United Nations
GENERAL ASSEMBLY
FORTY-SECOND SESSION
*Official Records**

SIXTH COMMITTEE
39th meeting
held on
Wednesday, 4 November 1987
at 10 a.m.
New York

SUMMARY RECORD OF THE 39th MEETING

Chairman: Mr. AZZAROUK (Libyan Arab Jamahiriya)

later: Mr. MIKULKA (Czechoslovakia)

CONTENTS

87-56721 0804S (E) 14p.

Distr. GENERAL
A/C.6/42/SR.39
6 November 1987

ORIGINAL: ENGLISH

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

AGENDA ITEM 135: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-NINTH SESSION (continued) (A/42/10, 179, 429)

AGENDA ITEM 130: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (continued) (A/42/484 and Add.1)

1. Mr. CALERO RODRIGUES (Brazil) said it was unfortunate that chapter IV of the report of the International Law Commission (A/42/10), entitled "International liability for injurious consequences arising out of acts not prohibited by international law", did not indicate the subjects on which the views of Governments would be of particular interest. The Commission had held a very wide-ranging debate on a great number of issues, which had gone even beyond the Special Rapporteur's request referred to in paragraph 132 of the report. It was advantageous to know how the Commission felt on the fundamentals of the topic and on the approach more or less agreed upon. However, the Sixth Committee could not reasonably deal with the 15 issues carefully presented in paragraphs 134 to 192 of the report. His delegation's observations would therefore be of a general nature, touching only on points to which it attached particular importance.

2. His delegation agreed with practically all of the Special Rapporteur's conclusions set forth in paragraph 194. The legal regulation of activities which had or might have transboundary physical consequences adversely affecting persons or things was becoming increasingly necessary. It would be preferable to reverse the order of terms in the subheading "Prevention and reparation" to read "Reparation and prevention", since reparation was the essence of liability. The draft articles should try to establish a reasonable and equitable régime of reparation, which should protect the affected State without imposing an unbearable burden on the State of origin. The articles might establish binding guidelines, with the details of each case being left to agreements to be concluded by the States concerned. That solution should not be considered as implying acceptance of the controversial concept of "strict liability", for strict liability was not absolute liability. In cases of State responsibility, restitutio in integrum must in principle be made for the consequence of an internationally wrongful act, but even there some mitigation was to be admitted, particularly when damage resulted from a lawful activity.

3. Should a strict set of rules of prevention be established, the main obligation of the State would not be to avoid transboundary harm, but to obey such rules. Non-compliance with the rules would amount to an internationally wrongful act, and the question would be transferred to the field of international responsibility. However, the question arose as to what would happen if, despite full compliance with the rules, damage still occurred, or if damage resulted from an activity which had not been subject to an agreed régime of prevention because there had seemed to be no risk involved. The Commission should see to it that the role of rules of prevention was not over-emphasized, to the detriment of rules of reparation. The

(Mr. Calero Rodrigues, Brazil)

Commission should be cautious in assessing the consequences of the Special Rapporteur's suggestion to eliminate the proposal in section 2, paragraph 8, of the schematic outline, according to which failure to comply with preventive rules did not give rise to any right of action (A/42/10, para. 179).

4. His delegation was confident that the Commission would move ahead from the preliminary stage in which it had been entangled for far too long to a more concrete phase of presentation and adoption of articles.

5. Mr. ROBINSON (Jamaica) said that the Sixth Committee was hardly in a position to exercise any influence over the kind of items on the Commission's agenda when its own agenda was so sparse in items worthy of its consideration. Many of the legal instruments drafted by the Third Committee would have been better formulated by the Sixth Committee, where the personnel were better equipped for that kind of work; by that process, the Sixth Committee's agenda would be enriched, as would that of the Commission by virtue of the referral to it of items relating to those instruments. The consideration of such items by the Sixth Committee and/or the Commission would not necessarily require more time than was used by the Third Committee. The Sixth Committee and the Commission ought to be principally responsible for assisting the General Assembly in discharging its obligation under Article 13, paragraph 1 (a), of the Charter.

6. His delegation continued to attach the greatest importance to the draft Code of Offences against the Peace and Security of Mankind. With regard to the principle of aut dedere aut punire, enshrined in draft article 4, he pointed out that, since several modern conventions dealing with the suppression of specific offences utilized the principle, the draft code could do no less. The article's title should be changed, however, to read "Duty to try or extradite", because the literal translation from the Latin did not conform with the way the law had been developed in that area; as formulated in several conventions, the duty was not expressed as a duty to prosecute if there was no extradition, but rather as a duty to submit the case to the competent authorities for the purpose of prosecution. Draft article 4 (1) should be clarified so as to refer to a duty to submit the case to the authorities for that purpose. Otherwise, it would present difficulties for several countries, including Jamaica, where the Government could not guarantee prosecution in all cases, since the decision as to prosecution was a matter for an institution which was wholly independent of the Government.

7. Article 4 should establish the principle of jurisdiction either in the courts of the country in which the offender was found or to which he was extradited, on the one hand, or, on the other, in an international criminal court. It was not clear, however, whether paragraph 30 of the report was correct in saying that the International Convention on the Suppression and Punishment of the Crime of Apartheid established as one of its jurisdictional features territorial jurisdiction, since under article V of that Convention, trial might take place in any State party which might have acquired jurisdiction over the offender, not necessarily in the State in whose territory the offender was found. Paragraph 30 made it clear that, in relation to an offence under the Code, the jurisdiction of

(Mr. Robinson, Jamaica)

domestic courts and that of any international criminal court were not exclusive, but, rather, existed at the same time. In that regard, questions arose as to whether an offender having been tried in a domestic court might none the less be tried again for the same offence by an international criminal court, or whether either the domestic court or the international court had jurisdiction to try the offender, but that once tried, for example, by the domestic court, he could not be tried again by an international criminal court.

8. As stated in paragraph 37, it would be difficult to invoke the non bis in idem rule since, by virtue of the primacy of international criminal law, an international criminal court would, in principle, be competent to try international crimes. His delegation's preliminary view was that the non bis in idem rule ought to find a place in the Code, irrespective of whether an international criminal court was established. The aforementioned statement in paragraph 37, moreover, was based upon a misconception, for there was no primacy of international criminal law allowing an international criminal court to try an offender under the Code who had already been tried by a domestic court vested with jurisdiction to try such an offender. The criminal law which an international criminal court would apply in relation to an offence under the Code would be the same criminal law applied by domestic courts with regard to a similar offence.

9. No question of the primacy of the jurisdiction of an international criminal court arose in relation to such domestic courts, unless the relevant States parties expressly made provision for such primacy in the relevant agreements. In the absence of such a provision, it would be wrong to assume that the international criminal court enjoyed some kind of priority over such domestic courts; both courts were best seen as courts of first instance to either of which an offender under the Code might be brought to trial.

10. The jurisdiction which a domestic court had under any of the international conventions dealing with the suppression of a specific crime should be distinguished from the jurisdiction which the same kind of court would have under the Code. The conventions required a State party to punish the guilty persons in accordance with its internal law; thus, the body of law which the domestic court applied in that situation was wholly internal and national. Under the Code, however, the body of law which it applied would be international to the extent that it would consist of such rules as were embodied in the Code or which reflected customary international law, rather than consisting of the rules and principles of its internal criminal law.

11. On the other hand, in a situation in which a domestic court exercised, in accordance with its internal criminal law, jurisdiction over an offender for a crime such as murder or hostage-taking, it would be proper for an international criminal court to try that offender for the acts which had given rise to the murder or hostage-taking, but which might bear a different nomenclature in that jurisdiction. However, where the body of law applied by the domestic court and the international criminal court was the same, it would be improper to subject a person who had been tried for an offence under the Code by a domestic court to another

(Mr. Robinson, Jamaica)

trial for the same offence by an international criminal court. The plea of non bis in idem should be open to such a person.

12. As to whether States parties to the human-rights conventions could agree to an abridgement of the rights enshrined in those conventions in circumstances not covered by them, his delegation did not feel that the sense of moral outrage instilled by a serious or heinous offence against the peace and security of mankind justified derogations from obligations under those conventions.

13. Article 4 of the International Covenant on Civil and Political Rights allowed derogation from the non bis in idem rule, contained in article 14 (7) of that Covenant, in time of public emergency which threatened the life of the nation. That provision raised the question of whether the trial of a person for an offence under the Code for which he had already been convicted or acquitted in circumstances not covered by the exceptional situation referred to in article 4 was not in breach of the non bis in idem rule. Moreover, under article 75 of Additional Protocol I to the 1949 Geneva Conventions, the non bis in idem rule applied even in situations of armed conflict, although it was made clear that it only prohibited a second trial by the same party and under the same law and judicial procedure. Accordingly, he wondered why the rule could not be included in the Code as also applying to situations not involving armed conflict.

14. Article 6 of the draft Code could be compared with article 14 of the International Covenant on Civil and Political Rights and article 75 (8) of Additional Protocol I to the 1949 Geneva Conventions, the latter of which stipulated that no provision of the article might be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1 of the article. His delegation believed that the Code should contain a similar provision. That would still leave unanswered, however, the question of whether a State party to the Covenant and to the Code would not, in a situation where the Covenant was more favourable than the Code, be obliged, as distinct from being entitled, to grant rights as enshrined in the Covenant. Since the list of rights set out in article 6 was not exhaustive, it would seem that a person charged with an offence under the Code would, in relation to a State party to the Covenant and the Code, be able to insist on a more favourable standard of human rights under the Covenant.

15. Paragraph 2 (a) of article 6 should probably also provide for an exception to the right to a public hearing, to protect certain interests such as national security or public order. The protection of such interests could in certain cases justify an in camera trial for an offence against the peace and security of mankind. Paragraphs (6) and (7) of the commentary to article 6 explained that paragraphs 2 (c) and 2 (g) of that article applied to situations other than those covered by those paragraphs. If it was intended that those paragraphs should have that application, it was not sufficient to say so in the commentary; the text itself should so provide. Using the commentary to draft treaty articles was improper. Moreover, the phrase "with regard to the law and the facts" in the chapeau of article 6 did not add anything to the provision and could be deleted.

(Mr. Robinson, Jamaica)

16. His delegation was in favour of preparation by the Commission of a statute for a competent international criminal juris ction for individuals, since such a jurisdiction was a necessary complement to the jurisdiction that the domestic courts of a State would have pursuant to the draft Code. Many States would prefer to see offences under the draft Code dealt with by an international criminal court rather than by their domestic courts. It was presumed that the draft articles would include a provision obliging States to adopt the necessary measures to establish their jurisdiction over offences under the draft Code. For many States, such steps would involve legislation to establish jurisdiction over offences committed outside their territory. The provision in question should be included whether or not the bracketed phrase, "under international law", was retained in draft artic e 1. Although the commentary did not explain the meaning of the phrase, it indicated that some members of the Commission had felt that its inclusion would necessitate the addition to the draft Code of a provision regulating the incorporation of international obligations in the internal law of States. Such a provision would constitute the usual general implementation clause to be found in most treaties.

17. His delegation suspected that the impact of the phrase "under international law" might be more cosmetic than substantive, signifying that the international community viewed crimes under the draft Code with the highest degree of seriousness. However, the problem with that kind of explanation was that it conflicted with the theory that there was no difference between international law and internal law. The Vienna Convention on the Law of Treaties defined a treaty, inter alia, as an international agreement "governed by international law". The phrase "under international law" had the same meaning as the phrase "governed by international law", but additionally pointed to international law as the source or basis of the criminality in the offences. Jamaica had no objection to the inclusion of the phrase in draft article 1. Many of his comments on the draft Code were based on the assumption that the draft articles would ultimately be embodied in an international convention, because there was no other way of making them useful to the international community.

18. The explanation of draft article 3 (1) offered in the commentary was confusing. Although motive was irrelevant to the commission of the offence, draft article 3 (1) spoke of motives that might not be covered by the definition of the offence, implying that the element of motive might be a part of the definition of an offence against the peace and security of mankind. If factors such as racial or national hatred, religion or political opinion were an essential part of the definition of an offence under the draft Code, they had to be established and proved in the same way as any other ingredient of the offence. Moreover, if in fact the definition of the offence had made such factors part of the offence's constituent elements, it was not correct to say that the factors were irrelevant to the commission of the offence because they were motives. He wished to refer to draft article 12 (3) in that connection. It was quite clear that a conviction for the offence dealt with in that draft article required proof that the relevant acts were committed on one of the bases set out in that provision. If the intention was that the offence was committed if the acts were based on other grounds, the

(Mr. Robinson, Jamaica)

provision would have to be so formulated that the enumeration of the grounds was open-ended and non-exhaustive. The difficulty with a provision so formulated was that it would lack the certainty so essential for the definition of a criminal offence. Article 3 (1) should be either deleted or redrafted to say simply that an individual who committed a crime against the peace and security of mankind was responsible for such crime irrespective of the motives for the commission of the crime.

19. It was clear that much more work would have to be done by the Commission on the draft Code, but the work done so far had provided a sufficiently solid foundation to guarantee success.

20. Mr. LEE (Canada) said that work on the law of the non-navigational uses of international watercourses had shown that the principle of "equitable utilization" was a fundamental one for the use and management of international watercourses, and that the Special Rapporteur was right to build his draft articles around it. His third report on the subject was a useful continuation of past work.

21. A general duty to co-operate was an essential foundation for draft articles setting out a régime for the relations of States that shared an international watercourse. Such a duty had already emerged in international law and must be elaborated by the formulation of specific procedural rules. In that regard, the draft articles prepared by the Special Rapporteur were generally satisfactory. There was an important balance to be achieved in any such rules between the rights of a State wishing to undertake a project relating to an international watercourse and those of States that might be affected by it. The validity and priority of any interests involved had to be determined by reference to the yardstick of equitable utilization, which suggested that third-party dispute-settlement procedures might be necessary for the effective functioning of the procedural rules.

22. Where a State contemplated a new use of an international watercourse, there had to be a duty to notify other States and provide them with sufficient information to enable them to assess any potential harm. Draft article 11 was therefore both necessary and appropriate. Draft article 12 allowing a reasonable period for replying to notification was also appropriate, although his delegation preferred the first suggested alternative text because it did not stipulate a specific minimum period. His delegation also supported the provision in draft article 13 that consultations should ensue at the instance of the notified State when it had determined that the proposed use would cause it appreciable harm and deprive it of its equitable share of the uses and benefits of the watercourse. Some members of the Commission had felt that the draft articles were weighted too heavily in favour of the notified State. His delegation agreed that the procedural protections for a potentially affected State should not be permitted to be used to frustrate legitimate uses by another State, but the proposed draft articles did not conflict with that position.

(Mr. Lee, Canada)

23. The chemical pollution of the Rhine in the "Sandoz" incident had shown both the importance of co-operation as a fundamental principle of watercourse management and the interrelated nature of all aspects of such management and control. Canada realized that some Governments had yet to support the idea that meaningful progress towards resolving the problems faced by riparian States could not be made without an integrated approach to the management of watercourse systems. But it had to be remembered that the Commission was only endeavouring to provide a workable and adaptable framework agreement. That approach provided the necessary degree of integration for comprehensive codification while preserving the option for States to make modifications to fit particular circumstance. His Government wished to reiterate its appreciation that more attention had been devoted to that important topic at the thirty-ninth session of the Commission. The task of providing a framework responded to an actual need being faced by States, and no delay should be allowed as the Commission sought to further its important preparatory work.

24. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that his delegation was concerned because the Commission had not devoted the time that was warranted to such an urgent and vital issue, and because the report on its debate suggested that some thought the topic not ripe for codification. Even if that was so, which he did not accept, the topic was certainly ripe for progressive development.

25. Some of the difficulty might be caused by the title, which focused on the fact that the acts causing injury were not contrary to international law. But a focus on environmental concerns provided a clearer understanding of the objectives; the result of the Commission's work, as his delegation saw it, would be a framework convention on international environmental law. The Sandoz and Chernobyl incidents were examples of the kind of problems that called for the development of a legal framework. It had been said that existing State practice was insufficient, but his delegation could not accept that the Commission should await an accumulation of environmental disasters before acting. What was being suggested was simply a legal régime that domestic law already provided, namely, responsibility for acts that harmed one's neighbour.

26. The problem was urgent and State practice pointed in the direction of responsibility. The general obligation to avoid environmental harm had been manifested in a host of international instruments which existed independently of any general body of law on State responsibility. The argument that work on the topic must await the outcome of work on State responsibility was therefore unacceptable. The issue was simply whether or not States continued to accept principles 21 and 22 of the Declaration of the United Nations Conference on the Human Environment. If not, it was doubtful whether the Commission could effect either codification or progressive development of the law on the subject. But if it did not do so, there was a risk that States would simply codify or develop the law outside the Commission.

(Mr. Lee, Canada)

27. The report of the World Commission on Environment and Development had brought home the danger of ignoring protection of the environment, and neither the International Law Commission nor the Sixth Committee could disregard its warnings. The organs of the United Nations had to take account of its implications for their work, and his delegation was therefore encouraged by the support for a convention on environmental protection voiced by the representative of the Union of Soviet Socialist Republics in the Second Committee. Canada hoped that the resolution submitted by the Sixth Committee to the General Assembly would make it clear that the topic was a matter of priority for the International Law Commission.

28. His delegation was in general agreement with the substance of the draft articles proposed by the Special Rapporteur. The difficult questions concerned the circumstances under which liability was to accrue and the extent of that liability. The issue was who should bear the loss where the nationals of one State were injured or where property was damaged as a result of activities occurring in another State. The answer was clearly that responsibility should rest with the State in which the loss-causing activity occurred. That would promote both of the objectives that should be behind any codification of the topic by ensuring that the State harmed was not left with a loss and by providing an incentive for States to take particular precautions where activities within their territories could have transboundary consequences. His delegation was encouraged by what the Special Rapporteur had produced so far, and hoped that he would continue to develop his draft articles along the lines indicated.

29. Mr. LUTEM (Turkey) said that so far as the topic of international liability for injurious consequences arising out of acts not prohibited by international law was concerned, the Commission had dealt mainly with general considerations because it remained divided on the substance. Most members had serious doubts about the subject's basis in international law, and thought that it would be difficult to draw up a general treaty on liability in the absence of established international norms. His delegation believed that it might be wise to leave theoretical problems aside and await the outcome of the work to be undertaken in accordance with the Special Rapporteur's preliminary conclusions in paragraph 194 of the Commission's report (A/42/10).

30. The régime envisaged by the Special Rapporteur on the law of the non-navigational uses of international watercourses was unrelated to existing practice and represented a forced and artificially elaborate innovation, because it introduced a strange rule that any new use of a watercourse might be considered a risk by other States and could not be undertaken without their consent. The draft articles could not be considered as deriving from international practice, and it was not possible, as the Special Rapporteur had done, to deduce from contractual practice the existence of a legal obligation on a watercourse State to notify other watercourse States of a new use, unless there was a specific agreement on the subject. The draft articles therefore were not in accord with existing inter-State relations on the subject, and went against the sovereign rights of States over their natural resources.

(Mr. Lutem, Turkey)

31. The complexity of the subject was due to the multiplicity of interests involved and the diversity of international watercourses. His delegation had had serious misgivings about the codification and progressive development of the topic from the beginning, and was still not convinced that it was ripe for codification. The differences of opinion even over the general obligation to co-operate (draft article 10) had shown that the law on the subject did not even lend itself to the formulation of a "framework agreement". International co-operation was a vague concept, yet draft article 10 stipulated a duty to co-operate as a general rule of law, which was not and should not be the case. Formulating the rule that imposed an obligation to co-operate was contrary to the very idea of co-operation.

32. Draft article 11 implied the establishment of an obligation for the upstream State, but not for the downstream State. Draft article 13 implied that if a notified State claimed that an envisaged use might cause it appreciable harm, the notifying State would find itself under a whole series of obligations. All in all, draft articles 10 to 15 were ill-balanced and should be recast as procedural rules in the form of recommendations. In that way, they would bind the watercourse States concerned only when incorporated in specific watercourse agreements.

33. With regard to the Commission's programme, procedures and working methods, and its documentation, his delegation welcomed the fact that the Commission had succeeded in reaching specific decisions; it hoped that they would bring positive results. On the other hand, the conclusions reached by the Commission in paragraphs 235 to 241 and 243 to 248 called for a response from Member States. With regard to the length of sessions, his delegation was convinced that the Commission would find means to compensate for their shortening. One remedy might be to hold more meetings than usual during any given session. On the other hand, the financial emergency should not be made an excuse for continuing to deprive the Office of Legal Affairs of several posts that were essential for the secretariat serving the Commission. In conclusion, his delegation welcomed the holding of the 1987 Gilberto Amado Memorial Lecture, and thanked the Brazilian Government for making it possible.

34. Mr. JACOVIDES (Cyprus) said that the Commission's current report was up to the usual high standards. Evidently, the Commission had functioned well, and it was gratifying to note the intensive work carried out by the Planning Group. Although the Commission had taken a welcome hard look at its programme, procedures and methods of work, there had been an unavoidable lapse in dealing with the very important issue of State responsibility, which - it was to be hoped - would be compensated for at future Commission sessions. None the less, there had been some constructive planning, as well as productive work on the issues of the draft Code of Offences against the Peace and Security of Mankind, the law of the non-navigational uses of international watercourses, international liability for injurious consequences arising out of acts not prohibited by international law, and relations between States and international organizations. Cyprus fully endorsed the Commission's call to Governments to submit on time their comments and suggestions regarding the jurisdictional immunities of States and their property,

(Mr. Jacovides, Cyprus)

and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

35. His delegation viewed with general approval the organizational matters dealt with in chapter VI of the report (A/42/10). More particularly, it noted the Commission's intention to complete by 1991 the first reading of the draft articles on the Code. However, it would prefer to see greater priority given to the issue of State responsibility. On methods of work, it agreed that some specific aspects of the Commission's procedures should be under constant review. The suggestions made in that connection at the previous meeting by Sweden, on behalf of the Nordic countries, deserved careful consideration. Cyprus shared the view that every effort should be made to maintain future sessions of no less than 12 weeks and to provide summary records and all the necessary facilities. Moreover, it looked forward to receiving as early as possible the updated edition of the publication The Work of the International Law Commission.

36. Cyprus noted with satisfaction the Commission's continued constructive co-operation with other bodies, and wished to pay particular tribute to the constructive contribution made by the Asian-African Legal Consultative Committee to the progressive development of international law. It also wished to reiterate the suggestions it had made earlier about appropriately taking into account the legal work of the Commonwealth and the Movement of Non-Aligned Countries. Moreover, it wished to stress once again the need for more attention to be paid to the contribution made by, and the special concerns of, the newly-independent and developing countries. Cyprus also fully supported the continued holding of the International Law Seminar, and had made a token contribution for that purpose. Similarly, it welcomed the holding of the Gilberto Amado Memorial Lecture and was grateful to the Government of Brazil for its generosity in that connection.

37. The item dealing with the draft Code of Offences against the Peace and Security of Mankind was of the utmost importance. Cyprus accepted the restriction of the draft's scope to individuals, for the time being for the pragmatic reasons stated in the past, without prejudice to its position on the responsibility of States. His Government also wished to make it clear that the draft Code should include the three elements of crimes, penalties and jurisdiction. In view of recent indications of rethinking by the Soviet Union of its attitude on international jurisdiction, there might be room for optimism in that connection. Furthermore, his delegation welcomed the Commission's decision to recommend that the title of the draft should be changed to "Draft Code of Crimes against the Peace and Security of Mankind". It noted with much respect the views expressed by Sierra Leone in that connection. The draft Code was dealing not only with "crimes", as distinct from "delicts" in the sense of article 19 of part one of the draft on State responsibility, but also with the most grave and serious crimes. While the term "offences" was broad enough to cover such crimes, it was logical to use the term "crimes", thereby aligning the English version with the French and Spanish versions. Such a change in terminology was more accurate legally and more weighty politically.

(Mr. Jacovides, Cyprus)

38. The definition in draft article 1 was acceptable so far as it went. For the reason cited in paragraph (5) of the commentary, the expression "under international law" should not be in square brackets. It would be preferable to find a way to convey the element of the seriousness or gravity of the crimes in the definition itself, rather than in the commentary. An additional paragraph might read: "The crimes against the peace and security of mankind are the acts which jeopardize the most vital interests of mankind and violate the fundamental principles of international law". Of course, the question of the crimes defined in the draft Code was left pending.

39. Draft article 2 correctly rested on the assumption of the supremacy of international criminal law. The analogy of the conflict in a federal system of government between a state statute and the federal constitution was indeed valid. Cyprus had always held the view that there was also such a hierarchy of rules in international law itself, with jus cogens prevailing over other rules of international law. His delegation wondered whether the second sentence of the draft article needed to be included in the article itself or whether it might be preferable to include it in the commentary.

40. The current text of draft article 3 differed from the earlier version submitted by the Special Rapporteur in two respects: it referred to an "individual" instead of a "person", which was broader; and it contained a second paragraph. Those changes related to the sensitive issue of whether the draft Code should cover the criminal responsibility of States. It had been agreed that for the time being the scope of the draft Code should be restricted to individuals, without prejudice to the position of many Commission members on the principle of the criminal responsibility of States. If that compromise on the draft Code did not speed up the equivalent work on the issue of State responsibility, the Commission members who held strong views on the matter would reopen the issue of the criminal responsibility of States in the context of the draft Code.

41. Cyprus had no difficulty in approving the text of draft article 5, which was in fact an improvement on the version submitted earlier. Nor did it have any difficulty in accepting draft article 6. If there was to be an international criminal court, it would have to have its own rules and procedural guarantees ensuring due process. On the other hand, the Special Rapporteur and the Commission had been right to rely on the distillation of the jurisdictional guarantees as formulated in several international legal instruments, and it could indeed be argued that the minimum guarantees to which every human being was entitled could amount to peremptory norms.

42. No one could disagree with the basic idea of protection against double jeopardy (non bis in idem) that underlay draft article 7. The question was how to apply that principle in the sphere of international criminal law. The crime in question was one that affected the whole international community and arose under the rules of international criminal law. Also in that context, there was the basic question of the application of the non bis in idem principle in terms of national or international criminal jurisdiction. As long as that question was unresolved,

(Mr. Jacovides, Cyprus)

difficulties might arise in practice. Cyprus had already expressed its preference for an international criminal jurisdiction that would provide the more satisfactory answer in terms of avoiding those potential difficulties. However, as long as universal, national or parallel jurisdiction could be exercised, it took the view that the crime with regard to which the alleged offender had been convicted or acquitted must be the same if the alleged offender was to be entitled to protection against double jeopardy. The wording of the draft article in question would need to remain pending until the fundamental question of who was to exercise jurisdiction under the draft Code was finally settled.

43. Cyprus was of the view that the Commission's mandate extended to the preparation of the statute of a competent criminal jurisdiction for individuals. Although international criminal jurisdiction was more consistent with the overall philosophy of the draft Code, it should not be forgotten that international law-making was the art of the possible, and that it was necessary to remain within the parameters of minimum common denominators and of compromises, as the price for securing a successful outcome for the draft Code. While the task ahead was difficult and challenging, the overall objective of deterring international crime and punishing those who committed it was a worthy one that should be pursued with determination.

44. For Cyprus, which had been the victim of brutal military aggression, continuing occupation and massive human-rights violations, the draft Code was far from an academic exercise. Over 13 years after the international crime to which he was referring had been committed, and despite dozens of legally binding resolutions adopted by the United Nations and decisions adopted by other international bodies, including the Movement of Non-Aligned Countries and the Commonwealth, the tragic situation in Cyprus remained without remedy. In fact, it had been further aggravated through illegal attempted secession and the systematic efforts of the occupying Power, Turkey, to alter and falsify the age-long demographic composition of the island, to destroy and obliterate the cultural heritage of the areas it had occupied through the illegal use of force, and to bring about partition in the guise of an unfair and unworkable system of ethnic separation. All that had been occurring before the eyes of the international community, whose members, for a variety of reasons, had been unable or unwilling to act effectively in order to implement the resolutions for which they had voted. Cyprus was a test-case for the relevance of international law and the effectiveness of the United Nations.

45. His Government did not believe that the draft Code was a cure-all, any more than the Definition of Aggression had proved to be salutary. However, an effective draft Code, with appropriate penalties and jurisdiction, might at least serve as an important building-block for constructing the edifice of international legal order and as a deterrent to aggressors and other violators of its provisions.

46. Mr. Mikulka (Czechoslovakia) took the Chair.

47. Mr. LUTEM (Turkey), speaking in exercise of the right of reply, reminded the representative of Cyprus that the Sixth Committee was not the right place for remarks about the situation in Cyprus.

The meeting rose at 12.10 p.m.