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Chairman: Mr. FRANCIS (Jamaica)

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

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

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

1. Mr. ILLUECA (Panama) said that his Government would submit written observations on the draft articles on jurisdictional immunities of States and their property in view of the great importance it attached to the topic. Panama shared the concern of other developing countries that in the codification and progressive development of international law, the fundamental principle of the immunity of the State and its property should be upheld. Because the Panama Canal was situated in its territory, Panama attached the greatest importance to draft article 18 on State-owned or State-operated ships engaged in commercial service. It supported the doctrine of the jurisdictional immunity of State-operated ships even when used for commercial purposes in the specific case of ships transiting the Panama Canal. Under no circumstances should the Canal or its installations be used for aggressive acts that undermined the rights of States.

2. Turning to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he noted the opposing opinions in the Commission. Some members favoured absolute immunity of the diplomatic bag; others had called for a certain degree of monitoring in the interests of the security of the receiving State. Draft article 28 was a key provision in that respect. His Government was in favour of a balanced approach that would ensure the protection of the diplomatic courier and the unaccompanied diplomatic bag, and not infringe the rights of the sending State, while preventing possible abuse that would affect the interests of the receiving and transit States.

3. The topic of State responsibility was extremely complex. His delegation agreed with the proposal that dispute settlement procedures should be considered once again when the draft articles of part two had been approved by the Commission. His Government would submit its written comments on the matter.

4. Panama wished to reiterate the importance it attached to the Yearbook of the International Law Commission. It would also welcome a new edition in 1987 of The Work of the International Law Commission. The Commission was justified in considering the International Law Seminar to be important; it was indeed of great benefit to young jurists, especially from developing countries.

5. In examining the general principles that would constitute the juridical, moral and philosophical basis of the draft Code of Offences against the Peace and Security of Mankind, the Commission had to consider the norms relating to fundamental human rights that in recent times had been incorporated in the international law applicable in armed conflicts. Offences against the peace and security of mankind should be defined in the context of public international law,

(Mr. Illueca, Panama)

independently of national law. Both the perpetrators of such offences and their victims should be considered subjects of international law. General Assembly resolutions 40/34, containing the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and 40/148, in which it was reaffirmed that the prosecution and punishment of war crimes and crimes against peace and humanity constituted a universal commitment for all States, had given impetus to the Commission's work on the topic.

6. The formulation of the draft Code was fraught with difficulties. His Government considered that in order for it to be effective, its provisions should cover: the definition of offences; responsibility of both States and individuals; penalties for offenders; and an international criminal jurisdiction.

7. He noted that both alternatives of draft article 13, "Definition of war crimes", referred to "international or non-international armed conflict". Article 39 of the Charter of the United Nations did not refer to war, but to "any threat to the peace, breach of the peace, or act of aggression". Moreover, the General Assembly had made a distinction between the outbreak of war and the start of hostilities, in resolution 378 (V). That resolution referred to "armed conflict", as did the 1949 Geneva Conventions and the 1977 Additional Protocols thereto. The latter had established a distinction between "international armed conflict" and "non-international armed conflict". General Assembly resolutions 2444 (XXIII) and 2597 (XXIV) also referred to "armed conflicts", as did the Vienna Convention on Diplomatic Relations.

8. The reasons for establishing legal terminology for "non-war hostilities" included: the desire of States to avoid any implication that they were infringing their contractual obligation not to go to war; the desire to prevent States not involved in a conflict from adopting restrictive rules of neutrality; and the desire to keep the conflicts local in character. The Special Rapporteur's formula in the second alternative of article 13 was not sufficiently comprehensive. In his delegation's view, it was essential that it should contain a reference both to war as such and to international and non-international armed conflicts. An acceptable formula might be to refer to war, armed conflicts and other hostile relations, in which case the end of draft article 10, referring to war crimes, might read "... and war crimes, including in that latter category crimes committed during an armed conflict or in other hostile relations". In article 13, a mixed definition should be used such as that provided in the second alternative of that article, which included the elements characterizing war crimes and an illustrative list of acts constituting such crimes. The definition contained in the second alternative could be broadened to include a reference to any serious violation of the conventions, rules and customs applicable to war as such, to international or non-international armed conflicts and to other hostile relations.

9. The draft articles presented a problem of terminology in Spanish. The title of chapter I, part I should read "Definición y tipificación".

(Mr. Illueca, Panama)

10. Although the Commission had decided for the time being to limit draft article 3 to the criminal responsibility of individuals, his delegation foresaw difficulties with that approach. Human rights and the norms of international law were closely bound together. That relationship was particularly important for the formulation of the draft Code, since there were a number of human rights which could not be described as individual rights, but belonged to the category of collective rights. They included the right to self-determination of peoples, the right of national, ethnic, racial or religious groups to exist, the right of a racial group not to be subject to pressure from another racial group, and the right of minority ethnic, religious or linguistic groups to maintain their identity.

11. Draft article 6 referred to the entitlement to the jurisdictional guarantees extended to all human beings and particularly to a fair trial. In that connection, the Commission should consider the question of potential collective offenders, such as States, organizations, institutions and groups of persons.

12. Attention should also be paid to individual and collective victims. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (resolution 40/34) presented clear guidelines in that respect. The Commission should also bear in mind that paragraph 9 of that Declaration referred to restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions. Paragraph 8 suggested the forms that restitution should take. With respect to compensation for victims, paragraph 12 of the Declaration provided that when compensation was not fully available from the offender or other sources, States should endeavour to provide financial compensation. Paragraph 10, which referred to substantial harm to the environment, provided an approach in that area which should also be borne in mind.

13. With respect to the offences to be covered by the Code, his delegation considered to be very relevant the description of the abuse of power made at a 1984 meeting of experts in Ottawa. It agreed with the experts that offenders should be prosecuted to the full extent of the law.

14. The principle of universal jurisdiction contained in draft article 4, paragraph 1, was correctly linked to the concept of aut dedere aut judicare. In the absence of an international criminal jurisdiction (which was not ruled out in draft article 4), his delegation considered that the approach taken by the Special Rapporteur was the sensible one.

15. Draft article 5 referred in unequivocal and unobjectionable terms to the non-applicability of statutory limitations to offences against the peace and security of mankind. That provision was in line with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XXIII)). In that respect, the Special Rapporteur might consider inserting a draft article stating clearly that States should not grant asylum to persons when there was good reason to suspect that they had committed crimes against peace, crimes of war or crimes against humanity. The denial of asylum in such cases appeared to be consistent with article 2 of the

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Declaration on Territorial Asylum (resolution 2312 (XXII)) and with principle 7 of the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (resolution 3074 (XXVIII)).

16. In draft article 11 "Acts constituting crimes against peace", the Special Rapporteur had correctly used a mixed definition, which had special importance in the case of aggression. The acts constituting aggression were clearly set forth in article 11, paragraph 1 (b). It was very important that the Special Rapporteur had made it clear that an act could be characterized as an act of aggression, regardless of whether there had been a declaration of war.

17. Article 11, paragraph 3 (b), referred to pressure or coercion of an economic or political nature. Such action had been specifically condemned by the General Assembly as a crime against humanity and as being contrary to fundamental principles of international law. With respect to the definition of terrorist acts in article 11, paragraph 4, his delegation considered that such acts should be maintained within the category of crimes against peace, as should colonialism. General Assembly resolution 40/61 should be borne in mind with respect to terrorism. His delegation preferred the second alternative of draft article 12, paragraph 2, on apartheid. He recalled that the General Assembly had condemned apartheid as a crime agains humanity.

18. Mr. ARANGIO-RUIZ (Italy) said that remarkable progress had been made during the Commission's 1986 session on the draft Code of Offences against the Peace and Security of Mankind. In the traditional framework of the tripartite division into crimes against peace, crimes against humanity and crimes of war stricto sensu, the Commission had successfully discussed a number of fundamental questions, several of which dealt with general principles of national and comparative criminal law. The Commission had also made considerable progress in the identification and more precise definition of the crimes in the three categories, in particular the two major categories, namely, crimes against peace and crimes against humanity. The Special Rapporteur's fourth report on the draft Code (A/CN.4/398 and Corr.1-3) further elucidated the trends emerging in the Commission with regard to the minimalist and maximalist approaches to the offences which should be condemned i the Code. Among the "hard core crimes" referred to in the report were genocide, apartheid and colonialism. Differences no doubt continued to exist about the exact definition of those crimes, but they were not likely to call into question the appropriateness, or indeed the need, to include them in one of the categories.

19. There were other acts which the members of the Commission felt should be studied further, including terrorism, mercenarism, drug trafficking and serious damage to the environment. Their inclusion depended on the exact definition of the conditions under which such activities were covered by the Code. If those conditions were not specified, the inclusion of some of the aforementioned actions was likely to disqualify the Code as an instrument designed to cover the most serious international crimes, and transform it into a futile and pretentious attempt to codify international criminal law.

(Mr. Arangio-Ruiz, Italy)

20. His delegation shared the consensus view on the inclusion of "hard core" offences. It had an open mind with regard to the unsolved problems, whether concerning the definition alone or the inclusion of specific crimes. His delegation also had a keen interest in the scope of the condemnation of terrorism, and in the question of acts committed in order to subject a people to a régime not in keeping with the right of peoples to self-determination and to deprive such peoples of human rights and fundamental freedoms (A/41/10, para. 101). Such acts constituted an international crime for two closely related reasons. Firstly, there was the non-conformity of the régime in question to the sacred principle of free choice by all peoples of their political, economic and social system. Secondly, such régimes gave rise to the most serious threats to the territorial integrity and political independence of other States, and thus to the peace of mankind as a whole. It would be an error to consider the aforementioned crime as a purely internal matter having no place in a code of offences against the peace and security of mankind.

21. Despite the difficulty of determining with the necessary precision the conditions which must be present in order for acts resulting in serious damage to the environment to be considered crimes against humanity, no effort should be spared to ensure them their proper place in the draft Code. He recalled in that context the list of 17 crimes contained in the second report of the Special Rapporteur. There were conditions and circumstances in which such actions threatened the very bases of modern civilization.

22. On the question of State crimes, his delegation noted that some countries, such as Mexico, Venezuela and the Sudan, considered that such crimes should be dealt with in the Code, whereas others, such as the Soviet Union, the Ukrainian SSR, the Byelorussian SSR and the German Democratic Republic took the opposite view. His delegation felt that the Commission had properly decided that, in the drafting of the Code, it should deal with the crimes of individuals acting either as "authorities of a State" or on their own behalf. Not only most jurists but also several Governments, including the Italian Government, had expressed the gravest doubts as to whether a State could be held criminally responsible, stricto sensu. At the same time, although the State, in its own internal legal system, was a "juridical person" legally incapable as such of committing crimes or suffering the penal consequences thereof, in international relations it was a sovereign entity whose internal organization was outside the limits, in principle, of international law. On that level, the State sometimes indulged in conduct which must be recognized as criminal. He recalled that, in 1945, certain States had been able to bring to trial some of the individuals responsible for crimes against peace and humanity only because the States of which those individuals had been the "authorities" had suffered a rudimentary collective punishment, without which the responsible individuals would have escaped justice.

23. The fact that States were not, strictly speaking "indictable" did not mean that they should not meet with a response from the international community. While States were rightly excluded for the time being and quite possibly ultimately from the scope ratione personae of the draft Code, that should not mean that the

(Mr. Arangio-Ruiz, Italy)

Commission's attention should not continue to be focused on the problem of State crimes and measures or countermeasures to be adopted in that regard. The problem facing the Commission was the same one, at least in part, as the one involved in the drafting of articles on State responsibility.

24. It was to be hoped that the General Assembly, while confirming its approval of the Commission's decision to concentrate on the international criminal responsibility of individuals, would give the Commission guidelines with regard to the need to consider the problem of the "criminal" responsibility of States. He also suggested that the Commission should make an express reservation concerning the responsibility of States in any draft articles which it adopted. The focus of the work on individual responsibility should be considered as without prejudice to the responsibility of States for international crimes. It would be imprudent to forget that, while in internal law it was correct to distinguish clearly between criminal responsibility and civil liability, that was not necessarily the case in international law.

25. His delegation shared the preference of several delegations for an international criminal jurisdiction. Only in the case of war crimes stricto sensu should account be taken, in principle, of the need for the belligerent parties themselves to bring to trial and punish the persons responsible for violations of treaty provisions or customary rules concerning the conduct of hostilities. Of course, it was not easy to solve the technical problems involved in the establishment of the necessary institutions and to make those institutions politically acceptable to the international community. Such institutions as the United Nations or the International Court of Justice would not suffice to ensure the arrest, trial, judgement and punishment of the accused. The international community must have supranational institutions. Despite the difficulties, his delegation felt that it was highly desirable for the Sixth Committee to indicate whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals. An affirmative response by the Committee would formally authorize the Commission to consider the technical problem of the establishment of such a jurisdiction, without prejudice to the solution or solutions to be finally adopted concerning the prosecution and punishment of offences against the peace and security of mankind.

26. Mr. VOICU (Romania) said that his delegation had often expressed the view that in the process of elaborating the Code of Offences against the Peace and Security of Mankind, the Commission should define the responsibility of States and individuals in that regard and establish a complete list of offences against the peace and security of mankind. A list of such offences should include internationally wrongful acts such as the planning, preparation, undertaking or conduct of a war of aggression, the establishment or maintenance by force of colonial domination, genocide, apartheid and violations of the laws and customs of war. The Code should also condemn in clear terms acts such as conspiracy, attempt and complicity.

(Mr. Voicu, Romania)

27. The definition of terrorist acts contained in article 11, paragraph 4 (a), was too vague. It was perhaps preferable not to give a definition but to enumerate the acts constituting terrorism. Special attention should be devoted to economic aggression and the corresponding offences referred to in the draft Code. Moreover, in order to ensure that persons guilty of offences against the peace and security of mankind were indeed punished, the Code should impose the rule of non-applicability of statutory limitations, and provide for prosecution or extradition. The fact that an individual had participated in an international crime within the framework of State policy or in execution of that policy should not be allowed to be used by any State to grant political asylum to that individual. The draft Code should include positive provisions concerning co-operation among States in accordance with the Charter.

28. The Special Rapporteur had reviewed the slow evolution of the concept of crimes against humanity, long linked to war crimes before acquiring absolute autonomy. It was evident that, at the current stage, the two questions should be treated separately, as the Commission had decided. It would also be appropriate, however, to study acts which were both war crimes and crimes against humanity.

29. On the question of the inclusion of the "mass" element in the definition of a crime against humanity, he remarked that, in order to be consistent with itself, the Commission should take into account article 19 of the draft on State responsibility. With regard to paragraph 3 of draft article 12, he remarked that it would be more appropriate to speak of "other inhuman acts" than simply of "inhuman acts", since genocide and apartheid, which formed the subject of the preceding paragraphs, were also inhuman acts. In defining "other inhuman acts", the Commission should take into account international instruments adopted since 1954 such as the Convention on the Use of Military or Any Other Hostile Use of Environmental Modification Techniques (General Assembly resolution 31/72). The definition of acts constituting war crimes should include the use of nuclear weapons; in that connection, the Commission should take account of the Declaration on the Prevention of Nuclear Catastrophe adopted by the General Assembly in its resolution 36/100. In considering the problem of complicity, the Commission should give preference to the extended meaning given to that concept in international law and should devote particular attention to the question of covert complicity in connection with the question of use of nuclear weapons discussed in paragraphs 113 and 114 of the report (A/41/10). With regard to the problem of attempt, he said that, since the draft Code dealt with the most serious offences only, attempted crimes should on no account be left out; they should be mentioned in the text, the draft Code of 1954 providing a possible basis for such an approach. In conclusion, he stressed the importance which his Government attached to the Commission's work on the draft Code. The item should be maintained as a separate one on the General Assembly's agenda.

30. Mr. RAO (India) welcomed the Commission's completion of the substantive work on two important subjects on its agenda and stressed the importance of achieving speedy progress on the other topics still before it.

(Mr. Rao, India)

31. With regard to the topic of jurisdictional immunities of States and their property, he remarked that the traditional functions of a State, which in the past had been confined to political and diplomatic matters, currently encompassed a variety of economic and trade activities. That situation had understandably given rise to the question of equal treatment for all agencies, whether governmental or non-governmental, engaged in economic and trade activities. The draft articles adopted by the Commission in first reading generally appeared to move in the direction of providing limited jurisdictional immunities to governmental agencies engaged in commercial activities. The real crux of the matter, however, was the definition of the scope of commercial activities or commercial contracts. The Commission's efforts in that direction were inconclusive, and the matter deserved further careful consideration, not only by the Commission but also by all Governments. The element of profit-making was undoubtedly relevant. In its activities designed to meet the basic daily needs of its own people, a State might engage in commercial purchases which did not involve any profit-making. Commercial contracts in such a case might arguably be regarded as a State function deserving jurisdictional immunities. A reference to the "nature and purpose" of the contract might not be adequate or even self-explanatory on all occasions. Other factors would have to be taken into consideration before the question of the jurisdictional immunities of States and their property was satisfactorily resolved.

32. The draft articles adopted in first reading on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier represented a happy blend of the interests of the receiving and sending States; the key provision in draft article 28 required further consideration in that light, but he did not anticipate many practical difficulties on that score as almost all States were both sending and receiving States and the basic motivating factors of reciprocity and common interest would doubtless operate in favour of a credible and viable régime for the protection of the diplomatic bag and courier.

33. The question of establishing a suitable mechanism for the settlement of disputes had been raised in connection with both sets of draft articles. It was his Government's earnest hope, as well as its considered policy and practice, that disputes should as far as possible be resolved through consultations and negotiations, any compulsory forum for the settlement of disputes being established only as a result of agreement among the parties to the dispute.

34. Work on the draft Code of Offences against the Peace and Security of Mankind was motivated by the valid expectation that the identification and designation of certain conduct within the international sphere as a criminal offence against the peace and security of mankind would set a standard of behaviour for all States and peoples in the interests of peace and harmony. In endorsing the Special Rapporteur's approach to the definition of offences against the peace and security of mankind, he specially mentioned the need to include, besides aggression, such activities as mercenarism, use of nuclear weapons, systematic oppression of human dignity through the practice of colonialism, apartheid, and terrorist activities. The broad categorization of the offences into crimes against peace, crimes against humanity and war crimes was a useful means of clarifying policies and assessing

(Mr. Rao, India)

trends in decision-making. The Special Rapporteur's efforts not merely to cover all relevant issues but also to provide a methodology for dealing with them deserved close study and the highest commendation.

35. Noting that other topics previously considered by the Commission had not received the same attention at the thirty-eighth session owing to time constraints as well as to changes of Special Rapporteurs, he expressed the hope that at its next session the Commission would give due consideration to those topics, and especially to that of international liability for injurious consequences arising out of acts not prohibited by international law. Lastly, he noted with approval the Commission's intention to embark on a serious and purposeful re-examination of its methods and priorities in the light of growing time and financial constraints.

36. Mr. ROUKOUNAS (Greece), referring to the topic of State responsibility, said that his delegation was generally in favour of the approach adopted by the Special Rapporteur, especially since it provided for compulsory conciliation. The possibility of referring certain disputes to the International Court of Justice was in line with the 1969 Vienna Convention on the Law of Treaties. With regard to draft article 2 of Part Three, his delegation considered that the injured State should not be burdened by an obligation to make several notifications before being entitled to take countermeasures. Greece also considered that the time-limits indicated in draft article 4 of Part Three should reflect the realities of setting in motion an effective dispute-settlement mechanism, and endorsed the Special Rapporteur's concern with providing a cooling-off period.

37. Draft article 4 of Part Three made discrete allowance for State criminal responsibility as envisaged in article 19 of Part One of the draft. In subparagraph (b), which concentrated on the additional rights and obligations referred to in article 14 of Part Two, further attention should be given to the question of the reaction of other members of the international community in face of an act of aggression constituting an international crime.

38. With regard to the question of the settlement of disputes involving the intervention of a third party, he pointed out that in Part Two of the draft the Commission had not yet given due consideration to the question of the weight to be attached to the injury caused by an internationally wrongful act. The Commission had been more concerned with identifying acts involving State responsibility and with possible responses to such acts than with the question of eliminating the wrongful act's consequences. While that approach was understandable in connection with so-called "secondary rules" of State responsibility, the question of the injury caused, whether moral or material, could not be avoided when dealing with the issue of reparation. Unfortunately, by reason of the shortening of its session, the Commission had been unable to give proper attention to the matter. In view of the advanced stage of work on the topic as a whole, that imbalance might usefully be redressed at the next session.

39. Turning to the law of the non-navigational uses of international watercourses, he noted the four points raised by the Special Rapporteur in paragraph 234 of the

(Mr. Roukounas, Greece)

Commission's report. His delegation had no objection to deferring the question of defining the term "international watercourse" until a later stage. It noted that the Commission proposed to give effect to the legal principles underlying the concept of "shared natural resource", and agreed with the view reflected in paragraph 238 that the obligation to utilize the waters of an international watercourse in a reasonable and equitable manner would be devoid of content without an indication of its meaning in the form of an indicative list of factors. On the final point raised, that concerning the use of the term "harm", his delegation considered that the Commission would fulfil its mandate more efficiently by concentrating on the issue of responsibility for any harm done than by engaging in an interminable semantic debate.

40. Mr. GARCIA-BAUER (Guatemala) said that the codification and progressive development of international law were the supreme expression of the civilized development of States. The human being took on a new and fundamental dimension in international life as the ultimate goal and subject of international law.

41. His delegation regretted that the Commission had not been able to submit definitive conclusions for consideration by the General Assembly in the form of draft international instruments. It would be advisable to give priority to the formulation of international instruments on specific topics.

42. Some parts of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, including those dealing with genocide, should be reformulated and improved. His delegation understood that that had been the purpose of the Special Rapporteur in dealing with genocide in article 12, paragraph 1, of the draft Code of Offences against the Peace and Security of Mankind. Apartheid, the criminal act of State discrimination, had been universally rejected and constantly condemned in the United Nations. It should be included among the crimes against humanity, as should serious breaches of an international obligation of essential importance for the safeguarding and preservation of the human environment. The pollution of the environment by radioactive fallout or toxic substances constituted a serious breach of international rules, for which sanctions should be established in international legislation.

43. Although they affected international peace, crimes of terrorism should be considered in the category of crimes against humanity. The type and frequency of terrorist acts which had recently been committed had highlighted the pressing need to address that issue in the international sphere. The General Assembly should instruct the Commission to deal with the subject of terrorism, and to produce a final draft at its next session so that the Assembly could take immediate action.

44. His delegation supported the initiative of mentioning, as a crime against humanity, any acts committed in order to subject a people to a régime not in keeping with the right of peoples to self-determination and to deprive such people of human rights and fundamental freedoms. Those responsible for such crimes should be punished. The systematic violation of human rights and fundamental human freedoms could not escape notice. The United Nations must take the necessary

(Mr. Garcia-Bauer, Guatemala)

measures to put an end to those practices, particularly when raised to the level of State policy. Guatemala believed that it was necessary to define those acts, which involved the responsibility of the individuals who committed them or participated in their commission, and possibly the responsibility of States which supported them or provided resources for that purpose, or which protected them or provided refuge for those deserving punishment. The Commission should consider the adoption of the term "humanicide" for such crimes, and should deal with their various aspects: their authors, accomplices and accessories and the responsibility of one or more States. With regard to war crimes, the main result of the debate had been to highlight the serious difficulties which the Commission had faced and which it would have to face in fulfilling its task.

45. Instead of trying to include all the relevant serious offences in a single Code of Offences against the Peace and Security of Mankind, the Commission should finalize successively the rules concerning particular categories of offences. The set of international instruments thus elaborated would eventually be incorporated into the Code. Until that time, the individual instruments concerning specific offences could be adopted and enter into force. The instruments making up the Code should address the question of the respective criminal jurisdiction, specifying the responsibility of the States and of the persons implicated in the offences, the penalties to be applied and the international organ or tribunal required to consider those offences and punish them.

46. The law of the non-navigational uses of international watercourses particularly interested his delegation, because some of the watercourses in Guatemalan territory constituted its boundaries with other States. The Commission had not made sufficient progress in that area to present final results. It was clearly impossible to do so without a definition of the term "international watercourses". A provisional working hypothesis had been accepted in 1980, but had apparently been abandoned. Because of the differing components involved, different types of legal rules must be harmonized in order to establish the relevant international legal order. The law concerning rivers was not the same as that concerning lakes or canals. His delegation believed that the Commission should postpone the formulation of a definition and should continue its work on the basis of a hypothesis such as the one approved in 1980.

47. As to the term "shared natural resource", there were many cases in which international watercourses were shared for industrial, agricultural or other purposes and not only for navigation. The legal consequences of that hydrologic reality could not be ignored. For example, at the point where three large Latin American States - Brazil, Argentina and Paraguay - shared a boundary, the Itaipu Dam had recently been constructed, in order to provide the three countries with electrical energy. Could that not be considered a "shared natural resource"?

48. A list of factors to be taken into consideration in determining what amounted to a reasonable and equitable use of an international watercourse might be useful but should not be so exhaustive or rigid that it would make the international instrument inoperative. The instrument was to be applicable in diverse regions of

(Mr. Garcia-Bauer, Guatemala)

the world where conditions with respect to watercourses and their use might be extremely varied, and it should not be an obstacle to the conclusion of bilateral or multilateral legal instruments. His delegation therefore supported, at the current stage of the discussion, the Special Rapporteur's suggestion contained in paragraph 239 of the Commission's report. The agreement should be a general one, whether termed a "framework agreement" or otherwise, which included the basic norms, organs, institutions, procedures and principles of a law which was fair to all nations and which met the requirements and needs of peoples whose resources included international watercourses.

49. The Special Rapporteur had mentioned the relationship between the obligation to refrain from causing appreciable harm to other States using an international watercourse, on the one hand, and the principle of equitable utilization, on the other. His delegation supported the inclusion of provisions concerning the prevention of harm in the use of a watercourse and procedures to be followed in the case of any dispute based on the use of such watercourse, so as to avoid denial of the use by other States of the watercourse without sufficient justification.

50. Mr. BUBEN (Byelorussian Soviet Socialist Republic) stressed the importance, in the present international situation, of collective efforts by States to strengthen and develop the bases of international law in the interests of maintaining international peace and security. In that connection, he drew attention to the socialist countries' proposal for the establishment of a comprehensive system of international security (document A/41/191). The early completion of the draft Code of Offences against the Peace and Security of Mankind would represent another major step toward ensuring international security based on law and ethics rather than on the force of arms.

51. His Government's comments on the draft Code were to be found in a number of documents, the most recent being document A/41/537. While taking a generally positive view of the Commission's work on the topic and of the efforts of the Special Rapporteur, his delegation considered that the Commission's approach led to confusion between matters of individual responsibility and the responsibility of States, thus making it possible for acts of a general criminal nature to be included in the draft. That was why the definition of offences against the peace and security of mankind incorporated in the Code should explicitly be related to individuals. For the reasons set out in paragraphs 4 and 5 of its reply (A/41/537), his Government was unable to agree to either of the alternatives for draft article 3 proposed by the Special Rapporteur. Taking into account article 19 of the draft on State responsibility, the criteria for defining offences against the peace and security of mankind should include the internationally wrongful nature of the offence, damage to the lawful interests of the international community, and the fact that the act was recognized as a crime by the international community.

52. Referring more specifically to the Special Rapporteur's fourth report (A/CN.4/398) considered at the thirty-eighth session of the Commission, he endorsed the view reflected in paragraph 88 of the report that motive was essential for the

(Mr. Buben, Byelorussian SSR)

characterization of the act as a crime against humanity. His delegation shared the Special Rapporteur's views concerning apartheid (para. 93 of the report). On the question of the inclusion in the draft Code of breaches of international obligations of essential importance for the preservation of the environment, his delegation took the view that such an act could be regarded as a crime only if it was committed with intent in violation of relevant treaties and conventions. On the issue of terrorism, his Government agreed with those members of the Commission who considered that terrorism had to be regarded as a crime against peace when it was instigated and perpetrated by a State against another State (para. 98 of the report).

53. With regard to the terms to be used in connection with war crimes, his delegation was in favour of retaining the traditional terms "war crimes" and "violation of the laws and customs of law". On the substance of the problem, it agreed with the Special Rapporteur's views on the advantage of a dual characterization, as set out in paragraph 108 of the report. On the question of methodology as applied to the question of nuclear weapons, his delegation considered that a State's first use of nuclear weapons, even in the absence of any conventional obligation in the matter, had to be qualified as a most serious crime against the peace and security of mankind. In that connection, he referred to the unilateral undertaking by the Soviet Union and the People's Republic of China not to be the first to use nuclear weapons and stressed the vital importance of other Powers following that example, and also mentioned the Declaration on the Prevention of Nuclear Catastrophe adopted by the General Assembly in resolution 36/100.

54. With regard to the Commission's consideration of general principles applicable to offences against the peace and security of mankind, he endorsed the views of the Special Rapporteur reflected in paragraph 134 of the Commission's report as well as those of members of the Commission who had emphasized that it was important not to confuse crimes under internal law with offences under the Code (para. 135).

55. Mindful of the provisions of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, his delegation supported draft article 5 as proposed by the Special Rapporteur. With regard to article 4, in which the Special Rapporteur opted for universal jurisdiction in relation to the application of the criminal law in space, he recalled that the Powers of the anti-Hitler coalition had adopted the principle of territoriality of the criminal law giving jurisdiction to the courts of the place of the crime. Offences committed against several countries could be punished jointly by the States concerned on the basis of an agreement. That approach was embodied in the "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity" adopted on the proposal of the Byelorussian SSR by the General Assembly in 1973 (resolution 3074 (XXVIII)), and the relevant provisions should be duly incorporated in the draft Code. In connection with the idea of an international criminal jurisdiction advocated by some members of the Commission (para. 147 of the report), he pointed out that the principle of criminal responsibility of States did not exist in international law; proposals for supranational judiciary procedures or tribunals

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were inconsistent with the principle of State sovereignty. The idea of the establishment of a permanent international criminal court did not appear constructive or practical, but special ad hoc international criminal courts could, of course, be established if necessary by agreement between States to try individuals accused of committing international crimes against several countries. The Code should include a provision encouraging Governments to incorporate its definition of offences against the peace and security of mankind in their national criminal codes and to provide for the severe punishment of such offences.

56. Referring to the question of exceptions to criminal responsibility, he reiterated his delegation's previously stated view that superior order could not serve as an exculpatory plea, although it might be taken into consideration in deciding punishment. Lastly, he said that the draft Code should include provisions on co-operation among States in accordance with the Charter of the United Nations in preventing offences against the peace and security of mankind and punishing individuals found guilty of such crimes. The Commission's work on the draft Code should be speeded up and the topic should continue to be separate and to be regarded as one of the most important items on the Commission's agenda.

57. Mr. OGISO (Japan) said that the Commission should complete the first reading of Parts Two and Three of the draft articles on State responsibility as soon as possible, thereby finalizing an entire set of draft articles in first reading. Then, after receiving the comments of Governments, the Commission should proceed to a second reading of Part One, bearing in mind the links between the different Parts. Owing to the nature of the subject-matter, the Drafting Committee required considerable time to produce even a single article for Part Two and the Commission should therefore envisage a mechanism which would give the Drafting Committee sufficient time.

58. The Special Rapporteur had emphasized the residual character of the draft articles on State responsibility. It was his delegation's understanding that the unilateral actions prescribed in Part Two were residual and that therefore the draf articles in Part Three were necessary only as a means of limiting the danger of an escalation stemming from unilateral actions as stipulated in Part Two. However, a dispute arising from unilateral actions covered in Part Two might often involve disputes arising from an earlier violation of primary rules, as stipulated in Part One. A number of Commission members had expressed doubt on that question of scope, and he thought that the scope of the draft articles in Part Three should be carefully examined in that light.

59. The draft articles on dispute settlement could determine the future willingness of States to associate themselves with the articles. The Commission should therefore work out a formula acceptable to as many States as possible. His delegation concurred with the basic ideas underlying the draft articles, namely the incorporation of an objective mechanism for dispute settlement such as submission of the case to the International Court of Justice or to third-party conciliation.

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60. With regard to article 1, precise data and facts about the wrongful act of the other State should be provided when a State entered a claim against the other State for the specific purpose of avoiding disputes in the future. As to the reference in article 2 to "cases of special urgency" in connection with the timing for proceeding to countermeasures by alleged injured States, he said that, although such flexibility might be necessary, the accommodation of exceptional cases must be considered with the utmost care. Therefore, the expression "cases of special urgency" should be clarified to the greatest possible extent. The Commission might wish to examine the stipulated time-frame more closely, since under the present formulation the prescribed periods for moving from the first step of notification to the final point of dispute-settlement procedure seemed too long.

61. Since article 4 seemed to be similar to the provision in the Vienna Convention on the Law of Treaties, his delegation thought that the wording of the article should be as close as possible to the formulation found in recent codification conventions.

62. He then referred to the draft Code of Offences against the Peace and Security of Mankind. If the international community was to punish directly an offender who committed an act deemed to be an offence against the community as a whole, it was essential to give careful attention to the following four elements: general principles; a clear definition of offences; penalties; and the establishment of an international criminal jurisdiction. Consequently, his delegation was not satisfied with the Commission's discussions on that topic, since it doubted that the idea of establishing an international criminal jurisdiction had been considered in detail. On the other hand, a number of Commission members had indicated their support for such a jurisdiction. It was important to establish rules appropriate to contemporary international circumstances and to avoid merely following the 1954 draft Code. The reference to apartheid in the section on crimes against humanity was therefore a valid reflection of the serious concern with which a great majority of States viewed the problem at present.

63. His delegation had consistently maintained that an introduction containing general principles should be discussed by the Commission as a priority item in parallel with, or even prior to, the listing of crimes. It therefore expressed appreciation for the far-reaching discussion on general principles held at the thirty-eighth session of the Commission.

64. The definition of crimes against humanity appeared to include both an objective element of quantity and a subjective element of intent or motive on the part of the perpetrator. His delegation could accept that, but hoped that a further refinement would be carried out with regard to each type of crime against humanity under consideration, particularly genocide and apartheid.

65. As to war crimes, there appeared to be three types of definition: a general approach, as used in the 1954 draft Code; an enumerative approach regarding existing laws and customs of war; and a combination of the two. From the standpoint of the progressive development of international law and in light of

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practical difficulties, his delegation was inclined to support the combined approach. At the same time, it believed that the Commission should continue to consider the matter as well as the two additional questions of terminology and substance described in paragraphs 104 to 109 of the report.

66. With regard to offences against the peace and security of mankind, the Commission had examined the concepts of complicity, conspiracy and attempt but had not reached a common understanding, mainly because of the different interpretations applied in domestic legal systems. He expressed the hope that the Commission would continue to study the topic with the utmost care and stressed the need to avoid ambiguous ideas and elements in the discussion of crimes against the peace and security of mankind.

67. With respect to general principles, his delegation appreciated the Commission's acknowledgement of the basic rule nullum crimen sine lege. If certain acts were deemed criminal in the international community, they must be clearly defined in law. With regard to the application of criminal law in space, the Commission had discussed the system of universal jurisdiction and that of international criminal jurisdiction. If individuals, including high-ranking political leaders of a State, were to be prosecuted before a criminal court, it seemed difficult to foresee that an objective and fair trial would be held in a domestic court of another State. In his delegation's opinion, an objective and fair trial could be ensured only through the establishment of an international court.

68. Mr. ROSENSTOCK (United States of America), referring to chapter IV of the report of the International Law Commission (A/41/10), expressed regret that more time had not been devoted to the important topic of State responsibility. It would be premature for his delegation to comment on the Special Rapporteur's latest submissions on the question, but they appeared to build in a sophisticated and world-order-oriented manner on his earlier drafts and on the approach to dispute settlement taken in the Vienna Convention on the Law of Treaties and in other comparable contemporary seminal instruments. They reflected, moreover, a perception of dispute-settlement machinery as a means not only of settling disputes, but also of avoiding a vicious circle of action and reaction.

69. His delegation was puzzled at the amount of time that the Commission had devoted to the highly problematic topic of the draft Code of Offences against the Peace and Security of Mankind, at the expense of other, more promising topics. It continued to have serious doubts that that inherently political topic was a suitable one for the Commission. To expect the Commission to resolve the political issue raised by the argument about the first use of nuclear weapons was absurd. It could only be assumed that those who advocated such an approach were naive or unconcerned about the damage they might do to the Commission by pushing it into such areas. Those who called attention to a relationship between the draft Code and a propagandistic proposal on a comprehensive system of international security merely recalled the lack of seriousness of those who cynically viewed the entire United Nations system as nothing but a platform for propaganda.

(Mr. Rosenstock, United States)

70. In view of the lack of agreement at the political level, it was perhaps not entirely surprising that the Special Rapporteur had chosen to use as his sources conventions that were not widely ratified and General Assembly resolutions adopted by a divided vote. Those sources suggested not what the law was or ought to be, but rather the lack of a sound basis for productive work by the Commission.

71. Even where there was a unanimously adopted General Assembly recommendation, such as the Definition of Aggression, there seemed to be an inclination to ignore its central element - the preservation of the role and discretion of the Security Council. The extent to which the Definition could be said to eliminate the problems that had caused the abandonment of the 1954 draft was debatable. That did not mean, however, that the Definition could be responsibly ignored. Yet it seemed that some would argue that it opened a way to success that had not existed in 1954, and that its central element could be ignored. In his delegation's opinion that was not merely wrong but dangerously destabilizing.

72. It might be that some of those concerns could be alleviated by an international criminal court. If the Commission elaborated a statute for such a court, the context of the entire effort would become clearer. At least, it would be possible to decide whether the enormous risks created by any approach which eschewed such a court were an inevitable element of the exercise.

73. Whether or not it proved practical to establish an international criminal court, the alternative or complementary component of the implementation process need not be universal jurisdiction. Neither the Nürnberg and Tokyo Tribunals nor the Convention on the Prevention and Punishment of the Crime of Genocide suggested universal jurisdiction on the part of national tribunals. If the topic was to be seriously pursued, all of those matters required careful consideration.

74. Turning to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", he said that it would be interesting to see how the present Special Rapporteur translated into articles the "schematic outline" of the previous Rapporteur. His delegation noted with particular interest the emphasis placed by the Special Rapporteur on prevention as an integral part of the topic, and looked forward to the Commission's work on that important subject.

75. With regard to the topic "The law of the non-navigational uses of international watercourses", he noted that the Drafting Committee had not completed its work on the articles submitted to it in 1984. His delegation was pleased that the Special Rapporteur had submitted his second report and believed that the extensive citations in part II thereof and the new articles in part III were a solid basis on which progress could be made.

76. With regard to the length of the Commission's session, he said that the matter had to be seen in the overall context. The duration of the sessions of other expert bodies had been reduced to an even greater extent. The better treatment of the Commission in that respect constituted a recognition of its importance.

(Mr. Rosenstock, United States)

77. With regard to the relationship between the Sixth Committee and the Commission, he said that improvements in methods of work of one body would succeed only if there were parallel improvements in the methods of work of the other. For the codification process to work, there must be a symbiotic relationship between the Commission and the Committee on substance and on methods of work as well. The Commission could help the Committee by making clear the areas in which it required the Committee's comments, but the Committee must also realize the need for improvements. There must be some self-discipline. The Commission should endorse formally the suggestions made by the Swedish delegation.

78. In conclusion, he said that members should undertake in 1987 to conduct a rationalized debate on the report of the Commission, and to work harmoniously with it.

The meeting rose at 6.30 p.m.