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Chairman: Mr. AFONSO (Mozambique)

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The meeting was called to order at 3 p.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/45/405)

1. Mr. NATHAN (Israel) said that the draft Code of Crimes against the Peace and Security of Mankind appearing in the report of the International Law Commission (A/46/10) had originally been envisaged as an instrument for the prosecution of the most revolting and atrocious criminal acts. Over the years of work of the Commission, however, the list of crimes had been constantly increased and now included crimes that clearly did not belong in the draft Code. The Commission should reconsider that question, and his delegation fully associated itself on that point with the comments submitted by the representative of the Netherlands at the meeting on 31 October 1991.

2. The basic requirement of any criminal legislation was that it should be clear, precise and devoid of political notions, since such notions were incapable of proper legal definition and therefore did not lend themselves to proper interpretation by a court, whether national or international. As his delegation had already noted at the Committee's previous session, vague language and political notions had crept into several articles of the draft Code, such as articles 15, 17 and 18. Article 15, for example, included a provision which might be used to justify aggression in certain circumstances.

3. Article 24 was unduly narrow in that it was confined to acts committed by a person acting as an agent or representative of a State and "of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public". The same criticism - vague language and inappropriate introduction of political notions - applied to article 22, which included a random listing of acts deemed to be "exceptionally serious".

4. With regard to the establishment of an international criminal court, which Israel had always advocated, since the Commission had so far dealt with that matter on a provisional basis and his Government had not yet had an opportunity to adopt a definite attitude to the Commission's suggestions, his delegation would confine itself to making observations on a preliminary and non-committal basis.

5. On the question of applicable penalties, the principle nulla poena sine lege required that they would have to be spelt out in the draft Code; it would be advisable to have separate penalties for each crime, and punishment should be a maximum penalty so as to enable the court to take into account the circumstances of each case. In view of the tendencies in the sphere of criminal punishment, the Code would probably not provide for the death penalty.

6. Regarding the jurisdiction of an international criminal court, two problems were likely to arise: the extent of jurisdiction of the court and

(Mr. Nathan, Israel)

its jurisdiction ratione personae (exclusive jurisdiction, concurrent jurisdiction with national courts, or a mixed system). It would not be possible to adopt a definite attitude on those matters until the list of crimes to be included in the Code had been finally settled. In regard to the conferment of jurisdiction, it might be necessary to require consent of the States concerned, expressed by special agreement or in a unilateral declaration. Another question to be considered would be that of whether criminal proceedings in respect of crimes of aggression or threat of aggression would require the prior determination of the existence of such a crime.

7. The establishment of an international criminal court would not attain its objective and would not gain the support of the international community unless the Code of Crimes was based on principles that were generally acceptable and the court was completely independent and free from political influences of any kind. Those principles should be enshrined in the statute of the court.

8. Mr. ROSENSTOCK (United States of America) said that he would confine his statement to the question of the establishment of an international criminal court. That question was enormously complex and raised profound legal, political and practical questions. In its 1990 report, the Commission had identified some 40-odd issues relevant to the matter, without providing any analysis of them. As requested by the General Assembly in paragraph 3 of resolution 45/41, the Commission had begun that analysis, and it had provided its views on the issue of the jurisdiction of the court in its 1991 report. His delegation was gratified and hoped that the Commission would provide analysis on other issues before it started drafting a statute of an international criminal court as some were calling for it to do.

9. While it was important to do everything possible to improve international criminal law enforcement, the question remained as to whether the establishment of an international criminal court was the best way of meeting that objective and whether it would be liable to disrupt satisfactory implementation of the existing systems, based on multilateral and bilateral agreements obliging States to extradite or prosecute offenders. Of course, not all States had ratified these conventions, and some countries lacked the ability or will to extradite offenders. However, there was no indication that an international criminal court would be the solution to that problem and would make up for the shortcomings of the existing system.

10. A second area which merited further study on the part of the Commission was how to avoid the risk of politicization of the court, particularly if it was called upon to consider the crimes included in the existing draft Code, many of which were defined in an unacceptable manner. Moreover, an acquittal or token sentence handed down by such a court could, pursuant to the principle of non bis in idem, effectively protect the accused from further prosecution or extradition; the proposals that had been made regarding the selection of judges and peremptory challenges, interesting as they might be, did not seem to be sufficient to dispel concerns about a court with such powers.

(Mr. Rosenstock, United States)

11. In the jurisdictional scheme proposed by the Commission, consent would be required of the State in whose territory the crime had been committed, the State of the offender and the State of the victim. However, many cases (aircraft bombings, broad narcotics conspiracies) would require the consent of literally dozens of countries, which would effectively prevent almost any case from ever going before such a court.

12. Many other questions (composition of the court, rules of procedure and evidence, investigations, incarceration, source of funding, etc.), which were linked to questions of principle, must be sufficiently addressed before States could decide whether the idea of an international criminal court was worth pursuing.

13. A fair degree of international consensus would be required in order to resolve the many problems he had mentioned. The United States therefore believed, like the majority of other countries, that the question of establishing an international criminal court required further study by the Commission.

14. Mr. EAFEARE (Papua New Guinea) said that he wished first to comment briefly on the draft articles on jurisdictional immunities of States and their property (A/46/10, chap. II). He felt that, in practice, the provisions of the draft articles would favour the developed countries. In the case of a commercial contract between a vendor from a developed country and a developing country, the former would be in a position to require the latter to forgo immunity of jurisdiction since the parties would not be equal ab initio. However, if the contract was between States, the vendor State, which would generally be a developed country, would no doubt insist on the inviolability laid down in article 5. If the vendor State was a developing country, any insistence on its part that the letter of the draft articles, in particular article 5, should be applied would result in a refusal to trade, leading to a further decline in its economy.

15. Article 1, paragraph 2, of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights provided that "all peoples may [...] freely dispose of their natural wealth and resources [...] In no case may a people be deprived of its own means of subsistence". If it was accepted that the term "means of subsistence" related to "natural wealth and resources", then it must be concluded that the rights of indigenous peoples all over the world also included their right to natural wealth and resources in or under the surface of their land. A distinction should also be drawn between the rights of a State and the rights of the peoples who lived in its territory, particularly their right to self-determination. It was, however, possible that those peoples might not want to exercise their right to self-determination and would prefer to enforce their right to the land and its resources. The State should recognize the rights of indigenous peoples, as outlined in the various United Nations instruments, and must create the necessary legal framework for

(Mr. Eafeare, Papua New Guinea)

enforcing those rights. Nowhere in the draft Code of Crimes against the Peace and Security of Mankind was there mention of crimes against the rights of indigenous peoples, especially their right to property and subsoil resources. However, when article 15, paragraph 2, for example, defined aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations", the definition should also cover the rights of indigenous peoples to their subsoil resources.

16. While there had been much talk about peaceful means of settling disputes between States, no mechanism had been envisaged for settling disputes between States and their indigenous populations in the area of enforcement of the latter's fundamental rights. It was difficult to see how domestic courts could resolve those issues in States whose laws were contrary to those fundamental rights.

17. Article 17, which dealt with intervention, nevertheless provided, in paragraph 3, for an exception which could be invoked by those providing assistance to a people seeking to enforce their right to self-determination. Instead of providing for exceptions, it would be better to define exhaustively all crimes against the peace and security of mankind, including crimes against indigenous peoples. The reasons for the crime should never be used to excuse its commission and should only be taken into account as attenuating circumstances in determining the punishment to be handed down.

18. Denial of the right of indigenous peoples to their subsoil resources was a flagrant denial of their fundamental rights and should therefore be included in the list of violations of human rights that constituted the crime dealt with in article 21.

19. Article 24 wrongly limited the crime of international terrorism to acts committed by an agent of a State.

20. If States had the political will, it would be possible to overcome the reservations concerning the establishment of an international criminal court. In addition, there would be a need to establish an enforcement mechanism, such as an international police force.

21. The process of codifying current practice was an attempt to maintain the status quo in favour of the developed countries, since it was their practice alone that was taken into account. The developing countries could conceivably demand that their socio-political structures should be included among the practices to be codified, but certain developed countries were requiring changes in the socio-political environment in developing countries as a precondition for economic assistance. The codification of State practice thus amounted to a perpetuation of an unjust economic system. The law must therefore be used as a tool for effecting the changes necessary to bring about a new world order.

22. Mr. VOICU (Romania) said his delegation shared the view that the topic of "Draft Code of Crimes against the Peace and Security of Mankind" was one of continued relevance, which helped to strengthen the rule of law in international relations. He recalled the role played by Romania in the elaboration of the draft Code. As early as 23 December 1927, Romania had officially expressed to the League of Nations the hope that one day an international criminal code would be adopted. Subsequently, Mr. Vespasian Pella, who at that time was President of the International Association of Criminal Law, had prepared a long memorandum on the subject, which had been published in the Yearbook of the International Law Commission, 1950, volume II.

23. The completion of the draft Code coincided with the establishment in Romania of the Vespasian Pella Scientific Association, which was devoted to international criminal law in the light of the work done by that great Romanian legal scholar. Mention should also be made of the role of Mr. Woetzel in promoting the draft Code of Crimes and the legal mechanism for its enforcement. At the International Seminar held at Talloires in 1991, the draft proposed by the Foundation for the Establishment of an International Criminal Court had been generally considered by the participants as a valuable paper, and a source of inspiration to Governments and institutions involved in the task of codifying international criminal law.

24. With regard to the structure of the draft Code submitted for the consideration of the Committee, he found merit in the Commission's decision to divide the draft articles into two parts, provided it was understood that the order of their presentation in no way indicated the order of seriousness of the crimes involved.

25. With respect to article 1, the bracketed words "under international law" should be included in the text, because crimes against the peace and security of mankind were in fact crimes under international law. Moreover, that interpretation was confirmed by the wording of article 2, which his delegation supported in its current form. Article 7, on non-applicability of statutory limitations, was consistent with the 1968 Convention on the subject, to which Romania was a party, and it was therefore also acceptable. In article 16, the threat of aggression should be treated as a separate crime. The wording, however, was too concise. The use of the word "seriously" was questionable since it was open to varying interpretations.

26. His delegation had some difficulty with article 14, which, in its view, required further examination. It was necessary to distinguish between armed subversive or terrorist activities and all other activities of that type. The concept of undermining the free exercise by States of their sovereign rights could not be dealt with in such a simple manner. Fomenting subversive or terrorist activities was a very serious act in itself and an additional characterization could weaken the legal content of the article. His delegation also supported the proposal to re-examine article 24, which appeared too concise, especially in comparison with article 23, concerning the recruitment, use, financing and training of mercenaries.

(Mr. Voicu, Romania)

27. The final version of the Code should offer a better balance between different articles so as not to create the impression that the list of crimes against the peace and security of mankind had been drawn up according to varying criteria. As currently drafted, some articles contained fairly detailed definitions, while for others, definitions were given only in the commentary, which would not be part of the Code itself.

28. With regard to article 25, his delegation was of the view that the Commission had acted wisely in confining itself to illicit drug trafficking. Its task had been facilitated by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which precisely defined the expression "illicit trafficking in narcotic drugs". The definition given in article 25 was clear enough. Lastly, his delegation supported article 26.

29. In conclusion, his delegation wished to comment on the question of the establishment of an international criminal court. It had noted the Commission's decision to continue to fulfil the mandate entrusted to it by the General Assembly in resolution 45/41, of which Romania was a sponsor. He wished to recall, however, that the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders had called for an examination of the possibility of establishing an international criminal court, or a similar mechanism, and for the elaboration of provisions to ensure its effective functioning. It would perhaps be useful for the Sixth Committee and the Third Committee to coordinate their consideration of the subject. Before the Second World War, Mr. Pella had put forward a draft statute for the establishment of a criminal chamber within the Permanent Court of International Justice. The draft statute had been accepted by the International Association of Penal Law.

30. Mr. VERENIKIN (Union of Soviet Socialist Republics) welcomes the completion of the first reading of the draft Code, which he regarded as a means for strengthening cooperation between States in combating some of the most serious crimes and punishing offenders. The Code should be an instrument for combating the most dangerous attacks on international peace and security, such as aggression, genocide, mercenarism and drug trafficking.

31. However, before work was concluded, the cardinal question of the body responsible for applying international criminal justice must be resolved on the basis of consensus, in a balanced fashion, and taking contemporary realities into account as closely as possible. It would be noted that the question of the applicable penalties was not the subject of unanimity in the Commission. Even though the tendency was to abolish the death penalty, States where it was still in force were entitled to insist that it be included in the Code. To overcome that difficulty, it might be possible to stipulate that the penalties applicable were those established by the legislation of the State of which the offender was a national.

(Mr. Verenikin, USSR)

32. Proceeding to an examination of the individual articles of the draft, he said that paragraph 2 of article 3 gave rise to a methodological problem in that attempts and complicity must be differentiated by taking into account the specific features of the crime itself, according to the qualifications stipulated in the Code. Article 5, on responsibility of States, should specify that the commission of a crime by agents of a State acting in their official capacity entailed the responsibility of that State.

33. The article on orders of a Government or a superior was to be welcomed, as was the article on defences and extenuating circumstances. He was pleased to note that one provision, article 21, was intended to ensure respect for human rights and fundamental freedoms, since it related to murder, torture, slavery, persecution and deportation. The provision was particularly important in that, while such crimes were rare in countries in which the rule of law prevailed, there was every likelihood of their being committed in countries which did not have a democratic system.

34. Article 26 dealt with one of the most fundamental problems currently confronting mankind, namely, protection of the environment. The Code should therefore criminalize acts such as those involving a major nuclear disaster, for example, which were comparable in their effects to a war. The forthcoming United Nations Conference on Environment and Development, to be held at Rio de Janeiro, would probably elaborate and adopt a code of environmental ethics which would establish the rights and duties of States in that regard, thus making it possible to broaden the basis for cooperation between States.

35. In conclusion, he expressed the hope that the Commission would, at its next session, make further progress in the elaboration of a draft which would promote greater openness and predictability in international affairs and would help to strengthen international law.

36. Ms. TUNKU DATO' NAZIHAH MOHAMMED RUS (Malaysia) said that the draft Code would help to strengthen the rule of law in international relations. In fact, the crimes listed, which ranged from aggression to illicit drug trafficking, had a severe impact on entire communities. It was therefore essential to provide for appropriate penalties to punish the perpetrators. Punishment should be exemplary in order to prevent the recurrence of such acts.

37. Drug abuse and illicit trafficking were among the greatest scourges afflicting mankind. They were accompanied by corruption, violence and terrorism. Illicit cultivation and production of drugs now involved many more countries than previously, and there were definite connections between criminals and ruling circles. The inclusion of drug trafficking in article 25 of the draft Code gave the issue due recognition as a crime against the peace and security of mankind. Despite the results achieved at the 1989 International Conference at Vienna, too few countries had imposed heavy penalties to eliminate that scourge. Malaysia, however, had stringent legislation to combat drugs.

(Ms. Tunku Dato' Nazihah
Mohammed Rus, Malaysia)

38. Damage to the environment remained a constant threat to the general well-being of mankind. Recent history provided examples of environmental disasters on a massive scale. The United Nations Conference on Environment and Development, to be held in June 1992, would discuss issues relating to environmental degradation. Article 26, as proposed by the International Law Commission, was thus in keeping with current developments. In that connection, however, the Commission should not overlook principle 21 of the 1972 Stockholm Declaration, which required States to refrain from causing damage to the environment of other States or of areas beyond the limits of national jurisdiction.

39. The establishment of an international criminal court would be a significant step forward in the development of international law, but it was fraught with difficulties. There was, for example, the question of relations between national and international judicial systems: which should prevail, national jurisdiction or international jurisdiction? There was also the issue of penalties: would a punishment considered appropriate in one country always be acceptable in another? The diversity of philosophies was an extremely difficult problem, both from the standpoint of determining penalties for crimes and from that of establishing an international criminal court.

40. Mr. PETROV (Bulgaria) explained that his delegation attached great importance to the elaboration of the Code of crimes against the peace and security of mankind for two reasons. The first was that a binding international instrument, together with the work of an international criminal court, would become an important element in the United Nations peace-keeping system and would help to strengthen the rule of law. From that point of view, Bulgaria subscribed to the preliminary comments made by the observer for Switzerland in respect of the possible relationship between an international criminal court and the United Nations Security Council in such fields as the determination of acts of aggression.

41. The second reason was that the crimes defined in the draft Code were crimes against humanity as a whole. It was precisely that universal aspect, rather than the subjective criterion of their barbaric and inhuman nature, which was their common denominator. A consistent approach to the definition of penalties would require a search for solutions that would avoid prior consent of the State concerned. Obviously, that would mean that States would have to renounce their absolute sovereignty in such an important area as jurisdiction in their own territory and the exercise of judicial power. Yet after all, the world was witnessing the emergence of a new subject of international relations, namely mankind.

42. Bulgaria was in favour of establishing an international criminal jurisdiction which should be exclusive. Since most States seemed to find that solution unpalatable, his delegation would be prepared either to adopt the principle aut dedere aut judicare, which would do away with the need to establish an international criminal court but would run counter to the very

(Mr. Petrov, Bulgaria)

concept of a crime against the peace and security of mankind, or, preferably, to accept the creation of an international court which would be called upon to hear appeals against the judgements of national courts. That option, whose effectiveness was recognized, seemed to enjoy relatively wide support among States. As for the court's jurisdiction rationae materiae, it should cover the crimes laid down in the draft Code.

43. The remaining issue was the problem of the penalties applicable to the perpetrators of such crimes. Bearing in mind their barbaric character and the fact that they attacked the very foundations of contemporary civilization, his country would favour a penalty of life imprisonment.

44. Mr. BELLOUKI (Morocco) said that the series of draft articles on the law of the non-navigational uses of international watercourses adopted on first reading struck a proper balance between excessively detailed rules and rules which were too general. Their auxiliary nature did not prevent them from being rules of international law whose function was to require watercourse States to comply with their obligations. The framework agreement for which the Commission had opted presupposed obligations governed by interpretative rules which might be supplemented or made more specific by specific bilateral or regional agreements. The obligation to negotiate and cooperate, the principles for utilization and equitable and reasonable participation in the watercourse system, the obligation not to cause appreciable harm, and the obligation to prevent, reduce and control the pollution of watercourses were elements that could bring about a constructive balance among the national interests concerned so as to benefit the obvious common good.

45. His delegation agreed with the Special Rapporteur's view that the draft articles should be based on hydrologic reality and with the view expressed in paragraph 40 of the report (A/46/10) that references to the relative internationality of a watercourse were unnecessary.

46. Groundwater related to surface water should be included in the definition of a watercourse. Ridding article 26 of its formalism had made it more acceptable. While general in nature, the obligations established in article 27 were nevertheless a factor in risk prevention and in optimizing the potential of a watercourse. His delegation welcomed the general obligation set out in article 26 concerning the safe operation, maintenance or protection of installations and other works. Article 29 stated a long-recognized obligation of international law. Article 32 reaffirmed a basic principle in the area of justice and protection of the rights of injured parties.

47. Once adopted as an instrument of international law, the draft articles would give international watercourse States a framework for cooperation that would help to ensure the preservation and protection of water resources.

48. Penalties must be established in the draft Code of crimes against the peace and security of mankind in accordance with the principle of nulla poena sine lege. While his delegation supported the idea of a general formula

(Mr. Bellouki, Morocco)

setting out the nature of the applicable penalties, it would like the future Code to set penalties for each crime according to its gravity and its specific nature. The maximum penalties prescribed should not prevent States that wished to do so from exceeding the required maximum, especially where there were aggravating circumstances. At the same time, a presiding judge might, pursuant to clearly defined provisions, take into account any extenuating circumstances. He might also order the confiscation of unlawfully acquired property and objects used or intended for use in committing the crime. He should decide to which party the confiscated property would be transferred or restored. National courts would thus have a role to play in determining punishments that should be afflictive and infamous in nature.

49. In article 3, attempts to commit a crime should cover all crimes and should be assimilated with them where punishment was concerned. Article 14 should be reworded so as to attenuate the absolving nature of defences and restrict the interpretative scope of the concept of exteruati circumstances. Paragraph 5 of article 15 seemed superfluous, since, whether or not the Security Council intervened, the use of armed force in violation of the Charter was sufficient proof of an act of aggression.

50. With respect to the possible establishment of an international criminal court, it was necessary to take into account the real world situation in which legal cooperation among States remained a very effective means of punishing crime.

51. With respect to jurisdiction rationae personae and rationae materiae, the court should be competent to try individuals for the most serious crimes contained in the future Code and covered by an international agreement.

52. As for conferment of jurisdiction, the most qualified State should be that in which the crime was committed. The court's jurisdiction should be concurrent with that of the national courts, and the consent of the States concerned should be required to confer jurisdiction. Acceptance of the court's statute should not imply automatic consent to its jurisdiction. The court should rule on jurisdictional conflicts among States. However, it should not have jurisdiction to review decisions handed down by a State's higher courts. His delegation favoured giving the court jurisdiction over the interpretation of provisions of the Code. The court should be able to interpret the rules of international criminal law on an advisory basis.

53. Regarding the institution of criminal proceedings (submission of cases to the court), that privilege should be exercised exclusively by States for all crimes. In the case of crimes of aggression or the threat of aggression, criminal proceedings should not be subject to prior determination by the Security Council of the existence of such crimes. The Security Council was a political body while the court was a juridical body; as such, they should perform different functions and should operate independently from one another. As for the right to institute proceedings, it should be granted to a

(Mr. Bellouki, Morocco)

public ministry attached to the court. The role of the States parties to the Code and to the court's statutes should be limited to bringing a case to the attention of the court by asking it to institute proceedings.

54. In conclusion, his delegation advised caution and realism in the establishment of an international criminal court if such a court was to function in a world in which States remained sensitive to any limitation of their sovereignty.

55. Mr. VUKAS (Yugoslavia) said that the topics covered in the draft Code of crimes against the peace and security of mankind were of the utmost importance to humanity as a whole and particularly to Yugoslavia, where a cruel war raging in Croatia threatened to spread to the rest of the country. As a result, many of the provisions contained in the draft Code and the portions of the Commission's report (A/46/10) dealing with the establishment of criminal jurisdiction and penalties for international crimes took on a very concrete, personal significance for every Yugoslav citizen. For those very reasons, his comments on the draft Code could not be as explicit as he might wish.

56. Although it was probably not the Commission's intention, article 1 as currently drafted could be interpreted as excluding the existence of crimes under international law other than those defined in the Code. The definition in article 1 should be brought into line with article 10 on non-retroactivity, which assumed the existence of crimes under international law without reference to the Code.

57. The Commission had been right to exclude the responsibility of States from the scope of the Code by differentiating State responsibility from individual responsibility. However, between the individual and the State there was still a whole range of possible perpetrators of crimes (Governments, political parties, organizations or groups) that should be treated differently. The example of the Nazi and Fascist Parties after the Second World War should not be forgotten.

58. Attempt to commit a crime (article 3, para. 3) should not be retained in the list of crimes. It would be difficult to justify, for example, the punishment of an attempt to commit a threat of aggression.

59. Article 11 should go further and oblige individuals not to obey a Government or superior that ordered them to commit a crime against the peace and security of mankind, even if they risked punishment for disobedience. If the law could require people to risk their lives to satisfy the ambitions of their Governments, it should also be possible to establish rules that would threaten their security for a just cause.

60. Defences and extenuating circumstances (article 14) should not be dealt with in part I. They should be used only in a limited manner, in accordance with the nature of each crime. Consequently, they should be dealt with separately in the articles devoted to specific crimes.

(Mr. Vukas, Yugoslavia)

61. The list of crimes in part II did not correspond to the title of that part or to the title of the draft Code itself. It included crimes such as illicit traffic in narcotic drugs and persecution on cultural grounds, which could not be considered to be threats to the security of mankind.

62. In crimes of aggression, the "individual who as leader or organizer plans, commits or orders the commission of an act of aggression" (article 15, para. 1) should not be held solely responsible for the crime; individuals occupying the highest decision-making positions who tolerated the commission of such acts should also be considered responsible. Such individuals included, by way of example, leaders who did not prevent "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State ..." [article 15, para. 4 (g)].

63. With respect to genocide, the Chairman of the Commission had said in his introductory remarks to the Committee that article 19 also covered cultural genocide. Yet neither the provisions of that article nor the Commission's commentary permitted such an interpretation.

64. The provisions of the article regarding apartheid (article 20) were unfortunately not applicable only to southern Africa. In those circumstances, it would perhaps be better to replace the title of the article by a generic term such as racial segregation or discrimination.

65. Bearing in mind the atrocities currently being committed in Yugoslavia, he could not approve of the extreme caution with which war crimes had been defined as crimes against the peace and security of mankind (article 22). The inclusion of only "exceptionally serious" war crimes in the Code would amount to an unnecessary limitation of its scope, particularly because such a qualification rested on two extremely vague criteria.

66. Again having in mind the acts committed in his country, he proposed that the national heritage (lakes, rivers, falls, marshes etc.) should be separately mentioned in article 26 even if, strictly speaking, that concept was included in "environment".

67. A code of crimes against the peace and security of mankind should provide for mechanisms for the identification and punishment of the perpetrators and should specify penalties. On the issue of international criminal jurisdiction, he referred to his statement in the Sixth Committee at the forty-fifth session (A/C.6/45/SR.36).

68. A mechanism should also be created for the prevention of war crimes. Throughout all war operations, an impartial international body should inspect the belligerents, inform them of the content of the laws of warfare and humanitarian international law and warn them of the consequences of war crimes for the population and for the responsibility of the perpetrators.

(Mr. Vukas, Yugoslavia)

69. Concerning penalties, the death penalty could not be defended by any argument and it might even be questioned whether life imprisonment was compatible with human dignity.

70. In conclusion, he emphasized that his comments had all been of a technical nature, thus demonstrating the general agreement of his delegation with the main ideas in the Code. His delegation sincerely hoped that the work of the Commission on the issue would be as fruitful in the future as it had been hitherto.

71. Mrs. SILVERA (Cuba) welcomed the fact that the Special Rapporteur had applied the principle nulla poena sine lege in deciding to list in the draft Code of Crimes against the Peace and Security of Mankind the penalties applicable to the perpetrators of acts deemed in the future Code to be criminal. That decision, however, raised difficulties for a number of countries owing to the diversity of legal systems and the fact that, contrary to what happened in national law, there was in international law a wide range of different approaches and interpretations which made it difficult to adopt a homogeneous system of prevention. The death penalty was an excellent example.

72. The nature and scope of article 2 should be more clearly defined. In article 3, reference should be made to the responsibility inherent in acts endangering relations between States committed with the direct or indirect participation of a State. While the draft Code dealt separately with individual and State responsibility, the title of article 5 should be worded in such a way as to remove ambiguity. Article 6 concerning extradition should be less imperative, bearing in mind the existence of bilateral and multilateral treaties on the issue. For its part, Cuba reserved its sovereign right to agree to the extradition of an alleged criminal in accordance with its legislation and the bilateral agreements it had concluded on the matter. Paragraph 3 of the same article could not be interpreted as conferring on the international criminal court a competence which might challenge the sovereign right of States to try on their territory the perpetrators of crimes which, while falling within the scope of the Code, would also be punishable under national legislation. Article 9 should be improved in the light of the views expressed by Member States and the comments made during the discussion in the Sixth Committee, as it risked producing inaccurate interpretations, particularly in paragraph 3. Article 13 went beyond acceptable limits. Article 16, the title of which encroached on the prerogatives of the Security Council, should be brought into conformity with the Charter of the United Nations.

73. Her delegation continued to have reservations regarding the creation of an international criminal court with mandatory jurisdiction. It would closely follow the progress of the work of the Commission and would keep it informed of its own views as it considered that there were many aspects of international criminal law which still required clarification. Her delegation wished in particular to emphasize the difficulties in the way of drafting universally acceptable rules on the issue, bearing in mind the divergence of the concepts underlying the legal systems of States Members of the Organization.

74. Mr. LACLETA (Spain), referring to the law of the non-navigational uses of international watercourses (A/46/10, chap. III), said that in fact the draft articles on the issue did no more than implement the general principle sic utere tuo ut alienum non laedas and create a notification, consultation and negotiation procedure between interested States with a view to achieving appropriate - equitable and reasonable - use of the common waters.

75. Nevertheless, certain articles continued to be of concern to his delegation. For example, the adjective "appreciable" used to qualify harm in article 7 was not sufficiently precise. The Commission was no doubt seeking to indicate that the issue related to damage on a certain scale and not to a minor and unimportant disruption, even though such a disruption might be perceptible and measurable. However, the adjective "appreciable" in Spanish as in other languages meant literally "which can be appreciated", that was to say, measurable no matter how minute or insignificant.

76. His delegation was of the view that the basic concept which must be retained should be that the waterway passed from the territory of one State to that of another, and that in such circumstances the upstream State should be vigilant to ensure that there was no important qualitative or quantitative change in the waters. In that connection it might have been better if the Commission had tried to draw a distinction between uses for purposes of consumption and other uses. In the latter case, it would be logical to stipulate a total prohibition on the pollution of the watercourse - as part IV of the draft articles did - while in the first case the basic goal should be to ensure rational sharing as it would not be possible to prohibit consumption by the upstream State for such purposes as human consumption and some agricultural and industrial uses. Basically it was such sharing which should be the purpose of the negotiations and consultations to which part III of the draft articles referred.

77. While endorsing the principle of obligation to cooperate set forth in article 8, his delegation did not think it wise to designate optimum utilization of the watercourse as the objective of cooperation. Optimum utilization was difficult enough to achieve within the territory of one State because of the multiplicity of possible uses and of interests involved; in an international context, the difficulty was even greater. Optimum utilization - which, moreover, was not easy to determine objectively - could at most be regarded as a desirable goal, but not as the sole object of cooperation.

78. The set of procedural rules constituting Part III of the draft articles appeared at first glance to be reasonable, although it was still necessary to devise a means of settling disputes in the event that consultations and negotiations failed to produce agreement; the only method of settlement envisaged in articles 17 and 18 was a moratorium of six months.

79. Turning to the draft Code of crimes against the peace and security of mankind (Chapter IV), he said with regard to the question of penalties that his country, which had abolished the death penalty, could not, of course, agree to anything more than life imprisonment of the convicted criminal and,

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in some cases, to restitution of property. As for the problem of a graduated scale of penalties, it could no doubt be resolved by taking into consideration the gravity of the acts concerned and specifying that the maximum penalty of life imprisonment could be reduced having regard to the circumstances of each case. On the other hand, it seemed difficult at the present stage to decide upon the maximum duration of penalties for each of the crimes dealt with in article 15 and the following articles.

80. With regard to the question of competent jurisdiction, his delegation, which had always favoured the establishment of an international criminal court linked with the United Nations system, continued to hold the view that it was premature to decide whether the court should or should not have a permanent statute. An interim solution which might be considered was that of a court whose members would be appointed on a permanent basis but which would meet only from time to time.

81. Besides the complex problems arising in connection with the question of the jurisdiction of an international criminal court, dealt with in paragraphs 106 ff. of the Commission's report, he wished to draw attention to an issue which had not received due consideration, that of the distinction to be drawn between crimes which could only be committed by individuals acting or appearing to act as agents or organs of a State (e.g. aggression or the threat of aggression, colonialism, intervention, etc.) and those which could be committed independently of the State such as, in particular, drug trafficking and certain other crimes. The same distinction should also be considered from the point of view of the future court's jurisdiction.

82. Mr. TUERK (Austria) said that a creative pause for further reflection might well be necessary before the International Law Commission continued its consideration of the draft Code of crimes against the peace and security of mankind. Some consideration might be given, for instance, to elaborating a Code of conduct as a first step with a view to working out binding rules at a later stage. His delegation wished once again to recommend a prudent approach to the topic, particularly if the aim was to produce a binding legal instrument. Experience had shown that the Commission's codification efforts had, in the final analysis, found only limited favour with the international community. In any event, the Committee would soon be faced with choosing between what might seem desirable on the one hand and what could be acceptable to the international community on the other.

83. Having noted that his country was among those which had abolished capital punishment, he said that like the representative of Norway in his statement on behalf of the Nordic countries, he fully supported the Special Rapporteur's position that the Code should refrain from imposing the death penalty, whatever the crime concerned. Austria could not agree to have the trend within the United Nations towards limiting the application of capital punishment as much as possible, with the objective of completely eliminating it in the future, counteracted by a new instrument. As for physical

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mutilation, he wished to recall that article 7 of the International Covenant on Civil and Political Rights prohibited any form of cruel, inhuman or degrading treatment or punishment.

84. His delegation shared the general feeling within the International Law Commission that the draft Code should contain provisions on applicable penalties, the most severe penalty being life imprisonment, but did not share the view that such punishment should necessarily apply to all the crimes defined under the Code. Each case should be considered on its own merits as regards both the crime and the individual. A single form of punishment, even if it took account of extenuating circumstances, could hardly meet that requirement. Moreover, life imprisonment ought not to preclude the possibility of parole.

85. With regard to draft article 3 relating to responsibility and punishment, he said that, in the view of his delegation, paragraph 3 on acts constituting an attempt to commit a crime against the peace and security of mankind lacked a provision to the effect that any attempt to commit a crime under circumstances which objectively could not lead to the actual commission of the crime would not entail criminal responsibility. Generally speaking, draft article 3 should be based on the criminal responsibility of the individual without prejudice to the international responsibility of the State, for only an individual, but not a State, could be held criminally responsible. His delegation also wondered whether the word "sanction" in the French version was really the equivalent of the word "punishment" in the English title of the article.

86. As regards draft article 11 dealing with the order of a Government or a superior, his delegation tended to agree with the reasoning set forth in the commentary that a subordinate must have had a choice in the matter and a genuine possibility in the circumstances at the time of not carrying out the order in order to incur criminal responsibility therefor. In practice, it might of course prove extremely difficult to assess objectively whether, in the circumstances at the time, it was possible for the subordinate not to comply with the order. The problem required further in-depth study; as the representative of the United Kingdom had pointed out, an exception formulated too broadly might entail the risk of undermining the Code. At the same time, no one could reasonably be expected to embrace martyrdom.

87. In his delegation's view, the Commission should in due course consider once again the relationship between the various types of crimes set forth in articles 19 to 22. Some of the provisions concerned might perhaps be more usefully combined in one article.

88. While finding itself in general agreement with the substance of draft article 20 on apartheid, he wondered whether, in view of the fact that apartheid as such was likely soon to become a thing of the past, the article might not be given a less specific title, such as, for instance, "Institutionalized racial discrimination".

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89. It was also doubtful whether draft article 22, on exceptionally serious war crimes, was really appropriate. Paragraph 2 (d) included a reference to "widespread, long-term and severe damage to the natural environment", the words used in Protocol I Additional to the Geneva Conventions. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, however, referred to environmental modification techniques having "widespread, long-lasting or severe effects". The problem of damage to the environment was also dealt with in draft article 26; overlapping of provisions concerning the environment should be avoided. In principle, no one wilfully causing or ordering the causing of damage to the natural environment should escape punishment, for it was truly a matter which concerned mankind as a whole. In future, moreover, the Commission would have to take into account any developments, either in the United Nations or in other international bodies, with respect to the exploitation of the environment as a weapon in times of armed conflict.

90. His delegation was in favour of the establishment of an international criminal court but doubted whether it could be done in the near future. While it was true that the principle of sovereignty was no longer as absolute as in the past, yet it seemed premature to establish an international court having exclusive jurisdiction with respect to the crimes covered by the Code. A more modest approach would seem to be more appropriate, i.e. to opt, for example, for an international criminal court which could review decisions of national courts and have advisory powers. As some members of the Commission had pointed out, such an arrangement would enable the court to ensure uniform punishment of international crimes and impartiality in prosecution. Furthermore, the idea of an international criminal court as a single instance, with no appeal against its decisions, would not be in conformity with recognized international standards of human rights.

91. Mr. HAYES (Ireland) said that there were some crimes so heinous that their perpetrators must be brought to justice under international law. Strenuous efforts must therefore be made to overcome the many obstacles standing in the way of the adoption of a Code of Crimes against the Peace and Security of Mankind.

92. However, since such a code would establish a new system of penal law, it must define the crimes envisaged and the body competent to try them, establish a prosecution mechanism, guarantee the rights of defence, and specify penalties in the event of conviction and arrangements for their enforcement. All of those points raised often very complex issues.

93. The proposed draft articles did not deal with all of those matters. Specifically, they did not address the question of jurisdiction, and unless that point was settled it was impossible to deal, for example, with prosecution and enforcement mechanisms. It would moreover be illogical to establish a code of crimes without assigning to a court a role in its enforcement. That role could take the form of various kinds of relationship with domestic courts.

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94. Article 6 of the draft Code dealt with the question of extradition, which would certainly be an essential part of the system, regardless of the question of jurisdiction. The alternative of trial by the requested State instead of extradition to the requesting State was well established in several conventions. However, it would be less appropriate when the request was for extradition to an international jurisdiction recognized by the requested State.

95. The obligation to extradite inevitably focused attention on the safeguards of the rights of the accused in the jurisdiction to which he was to be extradited. Accordingly, the acceptability of the obligation to extradite and thus of the international jurisdiction, if established, would be heavily dependent on the adequacy of such safeguards.

96. Rules on statutory limitations were included in the various criminal codes, mainly to guard against miscarriages of justice when evidence became unreliable with the passage of time. National legislations differed on the subject, but many countries did not apply statutory limitions to the most serious crimes. Accordingly, in view of the gravity and the heinous nature of the crimes to be prosecuted under the Code, draft article 7, which stated the principle of non-applicability of statutory limitations, was justifiable. It would be for the court to assess carefully whether the value of evidence produced long after the event might have been affected by the lapse of time.

97. Since the rule non bis in idem was an essential part of any criminal code, article 9 had its place in the draft Code. There should be no significant exceptions to the rule. Therefore, the provision would gain by being tightened during the review of the draft article, and not only in the context of the establishment of an international criminal court.

98. The second part of the draft Code (articles 15 to 26) should cover only a small number of exceptionally grave and heinous acts involving a high level of moral and criminal guilt. In fact, not all of the crimes listed in those articles were of equal gravity, and perhaps some of them were not sufficiently grave to be included in the Code.

99. It was obvious that the crimes of aggression, threat of aggression, and even intervention, dealt with in draft articles 15, 16, and 17 respectively, gave rise to particular difficulties because of the functions which the Charter assigned to the Security Council. A solution should be found which reconciled the role of the Security Council in regard to States with the role of an international court in regard to individuals.

100. Draft article 3 provided that an individual who committed one of the crimes covered by the Code was liable to punishment. However, the draft Code did not set out specific penalties, since the Commission had felt that further consideration of the various aspects of the question was required before it proposed any provisions. His delegation agreed with the conclusion of the

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Special Rapporteur in paragraph 100 of the report that the determination of penalties should not be left to internal law, all the more so if jurisdiction in respect of the Code was given to an international court.

101. Despite the many difficulties which the report pointed to as impeding the desirable result of a uniform system of penalties, not least of which was the wide diversity in philosophical approaches to punishment, the Commission should seek to propose a relatively simple system of penalties corresponding to the essential gravity of the crimes covered by the Code. While all the crimes were grave, there was likely to be a gradation of gravity between them which should be taken into account. That could perhaps be done by having a separate punishment provision for each crime and by giving the future court full discretion between minimum and maximum limits. The court would thus be able to take into account extenuating or aggravating circumstances in determining the appropriate penalty in each case.

102. His delegation expressed the hope that in their observations States would give the Commission the guidance and encouragement which it needed in order to complete the task of drafting a satisfactory and viable Code.

AGENDA ITEM 126: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES AND NORMS OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER (continued)

103. The CHAIRMAN announced that the Democratic People's Republic of Korea had become a sponsor of draft resolution A/C.6/46/L.6 on progressive development of the principles and norms of international law relating to the new international economic order.

The meeting rose at 5.55 p.m.