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SUMMARY RECORD OF THE 32nd MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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The meeting was called to order at 3.05 p.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. CHRISTOFFERSEN (Norway), speaking on behalf of the five Nordic countries, namely, Finland, Iceland, Denmark, Sweden and his own country, first of all recalled that the Sixth Committee had repeatedly pointed out that it would be more to the purpose if the Commission were to present either the whole draft Code or at least a section of it, rather than submit a few articles each year to the Sixth Committee for comments. Asking for comments on an incomplete penal code would certainly not have been approved at the national level.

2. The aim of the draft Code must be to achieve increased international co-operation in order to combat crimes against the peace and security of mankind and to ensure that individuals who committed specific serious crimes were brought to justice and convicted by a competent court. In the view of the Nordic countries, any penal system basically comprised three elements.

3. The first of those elements was a definition of the offences. The draft Code should contain an exhaustive list of the offences which should be considered crimes against the peace and security of mankind and which should thus be covered by the Code. That must be the approach in order to comply with the principle of nullum crimen sine lege. The second element in any penal system was an indication of the penalties. In conformity with the principle of nulla poena sine lege, the draft must explicitly state the penalties for the various offences. The third element was the establishment of a judicial organ to implement the system. In that connection, the International Law Commission deserved credit for the competence and expedition with which it had responded to the request by the General Assembly on the question of establishing an international criminal court. The significance of the Commission's work was even more apparent in the light of the fact that the question had been based on the proposal, submitted by Trinidad and Tobago at the previous session of the General Assembly, regarding the establishment of an international criminal court with jurisdiction in cases relating to illicit traffic in narcotic drugs.

4. The delegations of the Nordic countries continued to think that it would be worthwhile to consider including in the draft Code an overall definition of the wrongful act. Draft article 19 of the draft articles concerning State responsibility set the criterion of seriousness in a more conceptual scope. A similar provision could also be included in the draft Code of Crimes against the Peace and Security of Mankind. The current structure, in which wrongful acts were described in separate provisions, underlined the need for a specific definition of the notion of gravity. There should also be a clear distinction between international delicts and international crimes; such a distinction would also be of vital importance when dealing with complicity, conspiracy and attempt.

(Mr. Christoffersen, Norway)

5. With regard to the draft article on international illicit traffic in narcotic drugs (A/45/10, footnotes 32 and 34), the delegations of the Nordic countries saw no practical reason to have two separate provisions identifying the illicit traffic in narcotic drugs as a crime against peace, on the one hand, and as a crime against humanity, on the other. In general terms, the Commission should examine whether it was in fact useful for the Code to contain separate provisions identifying crimes against peace and crimes against humanity.

6. The "related offences", namely complicity, conspiracy and attempt, should not be included as separate crimes, but should be placed in the general part of the Code, together with the identification of the perpetrator. It would then be left to the appropriate court to determine whether the level of participation in a crime had been sufficient to make a person a perpetrator on the basis of complicity. Furthermore, a general definition of conspiracy and of attempt should be provided.

7. The delegations of the Nordic countries supported the Special Rapporteur's view that the Code should deal with large-scale illicit trafficking in narcotic drugs by associations or private groups, or by public officials, either as principals or as accomplices in the trafficking, and at the national and international level, since they believed that all possible means of combating international illicit traffic in narcotic drugs should be explored. In that connection, they noted that draft article 16, on international terrorism, and draft article 18, on the recruitment, use, financing and training of mercenaries, as provisionally adopted by the Commission, (ibid., para. 158), excluded the acts of private individuals or groups, notwithstanding the serious nature of such acts. The delegations of the Nordic countries urged the Commission to reconsider that issue when it reverted to the problems relating to the attribution of such crimes to individuals. In that respect, it was important to be aware of the linkage that could often be found between terrorism, mercenaries and illicit trafficking in narcotic drugs.

8. Although the Nordic countries had previously stated in the Sixth Committee that they were not convinced of the desirability of establishing an international criminal court, the Nordic delegations, bearing in mind the general developments that had taken place in the international situation, had changed their views and would not exclude, a priori, encouraging the Commission to pursue its work on the topic. In that connection, they considered that the establishment of an international criminal court must be considered in connection with the content of the Code. No decision could be made until the whole draft was available. A series of questions would then have to be resolved, including extradition, the obtaining of evidence and the conduct of investigations, in addition to the structure of the court, its rules of procedure and the nature of its jurisdiction.

9. The delegations of the Nordic countries believed that it was important for States to take measures to establish jurisdiction of their own and, in that context, they drew attention to article 4, paragraph 2 (b), of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. In their view, the best point of departure would be the principle of concurrent

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jurisdiction between an international criminal court and national courts, provided that the required procedure for appeal, which was a basic element of any penal system, could be met. They would, however, only be able to comment on resolution 25 adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders after they had studied that idea further.

10. In the view of the Nordic Governments, it would be of the greatest benefit to the Committee to see the complete draft before discussing the idea of an international criminal court further. The draft Code should include all aspects of organizational, procedural and material matters, including, of course, the economic consequences of the proposal.

11. In particular, the Special Rapporteur had drawn the Sixth Committee's attention to the divergence of views which had manifested itself in the Commission as to the advisability of covering in the draft Code breaches of treaties designed to ensure international peace and security. The Nordic countries, for their part, were not in favour of dealing with that topic in the Code, partly because such articles might make the Code less acceptable and partly because it would raise fundamental questions of treaty law, notably in the area of the validity and interpretation of treaties, relations between the States parties and the position of third States vis-à-vis treaties.

12. Finally, the delegations of the Nordic countries remained convinced that there was no good reason for retaining the draft Code as a separate item on the agenda of the Sixth Committee. On the contrary, it should be discussed as part of the report of the International Law Commission.

13. Mr. CRAWFORD (Australia) referred to draft article 15 (A/45/10, footnote 27) of the draft Code of Crimes against the Peace and Security of Mankind, which dealt with complicity and which he considered too wide and imprecise, despite a number of improvements. The draft article defined as acts of complicity "aiding, abetting or provision of means to the direct perpetrator, or making him a promise". The provision of means, however, would only be an offence if the provider knew that those means were going to be used to commit a crime. As to the making of a promise, if that were considered as a separate element of complicity, it should be specifically related to the commission of the offence and should be known to the promisor to be so related.

14. With regard to large-scale trafficking in drugs, he expressed a preference for draft article Y (ibid., footnote 34) since, although such traffic was indeed a crime against humanity, it was not in itself a crime against peace.

15. With regard to draft article 17 concerning breach of a treaty designed to ensure international peace and security (ibid., para. 89), on which the members of the Commission had been unable to agree, his delegation was of the view that the draft Code should contain only offences of universal scope, and that it did not fall within the framework of the draft Code to penalize acts contrary to bilateral or multilateral treaties. As to the basic principles of international law relating

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to the maintenance of peace and security, those were covered by other provisions of the draft Code. Draft article 17 should therefore be deleted.

16. It was helpful for the Commission to discuss the question of establishing an international criminal court, for two reasons. The first, a general one, related to the danger of unilateral, wrongful interpretations of the draft Code by certain States, especially given the highly political nature of the charges that could be brought under the draft Code. The second, more specific, reason was that some major crimes, such as drug trafficking on a large scale, threatened to exert pressure on the judicial system of some small States. The draft Code would be unacceptable without guarantees against unilateral and partisan interpretations. In addition, States should have the option of resorting to an international criminal jurisdiction in cases where their judicial systems were not able to cope with a particular category of offences.

17. The question of establishing an international criminal jurisdiction required further study. He invited the Commission to give consideration to the following points. First, such jurisdiction should be established by a protocol annexed to the draft Code and should cover only the offences laid down in that protocol. Second, it was necessary to establish concurrent jurisdiction which did not preclude the jurisdiction of national courts, except in certain cases. The court should be available to all States parties to the draft Code; it should not be a permanent body and should be funded, for the most part, on a "user pays" basis. The pre-trial examination procedures should be carried out by the referring State in accordance with its law, and that State should be required, in any case, to produce evidence capable of supporting a conviction. The judgements of the court should have the effect of precluding any new prosecution for the same or a related offence arising out of the same facts, in accordance with the principle of non bis in idem. Lastly, any penalty of imprisonment imposed should be served in the prosecuting State's penal institutions in accordance with the Standard Minimum Rules for the Treatment of Prisoners, although States parties could have the option of providing for other forms of detention.

18. In most cases, given adequate guarantees of due process, national criminal jurisdiction would be the normal method of implementing the provisions of the draft Code. However, experience had shown that there were cases in which national jurisdiction was not enough, and he commended the Commission for having undertaken the difficult task of exploring those issues.

19. Mr. MOMTAZ (Islamic Republic of Iran) noted with satisfaction that the elaboration of the draft Code of Crimes against the Peace and Security of Mankind had reached an active phase. With regard to Part One of the draft, dealing with complicity, conspiracy and attempt, his delegation was of the view that those acts constituted separate offences and should therefore be characterized and defined separately. The Special Rapporteur appeared to have taken an entirely sensible approach in that regard.

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20. The new version of draft article 15 on complicity (A/45/10, footnote 27) was more satisfactory than the previous one, but it would be a good idea to make it clear that complicity applied not only to crimes against the peace and security of mankind but also to attempt and conspiracy. With regard to the definition of complicity, it would be necessary to reduce its scope by limiting the applicability of the draft article to intentional acts. Likewise, in the case of crimes against peace and crimes against humanity, care should be taken not to apply the concept of complicity as it was understood in traditional criminal law. Similarly, it would not be reasonable to charge individuals with complicity in an international crime if all forms of resistance would have proved futile. In all such cases, greater discretion should be left to the judge in determining, in each specific case, the role of the various participants and the link between the act and the perpetrator.

21. He noted with satisfaction that subparagraph (b) mentioned incitement, which was closely related to propaganda, and which he wished to see expressly prevented and punished at the international level; it would be wrong to underestimate the control which belligerent and racist propaganda could exert over the masses or to invoke freedom of expression, information or the press in tolerating such activities.

22. The new version of draft article 16 on conspiracy (ibid., footnote 29) was not very satisfactory, and he preferred the original version. The desired objective was to combat the idea that no individual was responsible for collective crimes. The original version of the draft article was much more explicit in that regard. There was no doubt that crimes such as genocide and apartheid could not be committed by isolated individuals but arose from a common plan involving joint responsibility as well as individual responsibility. It should be noted, however, that joint responsibility did not necessarily imply collective punishment, because the mere fact of belonging to a group could not be viewed as an act of complicity. The second alternative text of paragraph 2 of the original version of draft article 16 was closer to that concept.

23. He supported the inclusion of a provision on attempt in the draft Code, in spite of the difficulties which would inevitably arise from its implementation owing to the fact that a mere attempt was not treated as a punishable act under the legislation of some countries. It should be noted, however, that an attempt should be regarded as a commencement of execution. The definition of attempt would not, of course, be complete without the moral element included in the draft Code by the Special Rapporteur, namely, the failure or halting of the act only because of circumstances independent of the perpetrator's intention. He approved of the inclusion of that definition in the new version of draft article 17.

24. His country, which was waging an all-out battle against illicit drug trafficking, could only welcome the draft article on that topic submitted by the Special Rapporteur. There was no doubt that organised drug trafficking on a large scale constituted an attack on the right to life, physical integrity and health which could be compared to a form of genocide. Under those circumstances, he could not fail to support the idea of characterizing the offence in question as both a crime against peace and a crime against humanity.

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25. He supported the idea of including in the draft Code an article concerning breach of a treaty designed to ensure international peace and security. Such a provision would reflect the universal condemnation evoked by the breach of treaties. The same consideration applied to the use of chemical weapons, which had been banned by the 1925 Geneva Protocol and should be regarded as a crime against the peace and security of mankind. Moreover, such a characterization appeared to conform to the definition of a State crime provided by the Commission in article 19, paragraph 2, of its 1976 draft articles on State responsibility.

26. With regard to the establishment of an international criminal jurisdiction and the various options presented by the Special Rapporteur, he believed that it would be useful for some offences to be brought before an international jurisdiction, especially very serious offences, such as aggression and those involving State responsibility. Only an international court would have the authority and impartiality necessary to try the most serious crimes on behalf of mankind. In fact, the two systems of prevention and punishment, national and international, should be linked. As provided for in the second model submitted by the Special Rapporteur (A/45/10, para. 155), States would not have to cede their national jurisdiction but could decide to submit certain cases to the international criminal court.

27. Inasmuch as some international conventions provided for the possibility of submitting the prevention and punishment of international crimes to an international judicial body, it would undoubtedly be preferable for the jurisdiction in question to be established independently of the draft Code, so that it could cover any matter with regard to which States conferred competence upon it. As for the submission of cases to such a court, he thought that it was not necessary to require the consent of the States concerned. Unilateral submission of a case by any State party to the statute of the court was unquestionably a legal innovation, the implementation of which threatened to create difficulties. That approach, however, was part of the trend towards vesting in States an objective right to the maintenance of peace. The question arose more specifically in connection with draft article 12 concerning cases in which the Security Council might conclude that an act of aggression had been committed.

28. Lastly, he wished to stress the need to determine a scale of penalties in accordance with the principle of fitting the punishment to the crime. In that connection, his delegation would favour a general list of applicable penalties, leaving the judge free to apply the appropriate penalty in each particular case. The value of the Code as an instrument for the punishment of crimes would depend upon it.

29. His delegation hoped that the General Assembly would continue to give high priority to the preparation of the Code of Crimes against the peace and security of mankind and to the Commission's work on the topic.

30. Mr. AL-BAHARNA (Bahrain) welcomed the progress achieved by the Commission at its last session on the draft Code of Crimes against the peace and security of mankind, one of the most important topics on its agenda.

31. With regard to the methodology adopted by the Commission in the formulation of draft articles on complicity, conspiracy and attempt, the question before the Commission had been whether complicity, conspiracy and attempt should be placed in the part of the draft Code dealing with general principles, or should be treated as separate crimes, or should be examined in relation to each of the crimes covered by the Code. The last-mentioned solution would, of course, be ideal, but he agreed with the Special Rapporteur that the task was an impossible one. The first solution, that of including the concepts concerned in the part dealing with "general principles", appeared doubtful because an accomplice often incurred the same degree of liability in law as the principal. In the event, complicity and conspiracy could be treated as separate crimes under the draft Code. His delegation thought, however, that attempt should if possible be examined in the context of specific crimes or groups of crimes.

32. As to draft article 15 on complicity, his delegation considered that the new version proposed by the Special Rapporteur represented a marked improvement over the original version. It was right that every person associated with a crime under the Code, whether he be an originator of the crime or merely an executor, should be inculpated. That was all the more necessary as the crimes to be covered by the Code were invariably committed by a number of persons. Care should be taken, however, to ensure that the persons inculpated had acted intentionally or in the knowledge that they were committing an unlawful act. So long as that condition was met, there could be no objection to holding all the persons involved in the crime culpable under the Code. Subject to that consideration, his delegation supported the main thrust of article 15, which included within its scope all the persons involved in the perpetration of the crime in question. As to whether the notion of complicity should include not only acts prior to or concomitant with the principal offence but also subsequent acts, his delegation would support the latter solution provided that there was a nexus between the principal offence and subsequent accessory acts. From the point of view of form, the new version of article 15 could bear improvement; a literal reading of the first paragraph conveyed the impression that it contained the definition of the crime of complicity whereas, in reality, the definition was contained in subparagraphs (a), (b) and (c) of the second paragraph. His delegation would urge the Commission to re-examine the text of article 15 with a view to making that point clearer.

33. The revised text of draft article 16 also marked a considerable improvement over the original version. His delegation shared the Commission's view that "the notion of conspiracy had been finally recognised in international law". Some questions of a conceptual nature still remained, however, for example the question whether the text should specifically include the criminal intent (mens rea) and, secondly, whether it was really necessary to have complicity and conspiracy as separate crimes or whether they could be dealt with under the general rubric of "participation in a crime". His delegation took the view that the definition of conspiracy should specifically refer to mens rea as an additional element. As to

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the second question, his delegation had no strong views on the matter and would support the approach which had a reasonable prospect of acceptance by the largest number of States. Lastly, he remarked that a neater definition could be accomplished by combining the two parts of the article in a single provision.

34. The new version of draft article 17 was likewise a marked improvement over the original version, even if controversy still persisted as to whether attempt should be included in the draft Code at all, and whether the concept of attempt should be limited to certain crimes only, namely, crimes against humanity. His delegation found it difficult to answer those questions at the present stage; the Special Rapporteur's views, as reflected in the first two sentences of paragraph 76 of the report, deserved consideration in that respect. Although the solution appeared to be grounded in an analogy with municipal law, it seemed reasonable and acceptable. His delegation supported draft article 17 in principle but recommended that its two paragraphs should be combined and certain drafting improvements made in the text by the Commission's Drafting Committee.

35. His delegation also welcomed the progress achieved by the Commission at its last session by the adoption of article X on illicit traffic in narcotic drugs. It considered that the purposes of the draft Code would be adequately served by article X postulating that drug trafficking was a crime against humanity without specifying that it was also a crime against peace. The draft article was welcome inasmuch as it included within its ambit every conceivable act connected with the crime in question while at the same time excluding isolated or individual activities of small dealers. His delegation was also glad to note that the scope of the article extended to money laundering operations.

36. With regard to the question of breach of a treaty designed to ensure international peace and security, he noted that the Chairman of the Commission's Drafting Committee had informed the Commission that irreconcilable views had prevented agreement being reached on draft article 17 concerning that issue. Not surprisingly, the discussion in the Commission itself had revealed the same picture. In paragraph 91 of the report it was stated that many members had felt that an article on the topic would not only violate the principle of universality but would also involve questions of treaty law, such as the validity and interpretation of treaties, relations between parties to treaties and the question of treaties and third States. His delegation shared the concern of those members of the Commission who had been critical of the proposed article on the ground that "an article of such a controversial nature would have an adverse impact on the acceptability of the Code".

37. Mr. GUIBILA (Burkina Faso) recalled that at the initiative of Trinidad and Tobago an item relating to the establishment of an international criminal court with jurisdiction over individuals and entities engaged in illicit trafficking in narcotic drugs had been placed on the agenda of the General Assembly and that the latter had, in its resolution 44/39, requested the International Law Commission to address that question when considering the draft Code of Crimes against the peace and security of mankind. The possibility of establishing an international criminal jurisdiction had always been envisaged by the Commission.

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38. His delegation, for its part, supported any initiative or mechanism aimed at the just and effective implementation of the Code being drafted. It felt, however, that the drafting of the Code and the establishment of the organ or organs entrusted with its implementation should proceed by stages. In other words, the Commission should, in the interests of efficiency and of rationalizing its work and with a view to avoiding undue dispersal of its efforts, complete the drafting of the Code before tackling the question of its implementation. Such an approach would in no way detract from the contents of the draft Code, as was made clear by paragraph 3 of draft article 4 which provided that the obligation of national courts to try or extradite did not prejudge the establishment and the jurisdiction of an international criminal court.

39. In his delegation's view, the Commission should draw up a list of crimes, each of which should be very clearly defined, and also a list of applicable penalties. So far, the Commission had worked only on the definition of crimes under the Code, and it was time for it to consider the question of penalties to go with their crimes.

40. His delegation welcomed the consensus within the Commission in favour of the inclusion of international terrorism, mercenarism and illicit drug trafficking as crimes under the Code. It fully approved the text of article X on illicit drug trafficking, a provision which took account of all aspects of that scourge. It hoped that proclaiming drug traffic, whether in the context of a State or in a transboundary context, as well as the laundering of funds derived from such trafficking to be crimes under the Code would contribute towards the complete eradication of one of the century's worst evils. As for adding narco-terrorism to the list, that did not seem necessary, since narco-terrorism was in fact a consequence of illicit drug trafficking, already proclaimed a crime under the Code.

41. Burkina Faso was pleased that a revised version of articles 15, 16 and 17, on complicity, conspiracy and attempt, had been submitted. The new version of article 15 was a great improvement on the former one because it was descriptive, more detailed and more precise; since interpretation was restrictive in criminal law, drafting must always be precise and clear. The new version of article 17, on attempt, filled the legal lacuna left by the former text, which had not defined attempt.

42. Even though Burkina Faso encouraged compliance with treaties and international agreements, whatever their purpose, for a number of reasons it was unable to support description of breach of a treaty as a crime in the draft Code, even if the treaty concerned was designed to ensure international peace and security. Firstly, treaty obligations had a relative effect, an inter partes effect, and only the parties to a treaty could take advantage of its positive effects or complain that it had been breached. Secondly, describing breach of a peace treaty as a crime would discriminate against, and constitute an unprecedented injustice in respect of, States that had entered into such treaties, as compared to States that had not done so, and would not encourage the latter to do so.

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43. Burkina Faso believed that instead consistent failure to observe and implement relevant Security Council resolutions should be described as a crime under the draft Code. Some situations upon which the international community's attention was still focused, where international peace and security were at stake, existed because the relevant Security Council resolutions were not universally respected. The continued existence of apartheid in South Africa and the conflicts in the Middle East, to name just a few cases, were striking examples of such situations.

44. Mr. SCHARTTI (Observer for Switzerland), noting that at its forty-second session the Commission had had before it the Special Rapporteur's eighth report on the draft Code of Crimes against the Peace and Security of Mankind, said that the Special Rapporteur's commitment and competence would be much needed in order to complete an undertaking that was quite controversial in political terms.

45. The Special Rapporteur's report was made up of three parts, the third of which, on the statute of an international criminal court, had been of particular interest to his delegation. Part three, which took the form of a questionnaire-report, contained various options and versions, on which the Swiss authorities did not as yet have a definitive opinion. Although one might well endorse the principle of establishing an international jurisdiction to try perpetrators of crimes against the peace and security of mankind, a number of questions arose as to the competence of such a jurisdiction, such as whether the jurisdiction in question would be exclusive or concurrent. Switzerland believed that exclusive competence should not be considered, so as to avoid devaluing or even disrupting, domestic efforts to suppress the crimes in question, or reducing the effect of judgements handed down by domestic courts. It would be paradoxical if the existence of a court were to have a "demobilising" effect on State judicial authorities.

46. The question was whether it should be concluded that concurrent competence was appropriate. Switzerland believed that such a formula would give rise to difficulties in the event that one party wished to bring an action before a national jurisdiction, while the other party wished to bring it before the international court. Furthermore, that solution would not guarantee uniform implementation of the Code, because it would entail a risk of divergent interpretations.

47. It might therefore be asked whether the international criminal court should be regarded above all as a court of appeal, which would review domestic judgements. For example, a case could be reviewed because: the State concerned had grounds for believing that the decision in question had not been based on a proper appraisal of the law or the facts; the acts had been tried as ordinary crimes and not on the basis of the Code; or the individual or individuals convicted had filed an appeal. Switzerland recognised that it could be objected that the existence of a jurisdiction having a review competence might diminish the authority of res judicata, particularly where the decision in question had been handed down by the supreme court of the State concerned. However, the establishment of such a court would be altogether in keeping with the contemporary evolution in the

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relevant area of law, which increasingly permitted individuals to have their domestic courts' decisions reviewed by an international jurisdiction. A court of appeal would offer the additional advantage of ensuring that individuals convicted by domestic courts could have their cases reviewed. Moreover, such an international jurisdiction could also, where appropriate, settle positive or negative disputes between States concerning competence.

48. With regard to the court's competence rationae materiae, the court should basically try and punish crimes laid down in the Code. Switzerland recognised that the concept of an international crime was broader than that of a crime against the peace and security of mankind. However, in order to avoid having its role devalued and robbed of its originality, the court should have competence only in respect of the most serious acts, the acts dealt with in the Code. Furthermore, Switzerland hoped that the Code, to a greater extent than other instruments making certain acts international offences, would lay down a definition of the crimes in question that met the requirements of criminal law. That was to say, as a result of the particular care taken in drafting the Code, the assumption could be made that it would contain sufficiently precise rules to form the basis for making an act a crime, in accordance with the inviolable principle nulla poena sine lege, whereby a penalty could be imposed only where there was a violation, either by commission or omission, of a clearly enunciated legal provision. Obviously, that option meant that the court could not be established until work on the draft Code had been completed. That was not a drawback, however, in view of the extent to which the substance of the law was linked to the corresponding implementation procedures.

49. At its forty-second session the Commission had also considered articles 15, 16, and 17, on complicity, conspiracy and attempt, respectively. His delegation reserved the right to return to those subjects at a later date, once the articles had been dealt with by the Drafting Committee. However, it wished to comment on the articles provisionally adopted by the Commission, on international terrorism, the recruitment, use, financing and training of mercenaries, and illicit traffic in narcotic drugs.

50. On the issue of the crime of international terrorism, depending on the specific circumstances, it might not be possible to draw a clear distinction between the ingredients of international terrorism and those of intervention, described as the act of intervening in the internal or external affairs of a State and encouraging subversive or terrorist activities. One might ask, for example, which of the two relevant provisions covered financing by a State agent of armed groups for the purpose of spreading terror in a given population and thus promoting the fall of the Government of another State.

51. The commentary on article 18, entitled "Recruitment, use, financing and training of mercenaries", set out in paragraph 158 of the Commission's report, called for a comment. The Commission recalled that under article 47 of Additional Protocol I of 1977 to the Geneva Conventions, a mercenary did not have the right to be a combatant or a prisoner of war. Two clarifications were called for. That provision permitted a party to the Protocol to deny that right to a mercenary; it

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did not oblige a party to the Protocol to do so. Furthermore, a mercenary without the right to be a combatant or a prisoner of war benefited, as did any civilian definitely suspected of activities hostile to the security of the State, from article 5, third paragraph, of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, which in particular guaranteed him, in case of trial, the rights of fair and regular trial. In any event, he would be covered by article 75 of Additional Protocol I to the Geneva Conventions. That was why article 16 (b) of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the General Assembly in 1989, contained a reservation concerning international humanitarian law. In Switzerland's view, such a provision should be included in article 18 of the draft Code.

52. Lastly, it might be asked whether there was any justification for including in the Code a provision on international traffic in narcotic drugs. Such traffic could in fact be regarded as an offence under ordinary law, motivated basically by the lure of the prospect of financial gain. However, such an assessment ignored developments that had revealed increasingly close links between international traffic in narcotic drugs and both local and international terrorism. It was not without reason that references were commonly made to narco-terrorism. In addition to the negative effect that it had on the health and well-being of individuals, international traffic in narcotic drugs had a destabilizing effect on some countries and thus constituted an obstacle, as the Commission relevantly remarked in its report, to harmonious international relations. Such traffic did appear to be both a crime against peace and a crime against the security of mankind. There was therefore reason to include in the draft Code, even if only as a provisional working hypothesis, a provision describing such traffic as a crime. However, the Commission would have something to gain from studying in greater depth the relationship between that provision and the corresponding provision in the United Nations Convention of 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which set up a universal competence, by giving international or regional organizations the authority to prevent the crime in question or to seek its perpetrators.

The meeting rose at 4.30 p.m.