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Chairman: Mr. DENG (Sudan)

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The meeting was called to order at 10.15 a.m.

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

AGENDA ITEM 1301 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/43/525 and Add.1, A/43/621-S/20195, A/43/666-S/20211, A/43/709, A/43/716-S/20231, A/43/744-S/20238)

1. Mr. ROMPANI (Uruguay) said that ho would confine his remarks to chapter IV of the Commission's report (A/43/10). Of the six articles that had been provisionally adopted at tha Commission's fortieth session, only article 12 contained a definition of a specific crime, namely, the crime of aggression, It was a measure of the arduousness of the task that had faced the Commission over the 13 sessions devoted to the item, that it had so few provisions to show for its work.

2. An international penal code such as that which the Commission was seeking to elaborate had two undeniable sources within the United Nations, namely, the Charter of the United Nations and the Universal Declaration of Human Rights. Article 1, paragraph 1, of the Charter referred to international peace and security, and to suppression of! acts of aggression or other breaches of the peace, Article 2, paragraph 3, added a new concept, that of justice. Chapter VII spoke of "enforcement measures", and it was well known that enforcement or coercion was the basis of all penal law.

3, The Universal Declaration of Human Rights proceeded from the premise that disregard and contempt for human rights had resulted in barbarous acts which had outraged the conscience of mankind, and that it. was thus essential that human rights should be protected by the rule of law. Naturally, international penal law could not be dissociated from that rule of law, The Pull import of article 28 of the Declaration could be appreciated in that light. Ho singled out the concepts of "social order" *and* "international order") an international penal order could give concrete form to those theoretical aspirations of the Declaration, Hut. the fact was that, under penal law, there must be absolutely clear definitions of what constituted criminal conduct, *and of the corresponding* penal ties. It was necessary to begin by defining such concepts as peace, security, justice and mankind, Of the six recently adopted articles, only article 12 referred to a specific form of offence, began with a general definition and provided a description of various acts of aggression, while envisaging various other acts that might possibly be included in the definition.

4. From that stemmed a series of problems in determining what were the active and passive subjects of the international crime; what type of conduct, individual or collective, constituted the key element of the offence; what penalties existed in international penal law; what authority, other than the parties, was entitled to pronounce on the conduct of the subject of the law; *and,* above all, what authority was to be entrusted with application of the penalty? Law - particularly penal law - without obligation and without penalties was unthinkable.

(Mr. Rompani, Uruguay)

5. Yet another problem was that of differentiating individual responsibility from collective responsibility and, in particular, from criminal responsibility of legal persons. Uruguay had expressed the view that the Commission should devote itself to establishing the criminal responsibility of individuals, Nevertheless, it accepted a poseibls application of the concept of international criminal responsibility to the State, given that certain crimes were imputed to States. Hill country also supported the inclusion of che crimes covered by the 1954 draft, *and* the inclusion of other crimes that had subsequently boon propored, such as apartheid, mercenarism and damage to the environment, with due regard to the gravity of the crimes included, which must be such as genuinely to effect the peace and security of mankind,

6. Possible conflicts between internal law and international penal law must be addressed, as well as conflicts of sovereignty. Uruguayan legislation on State security and public order adopted in 1972 had replaced the term "the citizen who" by the term "he *who",* thue referring to any person, whether or not a citizen of Uruguay. Thus arose the further problem of extradition, provided for in draft article 4, Article 13 of the Uruguayan Penal Code precluded extradition for political crimes, crimes punished for political ends, and crimes not recognised as such by national legislation, A similar provision war embodied in an international treaty between South American States concluded in Montevideo in 1889.

7. Similar difficulties arose regarding draft article 12, paragraph 5. It was not easy to see how and why the decisions *of an* executive body such as the Security Council could be binding on the decision6 of a jurisdictional body, whose purpore was to enunciate the law, The conflict would be still more pronounced in respect of an international legal body responsible for enunciating the law in specific criminal cases. Article 24 of the Charter conferred on the Security Council primary responsibility for the maintenance of international peace and security, the very legal goods likely to be harmed by the crimes provided for in thr future international penal code. Under Article 25 of the Charter, Members of the United Nations agreed to accept and carry out the decisions of the Security Council. But it seemed neither possible nor feasible that a determination made by the Security Council in a specific situation could be binding on a national jurisdictional or legal body,

8. Furthermore, it must not be forgotten that the characterisation of a crime must include the description of the human conduct which might lead to application of a penalty. The Sixth Committee and the General Assembly were aware of the difficulties that had been encountered in defining such apparently clear concepts or expressions as "mercenary" and "good-neighbourliness". The crime of homocide was defined by intent to cause death, yet the very concept of "death" was notoriously hard to define medically. With legal definitions, as with a hall of mirrors in which the same image was reproduced an infinite number of timer, each concept contained within itself a further defining concept which must in turn be defined. He himself had once remarked, half jokingly and half in earnest, that since only "peace-loving" States were Members of the United Nations, it was necessary to define not only the concept of peace, but also the concept of "love", in order to determine which States were truly peace-loving,

(Mr. Rompani, Uruguay)

9. It roamed that the reference to "crimes against the grace and security of mankind" did not encompass human conduct directed simultaneously against peace *and* against security. Perhaps a distinction rhould be made between crimes against peace, crimes against security, and crimes against mankind, His delegation favoured the broadest and most comprehensive terms, provided they were absolutely precise and loft no *room* for doubt, or that any doubts could easily be resolved. The International Law Commission and the Sixth Committee rhould thur persevere in the work of defining those concepts more precisely, with their customary diligence and intelligence.

10. The CHAIRMAN thanked the representative of Uruguay for his learned contribution, *Mr,* Rompani had been present at the inception of the United Nations and of its Sixth Committee, The Committee wished him every success on his return to his country.

11. Mr. GOROG (Hungary) said, with regard to articles 4 and 7 of the draft Code, that his delegation had from the outset felt that individuals who had committed a crime against tha peace and security of mankind rhould be tried and punished first *of* all in thr State whore the crime had boon committed. Hungary did not support the application of universal jurisdiction, which was at variance with thr principle that jurisdiction in criminal cares murt be vested in the court of the place where the crime had been committed, His delegation therefore opporrd the setting up of any international criminal court,

12, The compromire solution propoeed in article 4 was contradictory and unaccoptablo, The very term "any State", used in paragraph 1 of article 4, pointed in the direction of universal jurisdiction, wherrao the first two paragraphs gave only preference rather than priority to extradition, The text of paragraph 1 was wraksnrd by the phrase "alleged to have committed", In view of all the foregoing, paragraph 3 of article 4 should be deleted.

13. The text of article 7 exemplified efforts to reach a compromire solution that was intended to please everyone, and hence failed to be fully acceptable to anyone, The main problam lay in paragraph8 3, 4 and 5, which proceeded from a principle which had not yet been recognised by international law. It appeared to be a general practice of States not to recognise a criminal judgement handed down by a court of another State, except under the relevant terms of a treaty.

14, The Gordian knot of the two articles could be cut only by applying the territorial principle. Accordingly, paragraphs 2 and 3 should be retained, the first with a reference to paragraphs 4 and 5, and the second without the text in brackets. Paragraph 4 was likely to give rise to a serious problem, as it clearly left scope for double sentencing. The *word* "deduct" in paragraph 5 could not meet the requirement of justice, except in the case of closely similar systems of penal law.

15. With regard to article 8, the term "acts or omissions" should be used instead of the term "acts". The crimes under discussion could occur at least as much by omission as by commission.

(Mr. Görög, Hungary)

16. His delegation continued to believe that article 12, on aggression, should basically move along the same lines as General Assembly resolution 3314 (XXIX), and it therefore had no difficulty in *accepting* paragraphs 2, 3, 4, 6 and 7. However, Hungary shared the doubts formulated in paragraph (1) of the commentary regarding paragraph 1 of article 12. Not only was its substance a repetition of draft article 3, but the substance of the phrase "any individual" war very indefinite. Such difficulties could best be avoided by deleting paragraph 1, Moreover, since the provisions of the Definition of Aggression could not be exhaustive for national courts, the phrare "in particular" in paragraph 4 should be retained.

17, Although the majority of States were in favour of strengthening the role of United Nations organs, particularly the Security Council, they did not necessarily go so far as to accept the possibility that decisions of the Council could serve as a direct basis for the sentencing activity of courts.

18. In view of the arguments put forward in paragrnph 120 of the Commission's report (A/43/10), the Commission should thoroughly consider once again how the threat of aggression could be satisfactorily defined as a separate crime. That war not merely because, in the Declaration on the Enhancement of the *Effectiveness* of the Principle of Refraining frcm the Threat or Use of Force in International Relations, threat war clearly defined as an internationally wrongful act, but also because the threat of aggression war more frequent than actual aggression.

19, With regard to the breach *of* obligations under a treaty designed to ensure international peace and security, his delegation supposed that the omission of the proposed text wae due to the arguments advanced in paragraph 259 of the Commission's report, *For* the present, Hungary supported that omission. He drew attention to the fact, however, that the proposed enumeration starting with the phrare "in particular" was far from complete. Peace *and* security and the coexistence of States were threatened at least as much by gross violations by *certain* States of their commitments under human rights instruments as by violations in respect of disarmament.

20. Mr. CALERO RODRIGUES (Brazil), referring to the draft Code of Crimes, said that at least two of the articles on general principles showed the difficulties faced by the Commission as a result of the lack of a basic definition *of* jurisdiction. The assumption that the Code should be applied by national courts did not per se provide as firm a basis as it might seem, for the question arose as to which national courts were to be given competence. The concept of "universal jurisdiction" was not complete enough to lead to the formulation of concrete rules. Paragraph (1) of the commentary to article 4 explained that the article related only to "the general principles of jurisdiction", and that the formulation of more specific rules was left until a later stage.

21. Indeed, both article 4 and article 7 must be taken as very provisional in nature, and thur were rather disappointing. Although *the* principle contained in article 4 was no doubt correct, the content of the article was modest. The State was given the choice between instituting proceedings and acceding to a request for

(Mr. Calero Rodrigues, Brazil)

extradition, and if there were two or more requests for extradition, the State was free to choose among them. Too much weight was given to the State in whose territory the individual was present, since in moet cases that presence would be accidental, if not sought by the individual for his own reasons. Perhaps the excessive importance given to the jurisdictional power6 of that State resulted from the failure to solve the general problom of establishing a coherent principle governing attribution of such power6 to the different jurisdictions that might compete. A clear indication of an order of prio.ities among jurisdictions had to be inserted in the Code, and the choice between request8 for extradition would naturally follow from that indication.

22. The lack of definition on the question of jurirdiction war also responsible for the limitations of article 7, which dealt with the principle non bis in idem. The article was too long, and included, in a very incomplete form, elements that would more easily and properly be treated under the general question Of jurisdiction. The inclusion of the non bis in idem rule in the Code could theoretically be justified by the argument that any court *exercising* jurisdiction under the Code would be acting not as a "national" or a *"foreign"* court, but a6 an instrument of a legal community fcrmed by the parties to the Code. However, on practical grounds, and in order for any decision of a court in application of the Code to be above suspicion, it seemed essential that the question of attribution of jurisdiction should be carefully considered in the Code, If the system of priorities indicated in the Code for the exercise of jurisdiction still left room for the exercise of more than one jurisdiction, the parties to the Code could be called upon to decide which court would actually be empowered to hear the cause.

23, Two important exceptions to the non bus in idem rule were laid down in paragraph 4 of article 7. The first excepcion, based *on* the principle of territoriality, would not be necessary if a proper order for the exercise of jurisdiction were established. As to the second exception, doubts might be raised concerning the concept of a State as "the main victim",

24. Paragraph 5 set out the incontrovertible principle of criminal law that there should be no duplication of penalty for the same crime, Equally incontrovertible was the principle of non-retroactivity in article 8. His delegation was not entirely convinced, however, that paragraph 2 of the latter article was absolutely necessary, since it dealt with situations outside the Code.

25. With regard to article 12, on aqqrossion, the question that immediately arose was whether paragraph 1 was necessary. The idea which it contained was already to be found in article 3, which said that any individual who committed a crime against the peace and security of mankind was liable to punishment, From the point of view of legislative technique, each article *in* chapter II of the Code should be limited to the definition and characterisation of a given crime. Paragraph 1 should therefore not be included.

26. His delegation agreed with the statement in paragraph (1) of the commentary to article 12 that it would be advisable later to draft a more general provision

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applying either to all crimes, or to a category of crimes covered by the draft Code, If the first alternative was accepted, the language of article 3 could be modified to bring out more clearly the idea currently contained in paragraph 1, it being understood that the principle did not apply only to the crime of aggression, but to every crime in the Code. Article 1 could also be made technically more precise by being amended to read: "The crimes under international law defined in chapter II of the present Code constitute crimes against the peace and security of mankind",

27. Summarising the difficulties faced by the Commission in arriving at its definition of aggression, he said that it had correctly adapted the ● snentiala of the Definition provided in General Assembly resolution 3314 (XXIX). However, a link still had to be established between State and individual responsibility, so that an individual could be held accountable for a crime characterised by actr that normally could be committed only by a State,

28. The concepts embodied, but not completely developed, in the Charter of the Nürnberg Tribunal provided a basis for the attribution of responsibility to individuals for crimes constituted by acts of a State, An individual would be responsible for having contributed, as a leader, organizer, instigator or accomplice, to the commission of an act, That contribution - and it must be an important one - would be the criminal act for which he should be tried and punished, The same reasoning might be applied to other crimes, in particular crimes against peace.

29. A related issue was the connection between determinationa by the Security Council of the existence or non-existence of aggression and the exercise of the jurisdiction of courts under the draft Code, It was his delegation's view that a determination of aggression by thr Security Council should be binding on any court, national or international, because the draft Code, in matters pertaining to aggression, would hold the individual - as leader, organiser, instigator or accomplice - responsible for participation in acts committed by the State, Unless such a determination by the Security Council was made, a court could not act. It was difficult to imagine that a court, in application of the Code, particularly a national court, could be empowered to try and punish an individual for an act of aggression if the Security Council had not determined, under the Charter, that aggression had been committed by a State.

30. As work on the draft Code proceeded in the Commission, the complexity of the tasks became increasingly evident. His delegation would continue to co-operate in efforts to achieve the best possible results. It would be up to the General Assanbly, when it received the full text, to determine whether the work should be continued, and to give the Commission the political guidance so sorely naeded on that matter,

31. Mr. HANAFI (Egypt) said that *article* 4 of the draft Code, as provisionally adopted by the Commission at its fortieth session, embodied a principle that had had many precedents. While his delegation conceded the need for special consideration to be given to the request for extradition of the State in whose territory the crime had been committed, it also agreed with those who had called for an order of priorities to be established in respect of extradition. Priority should be given to the State in whose territory the crime had been committed, followed by the State whose interests or the interests of whose representatives had been directly prejudiced, then the State of which the offender was a national.

32. Paragraph 3 of article 4 dealt with the possible establishment of an international criminal court. That should be done in such a way as not to detract from the competence of national courts in respect of such crimes, and recourse to international jurisdiction should be optional. The precedents established in that field indicated that such an approach would be successful.

33. The principle *of* non bis in idem, in article 7 was based on considerations of justice and equity that were unimpeachable. [illegible] application should, however, take into account bilateral and multilateral agreements on the execution of judgements, since the predominant trend was not to recognise judgements handed down in foreign courts, in the absence of an agreement establishing such recognition. The question of the existence or non-existence of such agreements should therefore be referred to in paragraphs 2 and 4.

34. The concept of an act which was criminal in accordance with international law or domestic law applicable in conformity with international law (art. 8, para. 2) was generally conceded to be valid *and* did not require reaffirmation in the present context. The addition *of* the expression "applicable in conformity with international law" was also superfluous, inasmuch as the laws of a State were always in conformity with the rules of international law as embodied in pre-existing conventions to which the State was a party. Egypt would appreciate clarification from the Commission as to those cases covered by the expression so that it could better determine its underlying meaning.

35. His delegation associated itself with those members of the Commission who had expressed doubts about the need for paragraph 1 of article 12, on the crime of aggression. That paragraph was an unnecessary repetition of article 3. Article 12 also raised the question of enabling national courts to characterise as aggression acts other than those listed in paragraph 4. According such a faculty to national courts would be inadmissible, for it would be in conflict with the basic principle of criminal law *nullum crimen, nulla poena sine lege*. The characterisation of crimes and the establishment of penalties was within the competence of the legislature and not of the judicial authority, which had merely to apply the provisions laid down by the legislature.

36. His delegation *had* yet to reach a final decision with respect to the matter of linking the application of the draft Code to the operation of the Security Council. Two conflicting approaches were involved: the need to separate the judicial function from the executive functions of the Council, and the view that

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the decisions of the judicial organ should be subordinated to those of the Council in regard to resolutions determining thr existence or non-existence of aggression. His delegation required more time in order to examine the consequences that would flow from the adoption of either of those approaches.

37. Mr. VOICU (Romania), turning first to the rtatur of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, raid that the adoption of an international legal instrument providing a coherent and uniform régime on the subject would - given the practical dirficulties thrt had arisen in the implementation of t'1e four relevant Convontionr - have a positive impact on the maintenance of normal relations and truot between States.

38. Althouqh the text was not intended to cover thr offiaial communication8 of international organisations, the fact thrt many States, particularly headquarter0 States, tended to accord the same treatment in that respect to international organirationr as to diplomatic missions meant that the organisations would indirectly benefit from the adoption of thr new instrument. The draft ● rtlclrr in some inetancer improved on existing rules, thur contributing to the progressive development of international law. The text nought to maintain a balrncr between the legitimate interest of the sending State in ensuring the inviolability of the diplomatic bag and the security interests of the receiving *and* transit States. Tho draft articles rhould tako the form of a convention, which rhould bo adopted at a diplomatic conference of plenipotoniaries.

39. With regard to specific articles, his delegation agreed that the words "by custom" in article 6, paragraph 2 (b), tahould be deleted. Any modification by States of thr facilities, privileges and immunitirr for thoir diplomatic couriers and diplomatic bags should be made solely by agreement between tho States. In addition, the phrase "provided that much a modification is not incompatible with the object *and* purpoxo of tho present articles" was vague and could lead to a misunderstanding, since no limits were ● strbllrhed regarding tho modifications. Accordingly, a formula similar to the language *of* article 47, paragraph 2 (b), of tho 1961 Convrntion on Diplomatic Relations should be used, allowing States to agree on a régime more favourable than the one established by tho Convention, but without restricting the privileges and immunities of the diplomatic courier.

40. With regard to article 9, he believed that persons who were nationals of, or who resided in, the transit State should not. be permitted to be appointed as diplomatic couriers, unless so agreed in advance. With respect to article 12, paragraph 1, tha words "or not acceptable" rhould be deleted, since the dictinctior between a person declared persona non grata and a person declared not acceptable did not apply in the case of a diplomatic courier.

41, In article 14, the provision regarding the right of entry into the territory of the receiving State or transit State was formulated too broadly, whereas in article 7 the right of a State to appoint a diplomatic courier was not absolute, The formulation was obviourly too broad in the case of a State that was not recognised. Reference ohould be made in article 14 to articles 9 and 12, extendin

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(Mr. Voicu, Romania)

the applicability of those articles to the transit State. The text should also stipulate that entry into the territory of another State must proceed in accordance with the latter's regulations.

42. The second sentence of article 17, paragraph 1, should be deleted. The second sentence of article 18, paragraph 2, also should be deleted, since the extension or withdrawal of immunity from jurisdiction could not be contingent upon an element as variable and uncertain as insurance. With respect to article 22, paragraph 4, it was also important to guarantee immunity in respect of the execution of a judgement in criminal proceedings, in case the courier enjoyed immunity only in respect of acts performed in the exercise of his functions.

43. In article 28, paragraph 1, the words in brackets should be retained. In paragraph 2, the reference to the transit State should be deleted, but the reference to the consular bags should be retained, to ensure that the inspection measures were limited exclusively to the consular bag. If the reference to the latter was not retained, the portion of the text relating to the use of electronic or other technical devices must be deleted. Lastly, in article 12, the right to declare a diplomatic courier persona non grata should also be extended to the transit State.

44. Turning to the topic of jurisdictional immunities of States and their property, he said that the draft articles did not properly balance the interests of the foreign State and those of the State in whose territory the question of immunity arose. The draft articles reflected a restrictive interpretation of State immunity based on an anachronistic classification of the juridical acts of a State as acta jure imperii and acta iure sestionis. Only by adopting generally acceptable solutions reflecting the practice of all States would it be possible to elaborate a multilateral convention.

45. States increasingly were undertaking economic activities outside their own borders. His delegation considered that the State should enjoy immunity from jurisdiction in the light of the fundamental principles of sovereignty, equality of rights and non-interference in the internal affairs of States, principles on which the concept of the immunity of States and their property was based. Furthermore, a State which was not involved in the performance of particular juridical acts should, along with its property, be immune from jurisdiction with respect to all claims arising out of the juridical acts in question. Under most national legislations, a State did not participate *in* commercial or economic undertakings as a subject of civil law.

46. Turning to the specific draft articles set forth in the Special Rapporteur's preliminary report (A/CN.4/415), he said that the concepts in articles 2 and 3 should be combined in a single article. A universally acceptable definition of the right of a State to own property should be included in the text, given the many specific or implied references in the text to that right. In article 6, the words in brackets, "and the relevant rules of general international law", should be deleted, since the principle of State immunity should be defined as precisely as

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possible, without reference to concepts that evolved in time and were not unanimously accepted. Of the two alternatives proposed for the title of part III, his delegation preferred *'Exceptions to State immunity". In article 11, the words "the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly" should be deleted. The waiver of immunity in the case covered in the article was based on the fact that a contract had been concluded, and the State did not have to consent to the waiver.

47. Articles 12, 13 and 16 should be deleted altogether, since they unjustifiably broadened the *range* of exceptions to the rule of State immunity. The exception to State immunity established in article 17 should apply only where the State was a participant in a profit-making company or other collective body. In article 18, the words "non-governmental" should be deleted, since the word "commercial" more clearly defined the situations covered by the article. In article 19, his delegation preferred the phrase "commercial contract": the alternative, "civil or commercial matter", prompted a restrictive interpretation of the principle of immunity. In article 21, paragraph (a), the words "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" should be deleted, in order to permit the more effective application of the principle enunciated in the article. In the introductory paragraph, the words in brackets should be retained.

48. With regard to article 22, he observed that a waiver of immunity by a State with respect to certain measures of constraint had political significance, and could have serious consequences. Accordingly, the article should stipulate certain conditions to be met where immunity was waived, for example, that the waiver must be provided in writing, expressly stated and unequivocal.

49. To accept the option provided by article 24, paragraph 1 (d) (ii), would be equivalent to abandoning all formal conditions. Accordingly, only the options available under subparagraphs (a) and (c) should be retained.

50. With regard to chapter VIII of the Commission's report (A/43/10), he said that his delegation would express its views in the working group established under paragraph 6 of General Assembly resolution 42/156.

51. Lastly, he welcomed the publication of the booklet "The Work of the International Law Commission" and hoped that the French version would be issued without delay. An analytical index should be prepared to facilitate its use.

52. *Mr.* MIRZAIE-YENGEJEH (Islamic Republic of Iran) said that the idea of taking action against those who resorted to war of aggression and against war criminals had developed after the First World War, and had gained greater currency through the Charter and Judgment of the Nürnberg Tribunal. Although the Nürnberg Tribunal had provided a useful starting-point, it had not led to the establishment of a permanent judicial mechanism for the prosecution and punishment of aggressors and war criminals. The mandate entrusted to the Commission to prepare a draft Code of Crimes against the Peace and Security of Mankind should be *seen* as affirming the

(Mr. Mirzaie-Yengejeh (Islamic Republic of Iran)

international community's desire to set up a permanent judicial mechanism for that purpose.

53, His dolegation attached great importance to thr Commission's *work* on thr draft Code, and urged it to approach the *topic* on a priority basis. It believed that a legal instrument in that field could be *of* vital importanaa in preventing tha use of forca in international relations and *in* deterring individuals and States from committing crimes against the peace and security of mankind,

54. His delegation noted with satisfaction *that* tha Commission had provisionally adopted articles 4, 7, 8, 10 and 11, Although tha articles seemed to correspond closely to tha fundamantal aim of tha draft Coda, some of tha propositions advanced in chapter II of tha draft required comment.

55. Concerning tha definition of aggression in paragraph 1 of article 12, hi8 dalagation falt that tha international judicial function in criminal law should be independent of tha executive funotion of tha Security Council. Accordingly, tha draft Coda should provide an indapandant dafinition of ● *ggrarrion.* However, it would be better to avoid lengthy discussion *of* such a definition and to rely in the mean time *on* tha list of acts of aggression contained in General Assembly resolution 3314 (XXIX), with th8 proviso that tha list was not exhaustive.

56, His delegation favoured the inclusion of tha thraat of aggression and preparation of aggression a8 separate paragraphs *in* tha draft ● rticl88, since such provisions would be of vital importance in the deterrence and pravantion of aggression. At tha same time, the draft Coda should clearly distinguish between tha thraat of aggression and preparation of aggression *on* the one hand, and preparation for self-defence on tha other.

57, Annotation in all its form8 should be regarded a8 a crime against peace and rhould tharefora be inaludad *a8 a* separate crime in the draft Code.

58. The principle of non-intervention was *a* deep-rooted and universally accepted principle of international law, and had been incorporated in the Charter of the United Nation8 and several othar international documents, in addition to various declaration8 and resolutions adopted by tha General Assembly. It was thus pertinant to inoluda intervention in a separate paragraph in the proposed list of crimes.

59. A8 to th8 legal content *of* the concept *of* intervention, hi8 delegation *took* the view that the definition given by the General Assembly *in* it8 resolution 2625 (XXV), containing tha Declaration *on* Principles of International Law concerning Friendly Relations and Co-operation among States, should be considered the basis for a definition of the concept in the draft Code,

60. While supporting the view that tha breach of obligations under treaties designed to ensure international peace and security should be included as a crime

(Mr. Mirzaie-Yengejeh, Islamic Republic of Iran)

in the draft Code, his delegation shared the view that care should be taken to guarantee thut States not parties to a treaty on the maintenance of pcacc and cccurity were not placed in an advcntagcouc position vis-à-vis States which had signed ouch a treaty.

61, In supporting the inclusion of colonial domination in the draft Coda, his dclcgation took the view that its definition rhould not bc rcrtrictcd to historical forma of colonialicm, but rhould crtcnd to any other form of domination, With that aoncidcration in mind, it favourcd the scaond alternative of draft article 1.1, paragraph 6, proporcd by the Special Rapportcur, which was in liar with tho wording of relevant General Assembly resolutions.

62, In his delegation's opinion, mcrccnaricm should also bc included in the draft Code, dcepitc difficulticr relating to the criteria of recruitment, training and compcncction. It war to be hoped that the Commircion would find an appropriate rolution to the problem, preferably in the form of a ccparatc provision in the draft Code. Regarding the definition of a mcrccnary, it was inrufficicnt to rely on Additional Protocol I to the 1949 Geneva Conventions, since the Protoaol applied only to mcrccnarism in time of war, The draft Code should provide a broad definition which would also be applicable to mcrccnarism in peacetime.

63, Scriouc consideration should bc given to the cuggcction in paragraph 275 of the Commission's report (A/43/10) that such actr am the massive cxpulcion by force of the population of a territory and the implanting of ccttlcre in an occupied territory in order to change that territory's demographic composition rhould be included in the list. They should indeed be included in some appropriate form, either under crimes against ycacc or under crimco against mankind,

64, International tcrroricm wan a very scriour and complicated issue for the international community. Apart from the tragic toll in human livcc and the dioruption of social and economic dcvclopmcnt, international tcrrorirm imperilled the rccurity, independence and territorial integrity of States, and ccriourly jcopardiacd international pcacc and security. It ehould thus find an appropriate place in the liot of crimcc against the pcacc and rccurity of mankind, and an accurate and comprchcncive definition should be provided by the Commission. In that connection, it rhould bc borne in mind that in the prcviouc two decades international terrorism had reached new dimcncionc and emerged in different forms, with State terrorism as itc most harmful and deadly manifcrtation. Terrorist acts on a large scale and using modern means had been perpetrated with the aim of domination, or intcrfcrcnce in the internal affairs of Statcc, and any definition should pay due attention to that aspect of the problem, Another consideration was the legitimate right of pcoplcc to struggle for independence, self-determination, and freedom from the yoke of colonialicm, domination and racism. That right war deeply rooted in international law, and war recognised in several international instruments. In the definition of international tcrroricm, therefore, a distinction rhould be drawn bctwccn that phenomenon and the right of pcoplcc to national liberation,

(Mr. Mirsaie-Yengejeh, Islamic Republic of Iran)

65. Hi8 dclcqation war in full agreement with *the* consensus reached within the Commission that every crime characterised as a crime against mankind should be included in a separate article in the draft Coda, It was to be hoped that other crimes proporcd for inclusion would be examined by the Commission and duly incorporated in the draft articles. His delegation had proporcd the inclusion of the use of ahcmical wcapone, in view of the serious effects of such weapons on human society and the environment. When used, poisonous gases oould easily and rapidly spread over a vart area far beyond the battlefield, Moreover, there war a generally accepted international instrument prohibiting the use of chemical weapons, namely the 1925 Geneva Protoaol, The Special Rapportcur and the Commission were rcgucrtcd to pay due attention to the humanitarian aepcct of the proposal.

66. In conclusion, he said that his delegation could not disguise its *concern* regarding the Commission's general approaoh to the topic, While the provisions in chapter I of the draft wore qcncrally in line with the dcciaion made by the Commission to aonfinc its work at the currant stage to international criminal responsibility of individuala, it faced thu difficulty, in drafting articles intended for chapter II, of determining whether individual8 could in fact commit crimes aqainrt the peace and security of mankind, Some of the crimes proporcd for inclurion, ruah *as* aqqrcorion, preparation of aggression and the threat of aggression, could be committed only by States or by individuals who abused State authority, In hi8 delegation's view, in such cases both the States *and* the individual8 concerned should be held responsible. His delegation therefore believed that the draft Coda would be incomplctc, and to some extant even ineffective, if it did not deal with the responsibility of State8 in respect of crimes against the peace and security of mankind.

67. Mr. KHVOSTOV (Byelorussian Soviet Socialist Republic) raid that the legal and political issues raised by the draft Coda became increasingly complex a8 *work* proceeded. His delegation was pleased to note that, at its fortieth session, the Commission had ruccccdcd in provisionally adopting six draft articles, thus *giving* grounds for hope that substantial progress would continue to be made *on* the topic, I n his delegation's view, every legal problem had political implications, insomuch as States generally took into account their own political situation, security and national interest when considering the technical aspects of a legal problem. The codification of international law could thus not be restricted to questions which were non-controvcrrial from a political point of view; it must also deal with those arc88 in which there were difference8 of opinion between States as to which legal principles or norms were applicable,

68. The principle of territoriality should be clearly affirmed in draft article 4; the principle that the criminal should be punished in the place where the crime had bean committed should prevail. That had been the approach taken in a number of international instruments, including General Assembly resolution 3074 (XXVIII) of 3 December 1973 entitled "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crime8 against humanity", which had been co-sponsored by the Byelorussian SSR,

(Mr. Khvostov, Byelorussian SSR)

69, With regard to article 7, hi8 delegation considered that the Cods rhould contain a provirion permitting a second trial in the light of new ● vidcncc giving grounde for a different characterisation of the crime, Articlc8 8, 10 *and* 11 did not give rise to difficulties for his delegation.

70. The Commission had begun conridcration of the draft articlc8 relating to crimes against peace, Article 12 dealt with one aspect of crimcr within that group, namely aggression. That should be regarded as a vary serious crime in view of its potentially catastrophic consequences for the whole of mankind. In his delegation'8 view, such elements of agqrcesion ao the throat of aggression, annexation, the planning and preparation of aggression, the sending of armed bands into the territory of a State, intervention, and tcrroriam rhould be included in the draft Code as distinct crimes. The same was true of serious broacher of obligations under treaties designed to ensure international peace and security.

71. His delegation bclicvcd that it was incorrect to accord criminal courts the right to characterise a8 aggression acts other than those rofcrrcd to in the Definition of Aqqresoion adoptrd by the Qcncral Aeaembly in 1974, or defined as such by the Security Council,

72, Since the need to protect mankind from illegal acts was of crucial importance in international law, the topic of the drsft Coda ahould remain as a separate item with high priority on the Sixth Committee's agenda.

73, Mr. BELHAJ (Tunisia) maid that his delegation regarded the preparation of the draft Code as *an exercise of* the greatest importance. The difficulties involved and the reservations voiced by romc dclcgatione a8 to the content of the Code should not be allowed to *stand* in the way of its adoption a8 an immensely valuablr instrument of international law, Nor should the lack of a competent international jurisdiction be invoked ae grounds for questioning the usefulness of the Code.

74, *In* the world of today, the ruler of international law often made little headway against the jealously guarded sovereignty of Staten. At the acme time, there was a vast body of binding legal instruments which constituted jus gentium. Such rules did not arise spontaneously, and many of them derived from the progressive development of intcrnstfonal low, *In* that respect, the draft Coda, as the work of highly qualified jurists representing different legal systems, would serve a8 a valuable inrtrumcnt of *rcfcrcncc* pending its entry into force at the international level as a rule of positive international law. That should not, however, be its only function, end his delegation hoped that it would acquire binding force as soon a8 possible. Moreover, when the international situation permitted the establishment of a competent international criminal court, the availability of the Code would assist the judges of that court in carrying out their tasks.

75. A field as broad as that of the international criminal responsibility *of* individual8 rhould not be left without proper legal rcqulation or real judicial institutions. His delegation's initial *preference* would be for an international

(Mr. Belhaj, Tunisia)

court in the full sense of the term, in other words, a court with its own statute and with judges appointed on the basis of their legal qualifications, their moral standing and their rtatur am representatives of the major legal systems.

76. Tunisia conridered thr definition of aggression laid down in draft article 12 rather narrow, since it dealt only with armed force, whereas there were other forms of aggression - for ● xemple, eoonomia aggrerrion - to which the Commission rhould devote greater attention, International ● oonomia interests were interlinked to such a degree that a State, or a private entity acting either on the State's behalf or *under* its cover, aould trigger *a* serious crisis in another State's economy, For *example,* financial manoeuvres on oommodity exchanges carried out by States through certain powerful economic *and* financial ● ntitier aould lead to the collapse of *a* third State's eoonomia machinery. Such manoeuvres could be described as aggrerrion, and the individuals carrying them out could be described as criminals.

77, The threat of aggrerrion rhould be dealt with as a separate crime, Tunisia shared the views expressed by the members of the Commission in that connection, which *were* based on Article 2, paragraph 4, of the Charter of the United Nations and on General Assembly rrrolution 42/22. The threat of aggression was no less condemnable when it was of an economic nature, The views ● xprecsed in paragraph 220 of the Commission's rrport (A/43/10) also applied to economic aggression.

78. Whore intervention war concerned, Tunisia believed that the definition should be a8 broad as possible so as to cover all violationa of the sovereignty of States and of the right of peoples to relf-determination, Naturally, Tunisia fully recognized that that complex concept was difficult to delineate, Economic factor8 should alco be taken into account in the definition of the concept. In connection with such factors, as well as political and cultural factor@, he wished to refer to article 18 of the Bogotá Charter and to article 2, paragraph (9), of the 1954 draft Code of Offences against the Peace and Security of Mankind.

79. With regard to broacher of treaty obligations - which amounted to crimes when the obligations *in* question related to the maintenance of international peace - Tunisia believed that, although treaties on disarmament were indeed relevant, other treaties were also relevant. It shared the view expressed by France that it was unacceptable that disarmament should be regarded as the only element of international security. Moreover, not only broaches themeelves, but also their outcome should be taken into account, In other words, whatever the degree of seriousness of a breach of a treaty obligation, the outcome of the breach must be the determining factor.

80. Tunisia believed that colonial domination rhould be included in the draft Code as a crime against the peace and security of mankind, The Special Rapporteur had indicated that it war simply a question of translating the principle of colonial domination into legal terms. Tunisia therefore believed that the two alternatives put forward by the Special Rapporteur on the subject should be merged.

(Mr. Belhaj, Tunisia)

81. Mercenarism should be regarded as a reparate crime from that of aggression. Tunisia shared the views ● xpremred *on* the subject by the members of the Commission, as reflected in paragraph 27, of the report, Furthermore, the Commirrion should proceed to ● rtablirh a definition of the term "mercenary", without awaiting the outcome of the corresponding work carried out by the Ad Hoc Committee *on* mercenaries, and by the Third Committee, A definition propoosd by the Commission could be of assistance to the Ad Hoc Committee.

82. The definition of annexation ehould be as broad am possible. Tunisia shared the views reflected *in* paragraph 223 of the Commission's report, and believed that annexation should be dealt with as a reparate crime,

83. Mr. CRUZ (Chile), referring to the question of international liability for injurious consequences arising out of acts not prohibited by international law, said that - in principle - States were answerable to no one; the concopt of liability embodied an exception to the rule. The purpose of recognising international liability for injurious conrequencer was to control the conduct of States in order to prevent certain acts that entailed special risks, and in order to regulate the application of penalties, The "risk" doctrine was regarded as being applicable to certain types of situations, with a view to preventing, or providing compensation for, exceptional harm - ruah as that resulting from the storage, use or transport of radioactive materials *and* waste, from explosives or from environmental pollution, Of particular relevance, in that connection, was the Declaration on the Human Environment, especially principles 20 *to* 26. Chile conridered the general principles suggested by the Special Rapporteur completely valid, Anyone who introduced romething dangerous into society was responsible for any resulting accidents, regardless of whether he could be conridered guilty or negligent, In internatronal law, that doctrine had so far been applied in specific situations provided for in a number of international agreements, It war entirely appropriate to deal with the international liability topic in a general manner,

84. With *regard* to the general provisions proposed by the Special Rapportour, Chile wished to suggest that the beginning of article 2 (a) should read: "' risk' means the risk occasioned by the use, purpose or location of cubrtancec or elements", It would thus be clearer that the draft covered the use of natural or environmental elements, as in the case of the use of part of the territory of a State for the dumping of nuclear waste, Where the scope of the article6 was concerned, the phrase "in the absence of such jurisdiction" in article 1 was of particular importance, His delegation took the view that the State having jurisdiction or effective control was liable with respect to the harm resulting from its acts, regardless of any criteria for establishing guilt. There was thus an implicit risk for those who carried out the acts or were involved in them in a decision-making capacity, The State *in* question murt bear responsibility for the latent risk *of* causing harm, In *any* event, such responsibility was the counterpart of the exercise by States of sovereignty. The burden of proof would thur be shifted, since the State that was apparently liable would be called upon to prove that there was no link between the accident concerned and any resulting harm.

(Mr. Cruz, Chile)

85. His delegation had a few points to make on matters relating to the law of the non-navigational uses of international watercourses. With regard to the exchange of data and information, it believed that an in-depth study of the natural characteristics of a resource should be conducted with a view to establishing a basic definition. The characteristics of the resource should be assessed either at the location closest to the point where the resource and the international frontier intersected, or in the section of the resource coinciding with the frontier, according to whether it was a question of a successive or a contiguous watercourse. Maintenance of natural characteristics had various effects, including that of preserving water quality - from the point of view of both pollution control and protection of the ecology of the watercourse. Once the natural characteristics had been defined, it would be possible to embark on establishing the extent and nature of the liability of upstream watercourse States regarding the maintenance and protection of the characteristics in question and regarding notification of other States of changes in the characteristics. In the consideration of the relationship between the naturai characteristics of a resource and harm to a resource, account should be taken of such technical matters as statistics, averages and both typical and atypical seasonal variations.

86. The exploitation of shared water resources must not have an adverse effect on the natural characteristics of the watercourse concerned, in accordance with the principle of optimum harmonious utilisation. The exploitation of the resources in question therefore called for reconciliation of various interests with respect to the treatment of natural characteristics, which meant that the resources must be regarded as a unitary, dynamic whole. Ideally, therefore, the exploitation of shared water resources would be regulated by agreements between participating States based on prior recognition of the unitary whole and natural characteristics concerned. Chile believed that the regular exchange of data and information would contribute to the preparation of a regime for co-ordinated action. Once the natural characteristics of shared water resources had been established, those resources should be exploited in accordance with the principles of equity and optimum harmonious utilisation, under a comprehensive programme for the use of each resource. Such programmes should be established under a framework agreement governing all shared resources. A definition of natural characteristics was also needed in connection with environmental protection, pollution and related matters. Such a definition was a prerequisite for the definition of pollution laid down in article 16, as proposed by the Special Rapporteur.

87. Turning to the draft Code of Crimes against the Peace and Security of Mankind, he expressed support for the wording of article 11 proposed by the Special Rapporteur in his sixth report (A/CN.4/411). Chile took note with interest of the reference to the problems arising from the "preparation of aggression", "annexation", "the sending of armed bands into the territory of another State" and, more particularly, "interference by the authorities of a State in the internal or external affairs of another State". The first alternative proposed by the Special Rapporteur for article 11, paragraph 3, was preferable to the second.

(Mr. Cruz, Chile)

88. It was regrettable that, owing to lack of time, the Commission had been unable to consider the report submitted by the Special Rapporteur for the topic of jurisdictional immunities of States and their property. It was to be hoped that the Sixth Committee would devote due attention to the draft articles on that subject, as well as to those on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

The meeting rose at 1.10 p.m.