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SUMMARY RECORD OF THE 13th MEETING

Chairman: Mr. LEHMANN (Denmark)

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The meeting was called to order at 10.25 a.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Mr. CEDE (Austria) reviewed the commendable work carried out by the International Law Commission in the progressive development and codification of international law and expressed his delegation's gratification that so many codification conferences held under United Nations auspices had taken place in Vienna, thus establishing an association between Austria and the universal promotion of international law.

2. In the past, most codification efforts had been undertaken in areas where the reciprocal relation between particular States were directly affected but the recent radical changes in international relations had shifted the focus of such legislative endeavours to the rights and duties of States vis-à-vis the international community as a whole or to the position of individuals under international law in specific areas. The traditional mechanisms of the international codification process had also changed and new challenges had emerged which necessitated a quick and effective response to legal emergencies; thus, under the auspices of the International Atomic Energy Agency, two multilateral conventions had been adopted in 1986 relating to early warning and assistance in the case of nuclear accidents.

3. At the same time, the Commission had continued work on long-term projects, using working methods that had been developed many years before, and a certain stagnation had crept into the classical codification process. Notwithstanding such encouraging initiatives as the draft statute for an international criminal court and the draft articles on the law of the non-navigational use of international watercourses, the classical process of codification of public international law raised serious concerns: since 1980, not a single convention elaborated by the Commission had entered into force and the two drafts on the status of the diplomatic courier and the diplomatic bag and on jurisdictional immunities of States appeared to be making little progress.

4. The danger of the International Law Commission losing its prominent role in the codification of public international law and the need for it to regain the momentum built up over the years had prompted his delegation to make certain reflections. The classical codification procedure of elaborating draft articles as a basis for international diplomatic conferences, with a view to the subsequent adoption of binding instruments of international law, had been successful in the past, but of late had proved rather inflexible and should be reconsidered.

5. In that context, a fundamental question was whether multilateral conventions should remain the primary instruments of codification. Where a high level of acceptance was anticipated, the multilateral convention was probably the most appropriate format. Among possible solutions to the problem of increasing the acceptability of texts, he proposed such methods as limiting their scope to provisions which were based on well-established customary law and practice, although that would leave certain lacunae in areas where there were

conflicting views on the applicability of customary law and practice and such conventions could therefore not aim at comprehensiveness. Alternatively, provision could be made for the posting of reservations, which should, however, be admissible only with regard to certain provisions specifically identified as those which had resulted from compromises and were not based on sufficient customary law and practice. The compromise provisions could be incorporated in additional protocols.

6. He drew attention also to the time factor and to the need for measures to speed up the adoption of rules of international law widely acceptable to the community of States.

7. In addition, serious consideration should be given to the alternative of "soft codification", namely, General Assembly resolutions, declarations of a universal character and "restatements" of customary law and existing practice. Such instruments could have a harmonizing effect on the behaviour of States while avoiding the laborious procedures involved in transforming them into legally binding instruments under the law of treaties. In that context, particular attention could be given to the elaboration, by the Commission, of "restatements", following the methods used by the American Law Institute, which could take the form of handbooks for use by States in the application of international customary law and could be endorsed by resolutions of the General Assembly to give them greater legal and political weight.

8. A further examination should be made of the following aspects of the methods and quality of work of the International Law Commission: the schedule and structure of its meetings; the use of outside resources; interaction with States and their competent authorities; and the financing of, and support for, special rapporteurs. In addition, consideration should be given to the possibility of holding two or more sessions of the Commission per year, which would permit more focused concentration on the topics on the agenda, provided, however, that the special rapporteurs presented their reports regularly at the very beginning of each session. In view of the crucial importance of those reports, due attention should be given to financing research programmes at prominent academic institutions and enlisting the services of competent non-governmental organizations, in order to meet the needs of the rapporteurs.

9. Cooperation with States and their legal advisers could be crucial in expediting speedy acceptance of the final draft of an instrument and new means for such cooperation should be explored. The dissemination of questionnaires was too cumbersome and more informal and flexible forms of dialogue with States should be employed. In addition, the routine consideration of the Commission's reports by the General Assembly should be re-examined and methods identified of providing the Commission at an earlier stage with a more comprehensive overview of the positions of States. Delegations should be encouraged to state their countries' positions on given projects in a detailed and comprehensive fashion and their comments, if sufficiently precise in legal terms, would help guide the Commission in dealing with the key issues of a given draft.

10. In addition, the General Assembly might choose to intervene more boldly in the organization of the Commission's work identifying priorities among its topics and even removing items from its agenda as the need arose.

11. His delegation believed that the General Assembly should decide to establish an open-ended sessional ad hoc working group of the Sixth Committee at its fifty-first session with the broad mandate to review the codification process in the United Nations system and that States should be invited to offer comments on that issue in time for consideration by the ad hoc working group in 1996. He hoped that a resolution could be adopted on that issue by consensus.

12. Mr. JACOVIDES (Cyprus) noted that at its 1995 session the International Law Commission had made progress on part three of the draft articles on State responsibility, concerning the question of the settlement of disputes; in that connection, his delegation wished to reiterate its position that all multilateral law-making treaties concluded under United Nations auspices should include an effective and expeditious third-party dispute settlement procedure. While recognizing that difficulties remained, his delegation urged the Commission to complete its work on State responsibility as soon as possible.

13. The Commission had decided to propose "Diplomatic protection" as a new topic for inclusion on its agenda and to prepare a feasibility study on a topic provisionally entitled "Rights and duties of States for the protection of the environment". The first of those topics was closely related to State responsibility; the second was of great current relevance. His delegation would, therefore, have no difficulty in endorsing the Commission's recommendations in that regard. It wished, however, to maintain the position it had already taken with regard to additional topics and, in particular, on the need to clarify in an appropriate way the substantive contents of jus cogens.

14. Also noteworthy was the successful holding of the International Law Seminar, the value and utility of which had been established beyond any doubt. The Commission had continued its fruitful cooperation with regional bodies, which played an important role in developing rules of international law in the regional context. Groups such as the Non-Aligned Movement and the Commonwealth could help in a broader context to develop rules of international law on appropriate topics, such as the United Nations Decade of International Law and the convening of a peace conference in The Hague in 1999.

15. In his view, the task of the Sixth Committee was not to involve itself in the details of the work of the Commission or make drafting recommendations to it but to make general observations and provide evaluations on matters of legal policy, thus offering the Commission political direction and guidance.

16. The draft Code of Crimes against the Peace and Security of Mankind and the related subjects of an international criminal jurisdiction and the definition of aggression had a long and torturous history within the United Nations system, dating back to 1947. His delegation had long advocated the adoption of the Code as a complete legal instrument, to include crimes, penalties and jurisdiction. Such an instrument would serve to deter or punish violators of its provisions.

17. The draft Code, as adopted by the Commission on first reading in 1991, was very broad. In the past three years, the Commission had concentrated less on the substantive contents of the Code and more on the question of the establishment of an international criminal jurisdiction. The members of the Commission, including the Special Rapporteur on the topic of the draft Code,

had been aware of the need, during the second reading, to concentrate on well-understood and legally definable crimes and to produce a defensible and lean draft text, in order to gain the widest possible acceptance by States. In that and similar cases, the Commission had to walk a fine line. While it was not authorized to legislate, its mandate went beyond mere codification to progressive development. The extent to which a topic might be progressively developed depended on a careful weighing of the factors involved in each particular case. In the final analysis, ascertaining what projects States would accept was a matter of political judgement. There were, unfortunately, a number of recent examples in which draft texts completed after painstaking work in the Commission had not been accepted by States. The observations in that regard made earlier by the representative of Austria merited serious consideration.

18. Of the twelve crimes contained in the draft Code as adopted on first reading only six had been retained, some of them in an amended forum. Nevertheless, aside from its reservations with regard to certain drafting and substantive points, his delegation endorsed the course taken by the Commission. It would only caution that any surgery performed on the draft Code should not be excessive.

19. With regard to the proposed deletion from the draft Code of certain crimes, it was true that concepts such as intervention or the threat of aggression lacked the precision and rigour required by criminal law. Those crimes, as well as that of mercenary activity, could still be included under the remaining articles on aggression or terrorism. Non-intervention was recognized as a fundamental principle of international law in international instruments, the practice of the International Court of Justice and in General Assembly resolutions. The fact that intervention would no longer represent a separate category under the draft Code would in no way diminish the validity of the principle. While colonial domination and other forms of alien domination were abhorrent and unacceptable, it was to be hoped that such actions were a matter of the past; if included in the draft Code, they would not have a realistic chance of acceptance by States. Serious damage to the environment was, under article 19 of the draft articles on State responsibility, an international crime. It was clear that situations could be envisaged - wilful nuclear pollution or poisoning of vital international watercourses, for example - which might affect international peace and security. Such actions might be punishable under the other articles of the draft Code, thereby eliminating the need to make wilful and severe damage to the environment a separate category.

20. The prohibition and condemnation of apartheid remained a valid principle of international law. The political changes in South Africa meant that apartheid no longer met the criteria for inclusion in the draft Code. The world was not, however, free from institutionalized racial or ethnic discrimination. It was important that such actions should be included under one of the other articles of the draft Code as massive and systematic violations of human rights, in order to prevent their continuation or emergence in other contexts.

21. There could be no doubt about including the crime of aggression in the draft Code. Aggression, by its very nature and in the light of the legislative history of the draft Code, was a key element of the latter. Much time and effort had been spent by the United Nations system on defining aggression, which

had culminated in the adoption in 1974 of General Assembly resolution 3314 (XXIX). The proposed definition of aggression rested mainly - and with perfect justification - on that contained in resolution 3314 (XXIX). A current view in the Commission, supported by distinguished jurists, was that the concept of aggression was legally undefinable. In their written comments, Governments had widely supported the view that resolution 3314 (XXIX) had been intended to serve as a guide for political organs of the United Nations and was accordingly inappropriate as the basis for criminal prosecution before a judicial body. On the clear understanding that resolution 3314 (XXIX) continued to provide a valid definition of aggression, his delegation would be willing to endorse the new draft article on aggression (article 15) proposed by the Special Rapporteur, which limited itself to referring to only one paragraph of resolution 3314 (XXIX), reading: "aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations". That formulation was based on Article 2, paragraph 4, of the Charter, which according to the prevailing view provided the clearest example of jus cogens and could hardly be disputed.

22. With the adoption of the Charter and earlier instruments making war illegal, it was no longer necessary to make a distinction between "acts of aggression" and "wars of aggression". Acts of aggression, such as the invasion or annexation of territory, were not simply wrongful acts and were sufficiently serious to constitute crimes under the draft Code.

23. Genocide was the least problematic of the crimes proposed for inclusion in the current version of the draft Code. General agreement on the definition of genocide was based on general acceptance of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The points raised by Governments in their written comments could largely be met by interpretative statements. The United Kingdom had pointed out the relationship between the draft Code and article IX of the Genocide Convention, which provided for the compulsory jurisdiction of the International Court of Justice in the case of disputes between contracting parties relating to the responsibility of a State for genocide, and that was a welcome reminder of the need to accept compulsory third-party settlement in all multilateral law-making conventions. His delegation therefore endorsed the proposed draft article on genocide (article 19), leaving room for possible drafting changes.

24. The third crime proposed for inclusion in the current version of the draft had been adopted on first reading in 1991 as article 21 ("Systematic or mass violations of human rights"). In response to the comments of Governments and in view of further inquiry into the relevant jurisprudence, the title of the article had been changed to "Crimes against humanity". While not convinced of the need for that change, his delegation was willing to accept it. However, it wished to point out that the reference to "mass violations" had been intended to indicate the gravity of the offence. The Commission and the Drafting Committee might wish to consider the matter further.

25. Draft article 21, as currently proposed, contained a list of acts which, when committed systematically, would constitute a crime against humanity. His delegation endorsed the decision to retain the act of deportation or forcible

transfer of population, which had been included in the earlier version of the article. Institutionalized racial or ethnic discrimination could be added to the list to compensate for the proposed deletion of the crime of apartheid from the draft Code. Consideration should also be given to including in article 21 an appropriate reference to the practice of the systematic disappearance of persons, which was a major humanitarian concern in many parts of the world.

26. The fourth crime proposed for inclusion in the Code had been provisionally adopted on first reading as article 22 (Exceptionally serious war crimes). In the current version, the title had been changed to "War crimes" and some substantive changes had also been made, in response to the conclusions by the Special Rapporteur that the reservations expressed concerning the new concept of exceptionally serious war crimes were valid and that it was difficult, in practice, to establish a clear dividing line between the "grave breaches" defined in the 1949 Geneva Conventions and Additional Protocol I and the "exceptionally grave breaches" specified in the draft article as adopted on first reading.

27. The Special Rapporteur's conclusions in that regard gave rise to some difficulties. In the course of its debate on the jurisdiction of an international criminal court, the Sixth Committee had expressed a strong preference for the formulation as it had appeared in articles 21 and 22 of the draft Code, as adopted on first reading. In particular, it was his delegation's view that paragraph 2 (b) of article 22 (as adopted on first reading), which read "establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory" and which had received considerable support, should be retained in the current version. Although "ethnic cleansing" was not a legal term, it was universally understood. Appendix II to paragraph 4 of the 1977 Protocol I additional to the 1949 Geneva Conventions relating to the protection of victims of international armed conflicts, rightly prohibited the "transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory". Thus, the corresponding reference in the 1991 version of draft article 22 was solidly grounded and should be included in the new text in some appropriate way, even though the current version of article 22 already had certain formulations tending in that direction.

28. The fifth crime proposed for inclusion in the Code was "International terrorism". On the basis of the comments of Governments and his own views, the Special Rapporteur had added to the list of perpetrators private individuals acting on behalf of groups or associations. Bearing in mind recent acts of international and national terrorism, that appeared to be the right approach. While there was still no generally acceptable definition of terrorism and the piecemeal approach of identifying specific categories of acts which were condemned by the entire international community was a practical way of combating terrorism, the crime of terrorism should, nevertheless, be included in the draft Code, along with common rules applicable to all forms of terrorism, for the purpose of suppressing and punishing such acts. Although not perfect, the current version of article 24 was moving in the right direction.

29. The sixth, and last, crime proposed for inclusion in the Code was "Illicit traffic in narcotic drugs". Governments, in particular those of Australia and Sweden, had made some valid points in their written comments on the corresponding article, as adopted on first reading. Indeed, close scrutiny needed to be given to the relationship of the article with existing conventions such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, ways of implementing mutual legal assistance among States to prosecute offenders and prevent money-laundering, and the relationship between the jurisdiction of national legal systems and the proposed international criminal jurisdiction. Doubts had been expressed as to whether it was appropriate to include illicit traffic in narcotic drugs as a crime under the draft Code. Yet, narco-terrorism could have a destabilizing effect on some countries, in particular those in the Caribbean region, which strongly advocated its inclusion. Drug trafficking, whether carried out by agents of a State, individuals, or organizations, could also negatively affect international relations. For those reasons, his delegation urged that every effort should be made to achieve a satisfactory outcome on that important issue.

30. Ms. de BRICHAMBAUT (France) said that not every major infraction of international law or morally reprehensible act could be defined as a crime against the peace and security of mankind. In order to be included in the list of crimes in the draft Code, such infractions must correspond to the legal rules accepted by States, must be considered serious enough to be defined as crimes against the peace and security of mankind, and must refer to acts sufficiently identifiable to appear in a criminal text. The matter should be dealt with only from a legal, not a political, perspective.

31. He was pleased with the Special Rapporteur’s decision to restrict the draft Code to six crimes, thus meeting the concern of those delegations including his own, which had felt it important to avoid devaluing the concept of crimes against the peace and security of mankind. Crimes incapable of precise definition or which had political rather than legal implications should not be included in the Code. However reprehensible, the threat of aggression (article 16); intervention (article 17); colonial domination and other forms of alien domination (article 18); apartheid (article 20); the recruitment, use, financing and training of mercenaries (article 23); and wilful and severe damage to the environment (article 26) had no place in the Code and could only impede the preparation of a generally acceptable project.

32. The Special Rapporteur had replaced the original definition of aggression, which had been implicitly based on General Assembly resolution 3314 (XXIX) and had caused disagreement within the Commission. The original definition had been intended for a political body, and its inclusion in a legal document would raise substantive problems. However, despite the simplicity of the new wording, it was unclear whether progress had been made. The Security Council’s role in the definition of aggression was a crucial one, yet the new version made no reference to the relevant provisions of the Charter. As several members of the Commission had pointed out, judicial authorities might consider that an act constituted aggression and hence a crime against the peace and security of mankind while the Security Council, which was primarily responsible for the maintenance of international peace and security under the Charter, might disagree. The Commission would move more quickly if it accepted as aggression

any act determined as such by the Security Council rather than seeking to define the phenomenon.

33. The modification of article 19 to include incitement to commit genocide and the attempt to commit genocide was justified by the extreme gravity of the crime. France approved of the suggestion that the title of article 21 should be changed from "Systematic or mass violations of human rights" to "Crimes against humanity". The change reflected the wording used in public international law and the Charter of the Nürnburg Tribunal and the statute of the International Criminal Tribunal for the former Yugoslavia. However, as some members of the Commission had noted, it would be preferable to consider only crimes committed in a situation of armed conflict and intentionally aimed at a civilian population.

34. The Special Rapporteur had suggested that article 22, "Exceptionally serious war crimes" should be retitled "War crimes". France had always maintained that war crimes should not necessarily be grouped with crimes against the peace and security of mankind and would prefer that only the most serious war crimes should be covered under the Code. However, it was important to define such crimes correctly, and in that regard the new text proposed by the Special Rapporteur, which defined war crimes as "grave breaches of the Geneva Conventions of 1949", had merit. France did not share the opinion of certain members of the Commission who had suggested mentioning other international instruments, particularly Additional Protocol I to the Geneva Conventions. However, since the Protocol was generally conventional in nature and had only limited customary value in public international law, its inclusion in the definition of war crimes might impede France’s acceptance of the Code.

35. The Special Rapporteur had also retained the crimes of international terrorism and the illicit traffic in narcotic drugs. While the French delegation understood the Commission’s interest in such heinous crimes, it had doubts regarding their inclusion in the draft Code. Moreover, the Commission would inevitably encounter the problem defining terrorism, on which there was currently no consensus among States.

36. His delegation was therefore pleased that the Commission had decided to refer to the Drafting Committee only the articles concerned with aggression, genocide, systematic or mass violations of human rights, and exceptionally serious war crimes; that decision demonstrated that the Commission was directing its work towards a realistic, rather than a political concept of crimes against the peace and security of mankind. However, the decision to continue consultations on article 25 (Illicit traffic in narcotic drugs) and article 26 (Wilful and severe damage to the environment) was unlikely to produce results since those were not crimes against the peace and security of mankind. The Commission had also asked the Drafting Committee to include in the definition of the crimes to be covered under the Code the relevant elements of the crimes that had been eliminated from it. Such a course could only increase the difficulties and delay the conclusion of the Commission’s work.

37. He was also uncertain whether the Special Rapporteur and the Commission had been right to abandon any attempt to formulate a conceptual definition of crimes against the peace and security of mankind. While it had been a pragmatic

decision to list such crimes before attempting to define them, it was time to consider a conceptual definition, which would give greater stability to the Code, particularly if the goal was to draw up a list of crimes which might subsequently be revised.

38. Mr. CALERO RODRIGUES (Brazil) said that the Commission, in its haste to prepare the draft Code for its second reading by the 1996 deadline, might produce an inferior set of articles, as had been the case with the draft prepared for the first reading in 1991. During the past year, the Drafting Committee had approved several articles of part I, dealing with general principles, and two articles of part II, dealing with the definition of crimes, while the Commission itself had been unable to approve any articles. It had been a mistake to deal simultaneously with both topics; priority should have been given to the adoption of part II, which would have been of particular assistance to the work on the international criminal court. Some delegations in the Ad Hoc Committee on the establishment of that court had emphasized the importance of accelerating work on the draft Code. The Ad Hoc Committee had many organizational and procedural issues to consider, and its task would be rendered even more difficult and time-consuming if it also had to consider in depth the question of the substantive law to be applicable. The elements of that law were contained in various international instruments, and could be consolidated - with improved wording where necessary - in the draft Code, thus assisting the Ad Hoc Committee and eventually, the court. He feared that it would be impossible to complete work on both parts of the Code and also complete the first reading of the articles on State responsibility in the three weeks scheduled for the next session of the Commission. The Commission should concentrate on part II rather than fail altogether or produce inferior texts.

39. He welcomed the proposal of the Special Rapporteur to eliminate from the Code several articles which had appeared in the earlier version. Since aggression was perhaps the most serious example of wrongful conduct on the part of a State, it was logical to hold responsible individuals who led a State to commit aggression; however, it would be excessive to apply the same criterion to the mere threat of aggression. Intervention was too vague a concept to appear in the Code, while colonial domination was a political fact and it would be virtually impossible to indicate a precise action for which individuals could be incriminated. The inculpation of individuals for damage to the environment would better be left to national laws, which might have to conform to international standards, and the recruitment, use, financing and training of mercenaries were too topical to be included in the Code. The Special Rapporteur had not included apartheid among the crimes retained in the Code, but he had clearly been reluctant to eliminate that crime. The Brazilian delegation shared that hesitation and suggested that in view of its historical connotations, the word "apartheid" should be replaced by a more widely applicable formulation.

40. Since the six remaining crimes were the most inexcusable, it was imperative that the Code should be drafted with the utmost precision. A number of improvements to the text of Part II seemed called for; for that reason, it was particularly important that there should be no pressure to complete part I.

41. The omission of six paragraphs from the proposed text on aggression (article 15) was an improvement. It was important to remember that the article

dealt with the conduct of an individual, which was necessarily linked to that of a State. However, the Code need not deal with aggression by a State, which was defined elsewhere, but must indicate as clearly as possible the conditions under which an individual was liable for his contribution to aggression by a State.

42. With regard to the use of the expression "crimes against humanity" in article 21 to replace "systematic and massive violations of human rights", he reminded the Commission that all the acts described in that article had been taken from the Charter of the Nürnberg Tribunal and were widely recognized. However, in formulating the Nürnberg principles, the Commission had asserted that to be considered a crime against humanity, an act must have been committed in execution of or in connection with any crime against peace or any war crime. He wondered whether the Commission wished to maintain that limitation or whether it felt that the concept had evolved during the past 50 years and that the category of crimes against humanity had acquired an independent status.

43. Mr. PASTOR RIDRUEJO (Spain) said that the drafting of the Code of Crimes against the Peace and Security of Mankind gave rise to complex political problems. Because of institutional and other shortcomings, a significant number of States were not yet sufficiently politically mature to adopt and apply the Code, hence the slow progress and uncertain future of the Commission's work on the item. However, even if the Commission's work did not lead to an international convention that would be binding on a significant number of States - although that would be the desirable outcome - the ideas that had emerged could facilitate the adoption of another type of instrument, such as a declaration or model principles, as referred to in paragraph 46 of the report. That would be an important step towards developing morality in international law.

44. The criterion followed by the Special Rapporteur in reducing the list of crimes from twelve to six seemed realistic and reasonable in principle, although the vague wording could give rise to difficulties in practice, and his delegation could accept, in principle, the exclusion of the six crimes from the list on the basis of that criterion. It took note of the Special Rapporteur's comment, in paragraph 130 of the report, that a consensus had developed in favour of including four articles; those on aggression, genocide, war crimes and crimes against humanity, which constituted the core of the list of crimes. His delegation therefore supported the Commission's decision to refer articles 15, 19, 21 and 22 to the Drafting Committee.

45. His delegation supported article 2 of the Code. However, in view of the need for coordination between international law and national law, and to avoid any ambiguity, the obligation of States parties to the convention to adapt their criminal legislation to the commitments undertaken in the convention must be ensured. It was not reasonable that an action characterized as an international crime under the Code would not be punishable under the legislation of a State party to the Code. His delegation therefore suggested that the following words should be added at the end of the second sentence of article 2: "... without prejudice to the obligation of the States parties to adapt their legislation to the provisions of this Code".

46. With regard to article 21, his delegation preferred the title "Systematic or mass violations of human rights" to "Crimes against humanity", since other crimes in the Code could also be regarded as crimes against humanity, particularly genocide and war crimes. His delegation believed that the crime of forced and involuntary disappearances should be specifically mentioned in article 21.

47. Mr. HARPER (United States of America) said that the 1995 session of the International Law Commission had been particularly noteworthy for the work begun on two important new topics, "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". The Commission had also made progress on existing topics.

48. Although the reservations regime in the three Vienna Conventions on the law of treaties was not perfect, the Special Rapporteur on reservations to treaties had rightly pointed out in his report that its flexibility had facilitated broad accession to multilateral treaties. The United States had therefore been pleased to read that all Commission members had agreed that the definition of "reservation" and the rules contained in article 2, paragraph 1 (d), and articles 19 to 23 of the 1969 and 1986 Vienna Conventions, and article 20 of the 1978 Vienna Convention were invaluable and should be preserved as far as possible.

49. The United States agreed that the Commission's task should be to fill in gaps and clarify ambiguities. The best way to do that might be for the Commission to draft guidelines to facilitate the resolution of specific problems without adding greater rigidity to the law. Whether such guidelines might usefully be supplemented by model clauses could be determined at a later date.

50. Paragraphs 138-142 of the Special Rapporteur's report had discussed reservations to human rights treaties, a matter on which the United States Government held strong views. His delegation believed that the Commission had been right when it decided in 1966 to reject a lex specialis for reservations to certain kinds of treaties. In that respect, the Vienna Conferences which had adopted the Commission's recommendations had acted wisely.

51. Consequently, the United States could not accept the Human Rights Committee's views in its General Comment No. 24 (52), since it did not believe that the classic rules on reservations were inadequate for human rights treaties. On the contrary, they had helped to advance the fundamental objective of broad participation by States. The critical role of States - as opposed to the Human Rights Committee - in determining matters related to such treaties should be respected on both legal and practical grounds.

52. The United States did not agree that it legally fell to the Human Rights Committee to determine whether a specific reservation was compatible with the object and purpose of the International Covenant on Civil and Political Rights. The further assertion that if the Committee were to decide that a reservation was not compatible, that reservation would generally be severable in the sense that the Covenant would be operative for the reserving party without the benefit of the reservation, also had no basis in international law.

53. That claim contradicted the fundamental rule reflected in article 38, paragraph 1, of the Statute of the International Court of Justice, which held that international conventions established rules "expressly recognized by" contracting States. A State that had made a reservation to a rule in acceding to a convention could hardly be held to have "expressly recognized" that rule. On a more practical level, he wondered how many Committee members in their capacity as legal advisers would be willing to recommend that their parliaments should consent to ratification of a class of treaties to which the parliament wished to attach reservations, if they knew that international bodies established by such treaties might ignore the reservations and consider their country bound without them.

54. The Commission's work on the topic entitled "State succession and its impact on the nationality of natural and legal persons", could lead to a sound evolution of international law to enhance the protection of individuals and discourage statelessness. The Special Rapporteur's report had indicated the limits to the analogy between the nationality of individuals and the nationality of legal persons or corporations. The Special Rapporteur had questioned whether the Commission should give priority to studying the impact of State succession on the nationality of natural persons - the more urgent and easier problem - over that of legal persons. The United States was inclined to believe that it should.

55. Chapter VII of the Special Rapporteur's report dealt with continuity of nationality. The Special Rapporteur had not expected the regime of diplomatic protection to be placed on the Commission's agenda in the near future, and he had accordingly proposed to analyse the continuity of nationality in the context of his work. However, the Commission had proposed that it should begin work on the topic of diplomatic protection in the near future, and if that was accepted, the United States would suggest the desirability of taking up continuity of nationality as part of the work on that topic.

56. Regarding the matter of State responsibility, the United States Government continued to have serious difficulties and questions in certain areas, especially with regard to responsibility for so-called international "crimes" and the complex subject of dispute settlement.

57. By a divided vote, the Commission had decided to refer to the Drafting Committee the Special Rapporteur's proposals on the supposed consequences of so-called "State crimes". The United States had repeatedly stated that it had serious reservations about the very concept of international State crimes. The concept found little support in contemporary State practice, and it confused rather than clarified the analysis of particular situations. It did not acknowledge the range of contexts and situations in which the international community had to characterize and respond to State behaviour.

58. It was inappropriate and unproductive for the Commission to try to weave new rules concerning so-called international "crimes" by States into the fabric of State responsibility law. Such an effort would be the enemy of progress towards the completion of the first reading on the draft articles on the topic. The United States did not support continued work on the Special Rapporteur's elaborate proposed regime regarding the consequences of State "crimes".

59. His delegation also had doubts regarding the elaborate proposals for regimes for dispute settlement, both the general regime under the State responsibility articles and the regime for settlement of disputes involving international delicts and countermeasures in response.

60. The peaceful settlement of disputes was important, and the United States had taken part in a wide variety of dispute settlement procedures. That very experience had made his Government doubt efforts to channel disputes involving matters as broad and complex as those under discussion into a narrow range of predefined settlement mechanisms. Experience had shown that the range of legal and factual circumstances giving rise to disputes involving State responsibility was both varied and difficult to predict. Accordingly, it was impossible responsibly to agree beforehand to any particular rigid form of settlement.

61. His Government's concern extended to future disputes under the draft articles in general, for which the draft had contemplated conciliation. It also applied to the binding settlement regime proposed by the Special Rapporteur where one party had taken countermeasures. In such situations it was important for the parties to seek a peaceful settlement; their past inability to do so might have been part of the legal justification for the countermeasures. Nevertheless, the wide range of potential disputes required the parties to be flexible in devising dispute settlement mechanisms appropriate to particular circumstances.

62. The United States therefore believed that the current mandatory progression through various dispute settlement mechanisms was not appropriate, and urged that any dispute settlement mechanisms should be made optional for the parties to the dispute.

63. Regarding the draft Code of Crimes, the United States had long expressed reservations about the entire effort to develop such a code. In recent sessions of the Commission, the draft Code had evolved in such a way as to lessen some of those concerns.

64. While welcoming the Special Rapporteur's indication that he intended to limit the list of crimes to those whose inclusion would be hard to challenge, namely aggression, genocide, war crimes, crimes against humanity, international terrorism and illicit traffic in narcotic drugs, his delegation, like several others, particularly questioned inclusion of the last two. He also had doubts about proposals to add "environmental crimes".

65. Each of the four remaining crimes posed problems of definition and drafting, but the United States wished to register particular concern about the definition of the crime of aggression. The Commission had drawn from General Assembly resolution 3314 (XXIX) and Article 2, paragraph 4, of the Charter, neither of which provided a sufficient basis for drafting a criminal law definition or reflected the historical roots of the crime of waging aggressive war in the aftermath of the Second World War.

66. Two specific difficulties had presented themselves. It was incorrect to say that any use of force against the territorial integrity or political independence of any State could be equated with an act of aggression under

Article 39 of the Charter. The crime had been defined much too broadly and could encompass even minor intrusions or violations of territorial integrity. Certain intrusions without the permission of an affected State might be necessary to conduct non-combatant evacuation operations, hostage rescue or demonstrations of navigational or overflight rights under international law. Such actions were not, and could not be rendered, criminal acts.

67. While appreciating the difficulties inherent in drafting a code of crimes, the United States considered it essential to take the time required to achieve accuracy and to ensure that the result was fully satisfactory. The Commission's energies had recently been directed towards the task of drafting a statute for an international criminal court. His delegation believed that those deliberations had reached a critical phase and that any attempt to link the code of crimes, with its many controversial elements, to the court would only detract from or even retard progress in that sphere.

68. Regarding the Commission's effort to devise possible liability regimes for the injurious consequences of activities not prohibited by international law, he said that the United States was again urging caution. Existing State practice and agreements already concluded or under negotiation suggested a need for liability regimes closely tailored to the particular circumstances of the activity in question and the parties involved. Very broad general rules or binding guidelines regarding liability might not always be appropriate.

69. In seeking to fuse concepts of environmental impact assessment and liability, the Commission had raised many difficult issues, including the respective responsibilities of the State and of operators, the types of activities or substances to which any liability regime might apply, and the types of harm that a regime might address. Further work was required, and the United States urged that such work should be focused on the areas most likely to command consensus.

70. In that connection, he noted that the draft articles sought to impose an obligation on States to set up procedures for regulation and environmental impact assessment of all activities, public or private, that might potentially cause harmful transboundary effects, and could therefore be argued to imply State liability for all such harmful effects. Such a broadly drawn regulatory approach was unacceptable, and therefore the Commission would do better to focus on particularly hazardous activities with a view to producing a consensus document.

71. Mr. SANGIAMBUT (Thailand) noted with appreciation the progress made by the Commission during its forty-seventh session on the draft Code of Crimes against the Peace and Security of Mankind. His delegation believed that the Code should take the form of a convention containing sufficiently precise provisions to ensure its effective implementation in the prosecution of individuals.

72. His delegation believed that four crimes should be incorporated in the Code, namely aggression, genocide, war crimes and crimes against humanity. Other crimes might be included in the list at a later stage following a consensus decision to incorporate them.

73. Regarding draft article 3, concerning responsibility and punishment, his Government had requested that the definitions of crimes provided in article 3, paragraph 2, should be worded along the same lines as article 3, paragraph 3, so as to incorporate the notion of attempting to commit those crimes.

74. Mr. VILLAGRAN KRAMER (Guatemala) said that the Commission had made a great deal of progress on the draft Code; at the same time, the Code had been somewhat diminished by the cutting of major sections, and there was a risk that that process of truncation might continue. The Commission's major achievements were the clarification, for the purposes of the application of the Code, of the principles aut dedere aut judicare and non bis in idem, and the definition of the Code's sphere of international application by national and international courts; those advances were invaluable in view of the sensitivity of the problems which arose regarding the extradition of persons accused of international crimes.

75. It was significant that the Commission had asked the Drafting Committee, at its discretion, to deal with articles 17, 18, 20, 23 and 24; the Commission clearly felt that it was important to reconsider those crimes from a global perspective and from the point of view of their components. However, the report did not reveal whether, in establishing a working group to take up the issues of illicit traffic in narcotic drugs and wilful and severe damage to the environment, the Commission attached the same importance to those crimes as to other crimes.

76. His delegation felt that the Commission's consideration of the crime of aggression had been realistic and constructive. However, the Commission should go further and, on the basis of Article 39 of the Charter and General Assembly resolution 3314 (XXIX) on the Definition of Aggression, determine which acts constituted aggression and, most importantly, whether it was the State, the individual, or both, which committed aggression. Politically, the Definition of Aggression in General Assembly resolution 3314 (XXIX) was very broad; however, that definition reflected the reality of the bipolarity which had existed between super-Powers and could reappear. The States of the Americas, including the United States of America, had incorporated that definition in the Protocol of Amendments to the Inter-American Treaty of Reciprocal Assistance, so that the definition had entered the realm of treaty law and should be taken into account by the Commission.

77. With regard to the crime of genocide, a significant distinction had been made, in the draft statute for an international criminal court, between genocide under the treaty law which had originally defined it and genocide as an international crime under general international law. Whether or not it was included in the Code, genocide clearly constituted an international crime. His delegation supported the Commission's clarifications on the subject.

78. Although the crime of apartheid had originally been limited to South Africa, and the causes which had given rise to it had been eliminated, the crime as such had not disappeared; acts and policies which constituted apartheid must be regarded as international crimes. It was to be hoped that apartheid would not resurface elsewhere in the world.

79. Intervention should not be discarded as a possible international crime. From the point of view of lex lata, intervention did not constitute an international crime. However, from the point of view of the progressive codification of international law, the fact that it was a violation of an international obligation meant that it could be regarded as an international crime, especially since, as in the case of aggression, individuals who decided to intervene, and resorted to the threat or use of force, did so under the protection of the State.

80. With regard to systematic or mass violations of human rights, his delegation was in favour of entitling draft article 21 "Crimes against humanity", not only because it left aside the question of the scale of such crimes, but also because it allowed for the possibility of regarding forced disappearances of persons as an international crime. Although the Inter-American Court of Human Rights, in the Velasquez Rodriguez case in 1987, had regarded forced disappearances of persons as grave violations of human rights, entailing to the international responsibility of the State, the Court had not termed such disappearances an international crime. At all events, the subject should be considered in greater depth, in the context of the progressive development of international law.

81. His delegation could accept the list of crimes against humanity in draft article 21. However, the phrase "all other inhumane acts", stricto juris, was very vague and elastic and, to some extent, was influenced by geography, since attitudes varied in different parts of the world as to what acts were inhumane.

82. With regard to exceptionally serious war crimes, dealt with in draft article 22, his delegation was in favour of the Special Rapporteur's decision to revert to the traditional notion of war crimes, on the basis of the 1949 Geneva Conventions and also the statutes of the criminal tribunals for the former Yugoslavia and for Rwanda. It was not necessary to include all the cases envisaged in the Geneva Conventions, but only those that were grave violations.

83. His delegation was in favour of maintaining international terrorism, illicit traffic in narcotic drugs and wilful and severe damage to the environment as international crimes in view of the magnitude and severity of the damage and injury they caused. Illicit traffic in narcotic drugs referred to international traffic between neighbouring countries and between distant countries by air or sea, regardless of whether such traffic crossed the territorial sea of other countries, the high seas or national or international air space. The damage caused and the family and political instability generated must be addressed at the legal level and conflicts of jurisdiction must be resolved. The international community must be able to combat such traffic legally, under the principle aut dedere, aut judicare. His delegation believed that the arguments put forward by the Special Rapporteur regarding wilful and severe damage to the environment should be accepted by the Commission.

84. His delegation agreed that draft article 5, on responsibility of States, should be retained. The essential point was that the article did not exclude the responsibility of the State for damage caused by its agents in consequence of their criminal acts, taking into account, in addition, article XV of the Convention on the Prevention and Punishment of the Crime of Genocide. As to

penalties, it was clear that the Commission was not in favour of criminalizing the State. However, there could be situations in which a State was involved in an international crime, for example, aggression or State terrorism. His delegation believed that criminal responsibility lay exclusively with the individuals who committed the international crime and that if any criminal responsibility could be attributed to a State, penalties would have to be specified. The application of the principle societas delinquere non potest ruled out punitive sanctions; under international treaty law - the Charter of the United Nations - sanctions could be imposed by the Security Council; and general international law provided for the international responsibility of the State. Sooner or later the Committee would have to take up the sensitive problem of State responsibility in relation to the international crimes included in the Code.

The meeting rose at 12.45 p.m.