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

SIXTH COMMITTEE
32nd meeting
held on
Tuesday, 8 November 1988
at 10 a.m.
New York

SUMMARY RECORD OF THE 32nd MEETING

Chairman: Mr. DENG (Sudan)

CONTENTS

Distr. GENERAL
A/C.6/43/SR.32
11 November 1988

ORIGINAL: ENGLISH

88-56989 0698S (E)

The meeting was called to order at 10.20 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. YIMER (Ethiopia), referring to the question of international liability for injurious consequences arising out of acts not prohibited by international law, said his delegation agreed in general with the Special Rapporteur that it would not be feasible to draw up a list of activities with any practical usefulness, and that it would be better to establish criteria to identify activities involving risk (A/43/10, para. 23).

2. As to whether activities causing pollution should be brought within the scope of the articles, his delegation believed that, whether or not pollution causing appreciable harm was prohibited in general international law, it should be considered under the topic, since at an operative level such a prohibition existed in international law. His delegation shared the concern of those members of the Commission who had argued against the presumption that activities causing pollution were not prohibited by international law.

3. As to whether the topic should be limited to activities involving appreciable risk, his delegation supported the view that situations where appreciable harm occurred although the risk of harm had not been considered appreciable or foreseeable should be excluded. It also endorsed the characterization of the topic as progressive development of international law. That approach encouraged a consensus since it precluded any argument as to whether or not the rules and principles on the topic already formed part of the existing international law (para. 29).

4. In any case, there was merit in the Special Rapporteur's view that a discussion on whether the topic was based on progressive development or codification of international law was unnecessary. The fact that there was no norm in general international law under which there must be compensation for every occurrence of harm was of fundamental importance, and should be reflected clearly in the draft articles. His delegation also went along with the position taken by the Special Rapporteur that the principle of strict liability should not be adopted in an automatic manner (para. 31). It was thus correctly stated that there could not be liability for every occurrence of transboundary harm. However, the criteria to define the necessary threshold between compensable harm and negligible harm should be made clearer. His delegation agreed that the overall purpose of the draft articles was to serve as an incentive to States to conclude agreements establishing specific régimes to regulate activities in order to minimize potential damage (para. 32).

(Mr. Yimer, Ethiopia)

5. In connection with article 1 on the scope of the draft articles, he said that his delegation agreed with the Special Rapporteur that although the topic was essentially territorial, not all activities under the topic were territorially based, and, therefore, the word "jurisdiction" was more appropriate than "territory" (para. 38). As to the question of de facto jurisdiction, he agreed that the words "effective control" should also be included in order to avoid the implication of recognition of unlawful de facto jurisdiction, such as that exercised by South Africa over Namibia.

6. While his delegation accepted the definition of the phrase "appreciable risk" set out in the Commission's report, it felt that the word "harm" or "injury" was preferable to "risk". The issue should be explored further. Why the use of the term "appreciable harm" had been avoided was not entirely clear from the report. The criterion of risk should be limited to the obligation of prevention, and the draft articles should be concerned with activities causing transboundary harm.

7. The phrase "vested in it by international law", used to describe jurisdiction, could present problems, given the implications for the sovereignty of States. His delegation therefore supported the view summarized in paragraph 58 that the reference to jurisdiction in international law had no relevance to the assessment of the lawfulness of an activity.

8. Delegations should not be unduly concerned by the demarcation line between the topic under consideration and those of State responsibility and the non-navigational uses of international watercourses. Such overlapping could not be avoided entirely, owing to the unity of concepts in international law. Harmonization of overlapping elements could alleviate the problem to some degree.

9. Turning to article 3, on attribution, he agreed with the inclusion of the reference to knowledge of the activity that created the risk. His delegation therefore could not accept the argument of some members of the Commission as summarized in paragraph 71 of the report (A/43/10).

10. With respect to article 5, on the absence of effect upon other rules of international law, the wording was vague, and the proposed new version in paragraph 80 represented an improvement over the existing text.

11. Article 6, which embodied a basic principle, was of paramount importance, and must be drafted as clearly as possible. The phrase "considered appropriate" was vague and unnecessary. The phrase "with regard to activities involving risk" was not needed. The draft articles were aimed not at prohibiting activities within a State's territory, but at regulating them by means of prevention and reparation. Since the latter phrase might imply a limitation of a State's freedom of action, his delegation supported the suggestion that it should be deleted.

12. As the Special Rapporteur had indicated, the principle of participation was complementary to the principle of co-operation (para. 99). However, it could not be argued that participation was a form of co-operation. Draft article 8 could either be deleted or be included in a new version of article 7. Draft article 10,

(Mr. Yimer, Ethiopia)

concerning reparation, could be improved by making a distinction, as was suggested in paragraph 100, between the case where harm occurred despite preventive measures taken by the State of origin and the case where that State failed to take any preventive measures. The concept of reparation was broader than that of compensation and therefore should be retained.

13. Turning to the law of the non-navigational uses of international watercourses, he said that his delegation saw no difficulty in following the proposed tentative outline for the consideration of the topic. It agreed with the Special Rapporteur that "the bedrock of the sub-topic concerning the regular exchange of data and information was the general obligation of co-operation between States for the purpose of achieving reasonable and equitable utilization of a watercourse" (para. 126).

14. His delegation agreed with the majority of the Commission that it was desirable to have a separate part in the draft devoted solely to the question of environmental protection and the pollution of international watercourses. The arguments in favour of that approach contained in paragraph 135 were persuasive, in particular the argument that integrating the provisions on the subject into the other draft articles or sections of the draft would dilute the importance attached to dealing with the dangerous phenomenon of pollution. As to the scope of the sub-topic, his delegation favoured the preparation of general rules, leaving it to States to adopt more specific and detailed measures relating to the control of pollution and the protection of the environment, inasmuch as the Commission was drafting a framework agreement on which there appeared to be general accord.

15. Paragraph 2 was the core of draft article 16 as proposed by the Special Rapporteur, and his delegation was pleased that it reflected the concepts of "appreciable harm" and "due diligence". It could go along with the view that the exigencies of interdependence and good-neighbourliness made it necessary that some pollution should be tolerated and, accordingly, could not accept the view that "harm" was sufficient by itself. His delegation understood the apparent contradiction in the use of the terms "appreciable harm" and "detrimental effects" in draft article 16 to mean that it was only when pollution entailed detrimental effects exceeding the threshold of appreciable harm that it would be prohibited by article 16.

16. Although the question of strict liability was not expressly excluded from article 16, it was outside the subject-matter of the provisions. It was highly unlikely that States would accept the idea that the causing of appreciable harm entailed strict liability.

17. His delegation did not agree that the obligation of due diligence as a standard for responsibility for causing appreciable pollution harm had not been clearly defined; the concept was the most appropriate standard for determining liability for causing appreciable harm. Harm must be the consequence of a failure to exercise due diligence to prevent damage. But the mere fact that there was a failure to exercise due diligence did not entail automatic responsibility if harm did not ensue. The Special Rapporteur had put it succinctly by saying that the obligation was one of result, not of conduct (para. 166).

(Mr. Yimer, Ethiopia)

18. His delegation agreed that the burden of proof should rest with the source State, since due diligence was largely a defence. It was neither logical nor fair to put the burden of proof on the victim State. The view that the concept of due diligence should be linked to levels of development of a State deserved consideration. While it might be going too far to condition the acceptance of the standard of due diligence on that linkage, the argument that every State could not be expected to exercise the same level of diligence notwithstanding the amount of resources at its disposal (para. 165) was not without merit.

19. With regard to draft article 17, concerning the protection of the environment of international watercourses, he endorsed the view that such protection would be most effectively provided through specific régimes adopted by States for particular watercourses. In view of the fact that the draft would be a framework instrument, it would not be appropriate to require joint measures to be adopted by States.

20. On the question of notification concerning planned measures, his delegation firmly believed that, while consultation and notification were in principle the corner-stone of co-operation among riparian States, one such State could not be given the right to veto development projects of another such State. Accordingly, article 18, paragraph 3, as it stood was unacceptable. The interpretation therein, aside from being contrary to the well-known principle of permanent sovereignty of States over their natural resources, would not help to promote wide acceptance of the draft articles. He referred in that connection to the Special Rapporteur's discussion of the conclusions reached in the Lake Lanoux arbitration contained in the commentary to draft article 12.

21. The relationship between draft articles 6 and 8 continued to pose serious problems for his delegation. After reading out paragraph (2) of the commentary to article 8, he said that draft article 6 must not be subordinated to draft article 8; they should instead be complementary. Since the relationship between the two articles was central to the entire draft, the Commission should review the matter.

22. It was entirely appropriate to have included preparation of aggression, annexation, the sending of armed bands into the territory of a State, intervention in the internal and external affairs of a State, colonial domination and mercenarism, in the draft Code of Crimes against the Peace and Security of Mankind, since those acts constituted crimes against peace. While the precise formulation of each element was subject to discussion, there should be no controversy as to whether they should be included. His delegation agreed that the threat of aggression should be considered a crime against peace, and that its inclusion was justified since it would help to deter potential aggressors. As to the precise formulation, confusion between aggression and mere verbal excesses should be avoided, and the language should be as precise as possible, so that a State could not use the pretext of a threat of aggression to commit aggression itself.

23. Regarding preparation of aggression, Ethiopia could not accept the view that it should not be included as a separate offence on the ground that it would be difficult to distinguish acts amounting to preparation of aggression from other

(Mr. Yimer, Ethiopia)

legitimate acts of defence, and that it was covered by the crime of the threat of aggression. As was stated in paragraph 225 of the Commission's report (A/43/10), preparation of aggression consisted of "a high degree of military preparation far exceeding the needs of legitimate national defence; the planning of attacks by the general staff; the pursuit of foreign policies of expansion and domination; and persistent refusal of the peaceful settlement of disputes". It would be hard to find more persuasive language to justify the inclusion of preparation of aggression in the Code as a separate crime. The necessary elements of the crime of preparation of aggression were criminal intent and the material element of preparation, while in the case of threats of aggression, the actual threats could speak for themselves, without there being a need to prove criminal intent.

24. With regard to intervention and terrorism, his delegation favoured the second alternative formulation for draft article 11, paragraph 3, since it was more comprehensive and thus more appropriate in the type of international instrument in preparation. As to the legal content of the concept of intervention, he acknowledged that intervention was too varied in its manifestations to constitute a legal concept. Nevertheless, the problem of intervention was so serious at present that there should be no dispute as to the need to include it in the draft Code.

25. His delegation questioned the need to make a distinction between lawful intervention and wrongful intervention. The term "intervention" had the connotation of wrongfulness, and normal relations between States which were not characterized by coercion did not come under intervention. Furthermore, the direct use of armed force by a State against another State was more a matter of aggression than of intervention.

26. With regard to terrorism, his delegation subscribed to four significant points raised in the Commission (paras. 248, 249 and 254). Firstly, terrorism confined to a State without any foreign support did not fall within the chapter of the draft Code concerning crimes against peace. Secondly, the draft Code should cover terrorism committed by a State against another State. Thirdly, terrorism should constitute not only a crime against peace, but also a crime against mankind. Fourthly, acts of terrorism should not be directed against innocent people, and a distinction should be made between the legitimacy of a struggle and the means employed to advance the struggle.

27. With respect to colonialism and alien subjugation, his delegation felt that it was not necessary to choose between the two alternatives suggested by the Special Rapporteur; rather, they could be combined. They had always been treated together in previous international instruments. In fact, the question of whether they should be treated separately or together should not have arisen in the first place.

28. Noting that the Commission had also discussed the scope of the principle of self-determination, he said it went without saying that the principle occupied its own prominent place in contemporary international law. It did not detract from the importance of that principle to caution against its use in a cavalier manner, which might have serious implications for other significant principles of international law, in particular territorial integrity of States. Accordingly, it was

(Mr. Yimer, Ethiopia)

appropriate for the commentary to make it clear that the crime of colonial domination applied only to the subjection of a non-metropolitan people which had not yet attained independence, and did not cover the case of a minority wishing to secede from the national community.

29. His delegation felt that mercenarism should form the subject of a separate provision in the draft Code. It also felt that since mercenarism occurred not only in time of war, but also in time of peace, it was not sufficient to base the definition of the term "mercenary" on Additional Protocol I to the 1949 Geneva Conventions. The point was well taken that private gain should be regarded as an important element, without undue emphasis on the amount of the gain. As to how the issue should be co-ordinated with the work of the Ad Hoc Committee on mercenarism, his delegation considered that it would not be appropriate to suspend work in the Commission until the results of the efforts of other bodies were known.

30. Ethiopia welcomed the substantive progress made on all the items the Commission had had time to discuss at its fortieth session. It was also noteworthy that the Commission was keeping its programme, procedures and working methods under constant review. In particular, it was encouraging to note that it planned to complete, during its current term, the first or second reading, as appropriate, of various topics on its agenda pursuant to the request addressed to it by the General Assembly in paragraph 5 of resolution 42/156.

31. Lastly, his delegation reiterated its support for the call made by the Commission for financial assistance to continue the International Law Seminar, which had been of immense benefit to young lawyers from developing countries.

32. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries, said that he wished to give their views regarding the conclusions contained in paragraph 69 (c) (i) of the Commission's report on the work of its thirty-fifth session (A/38/10). They considered that a penal system was composed of three elements, the first defining the offences, the second indicating the penalties, and the third establishing a judicial organization to implement the system. It was not enough merely to state the primary rules binding upon a State; one must also seek mechanisms whereby those rules could be effectively implemented. Such reasoning was as applicable to a code of crimes against the peace and security of mankind as it was to disarmament or to international protection of human rights.

33. Was it practicable, at the current stage of development of international law, to establish an international criminal jurisdiction vis-à-vis those who committed crimes against the peace and security of mankind? The answer was probably "no". While enforcement machinery was imperfect with regard to States, it was non-existent with regard to individuals. Only States provided machinery for enforcing the rights and duties of individuals both towards each other and vis-à-vis the State, and it seemed unrealistic to expect a transfer of such machinery to the international sphere within the foreseeable future. The Nordic delegations thus deemed it premature for the Commission to consider the question of preparing a statute of a competent international criminal jurisdiction. That conclusion should not, however, be regarded as their answer to the wider question

(Mr. Lehmann, Denmark)

of a choice of method to ensure effective implementation of the rules the Commission was about to develop.

34. While the current state of international law regarding criminal jurisdiction did not involve a direct responsibility of the individual, the international community had on many occasions adopted the approach of an indirect responsibility of the individual through the creation of an extraordinary jurisdiction on the part of States (the principle of so-called universal jurisdiction). He cited article 129 of the third Geneva Convention, relative to the Treatment of Prisoners of War, one of a number of conventions to have adopted that approach. All those conventions had aimed, not at defining crimes to be dealt with by an international criminal court, or at laying down rules on State responsibility, but at intensified international co-operation with a view to ensuring that individuals committing serious offences were brought to justice and, upon conviction by a competent court of national jurisdiction, suffered appropriate penalties taking due account of the seriousness of the offences concerned. The Nordic delegations favoured the approach of creating an extraordinary jurisdiction for the States themselves, reflected in draft article 4, rather than the two other possibilities mentioned in the commentary to that article.

35. They considered that, in formulating article 7, the Commission had stretched the principle of non bis in idem too far. New decisive evidence, false testimony or a full confession were examples of factors justifying the remedy of a new trial. An absolute rule of non bis in idem might lead to unfairness and injustice. It was thus their view that the Commission should continue its deliberations about the exact scope of the principle. However, draft article 8, on non-retroactivity, was in line with their thinking.

36. With regard to draft article 10, the Nordic delegations had noted that it had been reproduced from article 86, paragraph 2, of Additional Protocol I to the Geneva Conventions. They agreed to the inclusion in the Code of an article along those lines, and also to the proposed article 11.

37. The Nordic delegations saw the Commission's efforts in relation to the Code as an attempt to codify existing law. As to the method of codification, they favoured reference to a general criterion, combined with an enumeration of acts prohibited. Looking at draft article 12, they were thus pleased to note that, with regard to the methodology, the Special Rapporteur and the majority of the Commission seemed to concur with their view. With respect to the substance, they considered it of paramount importance that the definition of the concept of aggression to be used in the draft Code should in no way prejudice the relevant provisions of the Charter of the United Nations. They thus welcomed the general reference to the Charter in paragraph 2 of the draft article. They hoped that the 1974 Definition of Aggression would still be considered acceptable to Members of the United Nations. While not ruling out possible additions, they did not believe that the 1974 text could be improved. They therefore did not favour inclusion of the bracketed words "in particular" in paragraph 4, which, furthermore, seemed to run counter to the principle of nullum crimen sine lege. Moreover, although they concurred with the substance of paragraph 5, they considered that it was out of place in article 12.

(Mr. Lehmann, Denmark)

They also believed that, at the current stage of the work, it was inadvisable to start enlarging the list of crimes by including de lege ferenda concepts, or concepts of a purely political character.

38. The Nordic delegations regretted that efforts towards rationalization of the Committee's work had thus far not been successful with regard to the discussion of the draft Code. In their view, there was no good reason for retaining it as a separate item on the agenda, and they wished to see it discussed under the general heading of the report of the Commission, as was the practice with regard to other Sixth Committee items being considered by subsidiary organs.

39. Mr. THIAM (Guinea) said that the issues addressed by the draft Code of Crimes against the Peace and Security of Mankind were not new, but the circumstances in which they were dealt with were constantly evolving. In his delegation's view, the aim of the report of the International Law Commission was to contribute to the establishment of a fruitful dialogue. Although substantial progress had been made in the preparation of the draft Code, certain questions remained unresolved, despite the efforts to reach compromise solutions. The intention behind the draft Code must be the maintenance and strengthening of peace and security among States, and the establishment of better living conditions for peoples. It thus reflected the current tendency of international law to evolve towards the elimination of conflict, the threat of war, and all other threats to mankind and his environment.

40. A reading of the draft Code showed that it drew inspiration from the Preamble to the United Nations Charter. If its objectives were to be achieved, a realistic and pragmatic approach must be adopted, and controversy avoided. Negotiation on the basis of mutual advantage and collective interest provided a means of achieving those aims.

41. In its search for universally acceptable solutions, the draft Code provided a list of crimes, albeit not an exhaustive one, and also a definition which might cover other criminal acts. In his delegation's view, such a solution did not resolve the basic question, since criminal law was governed by the universal principles of lawful criminal process and restrictive interpretation of criminal law. The establishment of precise and pertinent criteria leading to a comprehensive definition containing the essential characteristics of what constituted breaches of the peace and security of mankind would more faithfully reflect those principles.

42. His delegation was pleased to note that in addition to guaranteeing the certainty of punishment of the individual committing the crime against the peace and security of mankind by proclaiming the non-applicability of statutory limitations, the draft Code also set forth, in its article 4, the obligation for States to try or extradite. Nevertheless, problems persisted with regard to (a) the competent jurisdiction, (b) the procedure to be followed, (c) the severity of the penalty, and (d) the place of enforcement of the penalty. Of those, the problem of the competent jurisdiction was the most serious, since it involved a choice between creating an international jurisdiction and extending the competence of national courts to cover such crimes. The latter option involved the risk of

(Mr. Thiam, Guinea)

permitting States and systems whose Governments did not subscribe to the principles of primacy of law and respect for individual freedoms to mete out punishment indiscriminately. Moreover, the fact that the death penalty existed in some countries, but had been abolished in others, might cause differences in the severity with which the same crime was punished. Article 4 of the draft Code did not settle that question.

43. His delegation believed that the establishment of an international criminal jurisdiction would be more appropriate to the nature of crimes against the peace and security of mankind, and would guarantee equitable and independent judgements, the certainty of punishment, and the efficacy of the draft Code.

44. His delegation welcomed the concern shown in the draft to guarantee the rights of offenders against the denial or abuse of justice, by including the principle of non-retroactivity (art.8) and the non bis in idem rule (art.7). The addition of the phrases "in accordance with international law" and "applicable in conformity with international law" seemed an appropriate and acceptable means of guaranteeing that the crime would be punished and of eliminating abuses arising from flexible applications of the law.

45. Draft article 10, which clearly set forth the relationship between the responsibility of the superior by virtue of his knowledge that a crime had been committed or was going to be committed by his subordinate, demonstrated a simple presumption of responsibility, and was thus acceptable. It was entirely acceptable that the official position of the individual committing the crime should not constitue a justification or an excuse attenuating responsibility.

46. Because of the principles of peaceful settlement of disputes and non-use of force, it should be permissible to invoke self-defence only in clearly defined circumstances. Those circumstances should figure in the provisions of article 11 as submitted by the Special Rapporteur, which neither defined nor enumerated the elements constituting evidence of a threat. The wording of article 11 seemed incomplete, since it should contain provision for cases of abuse of self-defence. A distinction must be made between mere verbal excesses and actual threats, to prevent a State from using declarations as a pretext for aggression against another State on the grounds that it was under threat and obliged to defend itself. However, the desire to avoid too broad a definition should not be an obstacle to studying criteria for defining manifestations of the threat of aggression.

47. The international criminal system must contribute to promoting beneficial and equitable social development, taking due account of the rights of the individual and of society. It must constitute an impregnable barrier to any desire to undermine the foundations of liberty, democracy, peace and security, and have as its objectives the protection of mankind and his environment, and the promotion of the fundamental universal aspirations of peoples.

48. Mr. HAYES (Ireland) welcomed the progress made by the Commission at its fortieth session on the draft Code of Crimes against the Peace and Security of Mankind. In his report the Special Rapporteur had addressed the question of crimes

(Mr. Hayes, Ireland)

against peace, both those recognized in 1954 and those requiring characterization in the light of developments since then.

49. Eleven draft articles had been adopted provisionally on first reading. Part II of chapter I comprised general principles, and it was to draft article 7 that his delegation's comments would relate at the current meeting.

50. That article entitled Non bis in idem, was a normal rule in a penal code. It was based on the fact that an accused, even a convicted person, had rights, including the all-important right to fair treatment. Fair treatment required that such a person was not to be subjected twice to the possibility of being convicted and/or punished for the same alleged crime.

51. In paragraph (3) of the commentary to that article, it was pointed out that international law did not require a State to recognize a criminal judgement handed down in another State, which implied the absence of a non bis in idem rule between States in respect of criminal proceedings under their respective national penal codes. However, the subject under consideration was an international penal code with an internationally recognized criminal procedure, as yet undefined. His delegation believed that an adequate non bis in idem rule was an essential part of such a system, just as it was in a national penal code. Paragraph 1 of draft article 7 was a straightforward non bis in idem rule in regard to decisions of an international criminal court and was, in principle, acceptable to his delegation. Paragraph (2) of the commentary raised questions which the Commission must deal with.

52. Paragraph 2 of the draft article also comprised a non bis in idem rule, which, without the exceptions, would be acceptable, although the final words "in the process of being enforced" might need further clarification. The problems which his delegation found in the article rested on its paragraphs 3 and 4. It might well be appropriate to have a less than absolute rule of non bis in idem in the Code, but his delegation was concerned with the effect of the combined exceptions in paragraphs 3 and 4. As it interpreted the article, an accused could be tried four times in respect of the same allegation. He could be tried by the courts of State A, where he might be, for a crime for which its national criminal law provided extra-territorial jurisdiction. He could subsequently be tried by the courts of State B or even of the same State A, neither of them being the State where the act had been committed, or the main victim, for a crime under the Code. He could subsequently be tried by the courts of both State C, where the act had been committed, and State D, the main victim, again for a crime under the Code. Such a situation might not happen very often, but the provisions of article 7 permitted it, and the likelihood of its happening was enhanced by the provisions in regard to extradition and non-applicability of statutory limitations. That raised serious doubts as to whether article 7 was an adequate version of the non bis in idem rule.

53. The Commission had the task of proposing a draft that provided the basis of a generally accepted set of rules. His delegation thought that the absence of an adequate non bis in idem rule would cast doubts on the acceptability of the entire

(Mr. Hayes, Ireland)

draft Code to many States, particularly when regard was had to the obligation to try or to extradite in article 4, which was a perfectly appropriate provision for inclusion in the Code. However, combined with article 7 in its present form, it would mean that States parties to the Code would be required not merely to acquiesce in the possibility of multiple trials for the same act, but actually to facilitate the multiplicity by extraditing a person who had already been tried, perhaps more than once. His delegation therefore urged the Commission to consider article 7 once again, and to try to devise a much less limited version of the rule. Of course, his delegation regarded paragraph 5 of the article in regard to penalties as an essential addendum to any exceptions from the rule.

54. Mr. KOTEVSKI (Yugoslavia) said that the fortieth anniversary of the Commission was an opportunity not only to reaffirm the results achieved, but also to define further priorities, tasks and responsibilities in the light of contemporary developments in international relations. In the modern interdependent world, regulation of the rights and responsibilities of all those involved in international relations must increasingly be based on the rule of international law. Consequently, the tasks and responsibilities of the Commission, the General Assembly and the Sixth Committee had increased in significance, and the priorities for their future work must be defined anew.

55. He welcomed the provisional adoption of 14 articles of the draft articles on the non-navigational uses of international watercourses, and of 6 articles of the draft Code of Crimes against the Peace and Security of Mankind. He also welcomed the progress made on other topics, and hoped that it would be possible for the General Assembly to consider the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier at its forty-fourth session, and the draft articles on jurisdictional immunities of States and their property as soon as possible.

56. With regard to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", his delegation considered that the draft had rightly focused on the question of "risk" and "harm". The basic dilemma was whether "risk" or "harm" in that context constituted the basis for liability, a question which required in-depth analysis. His delegation's preliminary opinion was that harm, which was the material expression and a consequence of the activity that entailed an "appreciable risk", should not be excluded from article 1. The question was whether reliance only on the concept of "appreciable risk" would narrow the scope of the rule. In that context, his delegation regarded as very useful the suggestion made by the representative of Brazil that harm should be the paramount consideration in matters of reparation, and that risk should be the basis for the rules of prevention.

57. It seemed that the solution could be found by linking both elements, risk and harm, for it must not be forgotten that the Commission was dealing with the matter of liability for the activities of States which, in international law, were often in that grey area between acts not prohibited by international law and internationally wrongful acts.

(Mr. Kotevski, Yugoslavia)

58. With regard to the law of the non-navigational uses of international watercourses, he said that Yugoslavia, a country with numerous international watercourses and a party to many of the relevant international agreements, was very interested in an early establishment of universal rules in that area.

59. As to the specific questions raised in the report of the Commission, his delegation considered it desirable to have a separate part in the draft devoted solely to environmental protection and the pollution of international watercourses. That sub-topic deserved special attention.

60. With respect to the concept of "appreciable harm" in article 16, paragraph 2, as proposed by the Special Rapporteur, his delegation was of the opinion that it should be expressed in a more specific manner and in the context of both the non-navigational uses of international watercourses and pollution problems. The term "appreciable harm" itself was not precise enough; it should be given a proper legal form and placed in a clearer legal context, or changed altogether.

61. His delegation was pleased to note the continuing progress in the elaboration of the draft Code of Crimes against the Peace and Security of Mankind. That undertaking was especially important as the use of force and attempts to deny peoples and countries their right to independence and self-determination were still in evidence. While the articles provisionally adopted at the Commission's fortieth session were in line with the concept of the draft Code agreed upon earlier, his delegation thought that there was a need to reconsider whether and to what extent it was necessary to incorporate the text of the Definition of Aggression, particularly in the light of the content of the new article 12.

62. With regard to the draft articles on the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and the draft articles on the jurisdictional immunities of States and their property, he recalled that in January 1988 his country had provided written comments on them and was now awaiting the final results of their elaboration.

63. His delegation stressed the need for the Commission at its next session to devote the necessary attention to State responsibility, an issue which was of fundamental importance for the establishment of legal security in international relations and for the development of international law as a whole.

64. Referring to the future work of the Commission, he said that the world had entered a new era of development which should be reflected in the field of international law. In that connection, his delegation considered it useful that the Commission intended to establish a small working group which would be entrusted at the next two sessions with the task of formulating appropriate proposals. Yugoslavia thought, however, that the Commission itself should consider that question at its next session. In addition, it would perhaps be useful if the Commission and the Secretariat consulted professional associations and eminent jurists throughout the world on their opinion concerning the future work of the Commission and the overall trends in the development of international law. For its part, his country was prepared to make its own contribution to that important undertaking.

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65. Mr. MICKIEWICZ (Poland), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that his country endorsed the inclusion of the threat of aggression in the draft Code as a separate crime. It would correspond to the principle of the prohibition of the threat or use of force laid down in the Charter of the United Nations and many other international instruments.

66. The question of the possible inclusion of annexation as a separate crime required further consideration. If the concept was accepted, the relevant wording of the 1954 draft Code of Offences against the Peace and Security of Mankind would seem to be the most appropriate. Annexation, as a crime, could result not only from the illegal use of force but also from the threat of force. In addition, there might still be a legitimate question as to whether to include territorial cession as a result of force or the threat of force in the draft Code. Obviously, any future formulation concerning annexation and, perhaps, territorial cession should be without prejudice to the Charter, including its provisions concerning the lawful use of force.

67. The preparation or planning of aggression should be included in the draft Code as a separate crime. The concept had already been reflected in the Charter of the Nürnberg International Military Tribunal, in the Charter of the International Military Tribunal for the Far East and in the Nürnberg Principles. Now, in the nuclear age, it might be even more significant as a deterrent to activities entailing an incalculable risk. It would rightly facilitate the incrimination of individuals whose activities were essential for launching a war of aggression.

68. Where the sending of armed bands into the territory of another State was concerned, Poland shared the Commission's view that such acts should form part of the crime of aggression.

69. Intervention had become one of the most common forms of coercion of sovereign States. Poland believed that it should be covered by the draft Code and preferred the second alternative put forward by the Special Rapporteur in that connection. However, it would be useful to take account of the provisions of the 1954 draft Code dealing with coercive measures of an economic or political character as well. The relevant wording of the 1970 Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States might also be helpful in that regard.

70. International terrorism should be covered by the draft Code as a separate offence. The key problem remained the elaboration of a definition of the concept. The relevant provisions of the 1937 Convention on the Prevention and Punishment of Terrorism could be a useful point of departure but they did not constitute an appropriate solution. On the other hand, the experience gained in connection with the conclusion of treaties dealing with particular manifestations of terrorism might be helpful. In that connection, Poland wished to reaffirm its opposition to any attempt to equate national liberation movements with terrorism. However, it must be stressed that the basic rules of international humanitarian law should always be duly respected.

(Mr. Mickiewicz, Poland)

71. The issue of breaches of treaty obligations required further consideration - inter alia, in connection with the question of State responsibility. In any event, Poland shared the view that any provision dealing with a violation of a treaty should cover only the most serious breaches of treaty obligations, breaches that constituted a threat to international peace and security.

72. Where colonial domination was concerned, Poland endorsed the merger of the two alternatives proposed by the Special Rapporteur, since that would harmonise the relevant wording of the draft articles on State responsibility with that of the relevant General Assembly resolutions.

73. Mercenarism should be dealt with in a separate provision. The definition of mercenarism laid down in Protocol I to the Geneva Conventions of 1949 was not altogether satisfactory. In particular, Poland did not support either the nationality criterion or the requirement concerning material compensation. The Commission should continue its efforts to find a solution, taking into consideration the work of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

74. The question of the forcible expulsion of peoples required a cautious approach. Whereas the expulsion and resettlement of peoples could take place in the framework of a policy of genocide and brutal suppression, there were cases of transfers of populations on the basis of international agreements, implemented in a humane manner. Accordingly, such situations must be assessed in the light of international law.

75. Turning to the draft articles provisionally adopted at the Commission's most recent session, he said that draft article 4 still needed some improvement. It was not enough to give "special consideration" to the request of the State in whose territory a crime had been committed. The principle that war criminals should be tried and punished in the countries in which they had committed their crimes was already a well-established rule of international law. States should be encouraged to extradite individuals for procedural reasons, since the gathering of evidence was usually much easier in the country where the offence had been committed. Besides, experience had shown that States often neglected to prosecute their own nationals. Lastly, an awareness on the part of potential perpetrators of crimes against the peace and security of mankind that they might not escape extradition to the country where the crime had been perpetrated would increase the draft Code's preventive value. Poland endorsed draft articles 7, 8, 10 and 11. Draft article 12, which was of crucial importance, constituted an excellent basis for a final solution. Poland wished to associate itself with the view that any determination by the Security Council as to the existence or non-existence of an act of aggression should be binding on judicial organs.

76. Poland wished to reaffirm its support for the establishment of an international criminal jurisdiction. However, at the current stage, the Commission should concentrate on completing the draft Code as soon as possible. As a next step, it should draw up a statute of an international criminal tribunal for individuals charged with crimes against the peace and security of mankind and,

(Mr. Mickiewicz, Poland)

perhaps, draft agreements on the establishment of ad hoc or special criminal tribunals for some categories of crimes.

77. Ms. EGUH (Nigeria) said that her delegation was pleased to note that the Commission had made considerable progress on many topics.

78. With regard to the question of international liability for injurious consequences arising out of acts not prohibited by international law, Nigeria was happy to note that the Special Rapporteur considered the general debate on the topic completed. On the issue of the role to be played in the topic by the concepts of "risk" and "harm", Nigeria supported the view that risk must be appreciable and identifiable by virtue of the physical characteristics of the thing or activity involved. Transboundary harm should therefore be associated with an activity creating appreciable risk. The Commission should seek to clarify the concepts concerned.

79. Nigeria was pleased to note that, in dealing with the topic of the law of the non-navigational uses of international watercourses, the Commission had devoted some meetings to the sub-topic of the exchange of data and information and that environmental protection, pollution and related matters had received no less emphasis. Surrounded as it was by neighbours with international watercourses, Nigeria attached great importance to the topic. The obligation of watercourse States to co-operate with regard to the use, protection and development of an international watercourse should be in accordance with the erga omnes principle. Since Nigeria also attached great importance to the issue of environmental degradation, it supported the Special Rapporteur's work on the justification for a separate part in the draft devoted solely to the question of environmental protection and the pollution of international watercourses. Nigeria also supported the proposal that, as far as possible, there should be harmony between the draft articles and the relevant provisions of the 1982 United Nations Convention on the Law of the Sea.

80. Nigeria noted that the Special Rapporteur's preliminary report on State responsibility referred to two sets of wrongful acts (A/43/10, para. 533). It supported the view expressed in connection with article 6 that restitution in kind should consist in the re-establishment of the situation that had existed prior to the occurrence of the wrongful act, namely, the status quo ante. Where scope was concerned, restitution should apply to any kind of wrongful act. Nigeria accepted the fact that the only hypothesis where an international legal impediment could validly be invoked by a wrongdoing State would be the case in which the action necessary to provide restitution in kind was incompatible with a superior international legal rule. Nigeria also supported the view that the ultimate choice between a claim for restitution and a total or partial claim for pecuniary compensation should be left to the injured State, as well as the view that the injured State's right of choice should not be left unlimited.

81. Nigeria did not share the view that the scope of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier should be confined to the status of diplomatic stricto sensu and

(Ms. Eguh, Nigeria)

consular couriers and bags. As to the possible extension of the scope of the draft articles to the couriers and bags of national liberation movements, Nigeria agreed that the matter should be settled by means of special agreements between States and the movements concerned, but it supported the proposal that the scope of the draft articles should be extended so as to cover the national liberation movements recognized by the United Nations and some regional organisations. The scope of the draft articles could easily be extended by means of an additional optional protocol. The use of electronic or any other technical devices for examining the contents of the diplomatic bag amounted to an infringement of the immunity accorded to the courier and the bag and constituted interference in the sovereignty of the sending State. Nigeria therefore noted with satisfaction that the revised draft took account of the opposing views expressed in the Sixth Committee on the examination of diplomatic bags by electronic or other technical means. It was also pleased to note that the Commission had decided to abide by the established rule of absolute inviolability. Nigeria therefore welcomed the new formulation and believed that the provision in question would put an end to the controversy on the subject.

82. The topic of the jurisdictional immunities of States and their property was important to all developing countries engaged in State trading as a means of economic survival. It was therefore unfortunate that the Commission had been unable to consider the topic owing to lack of time. The substance of the topic had been the distinction between two kinds of acts of States, namely, acta jure imperii and acta jure gestionis. Nigeria supported the Special Rapporteur's proposal that, where the definition of a "State" was concerned, in the future convention federal States or agencies or instrumentalities of the State should be regarded as enjoying immunity. With regard to the definition of the term "commercial contract", Nigeria endorsed the Special Rapporteur's proposed new formulation of the purpose text (para. 510 of the Commission's report). With regard to draft article 18, Nigeria was happy to note the Special Rapporteur's proposal that the word "non-governmental" should be deleted from paragraphs 1 and 4. The rule in question should not be stated in such a way as to restrict the trade upon which developing countries relied for their economic survival. Concerning article 19, Nigeria was prepared to accept any formulation that did not seek to add to or detract from the existing jurisdiction of the courts of any State or to interfere with the role of the judiciary in any given legal system in the judicial control and supervision that it might be expected or disposed to exercise in order to ensure good morals and public order in the administration of justice necessary to implement arbitral settlement of differences.

83. The questions raised by the draft Code of Crimes against the Peace and Security of Mankind were of paramount importance where the peaceful coexistence of States was concerned. With regard to draft article 11 on colonial domination, Nigeria supported the proposal that the two alternatives suggested by the Special Rapporteur should be either merged or combined. As to the applicability of the principle of self-determination, Nigeria believed that the concept concerned was universally applicable. Nigeria regarded the crimes listed in paragraph 275 of the Commission's report as crimes against peace. It also supported the consensus that every crime qualifying as a crime against peace should form the subject of a

(Ms. Eguh, Nigeria)

separate article of the draft Code. Lastly, it wished to commend the Commission for the work it had done so far on the topic, which represented a great step in the right direction.

84. Mr. CRAWFORD (Australia) said that his delegation was particularly pleased to note the emphasis in the Special Rapporteur's report on the draft Code of Crimes against the Peace and Security of Mankind, and in the Commission's debate on the topic, on the need for a precise and workable definition of the crimes to be included in the draft Code. It should be stressed that the purpose of the Code was neither to develop general international law in relation to such matters as aggression in the sense of expanding the scope of the obligations of States, nor to define the scope of State responsibility at the normal inter-State level with respect to the matters covered by the Code. The key point was that the Code was concerned with offences subject to universal jurisdiction which were committed by individuals: it was thus of great importance that the specified offences should be clearly and precisely defined, and that the acts made criminal by the Code should themselves be matters of genuinely international concern as a threat to the peace and security of mankind. His Government shared the view of the International Law Commission that the Code should be limited to the acts of individuals and should not be concerned with the question of the criminal liability of States as such.

85. The Commission had endeavoured to state with as much precision as possible the content of those offences which were of sufficient importance to warrant universal jurisdiction. His delegation hoped that such an approach, which was not merely correct but inevitable, would be reflected in the Commission's consideration of the proposed article dealing with crimes against peace: both the alternatives proposed by the Special Rapporteur (A/43/10, footnote 225) were unacceptable, the first because of its extreme vagueness and the absence of any element of individual attribution of responsibility, and the second because of its excessive breadth and the lack of any defined element of international concern. More generally, it should be stressed that the Commission was defining the scope of crimes to be covered by the Code and that it should adhere as closely as possible to existing international treaties or draft treaties when defining particular offences.

86. The fact that the Code was concerned with the criminal responsibility of individuals and not with the international responsibility of States carried with it a corollary, in that the implementation of a system of criminal responsibility required a body of rules relating to the intention of the offender, to the various offences which could be relied upon, and to such matters as the burden of proof and related evidentiary and procedural issues. While the Commission had made progress in a number of respects, particularly with regard to draft articles 6, 10 and 11, the rules established were specific to the context of offences against the peace and security of mankind. In relation to criminal liability there would also be a range of general rules which sought to define individual responsibility. It was thus not strictly correct to say, as did draft article 2, that the characterization of an act or omission as a crime against the peace and security of mankind was independent of internal law. Unless the Code was to spell out the whole range of what might be described as the "general part" of the criminal law in relation to personal liability, it would necessarily be the case that the ordinary rules of the

(Mr. Crawford, Australia)

criminal law of the court concerned would apply. Although that requirement was not likely to prove difficult to fulfil in relation to many of the offences specified, it was a fundamental rule of criminal law that the intention of the offender remained an integral aspect of any serious criminal offence. The need to prove intent was not a matter to be governed by a presumption or, as the commentary to the draft Code might perhaps be read as implying, a matter merely of procedure.

87. Turning to the draft articles provsionally adopted by the Commission at its fortieth session, he said that he wished to focus attention on draft articles 7 and 12, since his delegation regarded draft articles 4, 5, 8, 10 and 11 as being generally acceptable, although the wording of paragraph 2 of draft article 8 might usefully be clarified, and in draft article 6, which dealt with judicial guarantees, it might be better to refer to the "minimum guarantees due to an accused person on trial for a serious offence", which would make it clear that the relevant guarantees applicable under national law in securing due process would also be applicable to offences tried by the court of that country under the Code. At the same time, it was also necessary to specify the guarantees which should be regarded as minimum in relation to prosecutions under the Code, and in doing so, to draw on the relevant provisions of the International Covenant on Civil and Political Rights.

88. Draft article 7 dealt with what was often termed as "double jeopardy". His delegation agreed that, if a person was tried for a crime under the Code by an international criminal court, that trial should be regarded as disposing of the issue once and for all, but the question remained of how that principle should be modified in relation to trials in national courts, pending the establishment and effective operation of an international criminal court. It was not a matter of determining the extent to which the courts of one State were obliged to recognise decisions made by the courts of another State in the matter of criminal responsibility. While it might be accepted that there were good reasons why the national courts of one State should not be bound to accept, under all circumstances, the decisions of the courts of another State on matters of criminal liability, the situation dealt with in the draft articles was one in which certain offences were defined as international offences which were the subject of universal jurisdiction. The States parties to the Code would be subject to an obligation to give effect to those provisions, with all that that implied in terms of such requirements as uniform interpretation and application in good faith. Under those circumstances, the principle that no one should be twice subjected to jeopardy in relation to particular criminal conduct must surely be the basic rule.

89. Under draft article 7, the basic principle non bis in idem was stated clearly and appropriately in paragraph 2. Thereafter two exceptions were allowed. The first related to subsequent prosecutions for an offence under the Code where the person had earlier been tried for a corresponding ordinary crime under the law of another State. The second related to the subsequent trial under the Code of a person who had previously been tried under the Code in the courts of another State, where the second State was either the State where the offence took place or the State which was the main victim of the crime. In his delegation's view, those exceptions were too broad, and constituted too great a limitation on the basic

(Mr. Crawford, Australia)

principle of double jeopardy. In each case the exception corresponded to a real difficulty, but the exception itself went too far.

90. Regarding paragraph 3 of article 7, the principle of double jeopardy should not be solely dependent upon whether the previous offence was prosecuted under the Code or under the national law of the State concerned: the latter might, for example, make conduct which was criminal under the Code criminal for precisely the same reasons and to precisely the same extent as the Code. Where substantially the same acts were the subject of criminal liability under a provision of equal seriousness as the Code, it could be strongly argued that the principle of double jeopardy should apply. There might be perfectly sound reasons why a particular offence was prosecuted under some other criminal provision rather than under the Code, and he therefore suggested that the Commission should consider some further modification to the exception in article 7, paragraph 3, to reflect the principle that any subsequent prosecution under the Code should be for an offence which was significantly more serious than the earlier offence charged. That could be determined either by some formula relating to the gravity of the earlier charge, or by reference to the maximum penalty which could have been imposed.

91. A second issue related to article 7, paragraph 4, which created an exception for subsequent trial under the Code by the court of the State in whose territory the offence was committed or the court of the State which was the main victim of the crime. The difficulty with that proposal was that it was not merely a partial exception to the principle of double jeopardy: it actually reversed the principle in a case where the second court was one of the two courts mentioned. There might thus have been a perfectly proper trial before the court of another State under an internationallly accepted principle of universal jurisdiction. Even if the defendant were acquitted after such a trial, the courts mentioned in paragraph 4 of article 7 would be completely free to try the defendant again, and, because the defendant had previously been acquitted, the guarantee in relation to sentence contained in article 7, paragraph 5, would be irrelevant. If the Code was to create a genuine system of universal jurisdiction, the decisions of national courts under that system must be respected, at least as a general proposition. If it was desired to give priority to the courts of the State in which the offence was committed, or which was the main victim of the crime, then the appropriate way to do so was to give those courts jurisdictional priority under article 4. Draft article 4, paragraph 5, did correctly point out that special consideration should be given to a request for extradition by the State in whose territory the crime was committed, but no mention was made of a request by a State which was the main victim. If the intention was to give some priority to the latter State, that should have been done under article 4, paragraph 2. The real difficulty which article 7, paragraph 4, sought to address was the problem of a "mock trial" before the courts of a State favourable to the accused, the purpose of which was to exonerate the defendant artificially. However, it should not be readily assumed that judicial procedures would be abused in that way, since the whole tendency in the law relating to international judicial assistance, in both the civil and criminal spheres as well as in the area of transnational arbitration, had been towards greater recognition of the decisions of other courts, notwithstanding the possibility of occasional abuses. His delegation therefore suggested that the

(Mr. Crawford, Australia)

Commission should limit the exception contained in draft article 7, paragraph 4, to defined situations where a second trial under the Code was justified, for example in a case where substantial new evidence had become available since the first trial. If it was necessary also to deal with the problem of a first trial which constituted an abuse of the Code, that should be done by means of a specific provision, but there was much to be said for the view that a second trial in such circumstances should be conducted before the proposed international criminal court. It was open to question whether any guarantee was provided under article 7, paragraph 4, that only the first trial would involve an abuse. His delegation had drawn up some alternative formulations which would be circulated informally to members of the Committee.

92. Draft article 12 represented an initial attempt to deal with the problem of individual responsibility for aggression. It clearly recognised that the question was not simply whether a State had committed aggression but whether a particular person was to bear individual criminal responsibility in relation to that violation of international law. The article was clearly not intended to cover the acts of individuals not acting on behalf of the State, and thus needed to be supplemented by the addition of provisions dealing with attribution for the purposes of article 12, paragraph 1. In that connection it might be asked whether it was not inappropriate to include paragraph 6 of article 12 in a Code of Offences dealing with individual responsibility. It was obvious that nothing concerned with the individual responsibility of persons, whether or not that they had acted on behalf of the State, could, as such, expand the international responsibility of the State itself. In view of the paramount position of the Security Council in relation to the concept of aggression under the Charter of the United Nations, he agreed that article 12, paragraph 5, should be included. It should not be open to a national court to determine, contrary to a determination of the Security Council, whether an act of aggression had or had not occurred. Of course, all issues relating to individual responsibility for that act of aggression would be matters for the trial court.

93. The question of the establishment of an international criminal court had been on the international agenda for a considerable period of time, and was a matter of great interest but very considerable difficulty. Debate continued as to the precise juridical basis of the two international criminal courts actually established in the twentieth century, since both had been created in rather exceptional circumstances at the end of the Second World War. The case for some standing machinery required serious consideration, but there was considerable risk and difficulty involved in establishing further international machinery for the resolution of disputes: such machinery might not be used, it would add to the cost and complexity of the international jurisdictional system, and it would deflect attention from securing the appropriate exercise of jurisdiction by national courts, which was the method normally chosen to implement international policies in criminal matters. Accordingly, although his delegation agreed that it could be appropriate for the International Law Commission to examine the question of establishing an international criminal court, it did not think that the draft Code should itself include specific provisions relating to such a court. Nor did it believe that the progress which the Commission was making on the item should be

(Mr. Crawford, Australia)

retarded or put at risk by the elaboration of what would undoubtedly be a complicated and controversial set of rules, which were properly the subject matter of a different instrument.

94. Mr. VONGSALY (Lao People's Democratic Republic) said that the drafting of a Code of Crimes against the Peace and Security of Mankind reflected the international community's serious concern at flagrant internationally unlawful acts directed against the legitimate interests of peoples and States in various parts of the world. Adoption of the draft Code would create a legal instrument enabling States to combat such crimes collectively and, if necessary, to prosecute and punish their perpetrators according to the gravity of their offenses.

95. Turning to the draft articles themselves, he said that his delegation agreed with the idea expressed in article 4, on the obligation to try or extradite, but felt that some small improvement could be made in paragraphs 1 and 2. Paragraph 1 gave the State in which the crime had been committed the right to extradite or to try "an individual alleged to have committed a crime against the peace and security of mankind". That wording, however, should be clarified in a separate article on the use of terms in order to ensure that an individual was not extradited or tried on the basis of malicious accusations. Regarding paragraph 2, his delegation considered that, if extradition was requested by several States, special consideration or priority should be given to the State which was the main victim or in which the crime was first committed. Paragraph 3 had given rise to divergent views, and some delegations had put forward quite convincing arguments against the establishment of an international criminal court. His delegation, however, considered that, since genocide, apartheid, mercenarism, international terrorism, the taking of hostages, the seizure of aircraft, unlawful acts directed against the safety of civil aviation, and offences against persons enjoying international protection were regarded as international crimes, the idea of establishing an international criminal court or an ad hoc court for the same purpose would not be premature.

96. While the principle of non bis in idem affirmed in article 7 would be applicable in the proposed international criminal court, many delegations wished to see the application of that principle extended to national courts. It should not, however, be used to exempt an accused person from prosecution by a national court of another State in which the crime had been committed. In that connection, his delegation supported paragraph 4, which did not exclude the possibility of giving jurisdiction to another State which had sufficient evidence to convict the offender, even if the offender had already, for want of solid evidence, benefitted from the dismissal of the case or an acquittal by the first court, or if the State in which the new trial was held was convinced that the duration of the sentence awarded did not correspond to the gravity of the acts committed. Paragraph 5 of article 7 accorded a defendant sufficient guarantee of his basic rights as an individual in the event of a second trial by another court.

97. Turning to the Special Rapporteur's sixth report and the draft article 11 which he had submitted on acts constituting crimes against peace, he said that his delegation had no objection to the wording of paragraph 2, which stated that

(Mr. Vongsaly, Lao People's Democratic Republic)

"recourse by the authorities of a State to the threat of aggression against another State" constituted a crime against peace but felt that the term "threat of aggression" should be defined clearly in order to avoid any possible ambiguity. Of the two alternative texts submitted by the Special Rapporteur for paragraph 3 of draft article 11, the first was too vague, while the second was more comprehensive and was accordingly preferable to his delegation.

98. In connection with the same draft article, the question arose of establishing whether a permanent economic blockade by one State of a neighbouring State with the intention of undermining that State did not constitute a crime against the security of mankind, and whether it was to be understood that genocide practised by the authorities of a State against its own people did not fall into the same category. It would be worth while for the Commission, at its next session, to draw up a full list of the acts which constituted crimes against the peace and security of mankind.

99. Regarding article 12, on aggression, the paragraphs as adopted by the Commission were merely extracts from the Definition of Aggression adopted by the General Assembly in its resolution 3314 (XXIX) of 14 December 1974. To facilitate the interpretation by judges of the scope of the acts of aggression concerned, the Drafting Group could perhaps be asked to reword the paragraphs on the basis of both the fundamental concepts of criminal law and the General Assembly's Definition of Aggression.

100. Mr. TARMIDZI (Indonesia) referring to the law of the non-navigational uses of international watercourses, said that Indonesia, as a riparian State, recognized the complexities the topic involved as it touched upon the vital interests of many States. The commission had drawn a tentative outline for the treatment of the topic as reflected particularly in draft articles 8 to 12, which required the observance of some immutable principles. First, the right which a State enjoyed within its territory was subject to the limitation of not causing harm to other watercourse States in the areas of public health, industry, agriculture or the environment. Secondly, the general obligation of States to co-operate through the regular exchange of data and information, including information concerning planned measures, with a view to ensuring a fair allocation of the uses and benefits of the watercourses and the smooth functioning of rules. Taken together, they sought to avoid the problems inherent in unilateral assessments and policies and established a viable procedural framework to assist watercourse States in maintaining an equitable balance between their respective uses of international watercourses.

101. In view of the diversity of international watercourses, in terms of both physical characteristics and the human needs they served, his delegation endorsed the "framework agreement" approach, which involved enunciating general principles and rules, leaving it to parties directly concerned to adopt specific measures appropriate to their unique circumstances and requirements. That approach would provide useful guidance for the management of international watercourses and constitute a solid foundation for the negotiation of future agreements.

(Mr. Tarmidzi, Indonesia)

102. With regard to the draft Code of Crimes against the Peace and Security of Mankind, his delegation noted with satisfaction that the general principles concerning non-retroactivity, responsibility, non-applicability of statutory limitations and judicial guarantees were to a large extent close to completion. The Commission should therefore build upon the progress already achieved by further identifying the hard-core issues of legally definable crimes in order to arrive at a meaningful and effective Code. Attention should be focused on some specific characteristics of certain acts which by their nature and intent were so heinous as to threaten the very basis of human society and survival. They included aggression, threats of aggression, annexation, apartheid, intervention in the internal and external affairs of States, terrorism, breach of treaties intended to ensure international peace and security, and the use or threat of use of nuclear weapons. In addition, there were crimes against peace such as colonial domination, transfer or massive expulsion of populations by force and implanting settlers in an occupied territory with a view to changing its demographic composition.

103. On the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation was of the view that the unauthorized scanning of the bag by electronic or other technical devices would impinge directly on the principle of confidentiality and the legitimate interests of the sending State. As his delegation had noted in the past, in the event of doubt or suspicion, the diplomatic bag might be opened in the presence of the competent authorities of the receiving State and by an authorized representative of the sending State. It agreed that the scope of the Convention should be extended to the bags of international organizations of a universal character, while special agreements might be entered into between the Governments concerned and national liberation movements recognized by regional groups and the United Nations.

104. For the past decade, the Commission had been concerned with the issue of liability for injuries suffered as a result of acts of States. He stressed the importance of that question, particularly in view of the numerous incidents which had harmful transboundary effects but in respect of which there were no relevant rules and procedures. Ecological considerations and damage to the environment demonstrated the urgent need to accord priority consideration to those issues of universal concern. Technological developments precluded the drawing up of a list of activities covered by that topic, since that would require constant modifications of the procedures and rules. His delegation therefore agreed with the recommendation that a set of general criteria would be most appropriate and practical. Furthermore, account must be taken of activities which had transboundary and long-range effects and were not territorially-based but were within the jurisdiction or control of a State. Such a State could not evade its responsibility or be exempt from liability for harmful consequences of such activities. Lastly, careful consideration should be given to the elaboration of a régime for State liability for nuclear damage.

The meeting rose at 1.10 p.m.