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

SIXTH COMMITTEE
34th meeting
held on
Wednesday, 9 November 1988
at 10 a.m.
New York

SUMMARY RECORD OF THE 34th MEETING

Chairman: Mr. ALI (Democratic Yemen)

CONTENTS

Distr. GENERAL
A/C.6/43/SR.34
11 November 1988

ORIGINAL: ENGLISH

88-57031 0720S (E)

22 P.

/...

The meeting was called to order at 10.10 a.m.

AGENDA ITEM 134: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTIETH SESSION (continued) (A/43/10, A/43/539)

AGENDA ITEM 130: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/43/525 and Add.1, A/43/621-S/20195, A/43/666-S/20211, A/43/709, A/43/716-S/20231, A/43/744-S/20238)

1. Mr. ROSENSTOCK (United States of America) said that the initiative to draft a code of offenc s against the peace and security of mankind had been one of the early efforts to revitalize international law after the Second World War. Since then, much of that revitalisation had taken place. However, it had to be recognised that the work of the Commission on the topic had not been marked by success. Since its resumption, there had been wide differences on a number of the articles and persistent criticism by a number of delegations. The work of the Special Rapporteur had helped to clarify the basic issues, and the Commission had now provisionally adopted 11 draft articles. Yet his delegation did not believe that the Commission was any closer to a useful or acceptable result.

2. Certain basic issues needed to be addressed. One such question, raised by the Special Rapporteur in his first report, was that of a tribunal if there was to be international jurisdiction. An international criminal tribunal would not be another piece of international dispute-settlement machinery. On the contrary, it would be a way of dealing with the question of international jurisdiction, free of the vagaries and risks of national approaches. That was not to say that an international tribunal was a good or a bad idea. It was simply a matter which must prudently be addressed before any decisions about the scope of jurisdiction were taken.

3. His comments on ways of removing or alleviating problems with regard to particular articles should not be taken as evidence that his delegation considered the exercise a useful one. At best, such measures would make it a slightly less dangerous one. Moreover, his delegation agreed with the speaker who had urged that before plunging into details, the Commission should identify and clarify the basic concept of what constituted a crime against peace and security.

4. His delegation disagreed with the Commission's view that, while it had not developed all of the articles that it might propose on the issue of jurisdiction, it had none the less proposed articles sufficient to establish jurisdiction over the offences to be codified, and that it had established "universal jurisdiction". Regarding article 4, for example, if national courts rather than an international tribunal were involved, it would have to be decided whether one was dealing with crimes under international law or crimes to be established under national law.

5. Regarding penalties, were all the crimes included according to the current approach to be punished with substantially the same penalties? Might it not be necessary either to envisage a range of penalties, or more realistically, to narrow considerably the purported focus?

(Mr. Rosenstock, United States)

6. The very use of the inherently imprecise term "international crime" was indicative of the Commission's imprecision in treating the jurisdictional and other issues. Among the categories of offences included in the draft were: (a) offences under international law, such as genocide; (b) acts defined by a treaty which States parties were obliged to treat as criminal offences under national law; (c) possibly, acts prohibited by international law, but constituing neither crimes per se under international law nor conduct which States parties were required to treat as criminal offences under national law; and (d) "international terrorism", which appeared to be an omnibus phrase for other offences. He noted, in passing, that no provision appeared to be contemplated for the traditional immunities extended to persons such as diplomats or travelling heads of State.

7. The element of intent appeared to have been deliberately omitted from article 3. Yet intent was normally an indispensable element of a crime under civil-law and common-law systems, a need fully recognized for example in the Convention on the Prevention and Punishment of the Crime of Genocide.

8. Comparison with the careful drafting of article 8, paragraph 1, of the International Convention against the Taking of Hostages revealed the problems with regard to draft article 4, paragraph 1. Nor was the provision in draft article 4, paragraph 2, giving priority to the extradition request of the State in whose territory the crime had been committed, persuasive. In some cases, justice might be best served by returning a fugitive for trial in the country where he had committed overt acts; in other cases, by delivering him to the country that had suffered most from acts committed elsewhere, as in the case of drugs imported illegally. In other cases again, the key issue might be the ability of one State to extradite the fugitive to a third country.

9. He again stressed the need to resolve the question of an international criminal court, referred to in article 4, paragraph 3. The unusual suggestion that seemed to flow from article 6, that an accused might be granted appointed counsel of his own choosing, could probably be cured by more precise drafting.

10. Regarding article 7, his delegation was not convinced by the Commission's reasoning in applying the principle of non bis in idem to all cases, instead of merely to extradition, as was current international practice. There were some offences, such as air hijacking, for which many States had jurisdiction. If a person was prosecuted for a hijacking in State A and made his own way to State B, State B was free to prosecute him for the same offence. There was nothing new with respect to the draft Code that called for a departure from current law in that area. Moreover, paragraphs 2 and 3 of article 7 contained exceptions to the proposed new rule that were themselves questionable, if not objectionable. The article should be revised to apply the rule only to extradition, provided that article 7, paragraph 1, remained unchanged. However, it would really not be possible to reach a conclusion on the non bis in idem issue until the question of an international criminal jurisdiction had been resolved.

(Mr. Rosenstock, United States)

11. Article 12, dealing with aggression, raised a series of difficulties. The Definition adopted by the General Assembly and repeated in the article without attribution had not been intended to give rise to individual criminal responsibility. It had been intended to provide political guidance to the Security Council in the exercise of its functions under Chapter VII of the Charter, for application in a political context where foreign-policy considerations played a role in determining whether a finding of aggression was desirable. The article's reference not to individuals who "commit the act" but to individuals "to whom responsibility for acts constituting aggression is attributed" to some extent reflected those facts, but was a fundamentally inappropriate predicate for determining the existence of a criminal offence. The implication that all persons performing some act in furtherance of the aggression would appear to be culpable, even if they were responding to prima facie lawful orders and their conduct was in compliance with the Geneva Conventions, seemed excessive. The saving clauses were a further example of problems arising from the borrowing of the Definition from a completely different context.

12. His delegation's difficulties with the entire exercise were not limited to technical problems with the articles. The fatal flaw was the extent to which the Commission had abandoned precise definitions of offences that were the hallmark of criminal law, and instead was substituting provisions broadly criminalizing conduct which its members considered to be undesirable on policy grounds. Though understandable, such politicization of the topic led his Government to believe that further work was likely to be unproductive.

13. His delegation also believed that, in addition to the problems with the approach taken, there had been a failure to reassess the need for the exercise. Such a need had existed when work on the project had begun in 1947. Substantial progress had been made in the interim in addressing many of the concerns reflected by the Code. Examples were the multilateral conventions expertly defining offences affecting the international community as a whole, the 1949 Geneva Conventions, and in particular the Convention on the Prevention and Punishment of the Crime of Genocide. Given those developments, the need for a Code had diminished. The question should thus be asked whether time spent on the topic at the expense of other topics was time well spent. Insistence on a separate agenda item, in addition to its irrationality, begged those questions instead of answering them.

14. Mr. KOZUBEK (Czechoslovakia) said that the fortieth session of the International Law Commission had seen further advances in the codification and progressive development of rules of international law, with the provisional adoption of six new articles of the draft Code of Crimes against the Peace and Security of Mankind. He hoped that the Commission could fulfil its task in the foreseeable future and submit a completed draft Code that would supplement the system of collective security as set forth in the United Nations Charter. However, some of the provisions adopted would no doubt require more detailed consideration or improvement in the future.

/...

(Mr. Kozubek, Czechoslovakia)

15. Article 4 regulated an issue of extreme significance, in that establishment of an effective system of prosecution was a sine qua non for achieving the purpose for which the Code was being drafted. However, the various possible means of prosecution required careful study. Czechoslovakia had no reservations or objections concerning the inclusion of the question of an international criminal jurisdiction in the mandate of the Commission.

16. His delegation had no comments or objections regarding article 4, paragraph 1. However, it could not fully approve of article 4, paragraph 2. As worded, it amounted to a retreat from the established practice under which perpetrators of crimes against the peace and security of mankind were almost invariably prosecuted and punished in the territory of the State where they had committed their crimes. That principle was enshrined in such international instruments as the Convention on the Prevention and Punishment of the Crime of Genocide. His delegation strongly advocated giving priority to the request for extradition made by the State in whose territory the crime had been committed, and thus favoured amending article 4, paragraph 2, accordingly. That position was prompted by his country's experience of war criminals tried and convicted in absentia in Czechoslovakia who had found refuge in other States.

17. His delegation also felt that article 4 should include a reference to co-operation among States in arranging extradition. As with the Convention on genocide, it should also provide that for purposes of extradition, crimes covered by the Code should not be regarded as political crimes. The Code should prohibit the granting of territorial asylum to persons under serious suspicion of having committed a crime against the peace and security of mankind.

18. Article 7 was in essence acceptable to his delegation. It particularly appreciated the fact that, as requested by many delegations, the Special Rapporteur's original text had been substantially amended. However, regarding paragraph 4 (b) of the article, he wished to know how it was to be determined which State had been the main victim, in cases where more than one State was involved. One possible interpretation was that the matter would be decided by a court of the State that would want to exercise jurisdiction. The Commission should express its position on the matter during the second reading, at least in the commentary.

19. His delegation endorsed articles 8, 10 and 11. Regarding article 12, it agreed with the Commission's decision that there should be a separate article on each individual crime. As to paragraph 4 of article 12, his delegation was unreservedly in favour of the article offering a complete enumeration of acts constituting aggression, and thus felt that the words "in particular" should be deleted. It was inadmissible to allow courts to decide which other acts might constitute the crime of aggression, and individuals should know in advance which acts would make them liable to criminal prosecution.

20. His delegation considered that, in addition to aggression or threats thereof, planning and preparation of aggression should also be punishable. The Charter of the Nürnberg Tribunal had contained provisions to that effect.

/...

(Mr. Kozubek, Czechoslovakia)

21. While not all terrorist acts should be incorporated in the Code, acts of State terrorism should undoubtedly be covered, in view of their gravity.

22. His delegation shared the Special Rapporteur's view that crimes against peace should include those breaches of obligations referred to in paragraphs 4 and 5 of proposed article 11. Yet, his delegation wondered whether every breach of such an obligation constituted a crime against peace. In its view, classification of such breaches of obligations should take account of the gravity of the consequences.

23. His delegation unreservedly supported the inclusion of mercenarism, gross interference in the internal affairs of States, and the breach of the prohibition of colonialism. It believed that annexation should be treated as a separate crime in the draft Code. There had been cases of annexation not directly connected with the use of armed force. In such cases, article 12, paragraph 4 (a), as it stood, might not provide for prosecution of the perpetrators.

24. His delegation deemed the problem of crimes against the peace and security of mankind to be one of the crucial items on the Committee's agenda, and strongly advocated its continued consideration as a separate item. The resolution to be adopted should call upon the Commission to continue to treat the drafting of the Code as a matter of priority in the years to come.

25. Mr. OESTERHELT (Federal Republic of Germany) said that some of the definitions of acts constituting crimes against peace presented by the Special Rapporteur raised fundamental doubts. Breaches of obligations between States designed to promote peace could not simply be recast in the form of criminal offences. In many instances, there did not even exist a specific definition of conduct that merited punishment. There was a danger that some States might attempt to impose their views on others by means of criminal prosecution. It was not realistic to entertain the prospect of individual judges deciding on the conduct of States in political matters which were the object of political contention between States. In view of those unsolved fundamental problems, he felt that many of the specific matters dealt with by the Special Rapporteur and the Commission were premature.

26. Article 4 set out the obligation of a State to try or extradite a person alleged to have committed a crime. Although such obligations were not alien to international practice, it was necessary to question the scope of that provision, which was specific only where competing requests for extradition were concerned. Should a State - without regard to its proximity to the territory where the crime had been committed - be entitled to request extradition or punishment? That question was of particular relevance in the light of doubts that it would be possible to formulate universally acceptable definitions of acts constituting crimes. The reservation in the commentary regarding the future formulation of rules on extradition showed that the Commission itself did not consider the definition of scope to be sufficiently clarified.

(Mr. Oesterhelt, Federal Republic of Germany)

27. With regard to article 7, which embodied the principle of non bis in idem, he said that to date double punishment by courts of different States had not been excluded by general international law, although regional attempts to do so had been made. There was a fundamental connection between the principle of universality and the non bis in idem rule. It seemed that the Commission had tried in article 7 to mitigate the negative consequences of universality in specific areas. That was particularly apparent in paragraph 4, where exceptions to the preclusion of double punishment were made in favour of the State in whose territory the crime was committed and in favour of the State that was the main victim, without there being any direct relationship between the special treatment of those categories, on the one hand, and the intention of avoiding double punishment, on the other. Contrary to the proclaimed principle of universality, the draft quite rightly made a distinction between States which were directly concerned and others which were indirectly affected.

28. Referring to article 8, he said that the wording of paragraph 2 was appropriate and more precise than article 15, paragraph 2, of the International Covenant on Civil and Political Rights, in that it took as its basis the law applicable at the time when the act in question was committed, rather than less specific "general principles". The wording of paragraph 1 might be misinterpreted to mean that the Code could become binding on Member States which had not ratified the Code. In that connection, he said that ratification of a convention containing penal provisions would, under his country's Constitution, require that those provisions should be sufficiently precise to meet the nullum crimen sine lege rule.

29. Article 11 rightly proceeded from the assumption that the official position of a person did not automatically relieve him of criminal responsibility. However, the conclusion in the commentary that an official position could not confer any immunity on the person concerned seemed to go very far if the purpose was to preclude existing rules on the immunity of certain high officials from courts of foreign States. It was inconceivable that judicial authorities could take action against foreign heads of State still in office, on the grounds that they had allegedly committed crimes.

30. With regard to article 12, his delegation thought that it was right to start from the Definition of Aggression contained in General Assembly resolution 3314 (XXIX), but believed that its complete incorporation was not possible. Paragraph 1, which attempted to transform the obligations of States into obligations of undefined categories of individuals, reflected the problem that arose in applying rules governing the conduct of States to the conduct of individuals. It was not without reason that Article 39 of the Charter of the United Nations made it the responsibility of the Security Council to determine the existence of any act of aggression. The armed conflicts of recent decades showed that the question whether an act of aggression had been committed, and by whom, had nearly always been controversial. So long as that question had not been settled with binding effect on the States concerned, the matter could not be left in the hands of any judge in any country. In fact, the question might be asked whether

(Mr. Oesterhelt, Federal Republic of Germany)

any State proceeding to prosecute persons involved would not be interfering in a conflict between other States, in contravention of international law. In any event, there was a danger that States would wrongly use such means in pursuit of their own political aims.

31. With regard to other offences proposed by the Special Rapporteur for inclusion in chapter II, part I, of the draft Code, he thought that it would be a mistake to relegate matters pertaining to the obligations of States to the level of national courts. Where precisely defined fundamental obligations of States existed and there were clear definitions of wrongful acts by individuals, such relegation might be possible, but if the goal was to cover such areas as non-use of force, non-interference and compliance with international treaties, there was a danger of overriding the means of settling disputes envisaged in Article 33 of the Charter. Common sense alone prompted the question whether it was right to refer such problems to national courts.

32. The question might also be asked whether it was the Commission's responsibility to pursue the formulation of fundamental international rights and obligations within the scope of the draft Code. Did the Commission intend to develop new rules on such subjects as "threat of aggression", "preparation of aggression" or the scope of the right of self-determination, within the framework of the draft Code? Could it, as now envisaged, leave aside acts such as annexation which had been unequivocally condemned by the community of nations, and at the same time allow "certain forms of intervention which are acceptable to those concerned"? Was a judge in one State to decide on such questions as the necessity of defence preparations in another State, or on disputes concerning the interpretation of international treaties, matters which to date had been the exclusive domain of the highest international tribunals?

33. The Commission's work would be realistic only if it focused on acts which the overwhelming majority of States recognised as constituting crimes, if the formulations met the standards of the principle of nullum crimen sine lege, and if the prosecution of such crimes was left to an international criminal court.

34. Mr. XU Guangjian (China) said that while the decrease in international tension was encouraging, aggression, the threat of aggression, international terrorism and apartheid continued to undermine international peace and security. Accordingly, the elaboration of the Code should remain a priority for the Commission.

35. With regard to article 11 proposed by the Special Rapporteur, concerning acts constituting crimes against peace, his delegation believed that the effectiveness of the Code would be compromised unless the threat of aggression was included as a separate crime. That was consistent with the principle embodied in Article 2, paragraph 4, of the United Nations Charter. The threat of aggression would take the form of coercion and intimidation, troop concentrations or military manoeuvres near a State's borders, or general or local mobilisation for the purpose of exerting pressure to make the threatened State yield to demands. Very often, the

(Mr. Xu Guangjian, China)

threat of aggression had the same objective as that of aggression itself, and could result in the same serious consequences. Although the modalities employed and the degrees of damage caused could differ, both endangered international peace and security.

36. With regard to annexation, any act by which a State, whether through the threat or through the use of force, annexed, against the wishes of a State, part or all of its territory constituted a crime against peace. Accordingly, annexation should be included in the draft Code as a separate crime. With respect to preparation of aggression, his delegation felt that the fact that the concept was elusive was not a valid argument for not including it in the Code. It was possible to identify various elements of preparation for aggression. Both the Charter of the Nürnburg International Military Tribunal and the Charter of the International Military Tribunal for the Far East contained clear stipulations on preparation of aggression, and the criminal law of many countries provided that preparation for a criminal offence was itself a crime. The inclusion in the draft Code of preparation of aggression as a separate crime would be conducive to the maintenance of international peace and security, would deter potential aggressors and would prevent wars of aggression.

37. On the subject of intervention and terrorism, he said that arbitrary and arrogant interference in the internal or external affairs of a State in disregard of it's independence and sovereignty constituted a violation of international law. The principle of non-intervention had long been a basic norm of international law. However, given the different modalities, motivations, degrees and consequences of intervention, it would be unrealistic to stipulate that all acts of intervention were crimes against peace to be included in the draft Code. Accordingly, only the most serious acts of intervention should be so classified. His delegation preferred the second alternative of article 11, paragraph 3, proposed by the Special Rapporteur.

38. China also favoured the inclusion in the draft Code of acts of international terrorism, which constituted serious forms of intervention. International terrorism was a crime against peace and differed from terrorism as defined in domestic criminal law. Since international terrorism also harmed innocent people, it might also constitute a crime against mankind. The Commission needed to deliberate further on the subject.

39. Colonial domination was by no means entirely a phenomenon of the past. In order to eradicate it thoroughly and prevent the emergence of neo-colonialism, colonial domination should be included in the draft Code as a crime against peace. The two alternatives of article 11, paragraph 6, submitted by the Special Rapporteur should be combined.

40. The draft Code should include mercenarism as a separate crime and differentiate it from aggression carried out by a State. The definition of a mercenary used by the Special Rapporteur was that found in Additional Protocol I to the 1949 Geneva Conventions. Although it reflected the fundamental features of

/...

(Mr. Xu Guangjian, China)

mercenaries, it was not necessarily fully reflective of the international situation and the requirements of the draft Code. The Commission should co-ordinate its work on the subject with the Ad Hoc Committee on mercenaries, in order to formulate a universally acceptable definition.

41. Turning to the draft articles provisionally adopted so far by the Commission, he said that the principle underlying article 4, concerning the obligation to try or extradite, had been widely accepted in international conventions on the punishment of international crimes. The provision that States should assume their international obligation to try or extradite criminals was necessary for the prevention and punishment of crimes against the peace and security of mankind. The fact that domestic criminal courts currently were responsible for the prosecution and punishment of international crimes should in no way preclude in-depth studies on the necessity and feasibility of establishing an international criminal court for the submission of appropriate suggestions on the matter to the General Assembly.

42. As to requests for extradition, his delegation favoured giving priority to the State in whose territory the crime had been committed and to the State which was the principal victim of the crime. Of course, the State in whose territory an individual alleged to have committed the crime was present could take into account various factors when considering requests for extradition. That principle was in conformity with general international practice and thus more likely to win acceptance by the international community.

43. The principle of non bis in idem contained in article 7 should be confirmed. In international law, a State did not have the obligation to recognize a criminal judgement handed down in a foreign State. The criminal laws of some States therefore stipulated that even if an individual had already been tried in a foreign country, he could still be indicted and tried in those States. However, if he had already been punished in a foreign State, he could be exempt from punishment or receive a lighter sentence. Accordingly, the provisions in paragraphs 2 to 5 of the draft article were appropriate, for they ensured that fundamental human rights were guaranteed and that crimes against the peace and security of mankind did not go unpunished.

44. The principle of non-retroactivity contained in article 8 was recognized by many legal systems and should be reflected in the Code. However, since crimes against the peace and security of mankind differed from ordinary crimes, it was important to ensure that perpetrators of the former type of crimes did not escape punishment. His delegation therefore agreed to the exceptions to the principle of non-retroactivity contained in paragraph 2 of the article. The concept of "domestic law applicable in conformity with international law" should be formulated more clearly.

45. His delegation in principle endorsed the content of article 12 on aggression. It agreed that General Assembly resolution 3314 (XXIX) did not fully apply, since the draft Code was not a political document, but rather was intended to be implemented by a judicial body. However, his delegation could not agree that in

(Mr. Xu Guangjian, China)

determining whether aggression existed, the responsible judicial organs should act independently of the Security Council. Under the United Nations Charter, the Council bore the primary responsibility for the maintenance of international peace and security. Since, under Article 25 of the Charter, Member States had the obligation to carry out the decisions of the Security Council regarding the existence or non-existence of aggression, such decisions also should be binding on the domestic courts of Member States. The brackets around paragraph 5 should therefore be deleted. Even though the stipulation contained in paragraph 1 had to be further substantiated, paragraph 5 was definitely necessary because of the obvious fact that an act of aggression could be committed only by a State, while at the present stage only individuals bore international criminal responsibility. The necessary link between the acts of a State and those of an individual was established by paragraph 1.

46. His delegation was satisfied with the progress made by the Commission on the draft Code at its fortieth session and looked forward to further achievements in its future deliberations on the item.

47. Mr. YEPEZ (Venezuela) said his delegation believed that article 11, paragraph 2, as proposed by the Special Rapporteur should include the threat of aggression as a crime against peace. That crime had been included in the draft Code of 1954, and was prohibited by Article 2, paragraph 4, of the United Nations Charter. However, the definition of the threat of aggression should be clarified, and the final text should include many examples to guide judges in reaching decisions. His delegation also favoured the inclusion of annexation as a separate crime in the draft Code. Since annexation could result from the use or threat of force, annexation by whatever means should be viewed as a crime against peace.

48. The question as to whether preparation of aggression should be incorporated as a separate crime against peace was a very complex one. Notwithstanding the fact that there was historical justification for doing so, as indicated in paragraph 224 of the report (A/43/10), it was very difficult to make a clear-cut distinction between preparation of aggression and preparation for defence. Accordingly, preparation for aggression should not be dealt with as a separate crime; rather, it should be covered by the provision on the threat of aggression.

49. With regard to the concept of intervention and terrorism, he said that intervention, although difficult to describe, should be covered by the draft Code as clearly as possible, and bearing in mind the provisions of article 18 of the Bogotá Charter and resolution 78 of the General Assembly of the Organization of American States, summarized in paragraphs 235 and 236 of the Commission's report. His delegation preferred the second alternative proposed by the Special Rapporteur for the definition of intervention, although it, too, should be further refined.

50. Terrorism could constitute a crime against mankind as well as a crime against peace, and terrorism by groups or organizations operating at the international level should be included. The draft Code should be limited to acts of terrorism constituting crimes against the peace and security of mankind, and should not

(Mr. Yepes, Venezuela)

include all acts of terrorism carried out by individuals. Accordingly, the 1937 Convention for the Prevention and Punishment of Terrorism should not serve as the sole basis of the relevant draft article. The presence of an international element was essential for an act to constitute a crime under the draft Code, and that was not always the case under the 1937 Convention. Furthermore, since international terrorism differed from other crimes, it should be dealt with separately in the draft Code.

51. Turning to the question of colonial domination, he said that the two alternatives suggested for paragraph 6 of draft article 11 should be combined in order to cover all possible forms of colonial domination.

52. His delegation was of the opinion that mercenarism should be dealt with in the draft Code as a crime separate from aggression. Although the definition of "mercenary" proposed by the Special Rapporteur on the basis of Additional Protocol I to the 1949 Geneva Conventions was acceptable in general, it should be refined, particularly regarding the meaning and scope of "compensation". His delegation agreed with those who felt that the exact amount of compensation paid or the nationality of the person in question should not be over-emphasized. It also agreed that the Commission, while taking into account the work being done in the Ad Hoc Committee on mercenaries and in the Third Committee, should continue its own work on the subject.

53. Other acts which the Commission should consider including among crimes against peace were the massive expulsion by force of the population of a territory, the forcible transfer of populations, the implanting of settlers in an occupied territory and changing the demographic composition of a foreign territory.

54. With regard to article 4, on the obligation to try or extradite, his delegation felt that the Commission should continue to seek to establish an order of priority for the granting of extradition to States authorized to request it. The principle that the request of the State in whose territory the crime had been committed should be given priority was not entirely satisfactory to his delegation.

55. He shared the doubts of others regarding article 12, paragraph 1, on aggression, which appeared to repeat article 3. It might be desirable to incorporate in article 3 the various elements of article 12, paragraph 1. With respect to the controversy regarding the definition of the concept of aggression and the acts which constituted it, his delegation favoured the theory that the international judicial function in criminal law should be clearly separated from the executive functions of the Security Council, and that, accordingly, the definition adopted in the draft Code did not need to be transferred in toto from General Assembly resolution 3314 (XXIX).

56. However, his delegation definitely was not in favour of retaining the words "in particular" in paragraph 4. They had been included to enable judges to characterize as aggression acts other than those listed in the paragraph. Criminal law should not be subject to conflicting interpretations, and the types of crime

(Mr. Yepez, Venezuela)

should be clearly defined. For that same reason, his delegation could not support the proposal to include paragraph 5, which would subordinate the decisions of national courts to those of the Security Council with respect to the existence or non-existence of aggression.

57. Mr. RAMAKER (Netherlands) said that any criticism his delegation felt obliged to make with regard to the draft Code of Crimes against the Peace and Security of Mankind reflected its conviction that the task of translating rules of conduct of States into penal provisions applicable to individual behaviour might be too ambitious. The Commission had devoted a considerable amount of time and scholarly attention to the topic, and the seriousness of its attempt to arrive at a successful outcome was not in doubt.

58. In its initial phase, the discussion within the Commission had been relatively general and abstract, focusing on problems such as the overall scope of the Code, the kind of offences to be covered, the application of the Code to the activities of States, and preparation of the statute of a competent international criminal court. The absence of clear guidance on those general questions had obliged the Commission to adopt certain assumptions at the outset of its work.

59. So far scarcely any attention had been paid to the question of the final status of the set of articles. Draft article 4, which required States either to try or to extradite individuals present in their territory who had allegedly committed a crime against the peace and security of mankind, evidently required implementation at the national level. That requirement obviously implied that the draft Code would have to take the format of conventional obligations. Article 8, paragraph 1, by expressly referring to the "entry into force" of the draft Code, pointed in the same direction. If implementation of the draft articles at least partially depended on the principle of universal jurisdiction, it would be incorrect to say that internal competence was relevant only in relation to such issues as criminal procedure and the extent of the penalty, and not in relation to the characterization of the crime. On the other hand, if a State was to exercise jurisdiction as contemplated under draft article 4, it was on the assumption that the act was a criminal offence under its own laws. If an act or omission was not punishable under its own laws, the State (in almost all penal systems) was unable to exercise either form of jurisdiction, with the result that, for the purposes of implementing the draft articles, States would have to accept a future code of crimes as binding and establish jurisdiction accordingly.

60. In its earlier consideration of the Code, the Commission had established two criteria, namely that the Code would contain only the most serious international offences, and that the characterization of the offences would be precise. His delegation's reservations related to the latter criterion. While it might be true that efforts to define aggression had borne fruit, it was an altogether different matter to render that definition compatible with a criminal-law approach, at least at the national level.

(Mr. Ramaker, Netherlands)

61. The records of the Sixth Committee's discussions on the Definition of Aggression confirmed that the Definition was to be regarded as a reference text at the disposal of the Security Council. As such it was intended for discretionary use, and thus could play an important role. However, Security Council practice had made it clear that the search for culpability was less important than the search for a lasting solution to a given conflict. In other words, the Council might not wish to categorize one of the belligerents as being the aggressor. If the Council was unwilling or unable to reach a decision as to which party was the aggressor, the existence of prima facie evidence of an act of aggression under the terms of the Definition of Aggression was not sufficient to permit the conclusion that an act of aggression had taken place. Article 39 of the Charter of the United Nations made it abundantly clear that an act of aggression must be explicitly determined to exist by a positive pronouncement of the Security Council.

62. That being the case, the Definition of Aggression, which served a primarily political purpose, could not simply be translated into a definition of an offence for the purposes of penal law. In the former role, the Definition should and did admit of a political input, whereas in the latter role it should be more precise. Instead of making a determination by the Security Council a pre-condition for applying the provision, the Commission had in fact diminished the role of the Council, thus allowing considerable discretion to national judges. There was a major difference between the Definition of Aggression and in paragraph 4 of draft article 12. The acts enumerated in paragraph 4 no longer qualified as acts of aggression subject to the proviso that it was the Security Council that had to weigh the prima facie evidence against other relevant circumstances; instead, they constituted acts of aggression, due regard being paid to the role to be played by the Security Council.

63. The result of that change would be that an individual might be tried before a national court for participation in an act of aggression, whereas the State on whose behalf those acts were committed went unpunished. His Government doubted whether such a result would meet any standard of justice. If the prosecution of an individual before a national court for participation in acts of aggression was only acceptable, as his Government believed it was, on the basis of a prior determination by the Security Council that an act of aggression by the State concerned had taken place, the entire article should state no more than that. Paragraphs 2, 3, 4, 6 and 7 were not only redundant, but misleading as to the proper role of national courts. Paragraph 5, in square brackets, attempted in an incomplete fashion to state the pre-condition of a determination by the Security Council, but it should be rephrased to affirm that the existence of an act of aggression, in any proceeding before a national court, could be assumed only on the determination of the Security Council.

64. A serious rethinking of the topic was called for in the light of the arguments and considerations his delegation had put forward.

65. Mr. SUESS (German Democratic Republic) said that there were clear indications of positive changes in the international situation. However, further joint efforts were required in order to ensure effective protection of such basic rights as the right to peace, the right to life and the right to comprehensive security. Top priority should therefore be given to the preparation of the draft Code of Crimes against the Peace and Security of Mankind, which should provide for individual criminal responsibility under international law in respect of the most serious international crimes.

66. Exactly 50 years earlier, on 9 November 1938, the German Fascists had staged Kristallnacht, which had heralded the extermination of millions of European Jews. The anniversary of that event should be an occasion for remembering the victims of the most brutal genocide in history. Care must be taken to prevent such crimes from being perpetrated ever again. The German Democratic Republic had recently reaffirmed that it was fulfilling the legacy of all those who had fought against fascism, militarism and war. At a commemorative meeting held on 8 November 1988, the supreme elected body of the German Democratic Republic had recalled the ordeal of people of the Jewish faith resulting from the Nazi pogrom of 1938.

67. An effective set of international legal instruments was needed in order to ensure that a crime of such immeasurable cruelty did not recur. The German Democratic Republic therefore welcomed the progress made by the Commission in the preparation of the draft Code. However, the work on the Code must be accelerated.

68. With regard to the draft articles on crimes against peace, which had been submitted in the Special Rapporteur's sixth report (A/CN.4/411), the German Democratic Republic endorsed the inclusion in the category in question of the acts proposed in article 11. However, it was essential also to include the preparation and planning of a war of aggression. Individual responsibility for that crime under international law was already an integral part of the Nürnberg Principles. It was now more imperative than ever to define the planning and preparation of a war of aggression as a crime, and to establish individual criminal responsibility for it. All individuals who had the means, including economic means, to plan and prepare aggression must be aware that such acts constituted crimes against peace. It was irrelevant whether the act of planning and preparing a war of aggression was included in the draft Code separately or under the heading of "aggression", which would cover all related acts, including warmongering and war propaganda. The draft articles submitted so far by the Special Rapporteur on crimes against peace did not clearly establish individual criminal responsibility. Article 12 represented an improvement in that regard, but paragraph 1 of that article should be reworded in order to obviate the need to declare every individual involved in an act of aggression, including ordinary soldiers, guilty of a crime against peace. It was important to identify clearly the circle of individuals who, owing to their political, military or economic powers, had the means to perpetrate acts connected with the planning, preparation and conduct of a war of aggression, and who should be held responsible for the crimes in question.

(Mr. Suess, German Democratic Republic)

69. Any determination as to the existence of acts of aggression other than those referred to in article 12, paragraph 4, was within the competence of the Security Council alone. The bracketed words "in particular" should be deleted from that paragraph. Paragraph 5 of the same article reflected existing law and the brackets surrounding it should be deleted. The provision laid down in paragraph 5 meant that when the Security Council made a determination as to the existence of an act of aggression, no national court might determine otherwise. A national court could not rule that an individual was involved in an act of aggression once the Council had decided that there was no act of aggression. However, should the Council determine that such an act existed, the national court was not limited in assessing individual involvement. The draft Code must be viewed as an essential element of the collective system of international security, which was why the reference to the Council in provisionally adopted article 12 was necessary.

70. He had a few remarks to make on the other proposed crimes against peace. As to interference by the authorities of a State in the internal or external affairs of another State, since it considered drawing a distinction between lawful and wrongful intervention unacceptable, the German Democratic Republic was in favour of the second alternative proposed for article 11, paragraph 3. Only the most serious forms of interference - those constituting a direct attack on the sovereignty or stability of a State - should be included in the draft Code. The definition of interference should take account of the relevant formulation in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. International terrorism in the form of terrorism organized or supported by a State was already covered by the Declaration. Only State-supported international terrorism involving massive interference in the affairs of another State should be included in the draft Code as a crime against peace. It would be premature to define terrorist acts, since no universally accepted definition of international terrorism had been agreed upon so far. However, that did not mean that in the commentary on the characterization of intervention no reference could be made to existing international conventions on co-operation in combating international terrorism.

71. The German Democratic Republic supported the inclusion of the breach of obligations in respect of disarmament and the limitation of armaments in paragraphs 4 and 5 of proposed article 11. The provisions on the crimes in question must be drafted in such a way as to establish the criminal responsibility of individuals. Moreover, it would seem to be appropriate for the elements of paragraphs 4 and 5 to be merged. The German Democratic Republic also wished to reaffirm, in that context, that the issue of the first use of nuclear weapons must not be omitted in the course of further work on the draft Code. Where article 11, paragraph 6, was concerned, the term "colonial domination", as proposed in the first alternative put forward for that paragraph, should be retained. Furthermore, the two alternatives should be merged.

72. Mercenarism should be characterized as a separate crime. The members of the international community must reach agreement on individual responsibility for the recruitment, use, financing and training of mercenaries, and due attention should be paid in that connection to the work of the Ad Hoc Committee on mercenaries.

(Mr. Suess, German Democratic Republic)

73. It should be possible to complete, in the near future, the preparation of a list of international crimes, which was a prerequisite for successful completion of the whole codification project.

74. Turning to other draft articles provisionally adopted at the Commission's fortieth session, he said that jurisdiction in respect of crimes against the peace and security of mankind, dealt with in article 4, must be based on the principle of universal jurisdiction. The German Democratic Republic therefore endorsed the provisions now contained in that article. Although those provisions did not prejudge the possibility of establishing an international criminal court in the future, it was unrealistic to demand that such a court should have exclusive jurisdiction. The establishment of different enforcement mechanisms for the draft Code should be examined carefully. Such an examination should cover all the legal and practical problems that different variants of an international criminal jurisdiction would entail. That process should, however, not be made a pre-condition for continuing codification work or be allowed to hamper further work on the draft Code, namely, on the material criminal law to be applied.

75. The adoption of article 7 on the non bis in idem rule was quite remarkable. For the first time, the prohibition of double criminal prosecution would be laid down in terms of international law, and the non bis in idem principle would be extended to the recognition of criminal sentences handed down in foreign States, to the extent that that was currently possible. The exceptions formulated in article 7, paragraphs 3 and 4, were necessary. Furthermore, the German Democratic Republic endorsed draft articles 8, 10 and 11, as proposed by the Special Rapporteur.

76. The question of the draft Code must remain a separate item on the Assembly's agenda, and a relevant resolution should be adopted in order to provide the Commission with a specific mandate for continuing its important work on that subject.

77. Mr. AL-ATTAR (Syrian Arab Republic) said that his delegation attached major importance to the drafting of a code of crimes against the peace and security of mankind. It welcomed the progress achieved by the Special Rapporteur in his sixth report, as well as the subsequent consideration of the topic by the Commission and the recognition, in draft article 12, that aggression constituted an extremely serious crime. At a time when Israel and South Africa were consistently guilty of aggression against neighbouring States and of continued occupation of those States' territories, his delegation believed that a separate article should be devoted to annexation. With regard to intervention, it favoured the second alternative version of article 11, paragraph 3. While endorsing the Special Rapporteur's approach to terrorist activities, it believed that a further article was required to distinguish between such activities and the legitimate struggle of peoples for freedom and independence. Such an article should also note that State terrorism constituted a crime against the peace and security of mankind. Mercenarism also required separate treatment, as did the forcible collective expulsion from their land of persons living under occupation, and the transfer by the occupying Power of some members of its civilian population to the territories which it occupied, for the purpose of changing the demographic composition of such territories.

/...

(Mr. Al-Attar, Syrian Arab Republic)

78. Other crimes which should be specified in the draft Code included apartheid, genocide and the use of weapons of mass destruction. It was also necessary to include an article obliging States to amend their national legislation in order properly to prosecute those guilty of crimes covered by the draft Code. His delegation was pleased to note that the Code neither provided for statutory limitations nor allowed for relief from criminal responsibility by reason of an official position.

79. The draft Code would not be complete or effective unless it recognised State responsibility as well as the responsibility of individuals, despite the fact that State responsibility was the subject of a separate discussion by the Commission. It was also essential, in order for the Code to be effective, that there should be a competent international criminal jurisdiction for individuals who perpetrated such crimes. Again, while the prosecution of individuals currently deserved priority, State responsibility must be addressed as the Code was further elaborated.

80. Mr. LOULICHKI (Morocco), referring to chapter IV of the report of the Commission on the work of its fortieth session (A/43/10), said that in order to define the expression "crime against the peace and security of mankind", the Special Rapporteur had proposed retaining the Definition of Aggression adopted by the General Assembly in 1974 and, possibly, including new manifestations of the unlawful use of force. In his delegation's opinion, the draft Code should not reproduce the 1974 Definition in toto, but should take from it some of the acts constituting aggression. Nor was it necessary to link the characterization of an act as constituting aggression with the prior determination of aggression by the Security Council. It went without saying that when the Council recognized the existence of aggression in a given situation, the national judge and a fortiori the international judge were bound by that determination. On the other hand, where the Council refrained, for political reasons, from giving a clear opinion concerning an act which had all the characteristics of aggression, that should not prevent the judge from ruling on the facts. Moreover, given the non-exhaustive nature of the 1974 Definition, the retention of the words "in particular" left open the possibility for national courts, or the international body to be established, to regard as aggression acts other than those listed in General Assembly resolution 3314 (XXIX).

81. Acts such as mercenarism and terrorism were forms of aggression or intervention. Where they involved violations of the territorial integrity of a State or were aimed at overthrowing a constitutional Government, they were linked through their serious nature with the concept of aggression.

82. His delegation considered that the threat of aggression was not of itself a crime against peace and was punishable only when initial steps were taken to carry it out, thereby reflecting criminal intent.

(Mr. Loulichki, Morocco)

83. With regard to intervention in the internal and external affairs of States, a concept that embraced several principles, such as non-use of force and respect for the right to self-determination, the main problem was to determine the line of demarcation between acts of influence permitted in relations between States and acts of interference which had consequences affecting the sovereignty of a State. Therefore, the second alternative of article 11, paragraph 3, proposed by the Special Rapporteur seemed to offer better prospects for the definition of intervention as a crime against the peace and security of mankind.

84. As to treaties designed to ensure international peace and security, only serious consequences of a breach constituted a crime, not a breach per se.

85. The time had come for the Commission to decide on the implementation of the Code, either by national courts or by an international court. That choice would simplify the discussions in the Commission on several articles, particularly those concerned with the obligation to try or to extradite, and the non bis in idem rule. In that connection, his delegation supported the precise wording of draft article 7, which should help to prevent an offender from being subjected to a penalty which did not correspond to the gravity of the acts.

86. Mr. VOICU (Romania), after reviewing the historical background to the draft Code, reiterated his delegation's opinion that in the elaboration of the Code, the Commission should define the responsibility of States and individuals and draw up a comprehensive list of crimes against the peace and security of mankind. The Code should include a general definition of the concept of crime against the peace and security of mankind, which would contain essential identification criteria such as the international wrongfulness of the act and the fact that it harmed the fundamental interests of the international community.

87. In his delegation's opinion, the list of crimes should cover internationally wrongful acts such as planning, preparing and waging a war of aggression, forcible establishment or maintenance of colonial domination, genocide, apartheid and violations of the rules of war. The Code should also characterize the following as crimes: conspiracy to commit crimes against the peace and security of mankind; direct incitement to commit such crimes; and complicity.

88. While it was true that the item had been on the agenda for quite some time and its importance had been stressed by many delegations, he wished to reiterate that the existence of such a Code would have a positive effect by discouraging individuals and certain political régimes from practising apartheid or genocide, or committing other crimes against the peace and security of mankind. Furthermore, the Code would encourage States to act on the basis of the principles which should govern their relations.

(Mr. Voicu, Romania)

89. With regard to the draft articles provisionally adopted so far by the Commission (para. 279 of the report) (A/43/10), Romania believed that the Commission had been right to recommend to the General Assembly that, in the English title of the topic, the word "offences" should be replaced by the word "crimes". The square brackets should be removed from article 1, since the words "under international law" should be included in the text. Romania endorsed the wording of article 2, whose second sentence should be retained. In connection with article 5, which was entirely satisfactory, he wished to draw attention to the fact that Romania was a party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and that the Romanian Criminal Code provided that statutory limitations should not be applicable to crimes against the peace and security of mankind. In article 6, the word "minimum" and the phrase "with regard to the law and the facts" should be deleted from the chapeau.

90. With regard to article 9, Romania believed that, bearing in mind Article 51 of the Charter of the United Nations, self-defence should be included as a condition precluding criminal responsibility. Romania also believed that the draft Code should deal with complicity in the context of general principles. In its future work on the subject, the Commission should use the term "complicity" in its broad sense under international law. Moreover, all elements of the issue must be dealt with in the draft Code with the greatest care. Where "attempt" was concerned, the Commission should choose from among the various solutions offered by domestic law, and develop an appropriate criterion. In any event, the draft Code must not fail to include attempt. With respect to the threat of aggression, Romania considered that it should be dealt with as a separate crime. In that connection, the Romanian Minister for Foreign Affairs prior to the Second World War had noted that if war was to be eliminated as a social phenomenon, it must first be eliminated as a legal institution, and that aggression existed only where there was certainty of impunity. Since those views remained valid today, Romania was in favour of continuing consideration of the topic of the draft Code as a separate item on the Assembly's agenda.

91. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) welcomed the progress made by the Commission on the draft Code. The urgency of the topic was highlighted by developments in the current year, which indicated that important steps had been taken towards reducing the threat of nuclear war and establishing a comprehensive system of international peace and security. The draft Code had an important role to play in both the punishment and the prevention of crimes against peace and security.

92. Although most of the progress made at the fortieth session of the Commission had been in connection with the articles of the introductory part of the draft Code, which were important for the understanding, interpretation and implementation of the Code as a whole, the Commission's report (A/43/10) revealed that substantive differences of viewpoint had arisen in the course of the discussions on matters relating to jurisdiction.

(Mr. Makaravich, Ukrainian SSR)

93. His delegation did not wish to prejudge the issue of establishing an international criminal court, but it wished to emphasize that other approaches should not be neglected, for example the idea of setting up, with the agreement of States, special criminal courts to hear specific cases. It should be noted that there was provision for such courts in the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid.

94. The Commission had been correct in its approach to the question of extradition. It would scarcely be appropriate to leave it entirely to the discretion of the country in which the offender was present to take a decision on extradition. For the time being, his delegation approved the flexible provision in paragraph 2 of draft article 4, which stated that, if extradition was requested by several States, special consideration should be given to the request of the State in whose territory the crime had been committed.

95. The Commission's approach in drafting article 7 was also to be welcomed, in that it had been determined that the Code should contain a provision to the effect that, in those cases where an act for which an individual had been tried as for an ordinary crime and in which subsequent evidence indicated that the act could be characterized as a crime against the peace and security of mankind, the individual concerned could be prosecuted again. There could also be no objection to the proposal that responsibility for trial and punishment could be transferred to the State which was a victim of the crime, if the judgement against the individual who had committed the crime had been handed down by a foreign court.

96. In all its deliberations on the draft Code, the Commission should be consistently guided by the mandate conferred on it by the General Assembly, which was to consolidate all the valuable elements introduced into international law by the Charter of the Nürnberg Tribunal, while taking into account the new circumstances and demands of the nuclear and space age, the current level of development of international law, and the sense of justice of the international community. When enumerating the crimes against peace to be covered by the draft Code, the Special Rapporteur in his sixth report (A/CN.4/411) had correctly taken as his starting-point the 1954 draft Code. It was clear that the Commission should be guided in its future deliberations by the General Assembly's 1974 Definition of Aggression, while taking into account acts of aggression defined as such by the Security Council.

97. In the course of the discussion in the Commission on article 12, the question had arisen as to the applicability to individuals of the Definition of Aggression, but it was unlikely that the issue would give rise to serious difficulties. Specific elements characterized by the 1974 Definition as pertaining to aggression must be evident prima facie in the actions of any individual or individuals, if such actions were to be regarded as pertaining to aggression.

/...

(Mr. Makarevich, Ukrainian SSR)

98. Planning and preparation of aggression should be included in the draft Code as a separate crime, although it was not always easy to differentiate between aggressive and defensive preparations. None the less, the inclusion of an appropriate provision was necessary if the draft Code was to achieve its intended effect. The criteria for distinguishing between preparations for aggression and planning for defence did exist: acts constituting planned aggression would, for example, include the categorical refusal to settle disputes by peaceful means, warlike propaganda, military stockpiling in excess of defensive needs, and the planning of offensive operations.

99. A breach of the obligations of a treaty designed to ensure international peace and security should also be counted as a crime against peace.

100. There must be a clear-cut formulation of those articles which enumerated crimes against peace. There must be a sufficiently clear definition of each component of each crime in order to avoid confusion with acts relating, for example, to the struggle for national liberation.

101. The provision in paragraph 5 of article 12, to the effect that any determination by the Security Council as to the existence of an act of aggression was binding on national courts, should remain in the draft Code. The Code must not be used as a pretext for releasing either an international criminal court - should such a court come into being - or national courts from the obligation to be guided by the decisions of the Security Council.

102. His delegation hoped that the Commission would carry out its task as expeditiously as possible, and that the resulting Code would be adopted by all States in the interests of strengthening the international legal order and ensuring universal peace and security. For that reason, his delegation felt that the topic should remain as a separate item on the Sixth Committee's agenda.

The meeting rose at 1.05 p.m.