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Chairman: Mr. ALI (Democratic Yemen)

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The meeting was called to order at 3.05 p.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. HAMID (Pakistan), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that in 1947, when the General Assembly, in its resolution 177 (II), had requested the International Law Commission to formulate a draft Code of Offenses against the Peace and Security of Mankind, it had been motivated by the determination of the Allied Powers to save succeeding generations from the scourge of war. The hope that had led to the holding of the Nuremberg trials had been dashed by subsequent events, and the international community must therefore re-examine its approach to those problems and identify the reasons why it had not achieved its goals.

2. With regard to the definition of a crime against the peace and security of mankind, his delegation understood that, in order to qualify as such a crime, an act must, on the one hand, be very serious and include a mass element and, on the other hand, have a certain motive. It believed that on the question of definition, it was desirable to concentrate on legally definable crimes; prudence demanded that controversial areas or those which gave rise to abuse should be avoided. In that regard, the Commission had included the threat of aggression in the list of crimes against the peace and security of mankind. That concept had undergone a radical change since it had been included in article II, paragraph 2, of the 1954 Code. Subsequent State practice and the experience of the United Nations itself indicated that the inclusion of the threat of aggression in the Code would be counterproductive. If the threat of aggression was included, that would automatically give rise to the exercise of the right of self-defence, with the catastrophic results that could be easily imagined. Besides, that right would not remain a right of self-defence, which was subject to certain limitations imposed by Article 51 of the Charter, but would become a right of self-preservation. It was therefore essential that the Commission should examine the question carefully.

3. Another provision which required some caution was that concerning the violation of a treaty designed to ensure international peace and security. Like many other principles included in the 1954 Code, the violation of a treaty designed to ensure international peace and security had been included in the Code at a time when the objective of the elimination of war had been an emotionally charged one. While that objective remained, of course, it was nevertheless necessary at the current stage to guard against any abuse of the concept. In the current circumstances, one could hardly see any objective criterion which could define that principle clearly and prevent it from being used by a powerful country to intervene, and even use force, in a weaker neighbouring country. Consequently, caution must be exercised when taking any decision on the inclusion of that crime in the Code.

(Mr. Hamid, Pakistan)

4. Among the acts being contemplated for inclusion, another presented even greater dangers of abuse, namely the preparation of aggression. His delegation believed that it should be deleted from the list of acts constituting crimes for the reasons stated by the Special Rapporteur in paragraphs 224 of the Commission's report.

5. The preceding remarks should not give the impression that Pakistan did not attach great importance to the subject. It intended merely to emphasise that an unusual political will must be manifested so that the Code could be adopted and successfully implemented. When the Commission took up the topic, its members must therefore keep in view the parameters set by its title. Any attempt to include in the Code predominantly political concepts, on which the interests of States conflicted radically or which impinged on the exercise of their sovereignty, would render the adoption of the Code difficult and, even if it were adoped, would fail to generate universal acceptance of it through ratifications and accessions.

6. Certain acts, on the other hand, were by their very nature criminal and should be punished in the Code. Such was the case, for example, with terrorism and mercenarism. Although they might be classified as different categories, their objective was the same: to spread terror, destroy property and kill innocent victims in order to destabilize Governments. Interference in the internal or external affairs of another State and colonial domination should also be included in the Code, and so should mass expulsion by force of the population of a territory, for the reasons set forth in paragraph 275 of the Commission's report.

7. The topic of the law of the non-navigational uses of international watercourses was of direct interest to Pakistan, a largely agricultural developing country, which was dependent on irrigation and in which rivers played an important role.

8. In any region where a river traversed the territories of several States, the riparian States downstream were always at a disadvantage in relation to the riparian States upstream, and the Commission should therefore consider ways and means of safeguarding their legitimate interests with respect to the use of the waters. Some delegations had stated that the modalities for that protection must be worked out in a treaty between the watercourse States, but experience had shown that the time between the beginning of negotiations and the signing of treaties was so long that excessive, if not irreparable, damage could occur during the interim period. His delegation therefore welcomed the retention of the principle of equitable use, including equitable sharing of the waters, during that interim period.

9. A State was at liberty to use the part of the river situated within its territory in a manner most beneficial to its interests, provided that the rights of other watercourse States were not jeopardized. Dumping of pollutants in the watercourse which made the water unfit for human consumption or for irrigation resulted in harm to other watercourse States for which the polluter must pay. Pakistan therefore favoured the strict liability principle because any limitation

(Mr. Hamid, Pakistan)

of liability and the obligation to make reparation would give rise to controversies and weaken the concept. Every State should be informed of the activities carried out in its territory, particularly on a scale that was likely to pollute the rivers, and if it allowed such activities to continue it must be held responsible for the consequences and compensate the affected State. Pakistan was also in favour of co-operation between the States concerned in order to reduce to the minimum the chances of transboundary harm.

10. Pakistan would like to see the Commission's report distributed to States, preferably at Headquarters, before the annual session of the General Assembly. The Commission dealt with various topics, some of which were extremely important to States, and the latter must have the necessary time to examine the report and formulate their position, sometimes through consultations between various ministries. In the current circumstances, his delegation had received the Commission's report only a few days before the opening of the debate on the report in the Sixth Committee and his remarks were therefore of a preliminary nature.

11. In conclusion, he believed that co-operation between the Commission and other legal bodies engaged in similar work - such as the Asian-African Legal Consultative Committee - would be extremely useful, as it would promote a better understanding of the topics discussed in the Commission.

12. Ms. HIGGIE (New Zealand) said that while at its creation 40 years before the International Law Commission had been destined to play a central role in the development of public international law, that body had in recent years been criticized for failing to play that role and for having devoted itself to subjects which were overly theoretical, unnecessary and of little practical value. As the representative of Sierra Leone had recently noted, the Commission had even been accused of having overseen the bureaucratization of international law. It was true that a good many years had passed since the Commission's last acknowledged successes. Those successes had involved work in areas of major importance in which the common interest of States in having an agreed régime had evidently outweighed any potentially conflicting national interests. That was not the case with many of the topics which had been on the Commission's agenda since then. Thus, it could be concluded that the Commission could only assume the role which had been envisaged for it in the development of public international law when it was dealing with a subject of central and direct concern to the majority of States.

13. The topic of international liability for injurious consequences arising out of acts not prohibited by international law presented the Commission with an opportunity to play a central role and to help shape the response of the international community in an area - preservation of the environment - of fundamental importance to all. Even if in the short-term the problem was perceived differently by victim States and source States, in the long run everyone would benefit from the outcome of the work and, therefore, all States should be resolved to establish a régime in that area, since no State was safe from transboundary injury.

(Ms. Higgie, New Zealand)

14. The principles underlying the rules in that area had long been identified, in particular by the first Special Rapporteur on the topic, who had stated in his third report that every State needed to feel that the law assured it large areas of liberty and initiative in its own territory, and more controlled areas of liberty and initiative in international sea and air space, but that every State also needed to feel that the law did not leave it at the mercy of developments beyond its own borders. Subsequently, the second Special Rapporteur had elaborated certain general principles, repeated in paragraph 20 of the Commission's most recent report (A/43/410). Those principles must continue to govern the Commission's work in the area.

15. The Commission had invited the comments of Governments on the role that risk and harm should play in the topic under consideration. If reference was made, as it was in the current draft article 1, to the existence of risk or to the foreseeability of harm, that would necessarily exclude from the scope of the draft articles any harm, however great, resulting from an activity not originally considered as risky. In the opinion of her delegation, such an approach would narrow excessively the scope of the draft articles; the absence of risk should not completely prohibit the application of the articles in a particular instance.

16. A more constructive approach to establishing the appropriate balance would be to widen the provisions relating to scope to cover all cases of transboundary harm but, as had been suggested by other delegations, to make risk the criterion for evaluating preventive measures. Account could be taken of the existence of varying degrees of risk, or even of the total absence of risk, in the assessment of reparations. For example, it might be appropriate, under the procedural articles of the convention, to provide for different standards of liability or for a different burden of proof depending on whether harm had resulted from a high-risk activity or from a low-risk or no-risk activity. In that connection, the representative of Brazil had said that the rules of reparation should be flexible and should not set a strict obligation of reparation for all harm in all circumstances.

17. Consequently, her delegation did not agree with the scope of article 1, based on the concept of risk. Nevertheless, it welcomed the Special Rapporteur's decision not to provide a specific list of dangerous activities to be covered by the draft articles. For the reasons listed by the Special Rapporteur, it was preferable to elaborate a draft convention of a general nature. In addition, her delegation supported the view of the Special Rapporteur, as set forth in paragraph 37 of the Commission's report, that activities causing pollution were within the scope of the topic. The Special Rapporteur should proceed on the assumption that all acts of pollution were to be covered, without prejudice to the question of whether such activities might independently be proscribed. It also strongly supported the Special Rapporteur's intention, referred to in paragraph 55 of the report, to reintroduce a reference to physical consequences in draft article 1.

(Ms. Higgie, New Zealand)

18. The topic of international liability presented the Commission with a choice: it could either assume the role originally envisaged for it or it could further reinforce the perception that it was solely preoccupied with the red tape of international law. Her Government hoped that the Commission would rise to the challenge and accord priority to the drafting of an effective, broad and comprehensive framework to help protect the environment. There was good reason to believe that a generally acceptable outcome on that topic would be possible.

19. With respect to the law of the non-navigational uses of international watercourses, her delegation continued to support the Commission's efforts to complete work on that topic in the shortest time possible and it had, in the past, indicated its satisfaction with the general approach adopted by the Commission. That body, in paragraph 191 of its report, had invited the views of Governments on two fundamental issues which called for a response.

20. With regard to the first issue, she noted that in paragraph 171 of its report, the Commission stated that all the members who had addressed that matter had expressed support for the inclusion of a general obligation to protect the international watercourse environment and the marine environment from pollution. Her delegation also supported the drafting of provisions relating to pollution and the protection of the environment which dealt with that subject in a coherent and comprehensive manner. With respect to the second issue on which the Commission had invited the views of Governments, her delegation was, on whole, satisfied with the concept of "appreciable harm". Nevertheless, it noted that, as indicated in paragraph 155 of the report, there was a need for consistency in the usage of that term both among the various articles of the draft and in the language used for other topics, such as international liability.

21. With respect to the draft Code of Crimes against the Peace and Security of Mankind, the Commission, at its 1988 session, had provisionally adopted six draft articles, five of which (draft articles 4, 7, 8, 10 and 11) were included in the draft Code under the heading "General Principles". Noting that in paragraph (1) of its commentary to draft article 4 the Commission had listed the mechanisms to ensure the effective punishment of the crimes included in the draft Code and that in article 4, paragraph 1, the Commission had chosen the concept of universal jurisdiction - and therefore enforcement through national courts - her delegation wished to reiterate its view that the preparation of the statute for a competent international criminal jurisdiction for individuals definitely fell within the Commission's mandate. While acknowledging that the mechanism referred to in article 4, paragraph 1, might very well be the one finally adopted, her delegation would prefer to give jurisdiction to an international criminal court. Although that preference might not have appeared very realistic in the past, the prospects for the establishment of such a jurisdiction were, as had been noted recently by the Canadian delegation, better in 1988 than they had been for a long while.

22. Several delegations had outlined the difficulties they had with the current text of draft article 7. The exceptions to the non bis in idem rule identified in paragraphs 3 and 4 of article 7 were predicated on the assumption that it would be left to national courts to enforce the Code. If there was to be an international

(Ms. Higgie, New Zealand)

criminal court, paragraph 1 of article 7 would of course be sufficient. As matters stood, and for the reasons outlined, including those put forward by the delegations of Ireland and Australia, New Zealand believed that the exceptions enunciated in paragraphs 3 and 4 must be narrowed in order to ensure a proper application of the "double jeopardy" rule.

23. Draft articles 8, 10 and 11 were broadly acceptable to her delegation. With regard to the definition to be included in article 12, entitled "Aggression", she was tempted to ask why the General Assembly had spent so much time defining aggression if its definition was not to be used in the draft. Accordingly, her delegation would support a definition based exclusively on the Definition of Aggression adopted by the General Assembly in 1974. It would wish to see, therefore, the deletion of the words "in particular" currently in square brackets in paragraph 4 of article 12 and the retention of paragraph 5 of that article. Since decisions under Chapter VII of the Charter were binding on Member States, they ought equally to be binding on national courts. It would be rather unfortunate if a national court was in effect permitted to dispute a finding by the Security Council as to whether or not an act of aggression had occurred.

24. Regarding the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, her Government did not support the extension of any privileges or immunities which were not required, in accordance with existing international law, on the basis of functional necessity. It could not, therefore, support the text of those articles which, as currently drafted, conferred personal inviolability on diplomatic couriers and privileges and immunities beyond those currently accorded them by international law. Some of the draft articles, for instance article 17 on the inviolability of temporary accommodation, were particularly difficult to justify in terms of functional necessity.

25. In the view of many delegations, the key provision in the set of draft articles was article 28. New Zealand's detailed views on the text of that article had been forwarded to the Secretary-General (A/CN.4/409). It was her Government's view that, under current international law, diplomatic bags could not be subjected to electronic screening. That position was consistent with the practice followed by New Zealand and with its refusal to permit foreign Governments to screen its diplomatic bags, and was based on its acknowledgement that electronic screening could, in certain circumstances, result in a violation of the confidentiality of the documents contained in a diplomatic bag. However, in order to balance the competing interests of sending and receiving States, her delegation believed that it should be made clear that the right to request the return of a bag to its place of origin should relate to both diplomatic and consular bags. It must also be made clear, however, that the right of challenge - for both transit and receiving States - existed only in "exceptional circumstances" and when there were "serious reasons" to believe that a bag contained something other than official correspondence, documents or articles intended for official use. Accordingly, and for the reasons indicated in paragraph 446, her Government's position on article 28 was broadly reflected in alternative C as formulated in paragraph 440.

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26. Lastly, it was evident from chapter VIII of the report that the International Law Commission had continued its very useful review of its procedures and working methods. The Sixth Committee had displayed similar efficiency and attention to matters of organisation and efforts to reinvigorate the annual debate on the Commission's report appeared to have been unusually successful partly owing, no doubt, to the tireless efforts of the representative of Austria, Mr. Tuerk, Chairman of the Ad Hoc Working Group.

27. Mr. ACHITSAIKHAN (Mongolia) said that the world was currently witnessing a new attitude favourable to the solution of problems affecting international peace and security. The first steps had been taken towards strengthening the role of the United Nations in the maintenance of peace and the peaceful settlement of disputes, and towards ensuring the genuine pre-eminence of international law. Those developments created a very propitious atmosphere for the work of the International Law Commission, in particular its work on the draft Code of Crimes against the Peace and Security of Mankind.

28. His delegation believed that the adoption of the Code would help to endow the international community with an instrument that would strengthen peace and security and might lend new impetus to the implementstion of the Declaration on the Right of Peoples to Peace adopted by the General Assembly in 1984, for, as the Declaration said, the implementation of that right constituted a fundamental obligation of each State. The drafting of the Code should be one of the priority tasks of the United Nations and the International Law Commission in the field of the codification and progressive development of international law. Although the Special Rapporteur and the Commission had already done significant work on the topic, important questions remained pending.

29. His delegation believed, for instance, that the definition of aggression given in the Code would be incomplete without provisions on the planning and preparation of aggression. It must be possible to bring those guilty of such acts to justice. There could, in fact, be no confusion between the preparation and planning of an act of aggression on the one hand and normal defence measures on the other. Making the preparation of aggression a crime could not but help to strengthen the Code and its role.

30. The Code should moreover define as crimes such acts as colonialism, genocide, racism, apartheid and mercenarism. It should also characterize as a crime terrorism, a phenomenon that was becoming increasingly disturbing as terrorists strengthened their arsenals and as the possibility of chemical or nuclear weapons falling into their hands could no longer be ruled out. The responsibility of States which tolerated acts of terrorism against other States must also be defined.

31. With regard to the punishment of individuals found guilty of crimes punishable under the Code, the latter should provide for unconditional extradition. It should be binding upon States to co-operate in that respect. The code should also contain provisions prohibiting States from granting asylum, and requiring them to take the necessary steps to give effect to that prohibition. The authors of crimes against the peace and security of mankind should be sent back to and undergo trial in the

(Mr. Achitsaikhan, Mongolia)

country where they had perpetrated their crimes, since the courts of that country were best placed to judge the culpability of the accused and impose on them penalties commensurate with the offence. Moreover, to ensure that punishment was unavoidable, there should be no statutory limitations for crimes covered by the Code.

32. In conclusion, the effectiveness of the Code would depend to a large extent on the clarity of the provisions on the machinery for its implementation. He trusted that the Special Rapporteur would give appropriate attention to the points he had just raised.

33. Mr. KOTSEV (Bulgaria) said, with regard to the draft Code of Crimes against the Peace and Security of Mankind, that while agreeing with the approach adopted by the Special Rapporteur and the Commission on the list of crimes against peace, his delegation was of the view that the scope rations personae of the draft Code should extend not only to government officials but also to other persons having participated actively in the organisation and planning of crimes against peace, and to private individuals who had placed their economic and financial power at the disposal of the perpetrators. That would give the draft Code a very important preventive and deterrent role, especially in cases of aggression. If the Commission did not establish the criminal responsibility of such persons, certain criminal activities would remain outside the scope of application of the future Code when by their nature and dangerous consequences they should be regulated by it.

34. Secondly, not all violations of international law constituted crimes engaging the responsibility of the individuals making the decision or issuing the order to commit the acts in question. It was therefore necessary to decide upon only the gravest and most dangerous activities. In that context, the threat or the use of force could serve as an appropriate criterion for pinpointing the dividing line between offences under general international law and crimes under the draft Code.

35. Thirdly, there was the danger of omitting acts constituting a crime by attributing them to individuals. That was why his delegation supported the view of the Special Rapporteur and many members of the Commission that in defining acts constituting crimes against peace it was perfectly justifiable to add to a general definition a list of acts pertinent to that definition, in keeping with the usual practice in criminal law. At the same time, it might not always be necessary to list all possible ways of committing a given crime; a definition of the main elements might suffice. Should the Commission follow the latter course, it ought to define the elements of the various crimes included in the list in a precise and restrictive manner, so that a much clearer definition could be provided for each crime and misunderstanding could be avoided in the application and interpretation of the draft articles in question.

36. As concerned acts constituting crimes against peace specifically, his delegation was satisfied with the wording of article 12 on aggression, which was properly based on the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX) of 14 December 1974, but since the list of acts in article 12, paragraph 4, was not sufficiently exhaustive, it favoured removing the square brackets around the words "In particular".

(Mr. Kotsev, Bulgaria)

37. There was no reason that the threat of aggression should not be characterized as a crime against peace. His delegation shared the view of those members of the Commission who were in favour of considering the threat of aggression as a separate crime, for a powerful State could achieve its aims through recourse to it. The argument that it was difficult to draw a distinction between preparation of aggression and preparation for defence was not convincing, because that could be done on the basis of existing military, technical, legal and political criteria. The distinction would be of vital importance for deterring and preventing serious crimes and nuclear war. Indeed, the Bulgarian Penal Code had recently been amended to characterize preparation of aggression as a crime in itself that was no longer covered by the general provisions on terrorism. In elaborating the provision in question, the Commission should, however, clearly define all acts constituting aggression in order to ensure that they did not serve as a pretext for groundless counter-aggression.

38. Bulgaria noted with satisfaction the Commission's attempt to identify the main elements of the concept of intervention. Further study should be done on those acts of intervention which posed such a danger to the international community that they engaged the criminal responsibility of the individuals who had planned, organized and implemented them. His delegation was in favour of the second alternative proposed by the Special Rapporteur in paragraph 231 of the Commission's report, because it addressed the goals of intervention and not the means applied and took special account of the most dangerous forms of terrorist activity. Due attention should, consequently, be paid to State-organized or State-directed international terrorism, which constituted a crime against peace only under certain circumstances, namely, when the harm it caused was of uncommon gravity and intensity.

39. His delegation supported the inclusion of mercenarism among the crimes against peace and did not think it advisable to ask the Commission to defer its definition of that crime until the Ad Hoc Committee established by the General Assembly for the purpose had completed its work. The Commission must instead help the Ad Hoc Committee by furnishing it with the legal elements of the definition of mercenarism.

40. With regard to colonialism, his delegation agreed that it should be considered a crime against peace. Moreover, the list of crimes against peace would not be complete without inclusion of serious breaches of treaties designed to ensure international peace and security, although that was a very sensitive matter that should be approached with extreme caution.

41. In conclusion, his delegation hoped that the Commission would continue to give priority to the draft Code of Crimes against the Peace and Security of Mankind, and proposed that the topic should be made a separate agenda item at the forty-fourth session of the General Assembly, to be discussed in conjunction with the report of the International Law Commission.

42. Mr. VILLAGRAN KRAMER (Guatemala), after making general comments on the manner in which the international community had proceeded in specifying and codifying the concept of a crime against the peace and security of mankind, on the overlapping competence of national courts and any future international criminal court, and in

(Mr. Villagran Kramer, Guatemala)

particular on the question of attributing pre-emptive competence to the Security Council in characterising such crimes and determining the facts in the matter, said that it would be good if both the Sixth Committee and the International Law Commission made it a priority to study the following questions more in depth.

43. First, there was the question of establishing an international criminal jurisdiction as the primary instrument for implementing the draft Code, taking into account, of course, the fact that a parallel judicial machinery, namely the national courts, already had competence to rule on some offences.

44. Secondly, there was the argument that only the international criminal jurisdiction would be competent to rule on some offences, particularly those that were most serious and should by nature be referred to an international tribunal rather than to national courts, such as the threat of aggression, acts of aggression, international terrorism - especially State terrorism - intervention, genocide, apartheid and colonialism. Greater progress would be made in that area if emphasis were given primarily to serious offences that were politically sensitive for States and Governments.

45. Thirdly, there was the option of having the draft Code empower the Security Council to add to the list of serious offences falling under the jurisdiction of the international tribunal and having the draft Code define as clearly as possible the pre-emptive character of intervention by the Council.

46. Of course, those were practical suggestions intended to simplify consideration of the question as a whole and to hasten the adoption of the draft Code of Crimes against the Peace and Security of Mankind. The aim was not to resolve all the problems facing the international community but to help to solve the major ones.

47. Mr. ROBINSON (Jamaica) said that the fourth report of the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law significantly advanced the work on the topic. In the interpretation and application of the draft articles, the question would inevitably arise as to whether they reflected customary international law or the progressive development of international law. According to paragraph 29 of the report (A/43/10), the Special Rapporteur appeared to have characterised the topic as progressive development of international law. His delegation felt that it would be preferable for the Commission not to pronounce itself on the question. The draft articles filled the gap in international law referred to in paragraph 24 of the report, in part, by building on principles of international law.

48. His delegation agreed that it was not useful to draw up a list of dangerous activities. It would be more helpful to establish criteria by which activities involving risk would be identified.

49. With regard to draft article 1, his delegation supported the use of the concept of "jurisdiction" rather than "territory". It also hoped that revisions of article 1 would take account of the following points: first, a disadvantage of the concept of jurisdiction was that it gave rise to questions of the legitimacy under national and international law of power exercised by a State. Second, whether a

(Mr. Robinson, Jamaica)

State exercised jurisdiction or only effective control over the relevant activities must be determined in accordance with international law. For that reason the phrase "vested in it by international law" should not be used to describe "jurisdiction", particularly since the expression was not applied to "effective control" which suggested that such control was not determined by international law. However, if the intention was to pinpoint the legitimacy of State power, some phrase other than "vested in it by international law" should be used.

50. Third, even though it was intended that the exercise of State power by South Africa over Namibia would be covered by the concept of effective control rather than jurisdiction, it might still be necessary to consider the inclusion in the draft articles of a provision specifying that acceptance of the articles in no way implied recognition of States exercising such control.

51. Fourth, the concept of jurisdiction would, in some situations, cover the exercise by a home State of jurisdiction over the activities of a transnational corporation in a host State. In most cases, the first was a developed country and the second, a developing country. The formulation of draft article 1 seemed to be advantageous to developing countries because developed countries would be bound by the obligations laid down in the draft articles. Developing countries, however, like some developed countries, resented the exercise of jurisdiction by a home State over the activities of a transnational corporation carried out within their territories; that was one of the problems encountered by the Commission on Transnational Corporations in its work on a code of conduct for such corporations. Care should therefore be taken, in completing the formulation of draft article 1, not to appear to legitimize the exercise of that kind of jurisdiction.

52. The Special Rapporteur had skilfully moved away from the concept of activities causing transboundary harm to that of activities creating appreciable risk of transboundary harm. Although the commentary gave a fairly good idea of what was meant by "appreciable risk", the definition of that term and of "risk" in article 2 were not sufficiently precise to be useful.

53. His delegation believed that the draft articles should be comprehensive and encompass the whole of the human environment and should cover liability for harm caused by activities which took place not only in areas under the jurisdiction or control of a State but also in areas such as the high seas, the international sea-bed and outer space. The duty to adopt preventive measures was also applicable to States. In some cases, however, it could be difficult to determine who would benefit from the duty to make reparation. The structure of draft article 1 did not need to be changed, but the definition of "transboundary injury" and "affected State" would have to be adjusted.

54. His delegation considered that it was useful to specify that a State of origin was not subject to the obligations laid down in the draft articles unless it knew or had means of knowing that an activity involving risk was being carried out in areas under its jurisdiction or control. It did not see the reference to "means of knowledge" as being only to the benefit of developing countries.

(Mr. Robinson, Jamaica)

55. In recent times the Commission seemed to have been systematically including in its draft articles on various topics a provision based on article 3 of the 1969 Vienna Convention on the Law of Treaties. Article 5 was an example. His delegation wondered whether that article was really necessary, since the title of the topic made it clear that it was not devoted to responsibility for transboundary harm resulting from wrongful acts. Article 5 should either be deleted or redrafted to more accurately fulfil its objective.

56. His delegation supported the provisions of draft article 7 on the duty to co-operate in good faith in preventing or minimizing the risk of transboundary injury. One of the main features of contemporary international relations was the growing interdependence of States, giving rise to the duty to co-operate as reflected in Article 1, paragraph 3 and Chapter IX of the Charter. It should be noted that, in the context of its work on the topic, and on the law of the non-navigational uses of international watercourses, the Commission was playing a very creditable role in the development of a corpus of law on the duty to co-operate. The Committee was working in the same area in its consideration of the items relating to good-neighbourliness and the progressive development of international law relating to the new international economic order. Both the Commission and the Committee must ensure that the duty to co-operate had the body and content of a juridical norm, the breach of which entailed responsibility.

57. His delegation believed that draft article 8 on participation was unsatisfactory because of its vagueness. The duty to allow participation was said to spring from the duty to co-operate and, as indicated in paragraph 91 of the report (A/43/10), "the modalities of such co-operation would have to be the subject of specific provisions". It would be helpful to indicate that either in article 7, or in article 8.

58. With regard to the law of the non-navigational uses of international watercourses, he believed, as indicated in paragraph 138 of the report, that the obligation set forth in article 16, paragraph 2, should be one of due diligence to ensure that appreciable pollution harm was not caused to other watercourse States, and that strict liability was not involved. It was not certain, however, that the formulation of paragraph 2 reflected that approach. Moreover, although international law did not prohibit all pollution, it seemed strange to provide, as in paragraph 2, that a watercourse State could pollute another watercourse State as long as appreciable harm did not result from that pollution. The formulation suggested in paragraph 162 of the report ("Watercourse States shall take all measures necessary to ensure that activities under their jurisdiction or control be so conducted as not to cause appreciable harm by pollution to other watercourse States or to the ecology of the international watercourse [system])" would deal with both the presentational problem and the substantive question relating to due diligence.

59. Article 16, paragraph 1, should identify the effects of pollution and there should be an express reference to the effects detrimental to marine life.

(Mr. Robinson, Jamaica)

60. With regard to the question raised in paragraph 172 of the report, either the articles could expressly provide that in the case of a breach of the duty to protect the ecology of a watercourse system, any watercourse State which was a party to the articles could be considered an injured State even though it suffered no direct harm, or they could proceed on that implicit understanding.

61. The relationship between article 6 (Equitable and reasonable utilization and participation) and article 8 (Obligation not to cause appreciable harm) reflected in paragraph 2 of the commentary on article 8, which stated that a use of an international watercourse system was not equitable if it caused appreciable harm to another watercourse State, was perhaps not sufficiently clear from the text of the articles themselves.

62. The impressive list of illustrations drawn from State practice, international agreements, case law and declarations of international organisations given in the commentary (ibid., p. 85 ff.) suggested that article 8 reflected a rule of customary international law or that, if it did not, the principle it embodied deserved to be included in the draft articles in keeping with the progressive development of international law.

63. What he had said earlier on the positive duty to co-operate in relation to chapter II applied with equal force to article 9 (General obligation to co-operate). In identifying the bases of co-operation, as much stress should be placed on the element of interdependence as on sovereignty. The expression "mutual benefit" was the only reference to interdependence, and perhaps consideration could be given to adding a reference to mutual respect or one of the other principles identified in paragraph 2 of the commentary (ibid., p. 101). If it was felt that the addition of those references would make the text too cumbersome, another approach would be to omit all reference to such bases of co-operation in the text of the article itself and to deal with the question in the commentary. The framework agreement should give prominence to the duty to co-operate because the provisions of article 6 could not be effective without the co-operation of all watercourse States. The modalities of such co-operation should be carefully worked out, and something as close as possible to an objective third-party system for settling differences relating to the discharge of that duty should be established.

64. It was said in the commentary on article 10 (Regular exchange of data and information) that the rules laid down in the article were residual in that they applied in the absence of a special agreement concluded pursuant to article 4 (ibid., p. 107). There was no reason why such an agreement should not apply in such cases, although it would be difficult to see why parties should feel the need to adjust the provisions concerning the regular exchange of information to the characteristics and uses of their particular watercourse. He wished to repeat the position his delegation had previously taken on article 4, namely, that it must not be construed as allowing adjustments to the fundamental principles set out in the articles (for example, articles 6, 8 and 9), but should rather be construed as relating to other less central provisions, such as those dealing with the machinery for co-operation.

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65. Article 12 (Notification concerning planned measures with possible adverse effects) and article 18 (Procedures in the absence of notification) generally struck a fair balance between the interests of notifying and notified States. It might, with some justification, be asked what protection such a system offered a potentially affected State if it was left to the subjective determination of each State to decide whether its planned measures would have adverse effects and whether it was obliged under article 12 to provide timely notification. The answer was to be found in article 18, which provided that, if a State that was planning measures failed to notify a potentially affected State, the latter could request that the former apply the provisions of article 12. In his delegation's view, that answer was fairly adequate.

66. The right of the notified State to have the implementation of the planned measures suspended was balanced by the right of the notifying State to proceed with implementation of its measures if an equitable solution was not reached within six months through a process of consultation and negotiation under article 17, which set forth the principle of good faith. In that connection, the International Law Commission was to be commended for putting some "teeth" into the duty to consult and negotiate, which was part and parcel of the duty to co-operate. It would be helpful if the Commission were to strengthen the duty to negotiate under article 17 by adding other more detailed provisions for determining whether the conduct of either the notifying or the notified State constituted a breach of that duty. The Commission might even consider establishing a third-party dispute settlement system.

67. As far as the drafting was concerned, two points needed to be clarified, namely, the reference to "the situation" in article 17, paragraph 1, and the words "the former State may request the latter to apply the provisions of article 12" in article 18, paragraph 1. With regard to the latter, it would be preferable to state expressly what provisions of article 12 were to be applied.

68. Turning to article 19 (Urgent implementation of planned measures), he did not see the point of consultations and negotiations as envisaged in paragraph 3 if the planned measures had already been implemented owing to the circumstances envisaged in paragraph 1.

69. While it was entirely understandable that the draft Code of Offences against the Peace and Security of Mankind should arouse passions, there was a need for clear and cool thinking so as to draw up draft articles that would gain the widest possible acceptance.

70. With regard to draft article 11, paragraph 3 (ibid., p. 151, note 225), his delegation preferred the approach of the first alternative definition of interference to the second, which defined interference by reference, inter alia, to terrorist activities. Intervention and terrorism should be treated as separate crimes. The first alternative also had the advantage of overcoming the problem posed by the 1954 draft Code, in which the concept of intervention was limited to "coercive measures of an economic or political character", by referring to "any act or any measure, whatever its nature or form, amounting to coercion of a State".

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71. The definition of terrorist acts in the draft Code (ibid, p. 152, note 225) was somewhat quaint; in particular, the requirement that the acts be "calculated to create a state of terror in the minds of public figures, or a group of persons or the general public" might be difficult to establish. In any event, if terrorism was included in the draft Code as a crime against peace, a saving provision should also be incorporated, similar to that included in the Definition of Aggression preserving the right of peoples to struggle for independence and against alien, colonial and racist domination. Such a provision had found its way into several United Nations instruments, such as the Manila Declaration on the Peaceful Settlement of International Disputes, the International Convention against the Taking of Hostages, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations and, lastly, General Assembly resolution 42/159 on terrorism. Such a saving provision should be applicable also to mercenarism and the crime of aggression. Indeed, the Definition of Aggression included such a saving clause, and the International Law Commission should therefore consider including a provision of that kind in one convenient place in the draft.

72. In spite of the difficulty of defining intervention, the description given in paragraph 241 of the report was excellent, since the central factor was the idea of coercion that was an obstacle to the free exercise of sovereign rights by a State. Of course, consent negated coercion, but for that to be so the consent had to be freely given. It was in that context that the legality of what the commentary referred to as "intervention by consent" or "intervention by request" must be examined (ibid., para. 242).

73. Commenting further on the subject of intervention, he observed that the question arose as to the extent to which an international organisation which under its constituent instrument had the power to take certain action in relation to its member States which were in breach of that instrument could take such measures without violating the principle of non-intervention. The response would be negative if the principle was considered a principle of jus cogens.

74. Lastly, some members of the Commission had referred to the fact that direct use of armed force by a State against another State was more a matter of aggression than of intervention. That raised the question of acts falling into more than one category of criminal conduct outlawed by the Code. In such circumstances, the Code, following the precedent of domestic law, could give the court responsible for applying the Code competence to decide on the characterization to be used in each particular case.

75. His delegation supported the position that every crime should form the subject of a separate article in the Code.

76. With regard to article 4 (Obligation to try or extradite), some members of the Commission had considered that the term "an individual alleged to have committed a crime" in paragraph 1 should be defined so as to ensure that it did not apply to an individual in respect of whom there was no proper basis for trial or extradition (ibid., p. 176). That was a legitimate concern which should be met by the drafting of the specific rules necessary for giving effect to the principle laid down in

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that article, whose elaboration had been deferred to a later stage. In practice, the individual referred to in paragraph 1 could be neither tried nor extradited unless sufficient evidence against him was available, the final decision in that regard being taken in the light of the criteria established in the Code. The principle laid down in article 4, paragraph 1, thus simply meant that the individual alleged to have committed a crime must be subjected to proceedings which could lead to his trial or extradition.

77. He agreed with the view of one Commission member that the Commission could undertake the task of drafting the statute of an international criminal court without being expressly requested to do so by the General Assembly. As to the question whether a regional criminal court would have jurisdiction over the crimes covered by the Code, that would depend on the Code's provisions on that subject. He himself could not see the utility of such a possibility.

78. While agreeing that it was difficult to apply the non bis in idem rule in international criminal law, he did not think that was so for the reason given in paragraph 3 of the commentary to article 7 (ibid., pp. 179-180), namely that "international law did not make it an obligation for States to recognise a criminal judgement handed down in a foreign State". A national court which had jurisdiction to try a person for a crime under the Code had that jurisdiction because the State in which it functioned had become a party to the Code and had taken the necessary legislative or other measures to give that court jurisdiction over such a crime. When such a court tried a person for a crime under the Code, its judgement ought to be respected by the courts of any other State party to the Code. It was clear that in such a situation the non bis in idem rule must apply. On the other hand, when the national court of a State party to the Code tried a person for an act which was a crime under its domestic criminal law system but not a crime under the Code, then another State party to the Code had no obligation to respect the judgement of that court and was free to try that person for a crime under the Code based on the act of that person. The non bis in idem rule did not apply in that situation because the person concerned was not being tried a second time for the same offence and also because the national court which had tried him did not derive its jurisdiction from the Code. Broadly speaking, paragraphs 2 and 3 of article 7 reflected those ideas. However, paragraph 2 did not really seem necessary because an ordinary crime was not "a crime under this Code". He appreciated, however, that the Commission had felt that it could not be too careful.

79. His delegation was opposed to the exception provided for in article 7, paragraph 4, and particularly in subparagraph (b).

80. The Commission's work on the topic was progressing very satisfactorily, and he hoped that in the immediate future it would be able to tackle the task of drafting the statute of an international criminal court. At an earlier meeting, the representatives of Canada and the United Kingdom had said that the time had come to establish such a court, and it was to be hoped that the Commission would take into account the consensus on that point which seemed to be emerging in the Sixth Committee.

81. Mr. DJIENA WEMBOU (Cameroon), referring to the topic of liabilty for injurious consequences arising out of acts not prohibited by international law, expressed approval of the cautious and realistic approach taken by the Special Rapporteur. In the case of so complex a topic, the Commission should prepare a framework agreement offering the greatest possible flexibility, which could guide States in concluding specific agreements regulating particular activities.

82. With regard to the respective roles of risk and harm in relation to that topic, the Commission should explore the aspects of prevention and reparation from a new angle, avoiding dogmatism and excessively rigid formalism, so as to eliminate the serious gaps which remained with respect to that topic in positive international law. It should also consider the risk of pollution, basing its work, among other things, on the various international conventions on environmental law.

83. With regard to the law of the non-navigational uses of international watercourses, the work done by the Special Rapporteur and by the Commission marked a significant stage in the Commission's normative activity in that field. With regard to the two questions posed by the Commission in paragraph 191 of its report (A/43/10), his delegation did not agree with the idea of including in the draft articles a specific chapter on pollution and environmental protection. In the interest of clarity, the Commission should confine itself to the provisions already drafted, namely draft articles 2, 4, 6, 8 and 9, which could be supplemented if necessary.

84. His delegation was pleased to see that some of its comments on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier had been taken into account by the Special Rapporteur and by the members of the Commission. It approved of the Special Rapporteur's observations as set forth in paragraph 293 of the report (A/43/10), particularly the idea of adopting in the elaboration of the draft articles a comprehensive approach leading to a coherent and, as much as possible, uniform régime concerning all kinds of couriers and bags. It also felt that special significance should be attached to functional necessity as the basic factor in determining the status of all kinds of couriers and bags.

85. With regard to draft article 17, his delegation considered that the current wording of paragraph 3 was cumbersome and ambiguous, and proposed that the first sentence should be amended to read: "The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing that the possession, import or export of articles which are in it are prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State."

86. His delegation approved of the approach taken in draft article 28 with a view to striking a fair balance between the interests of the sending State and those of the receiving State, and considered that the introduction, in paragraph 1 of that article, of the concept of "inviolability" or of the phrase "and shall be exempt from examination directly or through electronic or other technical devices" would make it impossible to maintain that balance. The words in square brackets should therefore not be retained in the final text. Moreover, his delegation supported

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the application of the provision contained in paragraph 2 of the draft article to all bags, both consular and diplomatic, but did not deem it desirable to extend to the transit State the rights accorded in that paragraph to the receiving State.

87. His delegation felt that the idea of allowing the receiving State to choose among the various inspection methods was not brought out clearly in the third phrase in square brackets in article 28, paragraph 2, which could be reworded to read: "They may request that the bag be subjected to examination through electronic or other technical devices or, failing that, that the bag be opened in their presence by an authorized representative of the sending State".

88. It was stated in paragraph 499 of the report that, for lack of time, the Commission had been unable to consider the topic of jurisdictional immunities of States and their property. It had, however, found it advisable to allow the Special Rapporteur to introduce his report in order to expedite work at the following session. His delegation would briefly outline his country's position on some of the draft articles submitted.

89. With regard to article 3, paragraph 2, which the Special Rapporteur had proposed should become paragraph 3 of the new draft article 2, his delegation wondered whether the conditions specified in that paragraph to determine whether a contract for the sale or purchase of goods or the supply of services was commercial were cumulative or whether a single one of those conditions sufficed. In the first case, the paragraph as formulated posed no problem. In the second case, however, it seemed to his delegation that the comma before the word "but" should be replaced by a period.

90. In draft article 6 it was a matter of whether or not to retain the words in square brackets, namely, "and the relevant rules of general international law". His delegation was not in favour of simply deleting those words, since draft article 6 merely provided a particular means of applying the principle of immunity, and recourse to general international law should remain possible, either for the purpose of interpreting the convention or should States deem its provisions inadequate. The reference to international law, far from restricting the scope of the future convention, kept open the possibility of adaptation to any subsequent development of the international normative order.

91. In his Government's opinion, part III of the draft articles should be entitled "Limitations on State immunity", because State immunity was a fundamental principle of international law whose application was subject to certain limitations.

92. The current formulation of draft article 19, concerning the effect of an arbitration agreement, gave rise to much uncertainty about the court before which the State party to an arbitration agreement with a foreign person lost the right to invoke jurisdictional immunity. As a general rule, the arbitration agreement determined the competent court or laid down sufficiently clear conditions for specifying its location and nationality. In the circumstances, draft article 19 should be worded in such a way that the State party to an arbitration agreement

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retained the right to invoke its immunity before the court of a State which was not affected or not designated by the said agreement (unless otherwise provided in the agreement).

93. The rationalisation of the Commission's agenda would lead to a reduction in the number of topics submitted to it. His delegation attached particular importance to the Commission, as the body responsible for the progressive development of international law and its codification, and to the drawing up of its future programme of work. In its opinion, the task of codification was not restricted to restating existing positive law but necessarily consisted in giving prominence to some elements thereof and in bringing the law up to date, even though the initial purpose had merely been to record it. The Commission's work would be of even greater utility if it enabled international law to be adapted to the changes in international society. Accordingly, the selection of topics to be included in the Commission's agenda must help to strengthen its role. The existence of a dichotomy between law and politics had been raised, as had the fact that the Commission could not embark upon the codification and development of rules in the case of legal questions which were pressing but not yet sufficiently mature. At the same time, the Commission should not select topics that had no influence on the daily life of the peoples of the world. Accordingly, his delegation hoped that the group to be established to identify topics for possible inclusion in the Commission's future programme of work would take account of those considerations and would be bold and imaginative enough to pick topics that would truly reflect the concerns of all groups of States, meet the expectations of the peoples and fulfil the hopes placed in the Commission at the time of its establishment in 1947.

94. Mr. GUEVORGUIAN (Union of Soviet Socialist Republics) said that the Soviet Union hoped that the draft Code of Crimes against the Peace and Security of Mankind, which would help to safeguard universal security by legal means, would soon be completed. It was gratifying that the International Law Commission had approved at its fortieth session a series of draft articles on important questions. Draft article 4, concerning the obligation to try or extradite, was of particular importance, since it made provision for specific ways of implementing the principles laid down in the draft Code. The challenge presented was to provide for a mechanism which defined the obligations of States with sufficient precision to ensure the inevitability of punishment but which, at the same time, was sufficiently flexible to be acceptable to the maximum number of States. In his delegation's opinion, that mechanism should be based on the principle of universal jurisdiction, as embodied in draft article 4, pursuant to which the State must either itself try or extradite to another country at the latter's request. In that regard, article 4, paragraph 2, was also very important, since it reflected the idea that, in the general context of the principle of universal jurisdiction, priority was given to the principle of punishment of the criminal where the crime had been committed.

95. Another vital element of the mechanism designed to ensure the certain punishment of the crimes to which the draft Code applied was the establishment of an international criminal court. That could be done either by establishing a

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general international court or special international courts, or by empowering some courts to try some types of crimes. An effective mechanism of international criminal justice would be a useful element in the general structure of the international judicial organs called upon to preserve stability and order in the world by the methods particular to them.

96. The Soviet Union had no fault to find with the general thrust of draft article 7, which developed the non bis in idem principle. There should, however, be provision in the draft Code for retrying a criminal in cases where new facts making his crime a crime against peace and humanity came to light. His delegation also approved draft articles 10 and 11 and would emphasise in that regard that the provisions of the general part of the draft Code should to the extent feasible preclude all possibility of evading responsibility. In particular, it should be stated expressly that the motives for a crime must not be invoked as justification.

97. The Soviet Union fully endorsed the inclusion of aggression among the acts constituting crimes against the peace. It therefore approved of article 12, which was consistent with the Definition of Aggression adopted by the General Assembly in 1974. The planning and preparation of aggression could not be regarded as the acts of an isolated individual. The process was long and complex, and all who participated in it, whether from the military, the economic or the propaganda standpoint, should be punished. Such had been the attitude adopted in the drafting of the Charter of the Nuremberg Tribunal, in article 6 (a) of which the preparation of aggression had been included among the crimes against the peace, as it had in the Commission's 1950 Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. It was therefore right to provide for those acts in the draft Code, not only from the standpoint of codifying international legal norms, but also to strengthen the role of the future Code as a means of averting the use of armed force. In addition to the acts covered by the 1974 Definition of Aggression, the Security Council was entitled to decide that other acts constituted acts of aggression under the Charter of the United Nations. That point should be expressly reflected in article 12 and, to that end, paragraph 5, which was currently in square brackets, should be retained.

98. In its future work, the Commission should pay particular attention to such topics as colonial domination, mercenarism, annexation, the breach of treaties designed to ensure international peace and security and the responsibility deriving from the first use of a nuclear weapon.

99. The item on the draft Code of Crimes against the Peace and Security of Mankind should continue to be included in the Sixth Committee's agenda as a separate and priority matter.

The meeting rose at 5.40 p.m.