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SUMMARY RECORD OF THE 43rd MEETING

Chairman: Mr. FRANCIS (Jamaica)

later: Mr. JESUS (Cape Verde)

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The meeting was called to order at 3.05 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. BOUABID (Tunisia) said that the conclusive results of the 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, which had focused on a set of draft articles drawn up by the International Law Commission, would certainly give the Commission a new impetus for its future work. However, the procedure by which the Sixth Committee annually devoted a good part of its time to considering the Commission's report did not seem to be the most effective way of helping it accomplish its task. The Swedish delegation had shown why the discussions of the report should be rationalized. Tunisia hoped that the question would receive all the attention which it deserved, and that agreement would be reached on the best ways for the members of the Commission to benefit from the observations made in the Sixth Committee.

2. The Commission had made considerable progress on the draft Code of Offences against the Peace and Security of Mankind at its thirty-eighth session. The Special Rapporteur's fourth report (A/CN.4/398 and Corr.1-3) contained, for the first time, a part devoted to general principles. Since 1982, his delegation had been encouraging the Special Rapporteur to give primary attention to the drafting of the sections concerning the offences to be covered by the draft Code and then to undertake the part dealing with general rules and principles.

3. There seemed to be general agreement that the future Code should include as crimes against humanity only the most serious international offences. It would therefore be inappropriate to include in that category offences committed against individuals, except in certain cases, which should be limitatively enumerated in order to ensure the selective nature of the draft.

4. His delegation noted with satisfaction that apartheid had been included in the Special Rapporteur's draft articles as a crime against humanity. The wording should be such that it would cover apartheid wherever it occurred. The second alternative of article 12, paragraph 2, as contained in footnote 84 to the Commission's report (A/41/10), was thus preferable to the first.

5. With regard to the terminology problems raised by the question of war crimes, it would be useful to replace the term "war" with "armed conflicts", thereby extending the scope of application of the future Code to all crimes, whether committed in an international or in a non-international armed conflict.

(Mr. Bouabid, Tunisia)

6. The substantive problem referred to in paragraphs 108 and 109 of the Commission's report was not insurmountable. It was true that a crime committed in time of peace could constitute a crime against humanity if it came within the definition of that category of crime, and that the same crime committed in time of war could also constitute a war crime. That concurrence of offences was a problem of qualification and classification, since the crime in question was in any case punishable. It might prove useful to include that type of offence in a separate category. The question could also be raised, at the point when the Commission undertook to determine the penalties to be included in the draft Code, as to whether the crime in question would be sanctioned differently depending on whether it had been committed in time of peace or in time of war.

7. As to the problems of methodology referred to in paragraph 110, the general definition of war crimes would perhaps not be the most appropriate method. The provisions of the future Code should as far as possible be characterized by a degree of precision which left no room for confusion. However, a detailed enumeration of crimes in that category might be incomplete and might freeze international law and hamper the codification of new rules and new offences. The third alternative, a general definition illustrated by a non-exhaustive enumeration, was the least acceptable because it ran the enormous risk of being imprecise, which might have serious adverse consequences for the scope of the future Code. Members of the Commission should therefore concentrate on the first two possibilities in order to arrive at a clear definition of that category of crime.

8. Of the three concepts dealt with in part III of the Special Rapporteur's report, only complot was a truly autonomous offence and could therefore be included in the section dealing with crimes against peace, or even in the section concerning crimes against humanity, on the assumption that the extended definition of complot was retained. On the other hand, perhaps the concepts of complicity and attempt belonged in the part relating to general principles. That was an idea which deserved further study.

9. Mr. YEPEZ (Venezuela) said that his delegation attached top priority to the topic of jurisdictional immunities of States and their property, because the international community lacked a general instrument in that area, and in recent years States had been promulgating laws which restricted jurisdictional immunities. The evolution from the doctrine of absolute immunity towards that of restricted immunity reflected the interests of developed, market-economy countries. In the elaboration of the respective international legal norms, however, it was important to bear in mind all the factors involved: legislative precedents, traditional practice and the interests of all States, particularly the developing countries. His delegation was therefore concerned that the Commission had chosen a system of very extensive exceptions to the sovereign immunity of States. Still, it was not too late for the developing countries - in which the State sector, because of a dearth of private capital, had to take on a whole range of activities in the area of international economics and trade relations - to ensure that the instrument being drafted was more in accordance with their interests and their economic realities.

(Mr. Yepez, Venezuela)

10. His delegation considered that the Commission should merge articles 2 and 3 in second reading. The words in square brackets in article 6 "and the relevant rules of general international law" should be omitted, because they could be interpreted as covering customary norms of international law based on State judicial, executive and legislative practice, which, if admitted, would make the codification exercise futile. To provide for the evolution of international law in that field and for the future concerns of States, the final instrument should contain norms on revision and modification.

11. Article 3, paragraph 1, specified what should be understood by "State"; there was therefore no justification for repeating the definition in article 7, paragraph 3.

12. The Commission might endeavour to soften the provision in article 8 (b) by including one or more exceptions, because there might be a fundamental change in the circumstances that had prevailed at the time a contract had been signed that would make it advisable or necessary to avoid proceedings. In second reading the Commission might consider the possibility of making that provision more flexible.

13. The title of part III of the draft articles should be "Exceptions to State immunity".

14. His delegation considered that the reference in article 23, paragraph 1 (a), was to all the property destined for the "purposes of the diplomatic mission of the State", including the general activities of the mission, which might in turn include commercial activities. For that reason, his delegation did not agree with the commentary to that paragraph. The provision should be redrafted. In article 21, the expression in square brackets "or property in which it has a legally protected interest" should be maintained. It provided for better safeguards for State property from measures of constraint.

15. Concerning the topic of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation considered that one the basis of the draft articles adopted in first reading, States could adopt an instrument that would contribute to clarifying the rules in that area. It was unfortunate, however, that no definitive decision had been taken concerning article 28 - one of the most important provisions in the draft - which was full of square brackets. It would be difficult to reconcile the divergences of view between States on that article. In second reading, the protection afforded the diplomatic bag as generally defined in article 3, paragraph 1 (2), should be made as extensive as possible. Article 28 should consequently be drafted to ensure that there were no restrictions on the protection afforded the bag. In his delegation's view, the future instrument should contain a chapter on the settlement of disputes arising out of the interpretation or implementation of its provisions.

16. Turning to the topic of State responsibility, he noted that there was a general reference in article 3, paragraph 1, of part three to the need to seek a solution through the means indicated in Article 33 of the Charter of the United

(Mr. Yepez, Venezuela)

Nations, whereas article 4 established other procedures for the settlement of disputes. That inconsistency could be avoided if article 3 could specify which of the means indicated in Article 33 of the Charter would apply. His delegation had reservations concerning the compulsory nature of the procedures proposed in article 4. It would prefer the means of conflict settlement to be a matter of choice for States. An alternative might be to increase the possibilities in article 5 for formulating reservations to all the provisions of article 4.

17. As to the draft Code of Offences against the Peace and Security of Mankind, he reiterated his delegation's position that the Commission should not dismiss the possibility that States might incur international responsibility for acts which violated the provisions of the Code, or that their acts or omissions might be included in some of the categories of offences against the peace and security of mankind. The Commission should also give further consideration to an international criminal jurisdiction, which should be provided for in the final document.

18. The wording of draft article 8 could be improved, in particular to avoid the unnecessary repetition of the words "does not relieve the perpetrator of criminal responsibility". The second alternative of article 12, paragraph 2, was preferable, for it was more comprehensive. Although his deleg tion agreed in principle with including "any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment" among the crimes against humanity, it considered that the word "serious" should not be used in that respect. The meaning of "safeguarding and preservation" should be spelt out so as to leave no room for varying interpretations.

19. The Commission should elaborate the topic in greater detail. It should provide a clear definition of the production of and traffic in narcotic and psychotropic substances, acts which should be included in the category of crimes against humanity. A chapter of the Code should establish the various penalties for offenders, without which it would have no practical effect.

20. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the Commission should emphasize such essential elements as the obligation to prevent injury, which should be clearly established, the obligation to negotiate with neighbouring States concerning activities which might be injurious, and the obligation of reparation. His delegation considered the latter obligation essential, though there might be exceptions or limitations to it according to the nature of the activities undertaken, the risk posed and the injury caused. The position of developing countries should be given special attention, taking into account their needs, their level of development, the difficulty of preventing and compensating for injury, the effects in their territory of the activities of transnational corporations, and all the relevant facts and circumstances.

21. The draft articles should provide for a broad and flexible dispute-settlement system, since implementation might give rise to problems that would require

(Mr. Yepez, Venezuela)

peaceful solution by the parties concerned. It might also be necessary to establish an objective and impartial fact-finding mechanism to be used in determining liability. He urged the Commission to expedite its work on the topic, for norms in that area were becoming increasingly necessary.

22. With respect to the law of the non-navigational uses of international watercourses, his delegation considered that the term "international watercourse" must be defined at the current stage of work on the topic. The obligations would vary according to how the term was defined. The term "international watercourse system" should also be clearly defined. The determination of "appreciable harm" could be a source of conflict among States. It might therefore be appropriate to provide that the use of the waters of an international watercourse system should not be detrimental to the other States belonging to the system. Agreements concerning the system should provide for its use, determine the harm that might be caused and establish rules concerning reparation. "Shared natural resource" was an ambiguous and unsatisfactory term with which to characterize waters of an international watercourse system. The provisions could govern the use of the waters of the system without reference to "shared natural resource". The definition of reasonable and equitable use should include a list of factors on which such use was based. However, his delegation doubted the appropriateness of using the word "equitable" to limit the use of an international watercourse.

23. The Commission should elaborate general principles and norms governing non-navigational uses of international watercourses, as well as guidelines for international watercourse management and for future agreements among States.

24. Mr. KULOV (Bulgaria) said that the elaboration of a draft Code of Offences against the Peace and Security of Mankind was an extremely important task, and should be given priority during the next mandate of the Commission.

25. His delegation considered that the draft Code should be limited to the criminal responsibility of individuals, although the international criminal responsibility of States for international offences should not necessarily be excluded. The elaboration of the topic of State responsibility would provide detailed regulation of that question. The object of the draft Code was to bring individuals to justice. The right to do so should be conferred upon every State, irrespective of where the offence was committed or the nationality of the offender. The elaboration of general principles, together with a definition of offences against the peace and security of mankind, would contribute to a better definition of the content ratione materiae of the draft Code.

26. The next goal should be to draw up a complete list of acts constituting offences against the peace and security of mankind, clearly indicating the constituent elements of such offences. That required an updating of the provisions of the draft Code of 1954 in the light of developments since then. His delegation supported the inclusion of aggression in the list, on the basis of the Definition of Aggression adopted by the General Assembly in 1974. The threat of aggression and the preparation of aggression against another State must also be included. As

(Mr. Kulov, Bulgaria)

far as terrorist acts were concerned, his Government had condemned all forms of terrorism, and fully agreed that individuals who perpetrated such acts must be prosecuted. But as far as the draft Code was concerned, it considered that not all terrorist acts should be considered offences against the peace and security of mankind, only those which were assisted by one or more States and were intended to undermine the security of another State.

27. His delegation supported the inclusion of mercenarism in the list of offences, although it had serious reservations with respect to the definition of a mercenary proposed by the Special Rapporteur. Such crimes as colonial domination, genocide, apartheid and racial discrimination should be included in the list of the most serious offences. It was particularly important to include the testing and use of nuclear weapons, since they endangered the very survival of mankind. The text of article 11, paragraph 6, showed that the Special Rapporteur had taken a step in the right direction as far as that was concerned. However, the draft Code should not be merely concerned with the codification of existing norms, but should also make a substantial contribution to the progressive development of international law. In the light of the efforts currently being made by the Soviet Union, it would be a manifestation of good will and sober-minded political thinking to make the complete prohibition of nuclear-weapon tests a peremptory norm of international law. Work on the draft Code provided such an opportunity. Of no less importance would be the assumption by all nuclear-weapon States of the obligation not to use nuclear weapons first. The draft Code must not fail to encompass such acts or provide for the criminal responsibility of individual State leaders.

28. He considered the attempt to identify the constituent elements of the term "interference in the internal or external affairs of another State" as well as its various manifestations, such as fomenting civil strife and the taking of coercive measures of an economic or political nature, to be an example of the progressive development of international law. It was imperative to include such acts in the draft Code.

29. The extreme importance of the topic justified its inclusion as a separate item in the agenda of the Sixth Committee.

30. Mr. AL-DUWAIKH (Kuwait) said that, although his Government would submit its written observations at a later stage, his delegation had one general observation to make on article 6 of the draft articles on jurisdictional immunities of States and their property. The topic was indeed a delicate one, since it hinged on the relationship between the development of international practice in the field and the traditional theory of absolute State immunity. The national legislation of some States and the practice of their courts with regard to the property of other States did not take account of the principle of immunity, one which was, of course, linked with the principle of the sovereign equality of States. In the view of his delegation, there was no need in draft article 6 for the words in square brackets, because of the lack of any precise State practice in the field. It was doubtful that a compromise formula could be devised allowing a balance to be struck between new and established practices, particularly in the light of complex problems of a practical rather than a theoretical nature.

(Mr. Al-Duwaikh, Kuwait)

31. With regard to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, it was the view of his delegation that the extent of the protection to be accorded to the diplomatic courier in the performance of his functions was linked with the need for a just balance between the interest of the sending State in ensuring the confidentiality of its communications and the security interests of the transit State. The status of the diplomatic courier could not be the same as that of diplomatic agents; the privileges and immunities should be sufficient to enable him to perform his functions, thus ensuring freedom of communication between the sending State and its accredited missions.

32. One crucial question was that of the relationship between the draft articles and the Conventions on diplomatic and consular relations. The draft articles had yet to address the topic in a precise manner. Although draft article 28, paragraph 1, stated that the diplomatic bag could not be opened or detained, draft articles 4 and 5 did not establish what consequences might ensue if the sending State abused the bag or the receiving State opened the bag in a manner incompatible with the object and purpose of the articles. His delegation also questioned the usefulness of draft article 31 and wondered whether there were any clear examples of the non-recognition of the sending State or of its Government. Draft articles 21 and 32 were largely satisfactory to his delegation, and the Kuwaiti authorities would submit written observations on them at a later date.

33. The concept of offences against the peace and security of mankind had begun to occupy an increasingly important position in international law, given the problems of racial discrimination, the possible use of nuclear weapons, environmental problems, mercenarism and economic aggression. His delegation supported the procedure followed by the Special Rapporteur in avoiding a precise definition of offences against the peace and security of mankind until such time as general agreement could be reached. New draft articles 1, 2 and 3 had taken care to link the definition of such offences with existing conventions. If some of the formulations contained in the Special Rapporteur's fourth report (A/CN.4/398 and Corr.1-3) were of a general nature, that was because certain principles were applicable to certain offences more than to others. His delegation endorsed the tripartite division of offences despite their overlapping. It doubted that it was possible to establish such a division on a purely historical basis if precision in the characterization of such offences was to be achieved.

34. His delegation regretted that the Commission had been unable to complete its consideration of part three of the draft articles on State responsibility, and would have welcomed a more analytical discussion. As to articles 3 and 4 of part three, international practice had demonstrated that the decisive factor was not dispute-settlement procedures so much as the readiness of the States parties to a dispute to co-operate and show the flexibility necessary for its solution. It was such co-operation that would lead to a settlement, and compulsory conciliation could be applied only in limited cases. His delegation hoped that the Commission would be successful in reaching agreement on generally acceptable dispute-settlement procedures, and that special priority would be given to the topic of State responsibility.

35. Mr. MAKAREVITCH (Ukrainian Soviet Socialist Republic) said that the realities of the present-day world made it particularly important for the draft Code of Offences to be completed as soon as possible. The adoption of a well-drafted international instrument on the criminal responsibility of individuals guilty of crimes against the peace and security of mankind would be a major practical step towards preventing such crimes and thereby improving the international situation. It was regrettable therefore that the Commission at its thirty-eighth session had not been able to devote enough time to a detailed consideration of the topic. His Government supported the Commission's decision to limit the content of the draft Code ratione personae to the criminal responsibility of individuals for the time being, and believed that questions of international criminal responsibility should not be raised in connection with the Code at any time. The two issues formed clearly distinct categories in law, and any attempt to consider them within the framework of a single topic would doom the draft Code to failure. As for the question whether the draft Code should deal with the criminal responsibility of individuals holding official positions of authority, or only with private individuals, he remarked that international crimes might be committed by persons who used State authority for those ends, or might reflect a State's foreign policy; the actual perpetrator in every case, however, was an individual, who might or might not be a State official.

36. With regard to the content ratione materiae, he stressed the importance of taking into account the criteria established in article 19 of the draft on State responsibility, thus ensuring a close linkage between the two documents. It was essential that the range of offences covered should reflect contemporary trends in international practice and international law.

37. His delegation considered that the elaboration of a definition of the concept of an offence against the peace and security of mankind, as well as of general principles relating to the criminal responsibility of individuals for such offences, should be deferred until articles on specific types of offences had been considered. The draft articles submitted by the Special Rapporteur in his fourth report would require much additional work. The objections raised to the proposed categorization of offences should be taken into account by the Commission. A number of the draft articles proposed were open to serious criticism as being too abstract or not precise enough. That was particularly true of paragraphs 2, 3 and 4 of draft article 11 which, despite objections raised in the past, again referred to "the authorities of a State" instead of defining actions by individuals or groups of individuals which constituted a specific offence.

38. With regard to the enumeration of offences to be included in the draft Code, he noted that the members of the Commission appeared to be agreed on the need to include aggression, genocide, apartheid, State terrorism and the imposition of colonial rule or its maintenance by force. Other types of offences, however, still gave rise to differences of opinion or to reservations. In that connection, his delegation wished to reiterate its view that the first use of nuclear weapons should be included in the draft. None of the arguments advanced against such inclusion were well founded or convincing. In particular, it had been said that unless the Commission refrained from pronouncing itself upon the issue, it would

(Mr. Makarevitch, Ukrainian SSR)

forfeit its prestige and authority as a legal body. Yet it was precisely in order to preserve its prestige and authority that the Commission should decide to include the first use of nuclear weapons in the list of offences against the peace and security of mankind. There could be no doubt that the overwhelming majority of States regarded the use of nuclear weapons as the gravest crime against peace and humanity. By reflecting that fact in the draft Code, the Commission would show that it was in step with the realities of the age.

39. In addition to provisions concerning the non-applicability of statutory limitations to offences against the peace and security of mankind, the draft Code should make it obligatory for States to include severe penalties for such offences in their national legislations. His delegation hoped that the draft Code would remain one of the most important items on the Commission's programme of work and a separate item on the Sixth Committee's agenda.

40. Mr. BALANDA MIKUIN LELIEL (Zaire) said that the draft Code of Offences against the Peace and Security of Mankind was the most important set of draft articles before the International Law Commission because its aim was to protect and safeguard the world's most precious heritage, the human individual. The future Code should provide definitions that were precise but flexible, in order to adapt easily to the complexity and the nature of international life. The Code should avoid taking doctrinal positions and should seek to establish a basis of generally accepted concepts, bearing in mind the progressive development of international law. In that context, he pointed out that before the establishment of the Nürnberg and Tokyo Tribunals, only a few authors had defended the concept of the international responsibility of the individual as such. Today, that idea was no longer questioned. Likewise, it had become possible to envisage the criminal responsibility of the State or other juridical persons. The major difficulty experienced by opponents of such a concept was in the area of penalties, some of which were obviously applicable only to individuals. There were, however, also methods of sanction or reparation specific to international law. Experience had shown that juridical persons could commit certain acts considered to be international crimes. Indeed, crimes such as aggression, apartheid or genocide could be carried out only by a State or with its direct or indirect participation. It remained to be determined whether such responsibility was purely political or civil, such as that envisaged in respect of wrongful acts in draft article 19 of the draft articles on State responsibility. The Commission should carry out further studies before taking a final decision to reject the concept of the international criminal responsibility of States and other juridical persons. Political expedience alone should not in itself dictate the path to be followed.

41. In order to be effective, the future Code should lay down scales of sanctions applicable to the subjects of the Code. An international jurisdiction would offer more guarantees that the prescribed penalties would be applied and promote uniformity of legal practice. On the other hand, the principle of universal competence proposed by the Special Rapporteur would require a high level of co-operation among States, which was far from likely for the time being. Before such international jurisdiction, all generally accepted guarantees ensuring a fair trial should be safeguarded.

(Mr. Balanda Mikuin Leliel, Zaire)

42. As to the general principles underlying the punishment of offences against the peace and security of mankind, the future Code should embody the legality of sanctions, the non-retroactivity of laws and the rule of imprescriptibility. The concepts of complicity, complot and attempt should also be included, but should be interpreted in a manner compatible with international realities. The theory of extenuating circumstances and justifying facts should not be disregarded. Likewise, no one should be punished or prosecuted twice for the same act.

43. It was important for the Commission to make an additional effort to establish a list of offences. The criteria should include special intention and extreme seriousness of the acts, but any act aimed at harming the physical, mental or cultural integrity of the human being should be taken into consideration. Moreover, for some acts such as genocide, the mass element would be inevitable. Thus, serious damage to the environment, drug trafficking, slavery, colonial domination, apartheid, aggression and other acts meeting the general criteria whose direct or indirect consequences led to the destruction of the human individual would be included in the list. Moreover, any type of weapon producing effects which fitted into the defined categories would obviously be banned. His delegation also shared the Special Rapporteur's view that crimes against humanity should be separated from the concept of belligerency, as had been done in the 1954 draft Code.

44. Mr. Jesus (Cape Verde) took the Chair.

45. Mr. LUKYANOVICH (Union of Soviet Socialist Republics) drew attention to his Government's view on the draft Code as set out in documents A/35/210, A/37/325, A/39/439/Add.3, A/40/451 and A/41/537/Add.1. The early elaboration of the draft Code would be a major landmark in the process of working towards the prevention of the preparation and unleashing of nuclear war, aggression, State terrorism, genocide, apartheid and other crimes, a process which today more than ever before required the combined efforts of States and peoples.

46. Although it was one of the draft Code's most active champions, the Soviet Union had certain objections both to the method underlying the draft's preparation and to a number of specific decisions adopted by the Special Rapporteur and the Commission on the basis of that approach. The Commission's decision that the content ratione personae of the draft Code should at the present stage be limited to the criminal responsibility of individuals was undoubtedly correct. Any attempt to apply concepts of international criminal responsibility to States would be not only politically harmful but legally unjustified. Criminal law, through the methods characteristic of it, punished individuals; a State could not be put in the dock or sent to prison. Its leaders, however, could be judged. An individual was responsible, not for the conduct of a State, but for his own behaviour. The topic of State responsibility was a separate one and should not be touched on in the draft Code.

47. The categorization of offences into crimes against the peace and security of mankind on the one hand and war crimes on the other was legally unfounded since offences in each category could also fall within the scope of the other. The

(Mr. Lukyanovich, USSR)

Special Rapporteur's interpretation of the term "humanity" (para. 83 of the report) seemed rather narrow, and the question raised in the same paragraph as to whether a crime against humanity should include a mass element or whether any grave attack directed at one single individual was such a crime was surely artificial. There could be no doubt that a mass element had to be involved, directly or indirectly, in the case of a crime against humanity. On the other hand, his delegation fully agreed with the Special Rapporteur's view (para. 86) that what characterized a crime against humanity was its motive.

48. Referring to paragraphs 93 to 102 of the report, he said that not all of the crimes listed deserved to be regarded as offences against the peace and security of mankind; it was indisputable, however, that the list should include apartheid, State terrorism and various other international crimes depending on such elements as the motives, aims, or results achieved. With regard to terminology problems arising in connection with war crimes (para. 104 of the report), he said that, although war as a means of settling international disputes was inconsistent with the Charter of the United Nations and in that sense was unlawful, Article 51 of the Charter recognized the lawfulness of the use of arms in a number of cases. Furthermore, the right of national liberation movements to resort to such use was also recognized. Only aggressive wars were entirely unlawful. Concepts such as "laws and customs of war" or "war crimes" therefore remained pertinent and should be retained. With regard to problems of methodology (para. 110), his delegation favoured a general definition containing a reference to the laws and customs of war and considered that a non-exhaustive enumeration of war crimes should be included. In that connection, he referred to paragraph 3 of his Government's most recent submission concerning the draft Code (A/41/537/Add.1), criticizing the Commission's decision to establish a list of specific offences against the peace and security of mankind and only then to formulate a definition of such offences and specify the categories of person who could be held responsible for them.

49. In connection with paragraph 113 of the report, he said that his delegation shared the view of those members of the Commission who held that the first use of nuclear weapons should be banned. In an ideal situation, the ban would no doubt be extended to the manufacture and possession of such weapons, but for the present a ban on first use would constitute an important step towards international détente.

50. With regard to other offences against the peace and security of mankind, his delegation favoured a more extended interpretation of the concepts of complicity, complot and attempt in international law in view of their exceptionally serious implications in the context of offences against the peace and security of mankind. On the question of general principles, he agreed with the Special Rapporteur's views as set out in paragraph 134 of the report, but also drew attention to the opinion of some members of the Commission reflected in paragraph 135. With regard to principles relating to the official position of the offender, his delegation considered that the relevant provisions of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights should be incorporated in draft article 6. On the subject of principles relating to the application of the criminal law in time, his delegation took the view that although the rule nullum crimen sine lege was widely accepted by States, the desirability of

(Mr. Lukyanovich, USSR)

automatically applying it in the draft Code should be seriously pondered in view of the especially grave nature and consequences of offences against the peace and security of mankind. As a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Soviet Union supported the idea of draft article 5, but would prefer a more concise wording such as: "No statutory limitation shall apply to offences against the peace and security of mankind".

51. With regard to draft paragraph 4 dealing with principles relating to the application of the criminal law in space, he referred to his Government's objections to universal jurisdiction set out in paragraphs 9, 10 and 11 of document A/41/537/Add.1. Lastly, with regard to principles relating to exceptions to criminal responsibility, he said that extreme caution was called for in the enumeration of exceptions applicable to offences against the peace and security of mankind.

52. Draft article 1 should provide a general definition of offences against the peace and security of mankind and should clearly relate to individuals. The present article 1, although preferable to old article 3, still failed to meet essential requirements. In that connection, he drew attention to paragraph 4 of his Government's submission in document A/41/537/Add.1. Agreeing with the idea embodied in draft article 3, he suggested that it should be amended to read: "Any person is responsible for an offence against the peace and security of mankind and liable to punishment therefor." In draft article 10, the words "war crimes" should be retained, and the wording employed in the relevant conventions should be used in draft article 12 and others dealing with specific crimes.

53. In its future work, the Commission should consider including a provision on the ineluctable nature of punishment of individuals found guilty of an offence against the peace and security of mankind. It should be made obligatory for States to co-operate in the prevention of such crimes and the punishment of individuals found responsible for committing them. In particular, States should be required to include severe penalties for such crimes in their national legislations.

54. After expressing the view that the question of the draft Code should remain a separate item on the Sixth Committee's agenda and should continue to be given priority, he emphasized the Committee's essential role as an international political law-making body. In the past years, the International Law Commission's productivity had diminished, largely because the process of codification of international law had been completed in many areas - to a considerable extent thanks to the Commission's own efforts - and attention was shifting to the progressive development of international law. That was a highly complex task requiring the harmonization of many different State interests and the co-ordination of the political will of States to assume obligations in the interests of the international community as a whole. The Commission, its notable achievements and the great competence of its members notwithstanding, could not, as a purely legal organ, perform that task. It was for the Sixth Committee to do so. The numerous international conventions drafted within the Committee bore witness to the

(Mr. Lukyanovich, USSR)

Committee's experience in that field. His delegation therefore took the view that the Committee's directly law-making activities in major areas of progressive development of international law should be given prominence in the future. The Committee's annual consideration of the report of the International Law Commission should also be highlighted as a means of acquainting the Commission's members with the positions of Governments and thus helping them to produce drafts of a really viable nature.

55. In conclusion, his delegation supported the Commission's decisions on the future organization of its work reflected in paragraph 250 of the report. Despite the shortening of the thirty-eighth session, the Commission had succeeded in achieving more specific results through better organization. In his delegation's view, future sessions should also not exceed 10 weeks.

56. Mr. CULLEN (Argentina) said that in theory, Argentina would have no problem accepting the concept of the criminal responsibility of States and the consequent need for an international criminal jurisdiction. However, a decision on the question of jurisdiction should be deferred for the time being. The Commission had decided to proceed on the assumption that the draft code related only to individuals, and his delegation agreed that it was best not to be too ambitious. However, when international crimes were perpetrated by the State, the responsibility incurred differed from that for ordinary wrongful acts and the draft Code should reflect that situation. While some crimes perpetrated by individuals, such as war crimes, had consequences only for the individuals who committed them, other crimes committed by individuals were attributable to the State, because they involved a breach of international obligations of States. They were typically State crimes, such as aggression. Consequences arose for the State and also for the individuals; the latter consequences could be extremely severe, as had been demonstrated at Nuremberg. The Commission would have to elaborate further on the theory, which would be transformed into practice. While there could be no individual perpetrators of a State crime, there would always be responsible persons.

57. Although there did not appear to be any sound practical reasons for it, his delegation had no objection to the tripartite division of offences into offences against peace, crimes against humanity and war crimes. However, the Commission's report also referred to "other offences". The general heading of the topic was somewhat unsatisfactory, leading to the illogical premise that war crimes affected peace, although by definition they were committed during wartime, and therefore in the absence of peace.

58. His delegation believed that the Special Rapporteur had rightly separated genocide from the circumstance of war. It agreed that the key to genocide was the motive: the aim of destroying a national, ethnic, racial or religious group in whole or in part. If that was the case, the mass element was of secondary importance. With regard to apartheid, his delegation preferred the second alternative, in order to avoid referring to instruments outside the Code itself. It supported the inclusion of that terrible crime in the Code. The concept of a serious breach of an international obligation of essential importance for the

(Mr. Cullen, Argentina)

safeguarding and preservation of the human environment was no longer purely theoretical and should be included in the Code, after further elaboration. With regard to war crimes, his delegation preferred the second alternative, because it contained specific definitions and obviated the need to refer to other instruments. For reasons of tradition, his delegation preferred to keep the term "war crimes". Terrorism, the maintenance by force of colonial domination and mercenarism should also appear in the Code.

59. In view of the extreme seriousness of offences against the peace and security of mankind, Argentina believed that they should not be subject to statutory limitations. They should have full procedural guarantees under article 6. His delegation agreed with the content of article 7, paragraph 1, which established the principle protecting the individual against the excesses of power. However, paragraph 2 was contrary to the principle that, in order for an act to be described as criminal, it had to correspond precisely to a type defined under the applicable norm. Analogy did not apply in criminal law and a general principle, precisely because it was general, lacked the necessary precision. The Special Rapporteur had probably been recalling the Nuremberg situation when drafting paragraph 2, but the current situation was fortunately not the same.

60. With regard to article 8, it was necessary to clarify that the idea of self-defence referred not to the State, but to the attacked individual. It was clear that individuals who were subjects of the attacked State could commit any type of international crime against the aggressors, who must be incriminated. Coercion, state of necessity or force majeure must be precisely defined, for example in the commentary, because domestic laws might differ in nuance, or even in important aspects. The stipulation that there must in all cases be a threat of a grave, imminent and irremediable peril would depend on the definition adopted regarding coercion, state of necessity and force majeure. The adjectives qualifying the peril seemed to refer particularly to a state of necessity in which the person faced the dilemma of perpetrating a crime or sacrificing a legally protected asset, such as his property or freedom. However, that element seemed to constitute a repetition.

61. With regard to attempt, although his delegation would be able to accept an expanded definition, it could not accept the idea of "conspiracy" because that virtually involved the concept of collective responsibility. Lastly, Argentina believed that the Commission should consider the concept of abandonment of action together with that of attempt.

62. Mr. GILLET BEBIN (Chile) said his delegation understood that the draft articles on State responsibility would be embodied in a convention. The fact that a convention did not enter inot force immediately did not mean that it would not influence the behaviour of States and constitute a valuable reference text for international judicial and arbitral tribunals, as well as other organs responsible for settling disputes. Chile believed that the decision to include an effective and obligatory system for the settlement of disputes would facilitate the work of the Commission in seeking consensus solutions. It was unlikely that the majority

(Mr. Gillet Bebin, Chile)

of States would accept a norm such as that contained in article 19 in part one of the draft, without having the legal assurance that they would not be accused by other States of having committed international crimes in the absence of an independent and authoritative system to establish the facts and the applicable law. In that respect, there was a clear analogy with the treatment of the concept of jus cogens received in the Vienna Convention on the Law of Treaties. His delegation was equally concerned about the question of reprisals and countermeasures. The adoption of such measures involved the implicit danger of escalation to illegality, including commission of the most serious of international crimes, the unlawful use of force.

63. With regard to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation believed that a specific instrument on the subject would regulate both the procedural and substantive aspects more effectively than the existing texts containing provisions on that subject. His delegation agreed with the content of article 28. Indeed, the exceptional situation referred to in paragraph 2 was already regulated by customary international law, subsequently incorporated in the conventions on diplomatic and consular relations.

64. Chile wished to highlight the co-operation which the Commission had extended to other organizations dealing with legal matters, which significantly contributed to the progressive development and codification of international law.

65. With regard to the annual Geneva seminar on international law, Chile commended the efforts of various Governments which had offered fellowships to participants from developing countries, allowing a satisfactory geographical distribution.

AGENDA ITEM 128: CONSIDERATION OF EFFECTIVE MEASURES TO ENHANCE THE PROTECTION, SECURITY AND SAFETY OF DIPLOMATIC AND CONSULAR MISSIONS AND REPRESENTATIVES: REPORT OF THE SECRETARY-GENERAL (continued)

66. The CHAIRMAN announced that Sierra Leone had become a sponsor of draft resolution A/C.6/41/L.8.

The meeting rose at 6.05 p.m.