UNITED NATIONS

General Assembly

FORTY-FOURTH SESSION

Official Records

SIXTH COMMITTEE
27th meeting
held on
Monday, 30 October 1989
at 10 a.m.
New York

SUMMARY RECORD OF THE 27th MEETING

Chairman: Mr. TÜRK (Austria)

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Distr. GENERAL
A/C.6/44/SR.27
16 November 1989
ENGLISH
ORIGINAL: SPANISH

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89-56702 1921S (E)

20p.

The meeting was called to order at 10.05 a.m.

AGENDA ITEM 145: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIRST SESSION (continued) (A/44/10, A/44/475, A/44/409 and Corr.1 and 2)

AGENDA ITEM 142: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/44/465, A/44/73-S/20381, A/44/75-S/20388, A/44/77-S/20389, A/44/123-S/20460)

1. Mr. LOULICHKI (Morocco) said that the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier afforded a sound basis for the adoption of an international instrument, for they represented a fair balance between, on the one hand, the need of the State sending the diplomatic bag to maintain rapid, secure and confidential contact with its missions abroad and, on the other hand, the security requirements of the receiving State and the transit State, and the duty to respect their laws and regulations. His delegation therefore supported the Commission's recommendation that an international conference of plenipotentiaries should be convened to adopt the draft articles in the form of a convention. Beforehand, there should be consultations in the Sixth Committee similar to those that had preceded the adoption of the Convention on the Law of Treaties between States and International Organizations or between International Organizations. That would raise the level of acceptance of the draft articles and, consequently, shorten the duration of the conference.

2. Although the draft articles addressed situations that were not fully regulated in the four existing Conventions on the question, the relationship between the articles and other agreements and conventions was still difficult to understand on some points which had not been adequately clarified in article 32. According to that article, the provisions of the draft would "supplement" the rules on the status of the diplomatic courier and the diplomatic bag contained in those four Conventions. To that end, the Commission should have confined itself to preparing certain provisions that would complement the rules forming the common denominator of the existing Conventions. The Commission, however, had opted for an exhaustive text independent of the four Conventions, implying that there was no contradiction between the draft articles and the Conventions. Nevertheless, the Commission had not ruled out the possibility that contradictions might arise. Accordingly, in the commentary to article 32, it was stated that if such were the case, resort should be made to the rules of the 1969 Vienna Convention on the Law of Treaties concerning the application of successive treaties relating to the same subject-matter. In that connection, his delegation would have preferred article 32 to state clearly that the provisions of the future instrument would "prevail" over those of the existing Conventions.

3. With regard to the scope of the draft articles, his delegation considered that the Commission had adopted the right approach in favouring optional protocols by which States parties might extend the régime of the future instrument to the couriers and bags of special missions and of international organizations of a universal character. In addition, the Commission had taken into account a number

(Mr. Loulichki, Morocco)

of reservations expressed during the first reading of the draft articles, by limiting the scope to the official communications of States.

4. On the question of the protection of the diplomatic bag, since it was impossible to adopt a unified régime along the lines of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, the Commission had proposed a compromise formula reflecting the concerns over abuses of the diplomatic bag and taking international practice into account.

5. In conclusion, he pointed out that certain articles (such as article 17, concerning the inviolability of the temporary accommodation of the diplomatic courier) might be condensed without impairing the clarity of their provisions.

6. Mr. VILLAR (Spain) said that some States had expressed misgivings as to the usefulness of elaborating a convention on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, since the existing conventions, specifically the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, set forth international rules applicable to official couriers and bags. A new codification exercise in that area must fulfil three objectives: facilitating the normal exchange of official communications; guaranteeing the confidentiality of the content of the bag; and preventing abuses. His Government doubted that the current draft articles ensured a proper balance between those objectives. As it had pointed out in its commentary of 21 December 1987, it had discerned in the wording of the previous draft articles a tendency to equate the status of the diplomatic courier with that of the members of the staff of diplomatic missions, as if couriers served permanently as professional diplomats. Although the new draft articles had gone some way towards rectifying that situation, Spain was still not fully satisfied with the wording of paragraphs 2 and 3 of article 9, which required the consent of the receiving State to the appointment of a diplomatic courier, or the wording of article 12, on the diplomatic courier declared persona non grata or not acceptable. Those provisions were unrealistic since, in the case of article 9, they were based on the assumption that the diplomatic courier resided permanently in the receiving State, when in fact the receiving State, in most cases, had no prior knowledge of his appointment or arrival. The provisions of article 12 were unrealistic because in principle, in most cases, the receiving State had no knowledge of the appointment of an official courier.

7. His delegation was pleased that article 17 had toned down the provision regarding the inviolability of the temporary accommodation of the courier often, nothing more than a hotel room. It still believed, however, that the provision could cause problems.

8. The protection of the diplomatic bag, referred to in article 28, was a principle essential to the normal and necessary exchange of official communications between States, but application of that principle should not lead to abuses and thus affect the legitimate interests of the receving State or the transit State. The Commission was fully aware that there had been instances in which persons had

(Mr. Villar, Spain)

used, or attempted to use, official bags for the illicit import or export of currency, drugs and weapons, and even to transport people.

9. His delegation was not satisfied with the distinction in the draft articles between diplomatic bag and consular bag; under article 35, paragraph 1, of the 1963 Vienna Convention on Consular Relations, a consular post could use diplomatic bags for its communications. That was also the normal procedure, and it was rare for a Government to use the so-called consular bag. It would therefore be best to refer solely to official bags, as the Observer for Switzerland had rightly suggested in his statement, and that would involve establishing a uniform régime for all bags. The Commission had taken the view that that should be done on the basis of the existing régime for the diplomatic bag, as reflected in the Vienna Convention on Diplomatic Relations, under which the bag was considered inviolable in all cases. In any event, it would be useful to envisage a different legal approach to that important question, by recognizing the right of the receiving State and the transit State to request that the bag should be opened in the presence of a representative of the sending State when there were serious and well-founded reasons to believe that it was being misused. If the authorities of the sending State refused, the bag could be returned to the place of origin. The régime of paragraph 2 would therefore apply to all types of bags. That would create mechanisms to deter possible abuses, and justify the elaboration of a new international convention, an exercise that appeared to be of questionable value if the draft merely reproduced existing rules.

10. The bag was already subject to examination through electronic devices; no airline would agree to carry a bag without first screening it. In any event, the use of sophisticated electronic devices that would make it possible to read documentation in the bag should be prohibited. The topic was a sensitive one requiring further thought.

11. The Commission's proposal to convene a diplomatic conference to elaborate an international convention on the status of the diplomatic courier and bag was premature. Without ruling out the possibility of taking such a decision at a later date, Spain believed that it was advisable to make sure beforehand that there was a broad consensus among the various groups of States on the content of the draft, so as to avoid elaborating a convention that would not be viable in the future, as had already happened in another case.

12. Mr. ROBINSON (Jamaica) noted that, while most of the international community had ratified the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, it had not been correspondingly accepting with regard to the other two conventions on diplomatic law now in force. For example, the 1969 Convention on Special Missions, which required 22 ratifications for entry into force, had been ratified by only 23 States. That response demonstrated that States were reluctant to go beyond the two basic conventions, so that there was little prospect that they would support a convention embodying the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic couriers. Nevertheless, and in view of the fact that States attached

(Mr. Robinson, Jamaica)

more importance to the status than to the provisions of the above-mentioned Conventions, the convention on the status might generate more support, which would not be forthcoming if many States continued to be unwilling to go beyond the 1961 and 1963 basic conventions. His delegation would not oppose the convening of a diplomatic conference for the adoption of a convention to embody the draft articles provided it was the consensus of the Commission.

13. With regard to the utility and relevance of the four conventions on diplomatic law, it was his delegation's view, first, that there was no question that the 1961 and 1963 Conventions constituted source material for that subject-matter, given the widespread support they had received through ratification and that many of their provisions reflected customary law. Secondly, the applicability of the 1969 and 1975 Conventions was questionable since both of them - even the 1969 Convention which had entered into force - had only been ratified by one fifth of the international community and it was doubtful that their provisions reflected customary international law. Consequently, his delegation considered that the 1969 and 1975 Conventions should not be cited as source material for the draft articles because only in a few cases had they been the main inspiration for those articles. Third, it should be noted that according to article 3 (1) and (2), which defined a diplomatic courier and diplomatic bag within the meaning of the 1961 Convention, and a consular courier and consular bag within the meaning of the 1963 Convention, those terms also encompassed the couriers and bags of permanent missions, permanent observer missions, delegations or observer delegations within the meaning of the 1975 Vienna Convention on the Representation of States in their relations with universal international organizations, but not within the meaning of the 1969 Vienna Convention on Special Missions. In that context, he did not understand why reference was made to the 1975 Convention and not the 1969 Convention.

14. In paragraph 9 of the Commentary on article 3, the words "bag of a permanent mission" or "bag of a delegation" within the meaning of the Convention on the Representation of States were understood by the Commission as encompassing the notion of bag of "representatives of Members" within the meaning of section 11 (c) and 16 of the Convention on the Privileges and Immunities of the United Nations. If that clarification was necessary, the question arose whether the reference in the Commentary was sufficient, since there was no express provision in the draft articles themselves.

15. His delegation fully endorsed the functional approach, which took the purpose and aim of the draft articles to be the establishment of a system fully ensuring the confidentiality of the contents of the diplomatic bag and its safe arrival at its destination, while guarding against abuse. Acceptability of the privileges and immunities of the courier was to be tested by the extent to which they were necessary for the performance of his functions and for the identification of his functions.

16. Jamaica commended the Commission on the inclusion of article 5, which had no counterpart in the four conventions on diplomatic law. On the other hand, those conventions included a provision on the duty not to interfere in the internal

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affairs of the receiving States, which was missing from article 5 (2). His delegation believed that article 5 should contain an express provision to that effect, a mere reference in the Commentary being insufficient, because the fact that the provision existed in all four conventions on diplomatic law could be used as an argument holding that the duty of non-interference did not apply in the context of the draft articles.

17. In article 6 (2) it should be made clear that the restrictive application of a provision of the draft articles by the receiving State was in response to a corresponding restrictive application by the sending State. That specification was necessary to ensure that the response of the receiving State was not in the nature of a reprisal.

18. While there was no corresponding provision in the four conventions on diplomatic law, it might be useful to give the receiving State the right not to consent to the appointment of a diplomatic courier who was a national of the sending State, as provided in article 9 (2) (a).

19. In view of the general character of article 13 (2), he suggested the addition of a cross-reference or qualifying phrase such as "without prejudice to the provisions of paragraph 1".

20. His delegation disapproved of the formulation of article 17 (1) because the words "in principle" were not necessary. Subparagraph (1) (b) was not very realistic because if a courier had contraband, he was more likely to have it on his person or in the diplomatic bag. In any case, any search of his temporary accommodation must not infringe the inviolability of his person or the bag.

21. The time had come to question the wisdom of preserving the inviolability of the diplomatic bag in cases where serious grounds existed for believing that it contained contraband and illicit material. In such cases, the necessary balance might be struck in the manner set out in article 35 (3) of the Convention on Consular Relations, the substance of which was reflected in article 28 (2) of the draft articles. However, that provision applied only to the consular bag and serious consideration should be given to extending its application to the other bags dealt with in the draft articles. Furthermore, it was incorrect to speak of the "consular bag" as used in article 28 (2). The correct reference should be to "the diplomatic bag as defined in article 3 (2) (b)".

22. His delegation fully supported the functional approach to immunity from criminal jurisdiction in article 18 (1). In connection with the Commentary on article 18 (4), it considered that there was a strong case for aligning conventions on privileges and immunities with the trend of modern-day conventions on the suppression of specific crimes so that a sending State would be obliged to take the necessary steps to assume jurisdiction over a person whose immunity prevented his trial in the receiving State.

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23. Article 22 (5) introduced an element of imbalance because not only was it based on the Convention on the Representation of States, whose authority was of dubious value for the reasons he had adduced earlier, it also raised the question why there was no similar provision in criminal cases.

24. Article 26 should be amended to make it clear that it only applied to States who were parties to the draft articles and to the international conventions governing the use of the postal service or any mode of transport.

25. Notwithstanding the provisions of article 32 (1), there could be situations of absolute conflict. Consequently, the International Law Commission should confront more directly the question of the relationship between the draft articles and the three conventions on diplomatic law. That could be done either by retaining the concept of a supplementary relationship but adding, as did the United Nations Headquarters Agreement, a provision dealing with cases of conflict or by eliminating that concept and utilizing instead a formulation based on article 30 (c) of the Vienna Convention on the Law of Treaties.

26. His delegation proposed that the language of article 32 (2) be amended to refer to the conclusion of new agreements by "two or more parties" as distinct from "the parties", thus making it clear that what was contemplated was not a new agreement between all the parties, but between some of the parties.

27. He concluded his remarks by stating that the draft articles constituted a solid basis for the negotiation of an international convention at a diplomatic conference. His only hope was that such a convention did not meet the same fate as the 1969 Convention on Special Missions and the 1975 Convention on the Representation of States.

28. Mr. RAKOTOZAFY (Madagascar) said that the draft articles on the status of the diplomatic courier and the diplomatic bag drawn up by the Commission were of particular importance to the developing countries, because use of the diplomatic courier and, more particularly, of the diplomatic bag was the only way in which such countries could guarantee the security of official communications with their diplomatic representatives abroad.

29. The Commission had succeeded in achieving its goals, which were to guarantee the diplomatic bag's safe and rapid dispatch, while safeguarding the rights and interests of the transit and receiving States. A just, satisfactory balance had thus been struck, and a number of innovations had been introduced, including, equal status for the diplomatic courier and the diplomatic agent wherever possible.

30. Madagascar supported the recommendation that an international conference of plenipotentiaries should be convened to consider the draft articles.

31. Mr. TREVES (Italy) referring to the draft Code of Crimes against the Peace and Security of Mankind, said that the new elements in the 1989 report did not dispel his delegation's doubts about a number of matters of fundamental importance. The

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Commission was not considering in great enough depth the role played by individuals who caused States to violate the norms of international law that the Commission was going to such lengths to define. Article 12, paragraph 1, referred - albeit in a rudimentary form - to individuals to whom responsibility for acts of aggression was attributed, while articles 13, 14 and 15, which had been adopted in 1989, did not. The latter articles had a structural peculiarity in that they contained definitions of the threat of aggression, of intervention, and of colonial domination and other forms of alien domination but did not state that such forms of conduct were crimes against the peace and security of mankind. More importantly, the articles did not state that individuals must bear responsibility for such crimes in instances where the crimes were attributable to individuals, nor did the articles indicate to which individuals the crimes were attributable or under what circumstances. The Commission indicated that it would consider that issue at a later date, but Italy believed that it should do so as soon as possible and that when it did so it should consider the matter in greater depth than it had in the case of article 12.

32. The importance of in-depth discussion of the matter became obvious when a number of specific problems that might arise in the implementation of articles 13, 14 and 15 were considered. Attention should be drawn, for example, to: identification of the individual or individuals who might be regarded as responsible for a "threat of aggression" as a result of a show of strength; identification of those to whom the crime of "maintenance by force of colonial domination" would be attributable; and the situation regarding members of collective bodies to whom responsibility by omission could be attributed, as well as the situation regarding those who might have expressed a view opposing the perpetration of the crimes in question.

33. There would appear to be no point in considering crimes in depth until ways of transposing such violations from the level of States to the level of individuals had been fully developed.

34. It seemed that the belief that acts of terrorism were unlawful, whatever their underlying cause, had become well established in the international community. Article 14, paragraph 2, should therefore be worded carefully so as to take account of intervention by means of acts of terrorism.

35. After reading the subsection of chapter III of the report, on war crimes, and comparing that with what the Commission had to say about aggression, he had a number of reservations. One might ask whether a member of the armed forces who committed an act of aggression without committing war crimes would be guilty of the international crime of aggression, or whether he would be considered exonerated owing to the fact that he was a member of the armed forces participating in an armed conflict. The criteria for attributing crimes to individuals must be clarified, and the validity of orders from a superior as grounds for exoneration from responsibility must be examined.

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36. The draft articles on the status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier represented a major contribution to the analysis and solution of a set of very tricky and politically complex problems. The articles would serve as a basic guide for State practice in the years to come. They satisfactorily reflected the state of international law in the field in question and took account of the emergence of new requirements reflected inadequately by existing law. However, before drafting a convention it would be wise to wait and see to what extent the approaches suggested in the draft were adopted in international practice.

37. If the instances of serious abuse of the diplomatic bag that had come to light recently were to recur, particularly the conveyance of weapons and narcotic drugs (and even human beings), States would be obliged to adopt far-reaching measures departing from the not entirely absolute régime laid down in article 28. He had already expressed doubts about the complete prohibition of electronic devices, and wished to reaffirm that he did not endorse the solution laid down in article 28, paragraph 1. It was difficult to understand why the option of requesting, with all the appropriate safeguards, that the bag should be opened should be accepted only in respect of the consular bag, because the requirement concerning the inviolability of the bag could be fully met in connection with such an option.

38. The approach reflected in article 28, paragraph 1, entailed a serious contradiction. It would seem that the existence of grounds for believing that the diplomatic bag contained unauthorized items would not mean that the transit or receiving State could open or detain the bag. However, in paragraph 6 of the commentary to article 28 the Commission pointed out that paragraph 1 of the article did not preclude non-intrusive means of examination, such as sniffing dogs. It was absurd to claim that a State that could lawfully ascertain by such means that the bag contained narcotic drugs should then permit that bag to continue on its way without hinderance, as appeared to be required by article 28, paragraph 1. Furthermore, instead of laying down an absolute and unrealistic prohibition of electronic devices, the Commission should have specified that such devices were lawful in the framework of a strict set of rules that took account of their technical characteristics.

39. The United Nations must first assess to what extent State practice was evolving in the direction advocated by the Commission, before it went as far as convening an international diplomatic conference. Furthermore, account must be taken of the discussion of, and reactions to, the draft in diplomatic and academic circles.

40. The drafting of article 5, paragraph 1, laying down a duty of sending States, was questionable. The receiving State's duty was not limited to "ensuring" that the privileges and immunities accorded to its couriers and bags were not abused. Use of that word was appropriate only in respect of duties involving "due diligence", or when the State had a duty only to adopt appropriate measures to prevent, to the extent possible, individuals under its jurisdiction from acting in a manner prejudicial to other States. The situation under consideration was

(Mr. Treves, Italy)

entirely different, since the diplomatic courier was an agent of the sending State - just as the individuals who filled the bag were - and his acts were thus directly attributable to the State in question (part one of the draft articles on State responsibility, article 5) even if the acts were carried out in violation of that State's domestic law or in disregard of orders received from hierarchically superior organs (article 10 of the same set of draft articles).

41. Draft article 25, paragraph 2, gave the impression that the sending State was not responsible under international law for the contents of its bag if it could prove that it had taken "appropriate measures to prevent the dispatch" of the prohibited items. Any type of use of the bag was always attributable to the sending State, which was therefore necessarily responsible under international law for the unlawful contents of the bag, since its responsibility was by no means limited to preventive measures and repression (or, in more general terms, due diligence).

42. With regard to the relationship between the draft articles and other conventions and international agreements, a number of improvements had been made in article 32 in response to a comment made by Italy the previous year. However, the words "shall ... supplement" used by the Commission in order to indicate the relationship between the draft articles and the three multilateral conventions referred to earlier perpetuated a flaw that paragraph 2 of the Commentary to article 32 did nothing to eliminate either. In view of the detailed nature of the proposed articles, it was not clear why they should not entirely replace the preceding provisions. Furthermore, the logic of paragraph 3 of article 32 was not apparent, any more than it was clear why two States should be prohibited from establishing a joint régime for their couriers and bags laying down principles entirely different from those upon which the draft articles were based, provided that the rights of third States were respected.

43. Draft article 18 contained what was on the whole an entirely satisfactory legal régime governing the jurisdictional immunities of the diplomatic courier. Immunity from civil and criminal jurisdiction must be confined to the acts performed by the courier in the exercise of his functions. Nevertheless, the Commission's commentary mixed together issues relating to the jurisdictional immunities of the diplomatic courier and issues related to aspects of substantive law. If a courier violated the laws and regulations of the receiving State or the transit State, that did not automatically mean that he had acted outside the scope of his functions and consequently was no longer entitled to immunity. When the courier violated the criminal or civil law of the transit or receiving State "in the exercise of his functions", that would give rise to the international responsibility of the sending State by virtue of his action in breach of an international obligation provided for in draft article 5, paragraph 2.

44. The courier's immunity from civil jurisdiction also applied, according to the Commission, to acts performed by him in the exercise of his functions. In fact, an act performed by him was, juridically, an act by his State, and the possibility of

(Mr. Treves, Italy)

proceedings being instituted against the sending State in the courts of the receiving State or the transit State could not be excluded, except in cases in which the sending State enjoyed jurisdictional immunity.

45. Mr. NAGAI (Japan) said that the Commission had concluded its deliberations concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, which it had been examining pursuant to General Assembly resolution 31/76, and had adopted the final text of a set of draft articles. Ever since it became a Member of the United Nations, Japan had consistently supported the Organization's law-making activities, particularly those of the International Law Commission. With regard to the Commission's future programme, his delegation considered that it should continue its consideration of the topics of State responsibility, jurisdictional immunities of States and their property and non-navigational uses of international watercourses.

46. The basic object of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was to complement the four existing international conventions in that field and to establish a uniform framework applicable to all kinds of official couriers and official bags. The Commission had, rightly, included in separate optional protocols matters relating to couriers and bags of special missions and international organizations of a universal character.

47. Particular attention had been paid to questions of how to ensure an appropriate balance between the respective rights and duties of the sending State, the receiving State and the transit State, and of how to make the need to protect diplomatic couriers and diplomatic bags compatible with the need to prevent their abuse.

48. His Government wished to study carefully the Commission's recommendation that an international conference of plenipotentiaries should be convened in order to adopt a convention on the subject.

49. Turning to the draft Code of Crimes against the Peace and Security of Mankind, he said that in order for the international community to punish directly the perpetrator of an act of aggression which constituted a crime against humanity, it was essential that an international mechanism, such as an international criminal court, should be established. The Commission should continue its deliberations with a view to codifying rules applicable to the international community and acceptable to its members.

50. At the Commission's most recent session, discussions had been held on draft articles 13 and 14, relating to war crimes and crimes against humanity. It would be more realistic to enunciate a general definition of war crimes than to draw up a list of specific crimes. In its deliberations on crimes against humanity, the Commission had covered broad items such as genocide, apartheid and attacks on assets of vital importance. However, the crimes listed as crimes against humanity should be limited only to strictly defined criminal acts which genuinely constituted crimes against the peace and security of mankind.

51. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries, said that in defining crimes against the peace and security of mankind, the Commission should bear in mind the overall concept of an internationally wrongful act as contained in article 19 of the draft concerning State responsibility. In that article, a distinction was made between international delicts and international crimes. The draft Code of Crimes against the Peace and Security of Mankind could be considered as a concrete application of article 19 to certain categories of international crimes, covering only the most serious international offences and leaving lesser offences to be covered by the draft on State responsibility. It would also be desirable, in reviewing the draft Code, to bear in mind the progress achieved under the topic on State responsibility.

52. In considering the crime of aggression at the previous year's session, the Commission had endorsed the definition of that concept adopted by the General Assembly in 1974. When discussing war crimes and crimes against humanity, the Commission should maintain the same approach, in other words it should draw up a list of such crimes. The list must be exhaustive so as not to run counter to the fundamental rule of criminal law expressed in the formula nullum crimen sine lege. That did not mean that further offences could not be defined in the future. The Code could always be revised, and a reference should be made in its text to the famous Martens clause. However, the Code should contain only a list of those crimes with regard to which consensus existed in the international community at the time the Code was adopted.

53. It would be preferable for the Commission not to try to invent new formulations or concepts in areas where principles recognized by the international community already existed, for instance on the behaviour of States during armed conflicts, especially the latest development of the rules contained in the two additional protocols to the Geneva Conventions of 1949. Those principles should serve as a basis for the Commission's work on war crimes and crimes against humanity.

54. With reference to draft articles 13, 14 and 15, dealing with the threat of aggression, intervention, and colonial domination and other forms of alien domination, he agreed with the Commission that such acts should form a part of a code of crimes against the peace and security of mankind. However, the definition of those crimes, as well as of the crime of aggression, raised the question of the application of the code ratione personae, in that all of those crimes involved the responsibility of the State, and so far the Commission had decided to limit the Code to the criminal responsibility of individuals. Accordingly, in drawing up the Code it might be worthwhile to keep in mind the distinction between acts committed by individuals and those committed by individuals representing their Government. That distinction had a bearing on the question of determining the penalties incurred by the perpetrators in certain cases, for instance in the case of acts by organs of State. Penal prosecution of the individual and payment of damages by the State, together with an assurance that the act would not be repeated, might be envisaged.

(Mr. Lehmann, Denmark)

55. He saw merit in having a separate article covering the concept of the threat of aggression. He also saw a need to address in that article the question whether a demonstration of force could be a legitimate protective response to certain acts, for example terrorist attacks directed against citizens of the State making the threat.

56. With respect to draft article 14, on intervention, he was in favour of deleting the words appearing in square brackets, namely "armed" and "seriously".

57. As to draft article 15, on colonial domination and other forms of alien domination, the Nordic countries strongly supported the right of peoples to self-determination enshrined in the Charter of the United Nations, and had been among those countries that most vigorously advocated the liquidation of all colonial situations. On the basis of the premise that the Code should in principle be limited to codifying existing law, they considered that only the concept of "colonial domination" could as yet be considered as being a crime under international law; the same could not be said of the much more elusive concept of "other forms of alien domination".

58. Lastly, they reiterated that there was no reason why the question should constitute a separate item on the agenda of the General Assembly; it would be preferable for the Sixth Committee to consider it when dealing with the report of the International Law Commission.

59. Mrs. OBI-NNADOZIE (Nigeria) said that the draft Code of Crimes against the Peace and Security of Mankind had its genesis in the war crimes perpetrated during the Second World War, although the need to restrain the activities carried out during armed conflict had long been recognized by civilized humanity. Since the second Hague Convention of 1907, mankind had witnessed wars of increasing brutality. The current efforts of the International Law Commission were designed to prepare a universally acceptable code. The existence of increasingly sophisticated weapons of mass destruction - chemical, biological and nuclear - could lead to indiscriminate slaughtering of defenceless civilians. That was likely to occur unless States undertook categorically never to be the first to use those weapons. When States armed their citizens and sent them int armed conflict, who would be held responsible for the war crimes committed? Nigeria accepted the suggestion that the use of nuclear weapons should be declared a crime against humanity, provided it referred to the future use of such weapons, since otherwise, a State which had used them in the past would be condemned retroactively. War crimes and crimes against humanity must be defined beforehand. Her delegation was therefore in favour of including a list of acts in the definition of war crimes. The definition should be a general one, followed by an indicative list of war crimes.

60. Nigeria supported the inclusion as crimes against humanity of apartheid, genocide, slavery and other forms of bondage, forced labour, and other inhuman acts, including destruction of property. It was regrettable that some members of

(Mrs. Obi-Nnadozie, Nigeria)

the international community still refused to recognize the heinous nature of the crime of apartheid. Nigeria hoped that those States would undergo a change of heart.

61. With regard to international traffic in narcotic drugs, her delegation supported the suggestion that it should be regarded as an international crime deserving the ultimate penalty, and that there should be no safe haven in any country for anyone engaged in that traffic. The international community's struggle against such illegal traffic was not helped by the existence of very weak penal systems in some consuming countries. Such systems constituted no deterrent to international drug traffickers and those countries should therefore extradite offenders to States where more severe penal régimes existed. Her Government had concluded agreements with a few States on modalities for dealing with illegal drug trafficking, tracing and confiscating laundered money, extradition and other related offences. Those agreements did not preclude the adoption of a common international approach to deal with the phenomenon.

62. Her delegation agreed with the thrust of draft articles 13, 14 and 15 adopted so far by the Commission. It hoped that those articles would enable the future of inter-State relations to be governed by principles more noble than the mere idea that might was right. The process of adopting a code of crimes against the peace and security of mankind would undoubtedly involve many difficulties, but Nigeria had no doubt that the goal would ultimately be achieved.

63. Mr. AL-BAHARNA (Bahrain), referring to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, said he supported the recommendation of the International Law Commission that a convention on the topic should be adopted. His delegation also supported the proposal to hold an international plenipotentiary conference to study the draft articles, as had been done for the adoption of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. It was also necessary to hold the conference because the Commission had proposed the addition of an optional protocol on the status of the courier and bag of international organizations of universal character, that would require a decision by the General Assembly as to the participation of international organizations in the conference. The draft articles adopted by the Commission at its latest session completed the codification of diplomatic law by consolidating existing rules on the subject and elaborating more precise rules for situations not fully covered by the earlier conventions.

64. Referring to the draft Code of crimes against the Peace and Security of Mankind, he said that in discussing those crimes it was necessary to bear in mind the developments that had taken place in international law since the Nürnberg Judgment and the adoption by the Commission in 1954 of the draft Code of Offences against the Peace and Security of Mankind. With regard to methodology, the question arose whether war crimes and crimes against humanity should be defined by enumeration or by a general definition. The Special Rapporteur had stated that he would not have recourse to the enumerative method. However, the Special Rapporteur for the 1954 draft Code had taken a different stand: while he had not been in

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favour of an exhaustive enumeration, he had not been averse to adding a list of crimes to the general definition, provided that the list was not exhaustive. He himself agreed with the latter view, since a general definition would either compound the difficulties national courts experienced in identifying war crimes, or would give them unwarranted discretion. He therefore supported the adoption of a formula combining a general definition with a non-exhaustive list of crimes.

65. With regard to the terminological problem, i.e., whether the term "war" should be replaced by the words "armed conflict", he considered that the latter had already replaced the former in modern international law. Nevertheless, he would prefer to retain the concepts of war and war crimes.

66. With regard to the classification of acts which constituted war crimes or crimes against humanity, it had to be borne in mind that the former were grounded in classical international law, whereas the latter formed part of modern international law, deriving from the Judgment of the Nürnberg Tribunal. While certain crimes might fall strictly within one or the other category, others might belong to both, since the dividing line between them was not rigid. The Commission would have to take that into consideration.

67. He welcomed the changes the Special Rapporteur had made in draft article 13 to reflect the majority view in the Commission that the list of war crimes was not exhaustive. That had been the solution adopted by the Commission in 1950 in codifying the principles of international law recognized in the Charter and Judgment of the Nürnberg Tribunal. Although his delegation supported the second alternative of draft article 13, it would like other crimes to be included in paragraph (c) (i) of the article, such as attacks against a civilian population, ill-treatment or inhuman treatment of prisoners of war, including their use as forced labourers during or after hostilities, the deportation of persons and the destruction of defenceless towns and villages. It would also like to see the use of nuclear weapons mentioned in the list of war crimes given in paragraph (c) (ii).

68. He was in favour of retaining the adjective "serious" in draft article 13, so as to avoid minor incidents being regarded as war crimes and crimes against the peace and security of mankind. He considered that it was not absolutely necessary to retain the words "intentional" in paragraph (c) (i) and "unlawful" in paragraph (c) (ii).

69. With regard to draft article 14, on crimes against humanity, he not only agreed with the Commission's view, expressed in paragraph 85 of the report, that each crime in the draft Code should be dealt with in a separate provision, but also understood that each provision or article would have a separate heading.

70. His delegation agreed with the definition of genocide in paqragraph 1 of draft article 14, and preferred the second alternative definition of apartheid, in paragraph 2. It was in favour of deleting the words in square brackets in the opening paragraph of the second alternative, since those words, namely "as

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practised in southern Africa", constituted a limitation rather than a clarification of the meaning of apartheid. Regarding "slavery and all other forms of bondage, including forced labour", in paragraph 3, he urged the Commission to study further the possibility of including the words "all other forms of bondage, including forced labour" in the crime of slavery. He agreed with the idea of declaring slavery a crime, but was not in favour of doing the same in the case of "forced labour", which in his view was not sufficiently serious in nature to be treated as a crime. He would also like the Commission to explain more clearly what was meant by the words "other forms of bondage".

71. Although his delegation favoured the inclusion of wording on the expulsion of populations in the draft Code, it would like the Commission to study further the question of defining under what conditions and circumstances the expulsion of populations became a crime under the Code. Furthermore, it was necessary to define the purpose of the expulsion or transfer of populations and to qualify paragraph 4 (c) by the word "forcible", so as to exclude transfers for humanitarian reasons.

72. While supporting the idea of including the mass destruction of property in article 14, paragraph 5, concerning other inhuman acts, his delegation would like the Commission to expand the concept of property to include within its scope property recognized as the common heritage of mankind. The idea implicit in article 14, paragraph 6, concerning any serious and intentional harm to a vital human asset, such as the human environment, was acceptable but the formulation was not altogether satisfactory because the words "a vital human asset" were too vague. Moreover, his delegation would like the Commission to specify the degree and extent of depredation of the environment, so that everyone knew what act or conduct in relation to the environment constituted a crime.

73. Lastly, his delegation supported the Commission's decision to request the Special Rapporteur to prepare a draft provision on international drug traffic in the draft Code of Crimes, since such traffic must be declared an international crime under the proposed Code.

74. Mr. HAMPE (German Democratic Republic) said that the Code of Crimes against the Peace and Security of Mankind must be regarded as an element of the United Nations security system. In today's world, marked by growing interdependence and the accumulation of weapons with huge destructive potential, the preparation of the Code could help substantially to strengthen the basic values of the international community and develop an international peace order based on the rule of law. It would thus be appropriate to speed up the formulation of individual draft articles by giving greater focus to the work of the Commission's Drafting Committee.

75. His country, like the overwhelming majority of the members of the Commission, favoured the second alternative of article 13. The reference to "rules of international law applicable in armed conflict" had several advantages. It avoided the term "war", and it did not introduce the concept of international or non-international armed conflicts, which could have caused difficulties of

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interpretation. The formula used in article 13 (a) of the second alternative simply meant that grave violations of international rules constituted war crimes irrespective of the nature and sources of those rules. Furthermore, only serious violations should constitute war crimes under the Code, and consequently the brackets around the word "serious" should be deleted.

76. The general definition of war crimes should be complemented by an indicative list which was not simply an enumeration of examples of war crimes but rather as accurate a description as possible of the gravest crimes.

77. A specific formula had been submitted, in the Commission, which dealt with crimes against protected persons, crimes committed on the battlefield in violation of the rules of war, and unlawful use of weapons and methods of warfare. His country had consistently favoured the inclusion in the Code of a special article on the prohibition of weapons of mass destruction, in particular nuclear weapons.

78. He welcomed the inclusion of genocide and apartheid as crimes against humanity. In both cases the crimes should be described very specifically, and his delegation therefore supported the second alternative, without any reference to a specific region. It had no basic objections to the inclusion of a special article on slavery or other forms of bondage, including forced labour.

79. In principle, his delegation also agreed with the approach in article 14, paragraph 4, which dealt with forcible transfer of populations, and it shared the opinion of the Commission members who had suggested that the scope of application of paragraph 4 (a) should be confined to occupied territories. It favoured also defining as crimes other inhuman acts, including destruction of property and serious harm to the human environment. However, more attention should be given to the concepts of mass destruction or mass attack on property and the destruction of cultural property constituting the common heritage of mankind, and the formulation relating to serious harm to the environment should be brought more closely into line with that of article 19 of the draft articles on State responsibility. Furthermore, article 55 of Additional Protocol I to the 1949 Geneva Conventions should be taken into account. It was gratifying that the Commission had decided to invite the Special Rapporteur to submit a draft article on illicit drug traffic.

80. His delegation welcomed the provisional adoption of articles 13, 14 and 15, even though they contained a number of insufficiencies. It was unsatisfactory that no agreement had been reached on the text of article 16. The threat of aggression, as a crime, continued to pose the problem of a definition of the specific group of persons who could be made responsible for the commitment of the most serious crimes. What mattered was to attribute those crimes to individuals, and a solution to that problem could be found in various international instruments, such as the Statute of the International Military Tribunal at Nürnberg, Law No. 10 of the Allied Control Council or Additional Protocol I to the Geneva Conventions of 1977. As to article 13, no connection had been established with article 12. Furthermore, it was necessary to include a provision, such as that in article 12, paragraph 5, stating that any determination by the Security Council as to whether or not an act of aggression existed would be binding on national courts.

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81. The current definition of the crime of intervention was satisfactory, although the word "armed" before the phrase "subversive or terrorist activities" should be deleted, because the definition should not be confined to methods involving armed force. The word "seriously" in the penultimate line of article 14, paragraph 1, should, however, be retained. It was gratifying that the definition of the crime of intervention was based largely on the Declaration on friendly relations and the Judgment of the International Court of Justice in the case concerning military and paramilitary activities in and against Nicaragua.

82. His delegation welcomed the inclusion of the crime of colonial domination.

83. The question of the implementation of the Code had been raised anew. In both the Commission and the Sixth Committee, State representatives had emphasized their view that the idea of a code was contingent on the establishment of an international criminal court. Other representatives had been rejecting the establishment of such a court for years. It was time to forget the comparison between universal criminal jurisdiction and an international criminal court and instead to seek a realistic solution. At the Commission's forty-first session, it had been suggested that the advantages of national courts and the principle of universal criminal jurisdiction should be combined in an international criminal court competent to review final decisions of national courts.

84. Only States whose nationals had been punished abroad and States in whose territories an offence had been committed or against which it had been directed, where the offender had been acquitted or condemned in another country, would be entitled to appeal. National courts could be authorized to ask the International Court for a binding opinion on a point of international criminal law. Such a procedure would avoid unnecessary extraditions, would not require a public prosecutor or law enforcement officials, would harmonize the case law of national courts and would provide States with effective protection against the shortcomings of the universal jurisdiction of national courts.

85. Attention must be focused on the finalization of the description of the crimes without making them hostage to agreement on the question of the implementation mechanisms. All States must recognize that the Code constituted an important element in the United Nations security system. The reports of the Special Rapporteur should indicate all the problems connected with the crimes to be established. The Commission should give the Drafting Committee sufficient time for formulation of the draft articles which were to be submitted to the Sixth Committee.

86. Mr. HANAFI (Egypt) noted that at its last session the International Law Commission had considered the definition of war crimes. The two alternatives proposed by the Special Rapporteur included the concept of gravity. The distinction between grave and ordinary breaches had appeared in the 1949 Geneva Conventions and Additional Protocol I. Under those instruments States had an obligation to impose penal sanctions only on the perpetrators of grave breaches. His delegation agreed with the Special Rapporteur on the need to include the element of gravity in the definition.

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87. His delegation supported the second alternative definition proposed by the Special Rapporteur. An indicative list of non-controversial crimes could be added to the definition. Such a list would provide guidance for national courts responsible for applying the draft Code. That solution would avoid the difficulties which would arise from the adoption of a general definition or the compilation of an exhaustive list.

88. It was justifiable for a distinction to be drawn between war crimes and crimes against humanity. Crimes against humanity belonged to a different category, although they might be included in the category of war crimes when committed in time of war. The underlying causes of crimes against humanity were racism, religious intolerance and ideological and political prejudices.

89. His delegation approved of the text proposed by the Special Rapporteur with respect to genocide. The approach taken accorded genocide a prime position among crimes against humanity, in accordance with the 1948 Convention for the Prevention and Punishment of the Crime of Genocide.

90. His delegation approved the inclusion of apartheid in the Code and was inclined towards the second alternative proposed by the Special Rapporteur in the text of article 14, paragraph 2.

91. The text of article 14, paragraph 3, concerning slavery or other forms of bondage and forced labour should be adjusted to take into account the relevant conventions, the national laws prohibiting such acts, and the studies made by United Nations bodies.

92. His delegation approved of the inclusion in the Code of the expulsion of populations and their forcible transfer. Cases occurred today of the implantation of settlers in occupied territories, changing the demographic composition of those territories. There were transfers of populations for humanitarian reasons which constituted relief operations. The present point at issue was the arbitrary transfer of populations.

93. The Egyptian delegation also welcomed the inclusion of the destruction of property among the crimes against humanity. The text should include in particular attacks on the cultural heritage of mankind. The conventions adopted under the auspices of the United Nations Educational, Scientific and Cultural Organization and the criteria established for definition of the concept of cultural heritage could provide guidance in the matter. It also welcomed the inclusion in the list of attacks on property constituting a vital human asset, such as the environment, and of international traffic in narcotic drugs. With regard to the establishment of an international criminal court, his delegation reiterated its support for the primacy of the national jurisdiction in trying the crimes included in the draft Code. Although the establishment of such a court might be accepted in the future, recourse to the national jurisdiction would remain an option. The issue was without doubt a difficult one, but the Special Rapporteur and the Commission would certainly do everything possible to overcome the difficulties.

94. Mrs. SANCHEZ (Cuba) said that the International Law Commission must take into account in its work the need to draft acceptable provisions designed to ensure respect for law and enhance the role of law as a mechanism for regulating international relations. Concepts relating to crimes against peace deserved detailed consideration, as did the mass expulsion of populations from an occupied territory in order to change its demographic composition. Such acts must be duly enumerated among the crimes against the peace and security of mankind. They must be defined explicitly and precisely. The use of mercenaries must be included, and the gravity of the act and the intention must be taken into consideration. In cases such as genocide and apartheid there was no need to prove the intention.

95. Although considerable progress had been made in the elaboration of the draft Code, some issues still had not been resolved. The draft Code must serve the purposes of maintaining and strengthening peace and security among States and establishing better living conditions for peoples; it would thus reflect the current trend in international law to concentrate on the elimination of conflicts, threats of war and other threats against mankind.

96. Her delegation thought that precise and relevant criteria should be established with a view to arriving at a comprehensive definition which included the essential characteristics of what constituted a violation of the peace and security of mankind. With respect to intervention in particular, Cuba supported the inclusion of terrorist activities, distinguishing from such activities the legitimate struggle of peoples for their freedom and independence. The article in question should also indicate that State terrorism constituted a crime against the peace and security of mankind.

97. The draft Code must also include genocide and the use of weapons of mass destruction. It was also important to include an article obliging States to change their laws in order to ensure that persons guilty of the crimes enumerated in the draft Code could be duly prosecuted. Her delegation noted with satisfaction that the draft Code provided that no statutory limitations should apply to such crimes and did not allow the official nature of a crime to exempt it from criminal responsibility. The draft Code would not be complete or effective unless it recognized the responsibility of the State and of individuals.

98. By virtue of the principles of the peaceful settlement of disputes and non-use of force, the right of States to invoke their legitimate defence must be clearly stated in the draft Code. Such circumstances must be dealt with in the relevant articles, and it would also be necessary to spell out and define the elements which constituted proof of threat.

99. A distinction must be made between mere verbal excesses and actual threats, in order to prevent a State from using certain kinds of statement as a pretext for attacking another State, alleging that it was under threat and compelled to defend itself. However, the desire to avoid too broad a definition must not constitute an obstacle to the study of the criteria defining manifestations of threats of aggression.

The meeting rose at 1 p.m.