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SUMMARY RECORD OF THE 29th MEETING

Chairman: Mr. AFONSO (Mozambique)

later: Mr. TETU (Canada)

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The meeting was called to order at 3 p.m.

AGENDA ITEM 126: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES AND NORMS OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER (continued) (A/C.6/46/L.6)

1. The CHAIRMAN announced that Costa Rica had become a sponsor of draft resolution A/C.6/46/L.6 entitled "Progressive development of the principles and norms of international law relating to the new international economic order".

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

2. Mr. RAZAFINDRALAMBO (Madagascar) said it was encouraging that the International Law Commission, which had strictly abided by the terms of its mandate, had been able to adopt in first reading the draft Code of Crimes against the Peace and Security of Mankind after 10 years of work and despite the scepticism of those who were concerned about the highly sensitive political nature of the draft Code.

3. In its general structure the draft Code was simple, precise but complete, and should prove eminently workable.

4. His delegation felt that article 4, by introducing a special provision on motives, could give rise to confusion and should therefore not be included in the Code. By definition, motive was not one of the constituent elements of a crime, although in certain cases, such as genocide, a constituent element of the crime, in that case the intention to destroy a racial group, was closely linked to a racist motive. It was possible, for example in the case of international terrorism, to take motive into consideration either by way of extenuating circumstances (in the context of the struggle for national liberation) or of aggravating circumstances (narcoterrorism).

5. Article 5, concerning the responsibility of States, was justified because, in view of the principle that only an individual could be criminally responsible for a crime against the peace and security of mankind, it was necessary to establish that that responsibility in no way excluded the responsibility of the State for internationally wrongful acts.

6. The inclusion in a single article, article 14, of two concepts as different as defences and extenuating circumstances could not be justified even on a provisional basis. Moreover, the definition of a defence, because of the oversimplification, was liable to give rise to difficulties of implementation; the Commission should therefore give careful consideration to circumstances which precluded incrimination. The second paragraph of article 14, while explicit in respect of extenuating circumstances, made the mistake of omitting aggravating circumstances. Even though the crimes included in the draft Code were all extremely serious, there was no

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justification for the omission of aggravating circumstances, unless there was to be a single, non-extendable penalty.

7. His delegation, which for the time being did not wish to comment on the crimes identified by the Commission and would at an appropriate time transmit the replies of its Government to the questions posed by the Secretary-General, considered that the problem of applicable penalties was just as important as that of the definition of crimes, because penalties were one of the pillars of the Co . That subject should therefore form a special chapter, either in the introduction, or in the section on crimes, a fortiori if there was consensus in favour of a single penalty, as his delegation hoped there would be, taking into account the identical and specific nature of all crimes against peace and security.

8. As to the type of applicable penalties, taking into account the very sharp division between proponents of the death penalty and advocates of its abolition, the only possible compromise was to provide for life imprisonment, without prejudice to the possible application of extenuating circumstances or a commutation of penalties for humanitarian reasons, after a minimum period of 15 to 20 years, except for cases where aggravating circumstances existed.

9. The Code should also make provision for accessory penalties and supplementary penalties. The total confiscation of property should, in theory, be a required supplementary penalty, particularly in cases of illegal drug trafficking; it would be optional in cases where the criminal origin of property was doubtful. The judge would have to determine in all cases who would receive the confiscated property.

10. It would be worth considering the question of grounds for absolution which, in limited and specific cases, for example in cases of illicit drug trafficking, could encourage accomplices or partners to denounce the other offenders.

11. Lastly, there could be an article on civil action providing for sentencing of the accused to the payment of damages, or even restitution of the stolen property.

12. Turning to Part Two of the ninth report of the Special Rapporteur (on the jurisdiction of an international criminal court), he said that his delegation had always considered that there was a close link between the Code and its implementation and that the Code should therefore be accompanied by a legal enforcement mechanism.

13. Unlike the advocates of a system of parallel jurisd' ion, his delegation did not believe that such a system would constitute only a limited infringement of the sovereignty of States, since the court would rule in cases of appeal, cassation or review and would therefore have the power to disagree with decisions which had already been considered at all levels of the national jurisdiction. It would therefore be preferable to consider establishing a

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court with a statute similar to that of the International Court of Justice, incorporating a procedure for recognition of jurisdiction under which all States parties to the statute would recognize that the court had exclusive jurisdiction to judge individuals suspected of having perpetrated a crime, but only by application of one or other of the principles of territoriality or active or passive personality. Other alternatives could be envisaged. At all events, the recognition could always be reviewed after a certain period of time. In order to test the validity of such a solution, an interim international criminal court could be established, with the power to interpret customs, laws and international criminal conventions. That would help to ensure the uniform application of laws and conventions, whether there was parallel jurisdiction or exclusive jurisdiction; the request for interpretation could emanate from a State or from an intergovernmental organization.

14. The right to submit cases to the court would be reserved to States parties to its statute, so that international organizations, which could not be parties thereto, were excluded.

15. It was the view of his delegation that the rule on separation of powers would prevent referral of cases to the court from being subject to a previous decision by a political organ such as the Security Council. But once a case had been referred to such an organ, the court would have difficulty in ignoring its findings, especially if they bore on the substance of the acts constituting the aggression. However, a refusal by the Council to deal with a complaint, for instance through the exercise of a veto, would have no effect on the normal course of the criminal proceedings, as the court would assess the merits of the criminal complaint entirely independently. Should the complaint lead to a finding of guilt and a conviction, that decision might have political repercussions in the General Assembly or even in the Security Council.

16. Mr. FLATLA (Norway), speaking on the draft Code of Crimes against the Peace and Security of Mankind (A/46/10) on behalf of the Nordic countries, noted that article 3, paragraph 3, introduced the possibility of punishing attempts.

17. The Nordic countries were pleased that a distinction was no longer made in the title of Part II of the draft Code between crimes against peace and crimes against humanity. They also welcomed the Special Rapporteur's decision to include penalties in the draft Code, for they were a vital element of a penal system. The Special Rapporteur was right not to include the death penalty among the penalties for crimes against the peace and security of mankind, for there was a strong trend within the United Nations towards the abolition of capital punishment, as witness the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty. Other international instruments were following, such as Additional Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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18. Concerning the question of establishing appropriate penalties, the most natural solution seemed to be a term of imprisonment, with a minimum and maximum for each crime. The crimes covered by the Code all merited severe punishment, but there should be a differentiation in the penalties: genocide, for instance, could not be equated with the recruitment of mercenaries. There was, however, no merit in including community work - even as an addition to another penalty - as a sentence for crimes which, by virtue of their extreme gravity, had been included in the Code.

19. While pleased to note that the Special Rapporteur had presented two draft articles on the jurisdiction of the court and the requirements for instituting criminal proceedings, the Nordic countries maintained the position they had enunciated during the previous session of the General Assembly, namely that it was inadvisable to discuss the establishment of an international criminal court until a draft was available covering all aspects of organizational, procedural and financial matters. As the first reading of the draft Code had been completed, the time seemed to have come for a more comprehensive study of the matter.

20. Without prejudice to the question of establishing an international criminal court, the Nordic countries advocated that the jurisdiction rationae materiae of such a court should encompass all crimes included in the Code, which had been selected because of their gravity. Further, the jurisdiction of the court should not be exclusive, but concurrent with that of national courts, or in combination with that of review.

21. On the question of which States should have the right to institute proceedings, the draft provision submitted by the Special Rapporteur formed a good basis for further consideration. However, only States parties to the statute of the court which had a relevant link to the crime in question should have the right to institute proceedings.

22. Mr. VARGAS (Chile) said that the draft Code of Crimes against the Peace and Security of Mankind was built around three basic elements: (a) the characterization of the offence in accordance with the principle nullum crimen sine lege; (b) the determination of the penalty for each offence under the principle nulla poena sine lege; and (c) a court having jurisdiction in the case to rule on it.

23. With respect to the characterization of offences, Part I of the draft Code was particularly important in that jurists must also be involved in formulating the principles underlying the law. Hence, articles 1 to 14 formed a solid basis which would allow his delegation to make its contribution to consideration of the draft Code in second reading.

24. Article 3, on responsibility and punishment, was particularly important. The commission of an illegal and reprehensible act that so harmed the social order that it became punishable could involve various degrees of participation. That fact, which was reflected in the internal law of many

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countries, including Chile, was also reflected in the draft Code. With regard to the reference in square brackets in paragraph 3 of article 3, his delegation felt it would be preferable to refer to the articles in question and to remove the square brackets. In addition, article 3 should be brought into line with article 5, on the responsibility of States, so as to distinguish the latter from the responsiblity of individuals.

25. Draft article 4 was very important, since it was essential to specify that there were types of behaviour (acts or omissions) that were by their very nature utterly abhorrent, whatever the motives invoked by the accused and not covered by the definition of the crime.

26. The principle of extradition enunciated in draft article 6 was particularly important as one means of combating certain offences. The Chilean Government had concluded various extradition agreements and on several occasions had granted requests for extradition. In that connection, he referred to the multilateral extradition conventions concluded within Latin America, such as the Bustamante Code of 1928, the Montevideo Convention of 1933 and the Caracas Convention of 1980.

27. Draft article 8, which dealt with the judicial guarantees to be given to any person accused of a crime against the peace and security of mankind, was essential to the normal, sound operation of the procedure envisaged. As for draft article 9, non bis in idem, it should be clarified from a conceptual point of view so as to facilitate its implementation. Also, it was essential to take into consideration any defences and extenuating or aggravating circumstances, as under any normal legal system.

28. In keeping with the principle of the peaceful settlement of disputes between States, Chile considered it desirable to repress the crimes against the peace and security of mankind covered by articles 15, 16, 17 and 18 of the draft Code, namely, aggression, threat of aggression, intervention, and colonial domination and other forms of alien domination.

29. The Chilean delegation supported draft article 19 on genocide, based on the definition given in the Convention on the Prevention and Punishment of the Crime of Genocide, which his country had of course ratified. The Convention declared that genocide was a crime under international law which the Contracting Parties undertook to prevent and punish. It also stated that, in addition to genocide, conspiracy, direct and public incitement and attempts to commit genocide, as well as complicity in genocide, should also be punishable. Nevertheless, it should be pointed out that the Convention stipulated that genocide and the other acts enumerated should not be considered as political crimes for the purpose of extradition and the Contracting Parties pledged themselves to grant extradition in accordance with their laws and treaties in force. That criterion should also be included in the draft Code.

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30. The proposed provisions of article 20 on apartheid, some aspects of which could be improved on second reading, offered an appropriate description of that evil practice, which it was to be hoped would be eradicated once and for all in the near future.

31. Equally reprehensible were the systematic or mass violations of human rights covered by draft article 21. His understanding of the article was that it referred to exceptionally serious offences committed in a systematic manner or on a mass scale and that isolated acts were covered by the various conventions on the subject, to which his country was a party. It was vital to establish a legal system which would make it possible to ensure greater respect for individual human rights and thus restore and maintain the peace and security of mankind.

32. As a signatory to the 1949 Geneva Conventions and the additional protocols thereto, his country considered it essential that the draft Code should contain provisions such as article 22 on exceptionally serious war crimes and article 23 on the recruitment, use, financing and training of mercenaries.

33. He welcomed the inclusion in the Code of draft article 24 on terrorism, since there were certain human values which must be respected not only by States but also by all those in the political arena and by all sides involved in an armed conflict, whatever its nature.

34. Draft article 25 on illicit traffic in narcotic drugs was of great importance to his country because of its geographical location. As a result, his country had concluded various bilateral agreements for the suppression of such traffic and had advocated the adoption of laws aimed at preventing the production, processing and consumption of and illicit traffic in narcotic drugs.

35. Article 26 on wilful and severe damage to the environment dealt with a very serious issue which needed to be considered in greater depth in the light of the progress made in the field of environmental protection by other international bodies. It therefore seemed premature to seek to codify the matter in a code of the kind under consideration until the outcome of the United Nations Conference on Environment and Development to be held in Rio in 1992 was known.

36. Mr. CALERO RODRIGUES (Brazil) said that he was aware that the Commission had been eager to complete the first reading of the draft Code rapidly in order to make it easier for Governments to respond and that consequently the text before them was not a finished piece of work but an outline giving States an idea of what the Code would be. Indeed, the Commission had itself recognized that the draft Code was open to improvements. In putting forward their remarks, States should bear in mind that, as noted in the report, no final text could be arrived at until a final decision was taken on the question of jurisdiction.

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37. The structure of the draft Code as it stood was in keeping with the usual arrangement of criminal codes. A first part defined concepts and set down general principles, while a second defined crimes and prescribed penalties. The main problem with the first part was that several of its provisions lacked clarity and precision, an imperfection due at least in part to the lack of a definition with regard to the question of jurisdiction. Most of the provisions of part II, which defined 12 crimes, were in need of improvement in order to attain the precision essential in criminal law.

38. His delegation had previously expressed serious reservations concerning two of the proposed crimes, namely threat of aggression and activities related to mercenaries. It maintained those reservations and also maintained the position it had previously taken on what was now article 17. While agreeing that the acts described in that article should be included as crimes under the Code, it felt that the reference to "intervention" was unnecessary and incorrect. Intervention, which was a well-established concept in international law, had a much wider meaning than that contained in the article in question and there was no justification for using the term in either the title or the text of the article.

39. Although the draft Code had its flaws, it would be wrong to conclude that it was a bad proposal. On the whole, it provided a useful basis for the establishment of a reasonable international instrument, if - and it was an important if - the international community agreed that such an instrument was needed. His delegation felt that some concepts had evolved in a positive manner. The general structure of the Code was sound and he was glad that the old tripartite division - crimes against peace, crimes against humanity and war crimes - had not been maintained. He was also pleased that the idea of including a separate section on "other crimes" had been abandoned and that attempt and complicity had been given their proper place in part I. He also welcomed the fact that the Commission had decided to include penalties in the Code.

40. He was confident that, in the light of the remarks and observations made by Governments, and after further deepening its own analysis of the problems involved, the Commission would be able to bring its work to a successful conclusion. He also felt that the resolution to be adopted on the question should call on the Secretariat to transmit the draft Code to the International Committee of the Red Cross, which would undoubtedly have valuable observations to make, having long been involved in some of the fields covered by the draft Code.

41. The beginnings of a solution had been found to the question of penalties which had been raised in the ninth report submitted by the Special Rapporteur to the Commission at its most recent session, in that part II of the draft Code provided that the individuals responsible for each crime "shall, on conviction thereof, be sentenced to ...", with the penalty to be indicated subsequently. It was right that the Code should prescribe the penalties for the crimes and not leave them to be determined by the courts, as had been the

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case in the 1954 draft Code, or to the internal law of States, as suggested by some members of the Commission.

42. His delegation also agreed with the Special Rapporteur that the Commission itself should propose specific penalties which States could accept as such or could modify when the time came for them to decide on the final text of the Code. However, unlike the Special Rapporteur, his delegation did not think it desirable to indicate a single standard penalty which the judge could reduce in cases of extenuating circumstances. It would prefer the Code to establish a maximum and a minimum penalty, and it would be up to the court, in the light of the circumstances of the case, to determine the actual penalty to be imposed. That was the standard practice in national legal systems. His delegation agreed with the prevailing opinion in the Commission that the death penalty should not be included in the Code.

43. Before analysing the question of penalties, the Special Rapporteur, in his ninth report, addressed issues related to jurisdiction, which had been the subject of extensive discussion, as could be seen from the Commission's report. Taking General Assembly resolution 45/41 as a basis, the Special Rapporteur had distinguished three possible solutions to the issue of jurisdiction: a system of "universal jurisdiction", the establishment of an international criminal court, or the establishment of some other trial mechanism. The latter possibility did not seem to have been seriously considered by the Commission, which was understandable since the expression "other trial mechanisms" was somewhat nebulous. It had, admittedly, been used in the General Assembly, but no examples had been given of what such "other trial mechanisms" might be in practice.

44. The system of universal jurisdiction had been widely used in international instruments, and could conceivably be adopted for the crimes under the Code, but it had some drawbacks, among them the fact that the same crime could have different penalties according to the jurisdiction exercised. It seemed advisable for the time being for the Commission to confine itself to the problems relating to an international criminal court, which was precisely what it was doing. It should be encouraged to follow that course, availing itself of the time during which the draft Code was being considered by Governments.

45. At its forty-third session, the Commission had examined specific aspects of the jurisdiction of a possible court. The question of jurisdiction ratione personae already seemed to have been resolved, since in its current version the draft Code dealt only with the criminal responsibility of individuals. Regarding jurisdiction ratione materiae, his delegation found intriguing the opinion of the Special Rapporteur in paragraph 107 of the Commission's report that "it was better to proceed cautiously and flexibly, starting, for example, by restricting the court's competence to crimes forming the subject of international conventions". That opinion was curious, since it did not seem to be difficult to conceive of a judicial authority applying rules which were not part of the substantive corpus of law in matters within its competence.

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As far as an international criminal court was concerned, the substantive law to be applied had to be contained in international conventions, and first and foremost in the Code. If some international crimes were defined in other instruments but were not included in the Code, the jurisdiction of the court might be extended to cover them, provided that that extension was admitted in the instrument establishing the court.

46. Another question which had been discussed was whether the court should have exclusive jurisdiction or concurrent jurisdiction with national courts. It was extremely difficult for his delegation to accept the view expressed in the Commission and referred to in paragrapn 114 of the report that "States would be free to bring proceedin , either before their own courts or before the international court. The international criminal court would have jurisdiction only in cases where national courts declared they were not competent". As for the possibility of giving the international court competence to review sentences of national courts, it was extremely doubtful that States would be prepared to agree that decisions of their courts, including their Supreme Courts, could be subject to revision outside their own judicial systems. It was, however, true that the attribution of such competence to an international court was theoretically defensible, since national courts would have applied international law, but his delegation's doubts in that regard remained.

47. Paragraph 108 of the Commission's report dealt with the question of "conferment of jurisdiction by States". For proceedings to be instituted before an international criminal court, the agreement of certain States would be required, namely the State in whose territory the crime had been commi'ted, the victim State (or the State whose nationals had been victims of the cr. e), the State of which the perpetrator of the crime was a national, and the State in whose territory the perpetrator had been found. The Special Rapporteur had indicated that in principle he was opposed to that rule, but he had added that "international realities made it difficult to dispense with it". His delegation hoped that the Special Rapporteur would find support for his position of principle and that he was mistaken in his assessment of international realities. It was encouraging that no member of the Commission had upheld the view that the permission of certain States was necessary for an international court to exercise its jurisdiction when such jurisdiction might in a given case have been established in accordance with an applicable international instrument.

48. The role of States was also considered in subsection (c) of section B of part IV of the Commission's report, entitled "The institution of criminal proceedings (submission of cases to the court)". The title highlighted a distinction which had emerged during the debate and which in his delegation's view should appear clearly in the text. The initiation of proceedings before an international criminal court should be the prerogative of a public organ, as was the case in national judicial systems. Such an organ would have to be created in association with the court. When a State considered that the court should take up a given case, it should bring the facts to the attention of

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that organ (procuracy, parquet) but it should not be entitled to seize the court directly. It should, of course, ensure that the organ in question acted properly in the discharge of its functions, and the court might, for example, hear complaints against its decisions.

49. The Commission had also discussed at some length (paras. 153 to 165 of the report) the question of the respective roles of an international criminal court and of the Security Council in the case of crimes of aggression or the threat of aggression. The debate seemed to have been lively, since the Special Rapporteur had stated that he fully understood the strong reactions to which the issue had given rise. A number of interesting opinions were reflected in the report. In his delegation's view, the question did not call for comment in so far as it concerned the threat of aggression, which it did not consider should be included as a crime under the Code. As for aggression, his delegation noted that the question for the court would be to assign responsibility to an individual for having committed or ordered the commission of an "act of aggression". The "acts of aggression" listed in paragraph 4 of article 15 of the draft Code characterized "aggression", which was defined in paragraph 2 of that article as "the use of armed force by a State". It therefore seemed that an individual could not commit that crime if there was no act of a State. According to the Charter of the United Nations, it was for the Security Council to determine the existence of an act of aggression. It might be doubted whether it was possible for an international criminal court to convict an individual for an act of aggression unless the Security Council had determined that an act of aggression had been committed by a State. The matter merited further reflection in order to arrive at a solution that took into account all its political and legal implications.

50. Mr. CRAWFORD (Australia), after congratulating the International Law Commission on having adopted on first reading a complete set of draft articles forming the draft Code of Crimes against the Peace and Security of Mankind, and paying tribute, in particular, to the Special Rapporteur, said that the issues involved must be confronted by the international community if it was to deal with certain extreme situations adequately and in accordance with the rule of law, which was even more fundamental in criminal than in civil matters.

51. The international community, and therefore the Commission, were facing a dilemma in that area. There was already a body of international criminal law, laid down in more or less widely accepted multilateral treaties, which relied on national courts and institutions for prosecution and punishment, with international cooperation limited to the extradition of suspected offenders and to judicial assistance. As shown by a wide range of cases, such national legal institutions appeared to be working fairly well; where they were not, the appropriate course was to reform them, not to duplicate them at the international level, which would be immensely expensive and complex. Not only would there be a need for international laws and judges, but also for international prosecutors, international penalties, international penal institutions, international rules for remission and parole - a vast number of

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institutions and rules, none of which currently existed. One horn of the dilemma related to the undesirability of creating international institutions which encroached on the work of long-established national criminal justice systems or which were costly structures condemned never, or hardly ever, to be used.

52. However, the other horn of the dilemma related to the possibility of the international community being confronted by cases in which national institutions were inadequate or inappropriate, cases in which the horror of the crimes committed was such that the offenders could not be allowed to escape, but in which the relevant national legal systems should not be expected to deal with the situation. The problem was that it was awkward, and contrary to the rule of law, to have to create special structures after the fact to deal with such cases. In short, the international community occasionally needed a mechanism whose creation, in order to meet a merely occasional need, appeared to be inefficient and excessive.

53. The question, however, was what the needs, or at least the categories of need, were. There were three possibilities. The first was the need for a range of internationally acceptable definitions of crimes which were inherently or substantially international in character, and which were crimes against the peace and security of "mankind". The second was the need, expressed by a number of Caribbean countries, for international assistance in dealing with criminals, such as international drug traffickers, who had sufficient resources to put them beyond the reach of a small and isolated criminal justice system. The third was the special need referred to earlier, namely, the necessity of punishing major war criminals, individuals whose offences were on such a scale or who had caused such injury that international action against them was the best way of responding and of ensuring a fair trial.

54. His delegation continued to doubt the utility of the draft Code if its only purpose was to respond to the first of the above-mentioned needs, namely, the development of a comprehensive code of offences which in one way or another threatened international peace and security. In some circumstances there could be merit in defining the crimes which were considered to be sufficiently serious to warrant treatment as crimes against the jus gentium. The jus gentium was perhaps being extended, as evidenced by the elaboration of multilateral instruments relating to crimes of an international character. The need to know the extent of the jus gentium had become apparent in negotiations for the conclusion of extradition treaties. A number of countries believed that, in the case of crimes against the jus gentium, it should not be possible to invoke the political-offence exception to extradition. If that view was to become part of international criminal law practice, then the exact content of the jus gentium must be determinable. If that was the purpose of the Code, there were basic difficulties.

55. The Code overlapped with and repeated internationally agreed definitions of offences already dealt with in international conventions, and it was

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unclear how States parties to the Code would reconcile their obligations under the multilateral treaties to which they were already parties with their obligations under the Code. For example, the Convention on the Suppression and Punishment of the Crime of Genocide required States parties "to provide effective penalties for persons guilty of genocide". The Code itself would prescribe penalties. He wondered whether the two sets of penalties were supposed to match.

56. In addition, the Code did not deal with all aspects of offences referred to in multilateral treaties. For example, article 25 dealing with illicit traffic in narcotic drugs repeated only one element of article 3 (1) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The question arose as to whether the other offences referred to in that Convention should be regarded as lesser offences, even though that was not what the Convention envisaged.

57. The multilateral treaties all recognized the concept of universal jurisdiction in one form or another. He asked whether the Code would affect that by instituting an international jurisdiction based on the principle of territoriality or another principle. The Australian delegation noted, in that connection, that the Special Rapporteur rejected the idea of universal jurisdiction for crimes against the Code. That might not necessarily be a bad solution in the case of provisions dealing with the jurisdiction of an international criminal court, but it was inconsistent with the jurisdictional provisions in the existing multilateral treaties. Lastly, as it currently stood in the draft Code, the list of crimes was not comprehensive if it was intended to reflect the modern jus gentium. While many of the offences included were the subject of multilateral conventions, piracy and hijacking, for example, had been excluded without explanation, although those crimes could affect the peace and security of mankind.

58. With regard to the Code as a form of assistance to the criminal justice systems of smaller States, his delegation understood the problems faced by some States, especially smaller States, in bringing to trial major drug traffickers and other organized criminals. While the matter required further study, Australia was not convinced that the draft Code was the best way of dealing with it. One alternative would be to set up a regional jurisdiction, with cooperative arrangements, for example, in sentencing. An example of such an arrangement was the Pacific Court of Appeal, a panel of judges from the region who sat on appeal cases from countries which did not have a sufficient number of judges or appeals to justify the establishment of a national appellate court.

59. Another potential issue was the need for an established procedure at the international level for dealing with major war criminals, especially those who had committed crimes against the peace and security of mankind, or of a region. Of course, that need would not arise often; however, it was a real one, and it was contrary to the rule of law to create, through retrospective treaties, institutions and rules to deal with such special cases. It was

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necessary to assess whether the need in question was a pressing one and whether the associated costs and difficulties justified creating such a body and such rules at the current stage. The fact remained, however, that if such was the purpose of the draft Code, it should apply only to the most serious international crimes, and any international institution created to give effect to the Code should not be a standing tribunal with permanent staff, because it would have relatively few cases, but a structure capable of functioning when the need arose.

60. The draft Code satisfied none of the possible purposes to which he had just referred. It was not a comprehensive statement of the jus gentium in the area of criminal law. Nor was it always consistent with the existing international criminal law conventions. It did little to deal with the special problem of drug trafficking and organized crime identified by some States. And it was overinclusive in identifying the most serious cases of international criminality. For example, under article 21 every murderer was liable to prosecution under the Code, as was every person who kept someone in a condition of forced labour. The crimes concerned were indeed odious, but that went too far.

61. It was true that there had been some attempt to limit the scope of the draft Code, for example, by limiting some articles to persons who did things "as leader or organizer". But the draft Code went nowhere near defining with sufficient precision the most serious cases of international criminality. A related problem was that of vagueness. It was not enough to limit the Code to serious offences simply by saying, as article 22 did, that it applied only to "exceptionally serious" violations. What exactly did that mean? What impact did that restriction have on the violations listed in paragraphs (a) to (f) of article 22? To take another example, what was "large-scale" drug trafficking under article 25?

62. The draft Code was thus neither a statement of principle nor an instrument of treaty status capable of implementation by States parties. It was in need of substantial further work, as the Commission itself acknowledged in paragraph 173 of its report. In his delegation's view, it was only if a satisfactory consensus could be reached on the issues to which he had just referred that it would be possible to take an articulated position on the following particular questions that had been raised by the Commission and by the draft articles.

63. The establishment of an international criminal tribunal was a separate but related issue. The Commission's commentary foreshadowed a strong link, to the point of determining who should institute proceedings and, in respect of some offences, the possible exclusive jurisdiction of such a tribunal. In Australia's view, it was only if the Code was limited to dealing with major war criminals that the issue of exclusive jurisdiction could arise, and then that jurisdiction could not exclude the jurisdiction of national courts to deal with other offences (such as murder or drug trafficking) involved in the same conduct.

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64. The problem of the relationship to the Security Council was exceptionally difficult. Under constitutional systems based on the separation of judicial power, a central element in an offence could not be left to be conclusively determined by an international executive agency such as the Security Council. It might be that the crime of aggression was one that should be exclusively within the jurisdiction of the proposed international criminal court, although without prejudice to the jurisdiction of national courts to try other offences (for example, murder and violation of the laws of war) that might have been committed in the course of an act of aggression.

65. With regard to penalties, the Commission's commentary suggested that penalty provisions should be included in the draft because the principle nulla poena sine lege so required. Australia could not see that the connection was necessary, unless the Code was intimately connected to a criminal jurisdiction. The existing multilateral treaties dealing with the prevention and punishment of crime managed to do so without specific penalty provisions. But the position would be different in cases where jurisdiction to try the offences under the Code lay with the international criminal tribunal.

66. His delegation had set out a number of specific comments on some draft articles in writing, and copies of the document in question were available to delegations.

67. Mr. MIKULKA (Czechoslovakia) said that following the reading of the draft Code as a whole a number of fundamental questions remained. He wondered, for example, whether the objective of the Code, as it had emerged from the first reading, was overambitious, and whether it was realistic to believe that once adopted the Code would be implemented by States and not remain a dead letter. It was chiefly the responsibility of the Sixth Committee to try to answer those questions, because it was the Committee that determined the political focus of the Commission's work. And it thus also bore some responsibility for the outcome of codification endeavours.

68. Czechoslovakia had always endorsed the idea underlying the Code: that although the criminal responsibility of individuals was based on domestic law the punishment of some crimes perpetrated by individuals was directly governed by international law, independently of domestic law. The crimes in question were chiefly those perpetrated with the consent of the State or upon the State's orders, in other words, they were acts committed by individuals behind whom the State was to be found.

69. Czechoslovakia had always been in favour of the preparation of an international instrument to codify the rules of international law in the area in question and thus contribute to the strengthening of legal safeguards for international peace and security. Over the years, that objective had been expanded to cover some related issues, such as efforts to control international crime in its widest sense, which were of a rather different nature. Their inclusion in the draft had made the subject more cumbersome, since consideration of such different issues called for different methods.

(Mr. Mikulka, Czechoslovakia)

70. In past years both the Commission and the Sixth Committee had devoted a considerable amount of time to clarifying the topic's key concept - that of a crime against the peace and security of mankind. In deciding to limit the scope of the draft to acts by individuals, the Commission had taken a major step in the right direction. That approach by no means disregarded the dual nature of the issue: that a crime committed by a physical person could at the same time constitute an illicit act by the State. However, it was only by separating the criminal responsibility of individuals from the responsibility of States that the complex subject-matter in question could be dealt with and codified.

71. At its most recent session, the Commission had decided that all the articles on the various types of crimes should be preceded by a chapeau specifying the categories of physical persons to which each article applied, thus responding to the proposals made in the Sixth Committee by many delegations, including the Czechoslovak delegation. Differentiation on a case-by-case basis seemed to be an appropriate solution, although Czechoslovakia did have some reservations about the scope of some articles. As history had demonstrated, some crimes against the peace and security of mankind had been perpetrated by individuals who had used the public authority conferred on them, in other words, by agents or representatives of the State. Such individuals had either abused their power or acted in accordance with the policy of the State in question, whose goals were in that case contrary to international law. However, it was not always possible to equate an individual with public authority on the basis of the duties of the individual concerned within the State apparatus. It would suffice, in that connection, to recall the case of Nazi war criminals, many of whom had in fact exercised power without actually performing official duties. He believed that it was that problem that the Commission had attempted to solve in the chapeaux of articles 15 (Aggression), 16 (Threat of aggression), 17 (Intervention) and 18 (Colonial domination). Those articles, unlike articles 23 and 24, did not refer to agents or representatives of the State but to individuals acting as leaders or organizers.

72. Likewise, articles 19 (Genocide) and 21 (Systematic or mass violations of human rights) did not limit the potential perpetrators of the crimes in question to agents or representatives of the State, since they referred to "individuals". That was precisely where the problem of drawing a distinction between crimes against the peace and security of mankind and crimes under ordinary law arose. Clearly, the solution to that problem could not be based on a more precise definition of the categories of individuals likely to commit such crimes. He wondered, therefore, what the criterion should be for drawing such a distinction. The Commission suggested the criterion of a "mass scale" or the "exceptional seriousness" of the acts in question. He was, however, not convinced that that was a satisfactory response.

73. With regard to the dual nature of crimes against the peace and security of mankind, which arose from the fact that such crimes were committed by individuals but also involved the State, he said that in cases where they were

(Mr. Mikulka, Czechoslovakia)

committed by agents or representatives of a State in the exercise of public authority, such crimes were directly imputable to the State. The situation was different in the case of crimes such as genocide or massive and serious violations of human rights committed by individuals who were not agents or representatives of the State, did not occupy any position within the State apparatus, were not exercising any prerogative of public authority, and therefore acted on their own account. The connection between crimes committed by private individuals and the State became apparent only in certain situations, e.g. when the State under whose jurisdiction the crimes had been committed failed consistently to discharge its obligation to suppress them in the widest sense of the term and, therefore, bore international responsibility for those crimes.

74. At the same time, if the State concerned was not failing in its obligation to suppress such crimes, the crimes - even if massive or serious - still remained crimes in ordinary law and should not be included in the category of crimes against the peace and security of mankind. That important aspect of the problem had not always been sufficiently explored and, despite all the improvements made in the draft, had not found adequate expression in the text. Of course it was not easy to bring out that aspect of crimes against the peace and security of mankind in each of the articles. The solution might lie in inserting a general provision that would supplement articles 1 and 2 of the draft and, in consequence, would define the scope of the draft more precisely while at the same time casting further light upon the interdependence between the draft Code and the draft articles on State responsibility.

75. Turning to the questions which the International Law Commission had discussed in connection with the Special Rapporteur's ninth report, he noted that the Commission had first considered the problem of applicable penalties. The Special Rapporteur was right in thinking that the draft Code needed to be supplemented by provisions relating to applicable penalties in accordance with the principle nulla poena sine lege while at the same time drawing attention to the difficulty which the undertaking entailed and which had already come to light in connection with the elaboration of the Charter of the Nürnberg Tribunal.

76. Draft article Z on applicable penalties presented by the Special Rapporteur proposed a simple solution to a complex problem. He doubted whether the introduction of a standard penalty was appropriate, not only in view of the diversity of the crimes covered by the Code but also in the light of the precedent constituted by article 27 of the Charter of the Nürnberg Tribunal. The question of the applicability of the death penalty was a separate problem. Although the Czech and Slovak Federal Republic had recently abolished the death penalty, he by no means underestimated the difficulties which its complete exclusion in the case of crimes against the peace and security of mankind might raise for countries whose legislations did provide for the death penalty, particularly if the system of universal jurisdiction were adopted. The question required more thorough consideration. So far as

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paragraph 3 of article 2 was concerned, he shared the views of Commission members who had criticized it. Restitution of illegally appropriated property by the perpetrator of the crime fell outside the scope of the subject of penalties and should be dealt with separately.

77. The solution to the problem of penalties was to a large extent connected with the question of the mechanism of the Code's implementation. If implementation were to be based upon the concept of "universal jurisdiction", it would be possible, instead of providing specific penalties for each of the crimes and thus facing the sometimes insurmountable difficulties involved in reconciling the contradictory concepts inherent in different legal systems, to follow the approach adopted by the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, in which States undertook to make such offences punishable by severe penalties or by penalties similar to those imposed in the case of any ordinary offence of a serious nature. A similar approach was embodied in the International Convention against the Taking of Hostages and in the Convention against Torture. The approach respected the diversity of penalties existing in different systems of penal law and, at the same time, introduced an element of standardization of the action taken by national courts.

78. A different situation would arise if the implementation of the Code or of part of the Code were to be conferred on an international jurisdiction. In that case, a standard system of penalties would be necessary for the purpose of inclusion in the Code.

79. The idea of the establishment of an international jurisdiction had received new encouragement at the forty-fifth session of the General Assembly. The coming years would show whether that had been a spontaneous reaction in response to a specific crisis or whether the declarations made by States had reflected a more consistent trend towards the establishment of an international criminal court.

80. His delegation took the view that the historic occasion now presenting itself should not be missed, and that the possibility of establishing an international court should be given serious consideration. The Sixth Committee should give a very clear lead to the International Law Commission on that point. He was prepared to go still further and say that, in order to avoid the risk of eroding of the authority of the Code as a result of divergent practices by national tribunals, it was necessary to give serious consideration to the possibility of conferring jurisdiction upon the international court, at least with regard to the crimes of aggression, threat of aggression, intervention, colonial domination and apartheid, or in other words in those cases where the determination of an individual's criminal responsibility was subject to an assessment of an act committed by a State at the international level - an assessment which national courts could perform only with great difficulty. The proposal made by some members of the Commission to the effect that the implementation of the articles relating to those crimes should be conferred on the international criminal court while

(Mr. Mikulka, Czechoslovakia)

that of the rest of the articles should be entrusted to national courts under universal jurisdiction was of interest in that connection.

81. As for the jurisdiction of the court, it should be established by the adoption of the court's statute and should ipso facto be binding upon all States parties to the statute. Adoption of the draft provision on the conferment of jurisdiction proposed by the Special Rapporteur would entail the risk of making the court powerless to deal with the most flagrant crimes - those committed with the consent or upon the orders of a State by its own agents or representatives perpetrating their crimes - such as, for example, the crime of ordering aggression or intervention to be committed - under that State's territorial jurisdiction. The provision would run counter to the historic examples of the Nürnberg and Tokyo Tribunals.

82. The Commission had also embarked upon a highly interesting debate on a draft provision concerning criminal proceedings which sought to make such proceedings subject to prior determination by the Security Council. While it could not but recognize to the logic of the legal arguments advanced against that idea, his delegation wished to emphasize that, whatever the solution adopted, it should not allow the procedure for instituting proceedings before the court to become a means of escaping the provisions of the Charter concerning the prerogatives of the Security Council to determine the existence or threat of an act of aggression. Any solution which endangered the balance of competences in the sphere of international peace and security set forth in the Charter would be a disservice to the cause of international peace. The establishment of an international criminal court would strengthen the system of collective security based upon the Charter only provided that the court was integrated in that system and that the existing checks and balances were preserved.

83. Ms. SZAFARZ (Poland) said that when evaluating the draft Code of crimes against the peace and security of mankind it was necessary to bear in mind that most of its provisions concerning specific crimes were only a reflection of the generally binding customary rules of international law having, in some cases, a jus cogens character.

84. Her delegation fully recognized the importance of the list of crimes against the peace and security of mankind incorporated in the draft Code. In general, it also endorsed the present definitions of specific crimes. The subjective elements forming part of those definitions, such as the expression "good reason" in article 16, "large-scale destruction" in article 22, paragraph 2 (e), "as to create a state of terror in the minds" in article 24 and "on a large scale" in article 25, paragraph 1, probably had to be accepted, but every effort should be made to provide adequate procedural safeguards.

85. The bracketed words "under international law" in draft article 1 should be included in the text, for the simple reason that, as was clear from article 2, crimes against the peace and security of mankind were, first and

(Ms. Szafarz, Poland)

foremost, crimes under international law. Draft article 15, paragraph 5, which was currently between brackets and which read as follows: "Any determination by the Security Council as to the existence of an act of aggression is binding on national courts" should also be retained. However, depending on what decision was taken in that connection, it would be advisable to refer to an international criminal court instead of or as well as to national courts.

86. Moreover, it seemed appropriate to provide that, in principle, any individual who committed an act which constituted an attempt to commit a crime against the peace and security of mankind would be responsible therefor and would be liable to punishment. The bracketed phrase in article 3, paragraph 3, could no doubt refer to the articles of the draft Code relating to specific crimes. The gravity of all those crimes justified punishing an attempt to commit them in many cases.

87. As to draft article 14, her delegation was of the view that defences such as mental incapacity and extenuating circumstances, if any, should always be taken into consideration.

88. With regard to the issue of penalties, it would be desirable to have the definition of each crime accompanied by the relevant penalty. That would have the advantage of being more explicit than a scale of penalties applicable to all crimes. Having said that, even the best code, even one that listed the penalties incurred, would be useless and even illogical without a mechanism for implementing it. For that reason, her delegation wholeheartedly supported the idea of establishing an international criminal court which would have competence solely for crimes defined in the draft Code.

89. The argument that establishing such a court would be too costly an undertaking was not convincing; if the mere existence of the court could deter potential perpetrators from committing the crimes enumerated in the Code, then the material and other benefits of establishing it would outweigh any cost.

90. The competence of the future international criminal court could be exclusive in the case of crimes against the peace, and concurrent with national courts in that of crimes against the security of mankind. All States parties to the statute of the court would be entitled to institute proceedings in it. The statute of the court would be contained in a protocol annexed to the convention concerning the Code. Finally, the preventive role of such a court could be even more important than its role in the area of repression.

91. Finally, concerning draft article 24, there was no justification for terrorist actions, and they should be prevented and suppressed. Terrorists should be extradited immediately to the State whose interests or citizens were affected. Naturally, that was an ongoing and very difficult undertaking, but a civilized approach and a concerted action by all States would make it possible to achieve in the best interest of each State and of the international community as a whole.

92. Mr. SCHARIOTH (Germany) pointed out that, when considering the content and overall structure of the draft Code, it was necessary not to lose sight of the Code's purpose. The draft Code was not just another attempt at codifying certain particularly serious acts prohibited under international law; its aim was to permit the prosecution and punishment of individuals who perpetrated crimes that were of such gravity that they affected mankind as a whole. It was being worked out with a view to being applied by the international community through an international mechanism which should take the form of an international criminal court. If such an international mechanism was to become effective and workable, the Code must be confined to offences which, in general international practice, were unequivocally regarded as crimes against humanity.

93. Part II of the draft code, however, listed a whole series of offences. Some of them, for example, genocide, systematic or mass violations of human rights, environmental crimes or the war crimes listed in article 22, were indeed of a most serious nature; others, however, were not.

94. It went without saying that, like all penal law, the code must be phrased in precise terms and must contain safeguards against arbitrary application, because the consequences of such arbitrariness could be most serious for the persons involved.

95. His delegation welcomed the fact that the Commission had expressly qualified the perpetrator of aggression, intervention and colonialism or alien domination as being a "leader or organizer". Other provisions, however, aimed at any "individual who commits or orders the commission of" certain acts. Considering the excessively broad wording of the provisions of article 3, paragraphs 2 and 3, concerning complicity and attempt, personal liability to prosecution under the draft would appear to be almost limitless. That, however, ran counter to the intended purpose of the draft code. In order to be both acceptable to as many States as possible and workable for a future international criminal court, the code should concentrate on punishing the real leaders or organizers.

96. And yet doubts remained even concerning the articles directed expressly against "leaders". For example, article 20 on apartheid also made certain legislative measures punishable. History had shown that the adoption of such legislation was not necessarily the doing of one leader but might take the form of regular parliamentary acts. It was hard to imagine how an entire parliament or administration enacting such legislation could be punished in the real world.

97. Ambiguities still remained concerning the relationship between international treaty law and certain draft articles. Several crimes listed in the draft code had already been dealt with in certain international treaties, for example, genocide, torture or the laws of war. Some of those treaties, however, had not yet been ratified by all States. Thus, opinion as to what constituted an "unlawful weapon", for example, in the sense of article 22 might vary depending on whether or not a State had ratified a given treaty.

(Mr. Scharioth, Germany)

The present draft code did not indicate how such discrepancies could be handled.

98. His delegation welcomed the fact that the Commission had addressed the issue of an international criminal jurisdiction. As to whether the mandate given to the Commission on the subject was clear enough to enable it to work out and submit a whole set of draft articles on the statute of an international criminal court, he pointed out that any criminal law, if it was to become effective, must be accompanied by an enforcement mechanism. Early attempts to address the question, which dated as far back as 1954, had simply been deferred until such time as, inter alia, the draft code of crimes would be finalized. Now that the Commission had completed its first reading of the draft code, the General Assembly should give it a clear mandate to elaborate concrete proposals for the statute of an international criminal court.

99. Turning to chapter VIII of the Commission's report on the work of its forty-third session, he noted with satisfaction that in paragraph 334 the Commission had at least partly endorsed his delegation's suggestion regarding the need to make wider use of article 16 (d) of the Commission's statute, in other words to establish small working groups to work with the Rapporteur on the preparation of drafts. It continued to believe, however, that the increasing complexity of the issues before the Commission and the growing need for speed made it highly advisable to divide work more evenly among the 34 members of the Commission, perhaps by appointing two Co-Rapporteurs for each topic in addition to the Special Rapporteur.

100. With regard to the Commission's long-term programme of work, his delegation agreed with the Chairman of the Commission that it was appropriate to start already considering what further topics were suitable for inclusion in the Commission's agenda since that discussion would take time. His delegation would be interested in hearing the views of other States on whether it would be worthwhile for the Commission to take up certain questions of treaty law that were not covered by the Vienna Convention on the Law of Treaties, for example, the consequences of objections to inadmissible reservations.

101. Mr. AL-BAHARNA (Bahrain) said that he fully concurred with the views expressed in paragraph 78 of the report (A/46/10) concerning the inclusion of penalties in the draft code as opposed to a procedure whereby the court or the internal law of States would determine the penalty to be imposed. He could not easily accept the argument that it would be preferable not to seek to impose uniform sentences in a heterogeneous world. Once the international community had recognized the existence of international crimes, to deny the need for uniform penalties would be a step backwards and would undermine the effectiveness of the code. The anxiety felt by the supporters of that argument should be somewhat allayed if the Commission, instead of opting for one rigid penalty, established a system of different penalties. His delegation believed that to impose a single penalty for all crimes would be unrealistic and unethical. For similar reasons, it seemed to his delegation that a series of penalties, rather than a single penalty, should be prescribed

(Mr. Al-Baharna, Bahrain)

for every crime, along the lines suggested by the Special Rapporteur in footnote 298 on page 213 of the report, with a minimum and a maximum being specified in each case.

102. With regard to the type of penalties to be imposed, while he felt that the point of view of those who favoured the abolition of capital punishment on the ground that no one had the right to take another's life was extreme, he recognized that the Commission could hardly ignore the developments in public opinion on the subject, which appeared to have shifted in favour of abolition. His delegation would have no hesitation in supporting a system of penalties including life or temporary imprisonment, provided, of course, that the possibility of a partial remission or a reduction of sentence upon review by an international board, and an appeal system, were not precluded. The lack of provisions on that subject might undermine confidence in the court. With regard to confiscation, only bona fide property belonging to the accused could be lawfully confiscated. Moreover, where the accused was serving a life or an extended sentence, the total or partial confiscation of his property might not be desirable, as his dependants would suffer. It would be useful for the Commission to re-examine that point.

103. The Commission had adopted an innovative approach in recommending the penalties mentioned in paragraph 98 of the report. However, his delegation could not agree with the view that it was difficult to draw a line between community service and forced labour.

104. The new versions of draft article Z (fn. 298) prepared by the Special Rapporteur represented an improvement to the extent that they took into account the views expressed by members of the Commission. His delegation preferred the second version, although it had some reservations. First, the precise extent of life imprisonment should be clearly stated. Secondly, the Commission should carefully reconsider all the ramifications of the total and partial confiscation of property in order to evaluate its utility as a penalty. Thirdly, the question of the deprivation of civil and political rights should be more thoroughly explored. Some of the problems mentioned in connection with confiscation should also be re-examined in that context. In the meantime, it was difficult for Bahrain to comment on that provision.

105. He noted with satisfaction that the Commission was gradually beginning to recognize the need for an international criminal court. With regard to the jurisdiction ratione materiae of the court, the Bahraini delegation did not support its establishment by reference to a list of international crimes based on existing multilateral conventions, as that would depart from a global perspective. A provision which emphasized the need to standardize and to universalize international criminal law would be preferable.

106. In principle, it would be ideal for the court to be directly vested with exclusive jurisdiction. However, if the conferment of jurisdiction by States was to be retained out of concern for a realistic approach, priority should be given to the State which could demonstrate that, without its consent and participation, the trial would be meaningless. In certain circumstances, that

(Mr. Al-Baharna, Bahrain)

would not be the territorial State but the nationality-of-the-victim State, or another State. Where more than one State could demonstrate "essential status", all should confer jurisdiction.

107. Although exclusive jurisdiction might be optimal, the advantages of concurrent jurisdiction, which were mentioned in paragraph 114, should not be ignored. While the specific conditions under which such jurisdiction would operate should be further developed, caution was required, as there were no models to follow.

108. With regard to the court's power to determine its jurisdiction, that was an inherent right of every court, whether or not it was expressly provided for in its constituent instrument. The question of appeals against sentences was not discussed in the report. That was a gap which must be filled. While agreeing that the court should be given the power to review sentences passed by national courts, his delegation recognized that such a proposition created legal and political difficulties. Bahrain agreed with the view stated in paragraph 132 of the report that the clause granting to the court the competence to interpret international criminal law would contribute to the clarification and the unification of such law.

109. The views expressed in paragraphs 154 to 157 of the report as to whether the institution of proceedings before the court should be contingent on a prior determination by the Security Council were interesting and some of them could be taken into account on second reading. Nevertheless, he wondered whether such a rule would not affect the independence of the court and whether the unanimity rule applied by the Security Council would not curtail the court's powers. Moreover, there was no such provision in the Statute of the International Court of Justice and it was hard to see the rationale for departing from that precedent.

110. Mr. PAL (India) said he believed that it was premature to deal with the question of penalties before having settled on the crimes to be included in the future Code of Crimes against the Peace and Security of Mankind. However, in view of the gravity of those crimes, the most exemplary punishment available in any given country should be selected.

111. The question of the custody of the property in the possession of a convicted offender was a matter of detail which could be settled later. The most obvious solution would be to restore such property to its rightful owners or to their heirs. In the absence of owners or heirs, the property could be placed in a trust or given to the State of the convict's nationality. There could also be other options. Whatever the option chosen with regard to the jurisdiction of an international criminal court - first-instance jurisdiction on issues of law and conflicting claims only; review competence in respect of sentences imposed by national courts; exclusive jurisdiction for some claims and review competence for others; or concurrent jurisdiction with national courts - such jurisdiction must be based on the consent of the States parties to the statute of the court which were directly concerned with the crimes being tried.

(Mr. Pal, India)

112. The question of the priorities to be established among multiple jurisdictions which could be exercised over the accused on the basis of different principles also required careful analysis.

113. The establishment of an international prosecutor's office, equipped with all necessary means of gathering evidence and deciding whether the case should be tried by a court, was of decisive importance. With regard to the question whether, in the case of crimes of aggression or the threat of aggression, the proceedings before the court should be subject to a prior determination by the Security Council of an act or threat of aggression, a problem could arise if the Security Council was unable to decide. Furthermore, it was advisable not to provide for the possibility of a case being brought before the court by indirect means; that should be the sole prerogative of the international prosecutor's office which, in turn, could serve as a safeguard of the balance between the court's jurisdiction and the Security Council. The court could be given the option of requesting advice from the Security Council which, however, would be solely in the nature of a recommendation; the Security Council could also seek advisory opinions from the court.

114. Lastly, his delegation supported the text of article 11 stating that the fact that an offender had acted pursuant to an order of a Government or a superior did not relieve him of criminal responsibility if, in the circumstances at the time, it had been possible for him not to comply with that order.

115. Mr. PUISSOCHET (France) said that the current wording of article 3 of the draft Code of Crimes against the Peace and Security of Mankind, which covered only individual responsibility, was reasonable. It was understandable that some members of the Commission should have wished to deal with situations in which the individual acted in the name of the State, but involving State responsibility would mean defining a regime which, because it was quite different from that envisaged for entailing the responsibility of the individual, could not be encompassed by the draft Code.

116. With regard to aggression, the question of the respective roles of the Security Council and a criminal jurisdiction must be completely clarified, but the views expressed in the Commission were still widely divergent. The Commission should therefore continue its consideration of that point during the second reading in the light of the comments by States.

117. Crimes against the peace and security of mankind must be characterized by a special degree of horror and barbarity and be of such a nature as to truly undermine the foundations of human society. However, the draft extended that concept to acts which did not all obviously belong in that category, a fact which had two unfortunate consequences: (a) the concept of a crime against the peace and security of mankind was devalued and (b) it became much more difficult to establish an international system for the punishment of extremely diverse acts.

(Mr. Puissochet, France)

118. It would be unwise to consider failure to respect rules established in treaties or resolutions of the General Assembly of the United Nations as systematically constituting a crime against the peace and security of mankind, for that would distort the scope of the draft Code and entail interference with matters dealt with elsewhere, such as for damage to the environment and war crimes.

119. With regard to war crimes (art. 22), the Commission had decided that the article should cover only acts which it considered exceptionally serious. Nevertheless, even though that approach defined the problem more effectively, his delegation considered that war on the one hand and crimes against the peace and security of mankind on the other belonged in different categories. Furthermore, the proposed list seemed to need further attentive scrutiny. The Commission should, in particular, determine whether it might not be premature to consider as a crime against the peace and security of mankind the violation of certain rules which were currently embodied in treaties and concerned questions still being studied by States. In that connection, his delegation wished to reserve its position on subparagraph (d) in so far as it reproduced word for word a provision of Protocol I of 1977. Furthermore, the reference in that subparagraph to collateral damage to the environment did not seem to be in harmony with article 26, which referred only to wilful damage. His delegation doubted whether the Commission could validly formulate in the draft Code substantive rules on the conduct of military operations. Such rules, whether relating to the protection of the environment, of civilian property or of property of religious, historical or cultural value, required special studies in the light of their purpose. That was a point which the Commission should clearly consider further. That observation was particularly relevant in the case of the wilful and severe damage to the environment referred to in article 26. It was open to question whether a problem of such magnitude could be dealt with in a brief text which left unanswered a number of questions such as the context in which such damage was caused (international armed conflict or purely internal action) and the way in which a judgement as to the nature of the acts committed might be influenced by the means used or the aim pursued.

120. With regard to the creation of an international criminal jurisdiction, it would be unwise at the current stage to consider only one option. Barring certain solutions which could already be set aside (for example, the creation of an international court which would hear appeals from national courts), the Commission could give the matter fairly wide-ranging consideration. The competence of the court should not encompass acts which were serious and condemnable but did not really constitute crimes against the peace and security of mankind. The question of whether the crimes should be defined in the code itself or in an annex to the statute of the court was purely formal, for it would be difficult to imagine that such an annex would not reproduce the provisions of the Code.

121. The report of the Special Rapporteur implicitly established a court which would have concurrent jurisdiction with national courts. That was a

compromise position which avoided posing the very sensitive question of national sovereignty in the judicial domain, but which also had obvious drawbacks. The international court would intervene only if national courts had declared that they lacked competence, but it might be wondered what would happen if the case had not been referred to the national court or had been referred to it only after the international court had been seized of the matter. Moreover, such a system would almost inevitably lead to conflicts of judicial practice on the same questions and might greatly delay the outcome of the proceedings.

122. The solution of conferring exclusive competence on the international court would not be easy to implement, for it would clash with the differences between legal systems and with the desire to preserve their sovereignty. It did, however, have the advantage of appearing to be a coherent solution, at least at the theoretical level.

123. Other possible solutions had appeared which might be more pragmatic. One consisted in defining the competence of the court differently according to the crime concerned: it would have exclusive competence in some cases and concurrent competence in others. In order to form an opinion, one would have to know how the two categories were to be differentiated and what advantages the system was expected to offer. The second possibility consisted in envisaging not the creation of a single court but of ad hoc criminal courts, which might be easier to set up. That was an option which deserved further consideration.

124. With regard to the territorial competence of the court and acceptance of its compulsory jurisdiction, there seemed to be two conflicting schools of thought. According to the first, which sought to be realistic, the territorial criterion played a key role: the court would rule on crimes committed in the territory of a State party to the convention creating the court and the consent of that State - to be expressed on a case-by-case basis - would be necessary. According to the second school of thought, the crimes were considered as being directed not only against a State but against mankind as a whole and therefore of concern to the entire community of States. Consequently, no State should be granted privileged status and the court should be able to intervene without the consent of the State in whose territory the crime had been committed or the State of which the perpetrator of the crime was a national. At the current stage it was difficult to choose between the two approaches. The second seemed to be logical, but it had to be acknowledged that it did not really correspond to the realities of international life. The point should be considered further.

125. It would be dangerous to establish a system which had been insufficiently thought out and which thus would not really improve the system for the punishment of the most heinous crimes and might even discredit the very idea of international justice. His delegation congratulated the Commission and its Special Rapporteur for having provided valuable material for study and would follow the future work with great interest.