Commission should have guidance from Governments. The Commission had quite properly left the question open for the time being, even though it war becoming increasingly difficult to deal with substantive issues without a decision on that matter. It seemed that the ideal solution would be to establish an international criminal court, but whatever solution war selected, the queetion of the respective roles of the Security Council and the court competent for the application of the Code would arise, particularly in respect of such crime8 a8 aggression.

12. With regard to article 4 (Obligation to try or extradite), the use of the word "try" in paragraph 1 without further elaboration caused some difficulty for hi8 delegation; it suggested that it should be replaced by "submit the case to it8 competent authorities for the purpose of prosecution". Another eolution would be to prescribe a series of specific steps which States would have to undertake when an alleged offender against the peace or security of mankind was in their territory. In view of the problemn of establishing priorities among competing jurisdictions, hi8 delegation supported the compromise wording produced by the Commission in paragraph 2, which established that where there were competing requests for extradition, "special attention shall be given to the request of the State in whose territory the crime was committed".

13. The exception8 to the rule *non bis in idem* contained in paragraphs 3 and 4 *of* nrticle 7 should be more clearly and strictly defined and narrowed in scope 60 as to ensure the objective application *of* that crucial rule. At a more general level, the article raised the fundamental question of the extent to which an international tribunal or national courts which heard cases under the Code should be bound by decisions of other domestic courts.

(Mr. Mathis, Canada)

14, His delegation had no special difficulties with draft articles 8, 10 and 11.

15, The moat important iaaua raised by article 12 (Aggression) war its relationship to the collective security ayatam ● atabliahrd under the Charter. The Code ahould not only complement that system but alao enhance it. His delegation was pleased to note that the Commission was sensitive to that iaaua, as evidenced in particular by paragrapha 5 *and* 6 *of* that article. While appreciating the concern of certain members of the Commission that the judicial function *of* the court enforcing the Code ahould not be unduly influenced by a political body such as the Security Council, his delegation conaidersd that the reverse aituation was just as delicate. The integration *of* the Code into the security system established under the Charter (and vice versa) raised many difficult questions. For example, there waa the question of whether a court would be obliged to await a Security Council finding baforr ruling on *a* case; and whether it ● hould rule on an allegation *of* aggression when thr Security Council had already made a specific finding, or had not chosen to rule on it, or had not been seized with the question. Those questions could not be ignored and, in that respect, a study by the Secretariat on the relationship between decisions of the International Court of Justice bearing on peace and security issues and decisions *of* the Security Council, as suggested by a member of the Commission, would be very useful.

16, The question *of* whether article 12 should alro apply to individuals who had participated in the organisation *and* planning of aggression but had not acted on behalf of the State should be given further consideration. It would room, on the basis of the Nuremberg precedent, that such a category should not be excluded out *of* hand. That question was related to the notions of complicity, planning, preparation and throat of aggression which also deserved further consideration as acts to be encomgaaard by tha Code.

17, The words "in particular" in square brackets in article 12, paragraph 4, rhould be deleted, ● ? as not give the impression that there waa uncertainty about the definition of aggression and about what acts were encompassed by the Code, and so as to avoid the risk of the Code not being uniformly applied, particularly if it was decided that national courts ahould enforce the Code.

18. As to the list of crimes to be included in the Code, it was clear that it should be exhaustive. Serious consideration ● hould be given to including ecological crimes in it. The term "intervention" should be reserved for wrongful acts and should not be applied *to* the influence exercised during normal relations between States. The term "colonial domination" raised a range of delicate issues *concerning* self-determination and deserved further study, As to *"economic* aggression", his delegation was not in favour of including it, essentially for the reason reflected in the decision of the International Court of Justice in the Nicaragua case.

19. In conclusion, his delegation recalled that it was one of the many delegations which continued to have doubts about the utility of attempting to draft a Code. None the less, it conridered it as its duty to make a constructive contribution to

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the negotiations. It also felt that, in view of the improvement in the international atmosphere, it war prrhapa a favourable time for establishing an international criminal court.

20. Mr. TREVES (Italy) arid that ho had been particularly interested in chapter IV of the report of the International Law Commission broauae for the first time the Commiaaion war trying to define specific crimes against the peace and ascurity of mankind, Nevertheless, his delegation continued to have doubts on the subject, and felt that the work waa still far from its objective.

21. His delegation had the impression from thr report that thr Commiaaion waa concentrating its ● fforta in a direction which war particularly difficult as well as legally and politically aontrntioua. It waa losing right of the central problem in that, in order to define crimes that oould be attributed to individuals, it was concentrating its attention on the codification of rules of general international law that were well known to be contantioua. It was not tackling persistently enough the taak of determining the role that individual8 played in act.8 committed by States in violation of the rulra the Commiaaion war ● o painstakingly trying to define. Articles 3, 10 and 11, and article 12, paragraph 1, were just a beginning in that direction. They were insufficient, but at least indicated how much deeper the Commission had to go.

22. The crimes that could be labelled "crimes against the peace and security of mankind" and for which individual6 could be hold responsible under the code *were* of two types: wrongful acts (and perhaps "international crimes" within the meaning of part I of the draft Code on State responsibility) committed by a State under international law; and those that did not constitute ouch wrongful acts because they could not be attributed to Statra. The latter aatsgory, which included certain forma of terrorism, war less complex, To term ouch acts "crimes against the peace and security of mankind" might serve the purpose of underlining their grave character, but did not make thorn qualitatively different from other crimes for which States had already agreed to ● atabliah universal jurisdiction, international co-operation and extradition, such as the hijacking of ai·craft, hoatage-taking and certain acts against the security of navigation.

23. Where the first category waa concerned, the qualification as "crimes against the peace and security of mankind" was essential in order to avoid the application of the usual concept *of* international law according to which individuals were not responsible to other States for the acts which they accomplished but which international law attributed to a State. It was thus as important to establish with precision in which cases the act attributed to the State could also be attributed to the individual as it was to define the requirements the act must meet in order to constitute a particular crime.

24. The discussions in ILC showed the dilemma it was facing; on the one hand, to give the definition of the crimes the precision required by criminal law, and, on the other hand, to seek that precision within the context *of* rules of international law defining the obligations of States, which were themselves extremely controversial, as waa clearly apparent in the cases of aggression and intervention.

(Mr. Treves, Italy)

25, It waa not by chance that States had ao far taaklrd the issues involved in that area directly, without resorting to rxparta and in the rather flexible form of declarations by the General Assembly. They had inserted the roaulta of their efforts within the institutional framework of the United Nations, as aould be seen, again, in thr case of aggroaaion. Admittedly, the ambiguities in the texts of the resolutions opened the door to widely divergent interpretations, ouch as thr well-known onra concerning non-armed intervention, but ILC ahould be aware of the fact that States were keen on maintaining thoao divergences of interpretation, as was shown by the work which had led to the adoption of the Declaration on the Enhanaamont of the Principle of Refraining from the Throat or Use of Force in International Relations. Laatly, the International Court of Justice had for its part boon ● xtromoly prudent where definitions were concerned, as emerged from paragraph8 233 and 234 of the report.

26, Those difficulties appeared also, although in a different way, in relation to the propoard crime of recruiting, organising, equipping and training mercenaries. It ahould be made clear first of all that the article dealing with that crime pertained only to acts which did not otherwise amount to violation6 of international law and were attributed also to States as wrongful acts or crimes against the peace and security of mankind, (It would be abaurd, for instance, to make a distinction between aggression committed through mercenaries and aggression parformod through othrr means.) Secondly, the work on that point waa only proviaional, but the Ad Hoc Committee responsible for drawing up an international convention on the ● ubjoat would find useful guidance in the ◆□□& ● ummarired in paragraph8 268-274 of the ILC report. It would find there, among other things, two useful indicationa, The first was that the qualification of "crimes against the peace and security of mankind" would be limited to the aata of those who recruited mercenaries, madm use of thorn, and ● o on, without ● xtonding to the acts of the mercenaries thamaalvra. The arcond was that ILC had retain.6 the criterion of participation in hostilities. That criterion might indeed be urrful in defining thoae rota connected with mrrcanariam which were deemed ● o grave as to be claaaifiablr as crimes against the peace and ● rcurity of mankind.

27, Mr. KANDIE (Kenya) raid his delegation had chosen to make a single ● tatempnt incorporating all the idaaa suggested to it by the report of the International aw Commiaaion (A/43/10). The taak of the Sixth Committee war to give ILC political guidance and, where poaaibls, to provide answers to the specific quertiona asked of it by the Commission. It ahould be noted in paaaing that the inevitable delay in the publication of the report and the complexity of the topics it dealt with prevented in-depth ● tudy of its rontent.

28, With regard to the first subject dealt with by ILC - international liability for injurious consequences arising out of acts not prohibited by international law - he recalled that in paragraph 102 of its report, ILC expressly requested the Sixth Committee to indicate to it the role which the concepts of "risk" and "harm" ahould play in the topic. Before responding, his delegation wished to ● mphaaise that ILC had taken the right approach to the subject, namely that of balancing the interests of thoar who undortook such activities and thoao who were harmed by them. Moreover, it was not in favour of enumerating in the text all the activities

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covered, and was persuaded by the reasoning of the Special Rapporteur contained in paragraph 23. It understood, furthrrmorr, the reasons for the polarisation in the work of thr Commission regarding those two concepts of risk and harm. Th8 aontrovrrry could be traced to the difficulties of determining in a clear and objective manner thr factual legal aonnotrtionr *of* the two principles.

29. With regard first of all to risk, thr Special Rapporteur made an interesting and innovative proposal in positing (para. 39) thrt any activity causing transboundary harm had to have ♋■ ● lomont of appreciable risk. However, the ● naly8i8 must be taken further. Indeed, the concept of risk could unduly limit the topic . Thr basic position of ILC rhould be that the injured or harmed State should be compensated in some w a y , Moreover, it was not ● lw8y8 ● a8y to establish *in* advance that any particular activity presented a distinct possibility of ● pproai8blo risk. The Special Rapportour indicated (para. 50) that he intended to introduar thr necessary modification8 to article 2 *(a)* of hi8 draft.

30. Turning briefly to article 3, ho said that the opposition between jurisdiction and control was interesting, but required further study in the light of the comments made by some members *of* ILC (paras. 56-59). The question would alro arise (para. 59) *of* jurisdiction and control over multinational corporations and their ● ativitio8, particularly in the territory of developing countries.

31, *Kenya* considered the law *of* non-navigational uses *of* international watercourses (chap. III) to be of immense contemporary relevance. It wished to respond to thr questions posed by ILC in paragraph 191 of it8 report. First, where the degree of elaboration with which thr draft articles rhould deal with problems of pollution and ● nvironmontal protection was concerned, it considered that the problem of pollution of watercourses must be viewed from the broader perspective of damage to the peoples of the world, ILC rhould not confine itself to the question of the liability of the State in question to another State. It would be entirely appropriate to deal with pollution in thr draft ● rticlrr, With more specific reference to the drafting of the relevant provisions, they rhould be madr general in scope, along the lines of artialr 16 [17], paragraph 1. In addition, that paragraph rhould be placed undrr the heading "Use of terms". As the object. of the ● xorciao was a future general framework agreement, it might be thought inappropriate to ● labor8to on pollution. However, au that was in fact the greatest risk to international watercourses, it would be appropriate, as some members had pointed out, to *have* a sub-topic on pollution and the environment.

32. With respect to the second question, on the subject of "appreciable harm" the Special Rapportour had chosen *to* limit the scope of article 16 [17], paragraph 1, inasmuch as it imposed on watercourse States an obligation not to cause or permit the pollution of an international watercourse, by introducing the concept of "appreciable harm". According to the Special Rapporteur, that concept embodied a factual standard, compliance with which could be objectively determined. Yet the concept of appreciable harm was difficult to comprehend objectively. For instance, *a* form of pollution which might cause no "appreciable" harm for irrigation might have catastrophic effect8 for human consumption purposes. That said, his delegation war in general agreement with the proposed article8 17 and 18.

(Mr. Kandie, Kenya)

33. Concluding his remarks *on* the second topic, h o reiterated his delegation's view that riparian States should co-operate closely in all uses of international watercourses. In the final ● nalyrir, regardless of whether 8 logically conceived framework agreement wan achieved, those Stat.8 themselves would be largely responsible for ensuring that international watercourses were used in the interests of all thr peoples and States concerned.

34. In the case of thr third topic it had discussed - the *draft* Coda of Crimes against the Peace and Security of Mankind (chap. IV) - thr Commirrion had based it8 work on thr xixth report of the Special Rapporteur, dealing with thr problems raised by crimes such as preparation ↗□❐ ● g9ro88ion, annexation, the sending Of armed bands into another State and intervention. The problems of colonialirm and mercenarism had also boon dralt with. He would comment *on* those questions one by one.

35. Thrro was a solid legal foundation for including the crime of aggression in the envisaged Code, particularly the 1974 Definition *of* Aggression contained in General Assembly resolution 3314 (XXIX). It would also seem loqiaal to include the preparation of aggression, since its ● xclurion would leave unpunished those who were the chief architects *of* thr aggression.

36. Tho concept of intervention was all thr more complicated because inter-State relation0 necessitated some form of intervention. But as the Special Rapporteur had observed, the essential element that would tranrform any form of intervention - whether direct or indirect use of force or economic, political or other forma of pressure - into wrongful intervention war thr element of coercion which sought to aubvart a State's sovereignty.

37, The crime of colonialirm should likewise be covered by the Code. Although classic colonialirm had virtually disappeared, vestiges remained in places such 8 8 Namibia. Thought should alro be given to prohibiting a resurgence of colonialism in thr future, and other, more subtle, forms of colonialirm, such as neo-colonialism, should likewise be proscribed.

38. The problem of mercenarism was being dralt with in another forum of the Sixth Committee. Its importance needed to be underscored by including it in the Code. The Commission hnd considered it desirable to takr account of the work of the Ad Hoc Committee on tho Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, but the examination of that serious crime should be based on a firmer foundation than diffuse considerations concerning the peace and security of mankind.

39. With regard to the ntatur of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation intended to rubmit its observations in writing and would for the time being confine itself to commenting on unresolved issues. First, it noted that article 20, which was pivotal, remained in square brackets. The differences of opinion that had arisen in the Commission and among the 29 States which had sent replies to the Commirrion showed clearly the difficulty of defining the inviolability of the bag. Should it be complrtrly

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inviolable? Should it be subjected to scanning by electronic means, or should dogs be used? Could it be opened in the presence of officials of the sending State? The divergent positions arose from recent incidents in which diplomatic bags had been used in an abusive manner. His delegation thought that the bag should not be subjected to inspection by technical means. It also felt that the future convention should be extended to the bags of international organizations. Nevertheless, his delegation believed that the draft articles represented a useful basis for the conclusion of a convention on the subject.

40. Mr. WATTS (United Kingdom) said that the results achieved at the fortieth session of the International Law Commission had in no way allayed his delegation's doubts about the utility of continuing the work on the draft Code of Crimes against the Peace and Security of Mankind.

41. Of the five draft articles concerned with general principles which the Commission had adopted provisionally at the fortieth session, three (draft articles 4, 10 and 11) were relatively non-controversial, although a number of detailed points remained unresolved - for example, the relationship between draft article 11 and existing rules of immunity from jurisdiction to which States and Heads of State or Government might be entitled under international law. By contrast, draft articles 7 and 8 still posed serious problems.

42. Draft article 7 (non bis in idem) gave rise to difficulties in three areas in particular. First, the right balance had to be struck between the requirement of justice and the possibilities of abuse as a means of protecting those accused of crimes: second, there were technical and practical problems involved in laying down rules for the operation in individual cases of the non bis in idem principle; and third there were difficulties relating to the operation of that principle in the event that an international criminal jurisdiction was created. That last possibility would fundamentally change the parameters of the problem and in his delegation's view proper treatment of the topic required a decision in that sense. Until it was decided to establish an international criminal jurisdiction, the discussion could only be provisional.

43. Article 8, paragraph 2, raised difficulties which were summarised in the commentary to that draft article (A/43/10, pp. 181-182). The Commission had tried to strike a balance there, but the matter needed further consideration before its proposals could find wide acceptance.

44. As to the individual acts which might be enumerated in chapter II (acts constituting crimes against the peace and security of mankind), his delegation was more than ever convinced that the Commission should first identify and clarify the basic concept of what constituted a crime against the peace and security of mankind before trying to prepare a list of acts which would be covered by the Code. The differing views of the members of the Commission recorded in the report demonstrated the validity of that opinion. Furthermore, the discussion concerning intervention and terrorism (ibid., pp. 151 ff) was to a very large extent a repetition of the discussions on equivalent subjects in the Sixth Committee in recent years. Until the Commission established some basic criteria for the kind of

(Mr. Watts, United Kingdom)

act which should be regulated by the Code, there would be a good deal more of that kind of rather unproductive debate. If indeed the whole idea of a Code was to be proceeded with, the Code should cover only the most serious international crimes. His delegation noted with regret that although the Commission itself had expressed that opinion (ibid., para. 198), there was often a failure to distinguish between acts which were simply unlawful under international law and acts which were so seriously unlawful as to justify inclusion in the Code.

45. The CHAIRMAN said that since he had received no observations from the chairmen of the regional groups concerning the letter from the Chairman of the Fifth Committee requesting the views of the Sixth Committee on agenda item 115, "Programme planning", he would take it, if there was no objection, that he could inform the Chairman of the Fifth Committee that the Sixth Committee had no comments to make on that item.

46. It was so decided.

The meeting rose at 4.45 p.m.