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SUMMARY RECORD OF THE 39th MEETING

Chairman: Mr. FRANCIS (Jamaica)

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The meeting was called to order at 10 a.m.

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

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

1. Mr. SANGSOMSAK (Lao People's Democratic Republic) said that article 6 of the draft articles on jurisdictional immunities of States and their property should not be restricted to the functional immunities of States. The jurisdictional immunity of States and their property had always been recognized as a well-established rule of international law, and it had become the practice of almost all States. Moreover, a large number of conventions of universal scope had accorded it a privileged place. His delegation therefore opposed the retention of the words in square brackets, which restricted the scope of absolute State immunity. The approach adopted in article 21 opened the way to measures of constraint and to arbitrary restrictions directed against the property of other States. That article should reaffirm the general principle of the immunity of States from measures of constraint, without including the exceptions set out in its subparagraphs (a) and (b). Neither did his delegation see any need for draft article 23, the provisions of which restricted the interpretation of the rule of State immunity; that might create confusion and abuse in the general application of the rule. It should also be noted that some of the draft articles, such as articles 2, 11, 15 and 19, reflected only the practice and legislation of certain States, which were being imposed as the dominant criterion to the detriment of the practice and legislation of other States.

2. In general, his delegation was satisfied with the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, with the exception of articles 18 and 28. The diplomatic courier should not enjoy merely functional immunity, as laid down in article 18, paragraph 1. The words "in respect of all acts performed in the exercise of his functions", which were contrary to practice chiefly deriving from the 1961 Vienna Convention on Diplomatic Relations, should be omitted. All of the square brackets appearing in article 28, paragraph 1, should be deleted. By exempting the diplomatic bag from examination by electronic means, that paragraph would meet the legitimate interests of the developing countries, which were unable to acquire such sophisticated devices, and would thus comply with the principle of equality in relations between States. Article 28, paragraph 2, did not establish the necessary balance between the need to preserve the confidentiality of the contents of the diplomatic bag and that of safeguarding the security interests of the receiving State or the transit State. To the extent that it envisaged rules that might weaken the principle of the inviolability of the diplomatic bag, it introduced elements of confusion and opened the way to abuse.

3. His delegation welcomed the five articles of Part Three of the draft articles on State responsibility. It nevertheless regretted that the Commission and the

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

Drafting Committee had not been able to give consideration either to draft articles 6 to 16 of Part Two or to the preparation for the second reading of the 10 draft articles of Part One.

4. It was to be regretted that, in his second report on the law of the non-navigational uses of international watercourses (A/CN.4/399 and Add.1 and 2), the new Special Rapporteur had returned to the notions of "system" and "shared natural resources", which had been highly controversial in 1980 and had been abandoned in 1984 by the previous Special Rapporteur. Elimination of the "system" concept would constitute a new approach according first place to the sovereign independence of the riparian States and leaving them a wide margin for manoeuver in defining the notion of "international watercourse" in their bilateral or regional agreements. The notion of "shared natural resources" tended to cast doubt on the sovereign rights of States over their natural resources. Moreover, its inclusion in the draft articles would result in the adoption of rules of law having ill-defined legal consequences, the mistaken interpretation of which might lead certain States to formulate illegitimate claims. Such a formula was of great concern to States for which an international watercourse constituted a natural frontier and which had concluded treaties definitively establishing the apportionment of water rights.

5. Sir John FREELAND (United Kingdom) said he hoped that, given the importance of the work entrusted to it, the Commission would be able to revert to a session of 12 weeks and that the current system of summary records would be continued.

6. With regard to the jurisdictional immunities of States and their property, the Commission and the Special Rapporteur should be complimented for the attempt they had made to find satisfactory solutions despite the divergent views of Governments on a number of the issues considered. It was only on the basis of such an approach and of a willingness on the part of Governments to compromise that a generally acceptable outcome could be found. His delegation had noted that the drafting of particular articles had often been criticized and had itself called attention to a number of instances where the drafting could be improved. It hoped that, in its second reading, the Commission would pay particular attention to improvements in the drafting.

7. Since it considered that the draft articles should not seek to put an end to future development of the law in that area, his delegation favoured the retention of the words in square brackets at the end of article 6. It supported the inclusion of a provision on the lines of article 28 but doubted whether the wording of that article was yet appropriate. That point should be very carefully re-examined in second reading. Article 21 set out the conditions to be met before property belonging to a State might be subject to measures of constraint. One of those conditions was that the property must have "a connection with the object of the claim". That was unnecessary and also had the drawback of being too vague, since the degree of connection was not defined.

(Sir John Freeland, United Kingdom)

8. In its written observations, his Government would touch on a number of other points arising out of the draft articles. His delegation could however say that it would be unlikely to find any major difficulty.

9. The real justification for the Commission's work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was the need to control abuse of the diplomatic bag. Nevertheless, the balance between, on the one hand, the security of diplomatic communications and, on the other, the suppression of possible abuse, must be maintained. It was against that background that the United Kingdom authorities would examine very carefully draft article 28 as provisionally adopted in first reading. The Commission had no need to apologize for having included so many square brackets, since that was an important provision and mature consideration of the problems raised by the text was necessary. If, in second reading, the Commission could not devise wording for draft article 31 which more accurately reflected its intention as disclosed in paragraph 4 of the commentary on that article (A/41/10, pp. 78-79), then it might be that that article should be omitted. While it might be the case that those States which hosted international organizations or conferences had to accept the presence on their territory of representatives of States which they did not recognize, bilateral relations were quite another matter. His delegation accepted the principle behind draft article 32 but considered that the Commission could give thought to making it more explicit that the draft articles would merely supplement the existing codification conventions for those States which were parties to them. Finally, although, in principle, it was preferable to achieve uniform rules on a subject, a provision like draft article 33 might be an unwelcome necessity if the draft articles as a whole were to command general acceptance.

10. Despite certain reservations regarding the articles proposed for Part Three of the draft articles on State responsibility, his delegation supported their basic thrust. While it agreed with those members of the Commission who wanted it to be made clearer that the rules in Part Three were residual, the Commission might consider whether Part Three should apply to disputes where the settlement of disputes provisions of an existing treaty did not contain certain minimum provisions to ensure the effectiveness of the procedure. It should also be made clearer in Part Three that that Part applied equally to Parts One and Two. It might be too early to consider how exactly to express that; the Commission had yet to consider the comments of States on Part One and was still a long way from completing its work on Part Two.

11. The requirements for notification in draft articles 1 and 2 of Part Three (A/41/10, note 71) did not reflect State practice. For example, draft article 1 stated that "notification shall indicate the measures required to be taken and the reasons therefor". In practice, the first step a Government often took was to deliver a protest in which it reserved all its rights, and the nature and content of that protest were usually quite sufficient for the other State to know what measures it was being asked to take and why. His delegation was unsure of the desirability of the requirement in draft article 2 which specified a minimum period

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of three months before the claimant State could invoke article 8 or article 9 of Part Two. The exception for "cases of special urgency" would probably be too restrictive. Where the latter might not be particularly urgent, it was clear from the reaction of the other State to the protest that it had no intention of doing anything. In such circumstances, it would not be right to require the injured State to wait three months before applying countermeasures.

12. Although the obligation imposed under Article 33 of the Charter of the United Nations to seek the peaceful settlement of international disputes existed in respect of all disputes and could not be limited by any convention on State responsibility, it must be ensured that article 3, paragraph 1, of Part Three did not in any way undermine the provisions of articles 8 and 9 of Part Two. The power to impose reasonable countermeasures, proportional to the gravity of the wrongful act, when combined with an effective compulsory dispute-settlement procedure, was one of the most effective ways not only of resolving international disputes but also of preventing breaches of international obligations.

13. The work carried out at the 1986 session on the draft Code of Offences against the Peace and Security of Mankind had not allayed the doubts about the topic expressed in the past by his delegation. With regard to the implementation of the Code, the Commission's mandate should be regarded as extending to the preparation of an international criminal jurisdiction competent to hear cases brought against individuals. That interpretation of the Commission's mandate should not, of course, prejudge in any way the positions of Governments on the acceptability of any suggestions or recommendations which the Commission might make in that respect.

14. The second report (A/CN.4/402) of the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law was thoughtful and well balanced. His delegation supported the views of the members of the Commission who had opposed restricting the scope of the draft articles to ultrahazardous activities. There would be great difficulty in agreeing on a criterion for deciding which activities should be regarded as falling within that category. In determining whether a State should be held liable for an activity which it did not know was likely to cause harm, it might be particularly helpful to carry out a comparative study of relevant national laws. In recent years there had been a growing tendency to adopt absolute liability principles which might suggest that even in the case mentioned the State of origin should at least share with the State affected, on an equitable basis, the cost of reparation, given that the nationals of both States were innocent.

15. With regard to the law of the non-navigational uses of international watercourses, there was a clear need to take into account in the further handling of that topic the work being done by the Commission on the topics of State responsibility and of international liability for injurious consequences arising out of acts not prohibited by international law.

16. After reviewing the results of the work done by the Commission since its establishment (an essentially positive record, although there had also been some failures due in part to excessively lengthy periods of gestation which had blunted

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the interest manifested initially in the codification of certain topics), his delegation stressed the need to complete, as urgently as possible, the work on the topic of State responsibility, which had been on the Commission's agenda for over 30 years. If the Commission was to give the priority which his delegation felt was due to that topic and to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and to complete its second reading of the draft articles already adopted in first reading, it should draw up a realistic plan of work for the next quinquennium providing for some staggering of the consideration of the various topics on its agenda so that it would not have to consider all of them at each session. The Commission should also plan to allocate more time to the work of the Drafting Committee so as to reduce and, if possible, eliminate the current backlog.

17. Mr. HUANG Jiahua (China) welcomed the specific results that the Commission had achieved at its thirty-eighth session. The work on the jurisdictional immunities of States and their property was of great concern to the international community, since it aimed to reconcile the differences between legal systems and resolve practical problems in international life, and the results would affect the relations of co-operation among States. The Commission must therefore seek a balance that would be acceptable to all States, including developing countries, between the two existing doctrines: the doctrine that State immunity was an established principle of international law and that a State was not subject to the jurisdiction of the courts of another State without its consent, and the doctrine that State immunity from the jurisdiction of other States must be considered as an exception granted only under certain circumstances.

18. Draft article 6, which was a key article, continued to make State immunity an exception granted under certain circumstances. The phrase "and the relevant rules of general international law" contained in brackets must be deleted, since the immunity regulated by the provisions of the draft articles must not depend on the future development of international practice, which was likely to further limit its scope. As worded, draft article 6 was unlikely to be generally accepted, particularly by developing countries. In order to arrive at a reasonable and realistic balance, the draft articles must clearly recognize, in normative language, the general principle of State immunity, and make due allowance for certain exceptions in its implementation. The balance of the entire set of draft articles depended on solving that problem.

19. With regard to Part Three, it would be more appropriate to use the title "Exceptions to State immunity" because State immunity was a general principle which was long established in international law. That formulation would also coincide with the relevant legislative practice of some countries.

20. Despite several revisions, draft article 11 of Part Three ("Commercial contracts"), which stipulated that questions of State jurisdiction should be decided by virtue of the applicable rules of private international law of the forum State, was not fully satisfactory to his delegation. It was not in conformity with the general principle that such questions should be decided first by international

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law. The article was also bound to encounter many difficulties in application, since the rules applicable in the case of conflict of laws might have different interpretations in different legal systems. His delegation also felt that Part Three of the draft articles contained too many exceptions to the principle of State immunity. Some of them would find little support in international practice, and others might lead to the abuse of lawsuits against foreign States and Governments to the detriment of economic co-operation and the stability of relations between States.

21. Part Four of the draft articles relating to the immunity of State property from measures of constraint deserved special attention. From a juridical point of view, immunity from constraint was much more strict than the jurisdictional immunity of States and, from the point of view of international practice, attachment and compulsory execution could have serious consequences and jeopardize relations between States. That point should be borne in mind during the second reading of the draft articles.

22. His delegation believed that the draft articles required further study and revision so that a more just and reasonable basis could be found. In order to make them a legal instrument that would be acceptable to all members of the international community, the interests of the numerous developing countries should be given special consideration.

23. The draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, adopted in first reading by the Commission, generally respected the balance between the rights and duties of the sending, receiving and transit States, included necessary provisions to ensure the safety of diplomatic communications and to prevent abuses in that area, and provided a good basis for future work. Draft article 18, provisionally adopted by the Commission, required further consideration of the questions of diplomatic immunity and functional immunity.

24. With regard to draft article 28, his delegation believed that the second phrase in square brackets in paragraph 1 should be retained, since electronic devices could violate the confidentiality of the content of the bag, which was precisely what was to be protected. As to paragraph 2, his delegation believed that the right of the receiving State to require that the diplomatic bag be returned to the sending State should be subject to certain conditions. Thus suspicions concerning the content of the diplomatic bag should be based on sufficient grounds, the two parties concerned could try to negotiate a proper solution, and the sending State could, on its own initiative, present written documents to confirm the content of the bag or, of its own free will, accept examination by electronic devices. The receiving State could not require that the bag be returned to its place of origin unless all those measures failed. It remained to be seen what the most appropriate solutions were, because it was essential to ensure the safety of the diplomatic courier and diplomatic bag and the Commission must continue the search for acceptable provisions.

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25. The topic of State responsibility, under study for more than 30 years, seemed to have developed beyond the framework of the "traditional" international law on State responsibility. Thus, the scope of the draft articles on the subject, originally restricted to the protection of aliens, had been expanded to State responsibility in general: not only had the wrongful acts that a State might commit been clearly differentiated into international delicts and international criminal acts, but the principle of proportionality in the implementation of State responsibility had been established.

26. His delegation was in agreement with the Special Rapporteur on the need to prevent international disputes from escalating, in order to make international relations more stable. It should be noted in that respect that escalation could be caused either by an excessive reaction on the part of the injured State or by persistence in or aggravation of the wrongful act on the part of the State regarded as the author. It would be unfair to provide only for the obligations of the injured State; perhaps articles should be added outlining the obligations of the author State.

27. Further, international practice in regard to dispute-settlement procedures through a third party showed that parties to a dispute arising out of State responsibility tended to resort first to direct negotiations. It would be advisable, therefore, for Part Three of the draft articles to refer to bilateral negotiation procedures in addition to the notifications envisaged in draft articles 1 and 2 and the means indicated in Article 33 of the Charter referred to in draft article 3.

28. Lastly, in regard to compulsory dispute-settlement procedures, his delegation felt that it would be difficult in practice to limit the jurisdiction of the International Court of Justice to matters of jus cogens and international criminal acts. It should not be forgotten that many countries had adopted a cautious attitude and, while accepting the compulsory jurisdiction of the Court had excluded cases where vital interests were involved. In the same line of thought, his delegation was also of the view that the provisions of draft article 5 on reservations should be more flexible.

29. The draft Code of Offences against the Peace and Security of Mankind was of great interest to the international community, particularly the small and medium-sized countries. However, it required further in-depth study, since the preparation of a Code on that topic touched on a relatively new area of international law, international criminal law, and the principle of international criminal jurisdiction raised many sensitive practical problems.

30. The term of the existing membership of the International Law Commission was coming to an end and new members were to be elected by the General Assembly at its current session. It seemed a good time to note that, in the past five years, the Commission had achieved definite results in the codification and progressive development of international law. The task had not been easy, given the extreme diversity of social, legal and cultural systems in the contemporary world. The

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Commission, in which the main forms of civilization and the principal legal systems of the world were represented, could perform its codification work only by seeking a balance among those systems and by bearing in mind contemporary realities and the interests of all sides. The legal instruments prepared by the Commission would meet with a warm reception and general support from all States, especially the small and medium-sized countries, as long as its work was pursued in that spirit. Together with many other developing countries, it was China's intention to participate constructively in the legislative activities of the United Nations.

31. Mr. CALERO RODRIGUES (Brazil) said that his delegation's position on the question of the draft Code of Offences against the Peace and Security of Mankind could be summarized in five points. First, given the current state of international relations, States were not prepared to give to a code of offences the broad support that would be needed to make it effective. Second, ratione personae, the Code should contemplate only the criminal responsibility of individuals, leaving questions of the criminal responsibility of States to be dealt with, for example, in the articles on State responsibility. Third, ratione materiae, the Code should cover only crimes of a very serious nature falling into one of three categories: crimes against peace, crimes against humanity and war crimes; furthermore, the list of crimes should not be unduly extended. Fourth, each crime should be carefully described and its constituent elements should appear clearly from the text. Lastly, in addition to containing general principles and a definition of each particular crime, the Code should indicate the penalties to be applied and the judicial authority competent to adjudicate.

32. The introduction to the draft articles, which should define and characterize the offences covered by the Code, should include the principles relating to the juridical nature of the offence and to the offender. The autonomous characterization of the crimes defined in the Code as "crimes under international law" (independent of their characterization in national legal orders) and the indication of the scope ratione personae would be better placed in the introduction to the Code rather than in its general part.

33. The introduction should also address the question of the application of the principle non bis in idem, so as to exclude the risk that a person might be prosecuted twice for the same act: once under internal law and once under international law. There were two possible solutions: to exclude the possibility of double prosecution or to exclude only the possibility of double punishment. It would probably often be the case that acts considered criminal under international law would also be considered criminal under the internal law of a State. Would it be necessary or possible to indicate which of the two legal orders should have priority in exercising its jurisdiction? Would it not be simpler to say that, whenever one of the jurisdictions had been exercised, the other should take into account the penalty already applied? Article 8 of the Brazilian Penal Code followed that course, and his delegation tended to believe that a provision of that nature would be sufficient to solve the problem, although it did consider it necessary for the International Law Commission to study the question further.

(Mr. Calero Rodrigues, Brazil)

34. The part of the draft Code relating to general principles should follow the pattern generally found in national criminal codes and should have four sections: application in time; application in space; determination of responsibility; exceptions to imputability.

35. As far as application in time was concerned, there were two questions to be considered: non-retroactivity and the statute of limitations. It would hardly be conceivable not to include the principle of non-retroactivity in the Code. The principle nullum crimen sine lege was one of the main foundations of criminal law and there seemed to be no valid reason not to apply it in international law. It was already enshrined in article 11, paragraph 2, of the Universal Declaration of Human Rights and, in his delegation's view, the only issue to be decided was whether the principle was to be asserted in its entirety or whether some flexibility should be introduced. It would appear difficult to accept, as did paragraph 2 of the draft article 7 proposed by the Special Rapporteur, that a person could be tried under the Code for an action or omission which, at the time of commission, was criminal according to the general principles of international law. His delegation agreed with those members of the Commission who had expressed reservations about recognition of general principles of international law or established customs as sources of international criminal law. It should be remembered in that connection how much criticism had been voiced, after the First and Second World Wars, of the decision to bring individuals to trial for acts which had not previously been defined as crimes. The Commission was responsible for codifying and developing international law. Its efforts would be seriously weakened if the possibility were admitted of prosecuting as crimes against the peace and security of mankind not only the acts so characterized in the Code but others not precisely determined.

36. On the other hand, his delegation agreed with the suggestion that statutory limitations should not be recognized for crimes under the Code. In criminal law in general, the system of limitations was tied to the seriousness of the offence. The offences under the Code were all of a most serious nature. The question whether the principle of non-limitation affirmed in the 1968 Convention on the topic was an accepted norm of international law should not even be brought up.

37. The question of the application of the Code in space was a complicated one. The draft article 4 proposed by the Special Rapporteur, which spoke of such an offence as a universal offence, did not solve all the difficulties. Application should be as universal as the international instrument of which the Code would be part in the sense that each State party would recognize the offences under the Code of Offences.

38. On the questions of responsibility and exceptions to criminal responsibility, the general principles contained in criminal codes were aimed at the determination of responsibility, even when they were related to the material elements of the crime. However, for a crime to be constituted, a moral element must be present together with the material element. Other general principles set out excuses and causes of non-attributability, which could be objective or subjective. It should be possible to accept a single concept of "general defences". The defences of age

(Mr. Calero Rodrigues, Brazil)

and insanity should therefore be added to the five exceptions to criminal responsibility listed in paragraph 151 of the report (A/41/10). He welcomed the fact that the official position of the author had not been included in the list and that the exceptions of self-defence and reprisals were subject to strict conditions. The concepts of "coercion" and "state of necessity" were more difficult to define than that of "force majeure", which should be included in the list in so far as the author had been subjected to an irresistible and unforeseen external force. Coercion could be admitted as a defence if a threat to the life or to the personal safety of the author had been established. On the contrary, a state of necessity should not be admitted as a defence. Moreover, certain defences could be accepted only for certain crimes.

39. The Brazilian Penal Code, like others, accepted a superior order as a justifying fact where such order was legal. However, the nature of offences against the peace and security of mankind was such that no order for their commission could be considered legal. The provision proposed by the Special Rapporteur, to the effect that the order of a Government or of a superior did not relieve the perpetrator of responsibility, unless a grave, imminent and irremediable peril existed, addressed the question of coercion and not that of superior order. In his view, the order of a superior should not be included in the draft Code as a defence.

40. He did not share the view expressed by the Special Rapporteur in paragraph 162 of the Commission's report. Indeed, one of the main purposes of the Code was to give precision to the rules of law, and an error based on misrepresentation of a rule of law was therefore inadmissible. On the other hand, an error of fact based on the circumstances of the crime should be admitted as a defence. In paragraphs 215 and 217 of his report, the Special Rapporteur had expressed the view that an error of fact could not breach the barrier of crimes against humanity and could not in any circumstances justify a crime against humanity or a crime against peace. However, an error removed the intention and hence the responsibility of the author.

41. Mr. ABDEL KHALIK (Egypt) noted that many questions remained to be answered concerning the draft Code of Offences against the Peace and Security of Mankind. With regard to Part One, entitled "Crimes against humanity", his delegation supported the view of the Special Rapporteur that the term "humanity" should be interpreted in a non-restrictive manner. The "mass" element of the crime was important, but not essential to the definition, unlike the motive, which was perhaps an essential element in the definition of a "crime against humanity". Moreover, it was not necessary that the acts should form part of a systematic plan.

42. Apartheid, which had not been covered in the 1954 draft Code, should be included in the category of crimes against humanity. Its definition should be general enough to be applied wherever and whenever the practice existed. At the same time, it should be distinguished from genocide and other crimes against humanity. In the case of serious damage to the environment, the essential element was the intention to cause damage.

(Mr. Abdel Khalik, Egypt)

43. The question of the inclusion of terrorism as a crime against humanity should be linked to the consideration of the acts referred to in paragraph 101 of the Commission's report, in order to achieve a harmonized text that would make it clear that terrorist acts did not include the struggles of national liberation movements and of peoples under colonial domination.

44. The concept of "war" had changed, and currently encompassed not only inter-State relations but also any armed conflict which pitted State entities against non-State entities. It would therefore be appropriate to replace the term "war" with the words "armed conflicts".

45. With regard to the substantive problems, his delegation supported the views expressed in paragraphs 108 and 109 of the Commission's report (A/41/10). Moreover, while it preferred the more general or combined definition proposed in paragraph 112 of the same document, it did not oppose an enumeration of offences, on the understanding that such enumeration would not be limitative.

46. It also supported a broad definition of complicity, and felt that the concept of complot should apply not only to crimes against a State, but also to crimes against ethnic groups and peoples as such. His delegation supported the interpretation of the concept of attempt given in paragraph 129 of the report (A/41/10), and was of the view that complot, complicity and attempt should constitute separate offences in the draft Code and should not be included in that part of the Code which related to general principles.

47. In connection with the general principles and the juridical nature of the offence, it was important not to confuse crimes under international law with offences under the Code, and to ensure that an individual was not prosecuted twice for the same act. Moreover, the definition of an offence must include the element of seriousness, and the jurisdictional guarantees must be specified in greater detail.

48. With regard to the application of the criminal law in time, his delegation agreed with the Special Rapporteur that the non-retroactivity rule was applicable to international law. It also supported the rule of non-applicability of statutory limitations to the offences. Until a definition was agreed upon and the list of offences drawn up, it would be premature to include a provision specifying that the offences were not political crimes for the purpose of extradition and the right of asylum.

49. With regard to the application of the criminal law in space, his delegation supported the system of territoriality and was of the view that the universal system should constitute an exception subject to contemporary international law, including bilateral or multilateral agreements in force between the State in which the offence had been committed and the State in which the offender had been arrested.

(Mr. Abdel Khalik, Egypt)

50. His delegation reserved the right to submit at a later stage written observations on exceptions to criminal responsibility. While it understood why the set of draft articles was limited to an enumeration of acts that constituted offences against the peace and security of mankind, it believed that the possibility should not be totally excluded of reaching a definition whose scope would prevent offences that were difficult to imagine from going unpunished.

51. His delegation welcomed the recent amendments introduced by the Special Rapporteur and hoped that the Commission would soon begin its first reading of the draft articles. Egypt hoped that the draft Code of Offences against the Peace and Security of Mankind would remain as a separate item on the agenda of the next session of the General Assembly.

52. Mr. ALTANGEREL (Mongolia) said that, at a time of steadily increasing risk of nuclear war, the inadmissibility of war must be proclaimed in order to save mankind from destruction. Every possibility of preserving peace must be explored, and Mongolia attached the greatest importance to international instruments that could help to prevent conflicts. The draft Code of Offences against the Peace and Security of Mankind was one of the most significant endeavours in that respect.

53. His delegation was satisfied with the work accomplished on that topic by the Commission and by the Special Rapporteur. At the current stage, the draft Code contemplated only the punishment of individual offenders. In the view of his delegation, the question of State responsibility should not be considered in the elaboration of the draft Code since that was likely to complicate and bog down the Commission's work. Under contemporary international law, the State was not subject to foreign jurisdiction. While it incurred international political responsibility and financial liability, only the individuals who committed the offences were criminally responsible. The draft Code should therefore be based on the principle that States had an obligation to prosecute and punish the individual offenders. A provision could make it clear that the criminal responsibility of individuals did not preclude the international responsibility of a State, provided that such responsibility had been established in conformity with international law as it was currently being codified by the Commission in the draft Code. The Code, moreover, should provide that the perpetrators of offences defined therein should normally be punished in accordance with the law of the State in which the offence had been committed.

54. His delegation supported the provisions of article 5, which established the non-applicability of statutory limitations to offences against the peace and security of mankind. It would also like to see the Commission continue considering the questions of the use of mercenaries and economic aggression, with a view to their possible inclusion in the enumeration of the offences in the Code. In its view, colonial domination also constituted a threat to peace, and it hoped that the first use of nuclear weapons would be included in the list of offences.

(Mr. Altangerel, Mongolia)

55. While the work already accomplished constituted a good basis for the future, the current international situation made it necessary for the Commission to expedite its work on the draft Code. His delegation hoped that the question of the drafting of the Code of Offences against the Peace and Security of Mankind would continue to be listed as a separate item on the agenda of the Sixth Committee.

56. Mr. GOROG (Hungary) said that his delegation's views on the content of the future Code of Offences against the Peace and Security of Mankind had already been set out in detail at the previous session. Turning to article 2, he said that the second sentence should be deleted because it merely explained the meaning of the first sentence. If it was retained, there was a risk that an offender might be held responsible twice for a single offence.

57. Like others before it, his delegation considered that paragraph 2 of article 7, concerning non-retroactivity, was unjustified and confusing. Basically, reference to the general principles of international law as constituting the basis for the establishment of an action or omission as an offence was contrary to the principle of nullum crimen sine lege, the general recognition of which was stressed in paragraph 139 of the report. The notion of "general principles of international law" was much too wide and controversial to serve as a basis for the establishment of jurisdiction.

58. Article 10 divided offences against the peace and security of mankind into three categories: crimes against peace, crimes against humanity and war crimes. His delegation supported that classification because it was in line with the spirit underlying the elaboration of the topic. However, overlaps were likely to occur in the characterization of an action, and any decisions on that matter should be taken only after careful consideration. Such difficulties were frequent and even inevitable in any codification process.

59. With regard to paragraph of article 11, his delegation felt that the draft should conform to the wording used to define aggression in General Assembly resolution 3314 (XXIX), rather than offer a new definition likely to lead to endless debates.

60. The definition of terrorist acts as contained in paragraph 4 of article 11, was not satisfactory because it confined the scope of perpetrators to "the authorities of a State". Although it was desirable that the draft Code should also cover terrorist acts perpetrated by a State or its authorities, everyday life showed that the acts enumerated in paragraph 4 (b) were also committed by groups, organizations and even individuals, for a wide variety of motives. His delegation therefore proposed that paragraph 4 should be supplemented accordingly.

61. Many delegations were likely to disapprove of the definition of a mercenary contained in paragraph 8 of article 11. His delegation failed to understand clearly why the draft had not adopted the widely accepted definition elaborated by the Ad Hoc Committee on the question of mercenaries in its own draft. The same applied to draft article 12 on apartheid. For the purpose of unifying terminology,

(Mr. Gorog, Hungary)

the draft should refer to the 1973 International Convention on apartheid and adopt its definition, especially as more than 80 States were parties to it, and had therefore not only accepted its definition, but also incorporated the text in their national legislation.

62. With regard to the definition of war crimes, of which the draft offered two alternatives at present, his delegation stressed, as it had already done on several occasions, that the final text should, in its view, contain a reference to the first use of nuclear weapons. Despite the opinion expressed by certain members of the Commission, as reflected in paragraph 114 of the report (A/41/10), Hungary did not believe that the inclusion of that element in the draft Code would be counter-productive.

63. Hungary supported the views expressed by the Special Rapporteur in paragraphs 83, 84 and 86 of the document under consideration, to the effect that a crime against humanity should include a mass element, although, in respect of certain offences, the specific intention of the perpetrator might also be of importance; it also believed that the future Code should cover only the most serious offences, and - like the Special Rapporteur - considered that a crime against humanity was primarily characterized by its motive, as defined in paragraph 86 of the report. In view of its desire to preserve the future of civilization, his delegation welcomed the idea that crimes against humanity should include any serious breach of an international obligation providing for the preservation of the human environment.

64. Given the considerable legal and political importance of the draft Code of Offences against the Peace and Security of Mankind, that item should again be considered separately at the next session of the General Assembly.

65. Mr. KANJU (Pakistan) observed that the origin of the idea of a draft Code of Offences against the Peace and Security of Mankind could be traced back to the Allied Powers' determination to punish those who had been their opponents during the Second World War, and deter future generations from embarking upon similar ventures. However, it had become apparent, 40 years later, that the exemplary value of the Nürnberg trials had not been successful in eliminating the scourge of war. It was therefore necessary to consider why the objectives had not been achieved. The political will of States was a condition sine qua non for the success of the work done by the Commission on the draft Code of Offences against the Peace and Security of Mankind. In order to ensure the effectiveness of its work, the Commission must resist the temptation to include in its draft any essentially political notions on which the interests of States diverged completely, and must keep its work within the limits set by the title of the topic itself.

66. Regarding the definition of the offence, his delegation took it that a crime against a State was also, in effect, a crime against mankind or a multitude of individuals. Furthermore, there were offences which were committed by States against States, and a special category should perhaps be established to provide for that political fact. The tripartite division was acceptable to his delegation,

(Mr. Kanju, Pakistan)

which considered, however, that an act, to qualify as a crime, must have the following characteristics: it must be of a very serious nature, include a mass element and be defined in terms of its motive.

67. As to the threat of aggression, State practice and the experience acquired over the years indicated that the inclusion of that concept as a crime in a future code was likely to be counter-productive. If the threat of aggression were considered a crime, it would automatically entail the exercise of the right of self-defence. The catastrophic results were easy to imagine because, under Article 51 of the Charter, that right could be exercised before the case was reported to the Security Council. His delegation therefore urged the Commission to give careful consideration to that matter.

68. His delegation supported the provisions of draft article 11 concerning interference in the internal or external affairs of another State but pointed out the dangers of abuse of the provision in paragraph 3, subparagraph (a). The Commission should examine that provision objectively so as to obviate any chance of making the provision a handy tool to be used by a stronger State against weaker neighbours.

69. The position of Pakistan was clear on the subject of terrorism which it condemned and would like to see eradicated. The Commission should, however, give more thought to the definition of terrorist acts, because inclusion in the Code of an ill-defined concept or limit would detract from the effectiveness of the future instrument. The Commission should take into account the wide differences on that item which had surfaced during the discussion at the fortieth session. It should also exercise caution in its approach to the consequences of violation of a treaty designed to ensure international peace and security and consider in particular the risk of providing powerful countries with a pretext to intervene and use force against a weaker State.

70. Pakistan had consistently condemned colonial domination and sincerely hoped that that abominable system would have disappeared by the time the Code was adopted or by the time it entered into force. Moreover, a colony could be established only through aggression and military occupation which were already classified among the gravest offences. Pending the disappearance of that hateful practice, Pakistan supported the inclusion of colonial domination among the crimes forbidden by the draft Code.

71. In the same way, it condemned mercenarism in all its forms. Mercenarism was the archetypal crime against peace. A separate committee had been assigned the task of drafting a convention on that subject and, if that committee was able to meet in 1987, the draft convention would be ready before the draft Code of Offences. The interrelationship between the two instruments would then become a major problem to be solved. In his view definitions in various international instruments should be consistent for the purpose of uniform interpret tion. It was therefore comforting that the definition of a mercenary, in Additional Protocol I to the Geneva Convention of 1949, had been incorporated in draft article 11, paragraph 8.

(Mr. Kanju, Pakistan)

72. His delegation was greatly concerned at the inclusion in the draft Code of the provision on economic aggression. Since military strength was the dominant factor in the actual conduct of relations between States, it dreaded a situation whereby economic aggression was invoked as an excuse for military aggression which would be proffered as an exercise of the right of self-defence. Such a situation would result in a nightmare for weaker States. Moreover, it was difficult to establish an objective criterion on the issue. His delegation wished to sound a note of caution and realism and to emphasize that the aim was to formulate objective criteria for eliminating possibilities of misuse or abuse.

73. Concerning the jurisdictional immunities of States and their property, Pakistan would examine the draft articles prepared by the Commission in the light of its own legislation on the subject and submit its comments in due course.

74. His delegation had noted with satisfaction that the Commission had completed its first reading of the draft articles on the status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier which, in order to enjoy universal acceptance, must be founded on three basic criteria: each State had the potential of being a sending State, a transit State and a receiving State; the bag was meant to be used for official communications; and, the inviolability of the bag was intended primarily to maintain the confidentiality of official communications. Those criteria had been reflected in the draft articles, and to a large extent a balance had been achieved between the interests of the three categories of States, but certain articles did need further examination.

75. The draft articles extended the same privileges and immunities to the courier as were extended to a diplomatic agent under the 1961 Vienna Convention on Diplomatic Relations. Those privileges and immunities were essential for the efficient performance of the courier who, in exchange, was quite logically required not to interfere in the internal affairs of the receiving State or to violate its laws.

76. With regard to the diplomatic bag, draft article 25, paragraph 1, laid down the basic principles regarding the purpose for which the diplomatic bag was to be used and regarding its contents. That principle was based on draft article 3, paragraph 2, and draft article 4 which, respectively, defined the term "diplomatic bag" and stated that the bag was to be employed for "official communications". While his delegation considered that the phrase "articles intended exclusively for official use" was not in conformity with the term "official communications", it could accept the current draft, but the use of the word "may" in draft article 25, paragraph 1, completely eroded the restrictive nature of the provision and it therefore proposed starting with the words "The diplomatic bag shall not contain" in order to express more clearly the basic intention of the paragraph.

77. His delegation generally agreed with the principle incorporated in draft article 27 but suggested that, for practical reasons, the expression ", as permitted by local circumstances," should be inserted after the word "shall".

(Mr. Kanju, Pakistan)

78. Draft article 28, paragraph 1, stipulated the basic elements for the protection of the diplomatic bag itself. In order to ensure the confidentiality of the contents of the diplomatic bag, his delegation agreed with those who had supported the retention of the words in brackets. It also agreed with those who had expressed the opinion that the transit State should not necessarily have the same rights as the receiving State. Actually the bag would merely be passing through its territory and its security and financial interests would in no way be compromised. That aspect required further examination and the provisions in brackets in paragraph 2 should be deleted.

79. His delegation doubted the need to include in draft article 29 a provision exempting the diplomatic bag from payment of customs duties and other dues and taxes. It was contemporary State practice not to levy dues or taxes on diplomatic bags and the practice would continue even in the absence of the provision. His delegation would however go along with the majority.

80. His delegation expressed satisfaction with the pace and general pattern of the work of the Commission on State responsibility and hoped that consideration of that important topic would shortly be completed and that the topic of the law of the non-navigational uses of international watercourses would be given the priority it deserved in the interest of international peace and security, bearing in mind the many relevant delicate problems to be settled. It urged the Secretariat to do everything possible to ensure regular publication of the Yearbook of the International Law Commission which was an important source of material for the study of all aspects of international law; it had likewise noted that the new edition of the volume entitled "The work of the International Law Commission" was long overdue, particularly in the view of the adoption of some conventions based on the draft articles prepared by the Commission. It also hoped that funds would be available in 1987 for granting fellowships to participants in the International Law Seminar at Geneva and joined the appeal for increased contributions for that purpose. In conclusion, it supported the views of delegations which had stressed the need for co-operation between the Commission and other bodies engaged in similar work in order to broaden the scope of the sources to which it had access and to foment better understanding of the topics being discussed.

81. Mr. DE SARAM (Secretary of the Committee) announced that Mozambique and Zaire had become co-sponsors of draft resolution A/C.6/41/L.2 on the peaceful settlement of disputes between States.

The meeting rose at 1 p.m.