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SUMMARY RECORD OF THE 31st MEETING

Chairman:	Mr. ESCOVAR-SALOM	(Venezuela)
later:	Ms. WONG (Vice-Chairman)	(New Zealand)
later:	Mr. ESCOVAR-SALOM (Chairman)	(Venezuela)

CONTENTS

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The meeting was called to order at 10.10 a.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (A/51/10, A/51/332 and Corr.1, A/51/358 and A/51/365)

1. The CHAIRMAN invited the Committee to begin consideration of the agenda item and said that the Committee was particularly proud of the special relationship which it enjoyed with the International Law Commission, whose outstanding contribution to the progressive development and codification of international law was universally recognized. Although meetings would be devoted to the consideration of particular chapters of the Commission's report, delegations should feel free to consolidate their comments on the entire report in a single statement. However, priority would be given at each meeting to delegations wishing to make statements on the designated topic for that meeting.

2. Mr. MAHIOU (Chairman of the International Law Commission), introducing chapters I and II of the report of the International Law Commission on the work of its forty-eighth session (A/51/10), said that at its recent session the Commission had completed the second reading of the articles of the draft Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. In addition, a Working Group had reviewed and presented a complete set of articles together with commentaries on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The Commission had considered the second report of the Special Rapporteur on the topic of State succession and its impact on the nationality of natural and legal persons, and had agreed on the broad outline of its future work on the topic. Regarding the topic of reservations to treaties, the Special Rapporteur had submitted a comprehensive report which the Commission would consider at its next session.

3. In response to issues raised in paragraph 9 of General Assembly resolution 50/45, the Commission had adopted specific conclusions and recommendations concerning its programme, procedure and working methods. With respect to its long-term programme of work, the Commission had set out a general outline of the main legal problems raised by three of the possible future topics which, in the Commission's view, were ready for codification and progressive development.

4. The draft Code of Crimes against the Peace and Security of Mankind consisted of 20 articles which were divided into two parts. Part I contained general provisions relating to the scope and application of the Code, principles of individual criminal responsibility and punishment, and procedural and jurisdictional issues. Part II contained definitions of the five categories of crime included in the Code, namely, aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes.

5. Concerning Part I of the draft Code, he observed that article 1 limited the scope and application of the Code to the crimes listed in Part II and stipulated that such crimes were prohibited under international law and punishable as such irrespective of national law. Article 4 indicated that the provisions of the

Code concerning individual criminal responsibility were without prejudice to any question of State responsibility under international law.

6. The general principle of individual criminal responsibility was set out in article 2. Paragraph 1 stipulated that a crime against the peace and security of mankind entailed individual responsibility. That general principle was applicable to all crimes against the peace and security of mankind, whether or not they were listed in the Code, and was formulated without qualifications. Paragraph 2 reaffirmed the principle of individual criminal responsibility for the crime of aggression, which was dealt with in article 16.

7. Paragraph 3 of article 2 laid down the principle of individual criminal responsibility for the remaining crimes covered by the Code, namely, genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes. Subparagraph (a) covered the intentional commission of a crime, while subparagraphs (b) to (f) dealt with conspiracy and complicity, including the failure of a superior to discharge his or her responsibility in the circumstances set out in article 6. Subparagraph (g) dealt with attempts to commit a crime. While the acts described in those subparagraphs generally entailed individual criminal responsibility under the Code only if a crime actually took place, two exceptions to that rule were to be found in subparagraphs (b) and (g), concerning individuals who ordered or attempted to commit a crime.

8. Articles 5 to 7 and 14, dealing with superior orders, command responsibility, official position and defences, concerned other important general principles relating to individual criminal responsibility.

9. Articles 3 and 15 addressed the punishment of individuals who incurred responsibility for crimes covered by the Code. Article 3 laid down the general principle that an individual who was responsible for a crime was liable to punishment commensurate with the character and gravity of the crime. The competent court was entrusted with the task of determining the penalty in a particular case; no form of penalty was precluded. Article 15 ensured that the court would take extenuating circumstances into account in passing sentence in accordance with the general principles of law.

10. The remaining articles in Part I dealt with various procedural and jurisdictional issues. Article 8 set forth the obligation of States parties to take such measures as might be necessary to establish national court jurisdiction over the crimes covered by the Code other than the crime of aggression. That provision was without prejudice to the jurisdiction of an international criminal court. Such a court would have exclusive jurisdiction over the crime of aggression, except in the case of the national courts of the State committing aggression, which would have concurrent jurisdiction. Articles 9 and 10 dealt with the obligation to extradite or prosecute alleged offenders. Those provisions were also without prejudice to a similar obligation with respect to an international criminal court. Article 11, which was drawn mainly from the International Covenant on Civil and Political Rights, set forth the judicial guarantees to which an individual charged with a crime under the Code was entitled. Article 12 dealt with the non bis in idem principle and article 13 with the principle of non-retroactivity.

11. Part II contained definitions of the crimes covered by the Code. Article 16 defined the crime of aggression for the purpose of individual responsibility. It focused exclusively on the role of the individual and did not attempt to define aggression by a State, which was beyond the scope of the Code. Individuals were held to be responsible in their capacity as leaders or organizers, as stipulated in the Charters of the Nürnberg and Tokyo Tribunals. The threshold of involvement of an individual as leader or organizer was defined as actively participating in or ordering the planning, preparation, initiation or waging of aggression committed by a State. That criterion reflected the recognition that aggression was always committed by individuals occupying the highest decision-making positions in the political or military apparatus of a State and/or in its financial and economic sector.

12. Article 17 set forth the definition of the crime of genocide as contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

13. Article 18 defined crimes against humanity in terms of a general criterion followed by a list of specific offences. In order to qualify as crimes against humanity, the prohibited acts must be committed in a systematic manner or on a large scale and be instigated or directed by a Government, organization or group. Thus acts committed by terrorists could qualify as crimes against humanity under that provision. The crime of apartheid was also covered by the article under the more general heading of "institutionalized discrimination" in subparagraph (f).

14. Article 19 set forth the definition of crimes against United Nations and associated personnel as contained in article 9 of the recently adopted Convention on the Safety of United Nations and Associated Personnel. The scope of the provision was limited by its second paragraph, which was drawn from article 2 of the Convention. The additional criteria set out in the chapeau had been added to ensure that the crimes were of sufficient gravity to constitute a threat to international peace and security.

15. The definition of war crimes in article 20 consisted of a general criterion followed by a list of specific offences. A war crime listed in the article would qualify as a crime against the peace and security of mankind only when it was committed in a systematic manner or on a large scale. Subparagraph (a) dealt with grave breaches of the Geneva Conventions of 1949. Subparagraphs (b) and (c) dealt with the grave breaches listed in article 85 of the 1977 Protocol I Additional to the Geneva Conventions of 1949, while subparagraph (d) explicitly reaffirmed the criminal nature of such conduct, which was contrary to the more general prohibitions contained in the 1949 Geneva Conventions. Subparagraph (e) dealt with violations of the laws and customs of war, known as the "Hague Law"; subparagraph (f) dealt with violations of international humanitarian law in non-international armed conflict; and subparagraph (g) dealt with damage to the environment during armed conflict that was so severe that it might be characterized as a crime against the peace and security of mankind.

16. As indicated in paragraphs 47 and 48 of the report, the Commission had considered various forms which the draft Code could take, including an international convention adopted by a plenipotentiary conference or the General

Assembly, incorporation of the Code in the statute of an international criminal court, or adoption of the Code as a declaration by the General Assembly. The Commission recommended that the Assembly should select the most appropriate form which would ensure the widest possible acceptance of the draft Code. As noted in paragraph 49 of its report, the Commission had paid a tribute to the Special Rapporteur for his outstanding contribution to the preparation of the draft Code.

17. Mr. HAFNER (Austria) noted that as early as 1947, the General Assembly had requested the Commission to prepare a draft code of offences against the peace and security of mankind based on the Nürnberg and Tokyo Principles. Forty-nine years later, that work had been completed. In its report (A/51/10) the Commission described the setbacks it had experienced owing to the lack of an agreed definition of aggression, but the report also showed that the Commission was not responsible for the long delay in completing its task. The best legal skills and efforts would be unable to produce a particular text if political circumstances precluded an agreement among States on certain basic principles. The Commission's first major success in that area had been the preparation of the draft statute for an international criminal court, which now served as the basis of discussions in the Preparatory Committee on the Establishment of an International Criminal Court. Moreover, the Commission had submitted the complete text of the draft Code of Crimes against the Peace and Security of Mankind to the General Assembly at the current session.

18. The draft Code deserved the wholehearted appreciation of the Sixth Committee, especially in the light of the complexity of the legal issues involved. As to the content of the draft articles, his delegation believed that the time had not yet arrived to take a decision on them. The draft articles addressed the same issues as those which were being discussed in the Preparatory Committee; to discuss them in a different framework, with different participants, would only generate confusion. His delegation nonetheless believed that the draft Code in its current version had benefited from the reduction in the number of crimes.

19. With regard to the various forms the draft Code might take, his delegation did not support any of the alternatives proposed by the Commission in paragraph 47 of its report. Since the outcome of the negotiations on the draft statute for an international criminal court was not yet known, it could not be determined whether the statute's provisions would conform to the Code as currently drafted. Nevertheless, the existence of divergent rules on the same issues would not be conducive to an effective criminal jurisdiction. Similarly, a solution whereby crimes at the national level differed from those at the international level would be undesirable, since neither the principle of complementarity nor that of speciality would be applicable.

20. As to the possible incorporation of the draft Code in the statute of an international criminal court, his delegation saw no need for formal action in that regard, especially in view of the numerous alternative versions of the statute being discussed in the Preparatory Committee. Accordingly, a final decision on the form should be postponed until the draft statute had been finalized.

21. The foregoing comments did not imply that the Commission's work on the draft Code had been a futile exercise; on the contrary, the draft Code constituted a valuable contribution to the negotiations on an international criminal court. Articles 2 to 7, for example, were extremely helpful, since the Preparatory Committee had held only an initial round of discussions on the general principles of criminal law. Articles 2, 5, 6 and 7 in particular dealt with matters that had been insufficiently analysed in the Preparatory Committee but which required deeper scrutiny in the light of the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

22. Article 8 of the draft Code contained interesting ideas relating to the issue of complementarity. However, with regard to the Commission's commentary on that article, he wished to note that article VI of the Convention on the Prevention and Punishment of the Crime of Genocide did not restrict jurisdiction over such crimes to the State in whose territory the crime was committed. Although the article imposed a duty to prosecute only upon that State, it did not exclude the right of another State to exercise criminal jurisdiction over such crimes as well.

23. While the Preparatory Committee had not yet embarked upon the definition of crimes, it was already clear that such a definition was one of the most difficult issues to be negotiated; the formulations presented by the Commission therefore constituted a welcome contribution in that regard. While recognizing that not all the crimes defined by the Commission would fall within the jurisdiction of an international criminal court, his delegation supported the inclusion of crimes against United Nations and associated personnel in article 19 of the draft Code.

24. Ms. Wong (New Zealand), Vice-Chairman, took the Chair.

25. Mr. CALERO RODRIGUES (Brazil) said that his delegation supported the reduction in the number of articles and categories of crimes contained in part II of the draft Code of Crimes against the Peace and Security of Mankind, which should embody only those acts that were gross infringements of universally accepted standards of human behaviour. He also welcomed the inclusion of crimes against United Nations and associated personnel, although he felt that the text would be improved by the addition of further elements, such as a definition of the term "United Nations operation".

26. The distinction in the text between the very specific crimes of aggression and genocide, which were referred to in the singular, and crimes against humanity and war crimes, which, being non-specific, were referred to in the plural, was a relevant one. The International Law Commission had also been wise to include in the text of article 18 of the draft Code only those acts which were characterized as crimes in accordance with generally accepted norms of international law. With regard to the form of that article, however, he believed that the initial confusion created by the inclusion of so many subparagraphs would be dispelled if the crimes concerned were presented in a logical order, rather than on the basis of the instruments from which they were derived. The article might start, for example, with acts which affected individuals, followed by acts which affected groups of human beings and concluding with acts which affected property, although it might be necessary to

distinguish between acts committed in armed conflict and those committed in conflicts of an international character.

27. He expressed his delegation's admiration for the drafting of article 16, on the crime of aggression, and then outlined the difficulties that had arisen in defining aggression. In that connection, the draft Code should address only crimes committed by an individual through participation in an aggression committed by a State. Fortunately, such participation was well defined in the text of article 16. In the light of that text, he wondered whether the problem of the inclusion of aggression as a crime falling under the jurisdiction of the proposed international criminal court could be alleviated, if not put to rest. He also believed that the draft Code should include a provision similar to that contained in article 23, paragraph 2, of the draft statute of the proposed court, which adequately addressed the issue of the relationship between the court and the Security Council. The current draft Code was a valuable contribution towards providing the international community with an adequate instrument for penalizing individual conduct which threatened international peace and the security of mankind.

28. As to the action that should now be taken on the draft Code, his delegation believed that the Commission's failure to make any specific recommendations in that connection was motivated by its fundamental conviction, illustrated in article 48 of its report (A/51/10), that the draft Code should become a legal instrument which enjoyed wide acceptance among States. The Commission therefore assumed that the General Assembly was in the best position to decide the most suitable means of achieving that objective. Of the three possible options, adoption of the draft Code by a General Assembly resolution would not necessarily give it binding legal force, which was an essential consideration. Neither would the inclusion of the draft Code in the statute of an international criminal court provide a complete solution, as its provisions should be applicable by national courts as well as by the international criminal court, and the former, by definition, could not be bound by the statute of the latter.

29. It was only through the third option of embodying the draft Code in an international treaty that the Code would acquire the necessary binding power and become an efficacious instrument. His delegation favoured that option, despite the risk that it would not automatically lead to the ultimate goal of universality. It also believed that consideration should be given to the early incorporation of the provisions of the draft Code in the draft statute of the international criminal court, a possibility which the Preparatory Committee on the Establishment of an International Criminal Court should be invited to examine.

30. Mr. PERRIN DE ROCHAMBAUT (France) said that his delegation shared the concern that the notion of crimes against the peace and security of mankind should not be devalued and therefore welcomed the reduction in the number of crimes contained in the draft Code. Article 16, however, failed to make any reference to the relevant provisions of the Charter of the United Nations concerning the essential role of the Security Council in determining aggression, thus giving rise to the possibility that judicial authorities might differ with the Council in regarding a particular crime against the peace and security of mankind as constituting aggression. For that reason, article 16 was difficult

to accept, whereas article 17 posed no specific problems. Article 18, on the other hand, should state that crimes against humanity referred exclusively to crimes which were deliberately targeted at civilians.

31. Article 20 also posed difficulties for his delegation, which had consistently maintained that only the most serious war crimes should continue to be included among crimes against the peace and security of mankind, provided that they were carefully defined - along the lines of the four Geneva Conventions of 1949, for instance. Conversely, his delegation was opposed to the inclusion of any reference to certain provisions of Protocol I Additional to those Conventions or to protection of the environment in times of armed conflict. In the case of offences considered as war crimes, it would be preferable to adhere to the Statute of the International Criminal Tribunal for the former Yugoslavia.

32. His delegation continued to question as misplaced the inclusion of crimes against United Nations and associated personnel, their seriousness notwithstanding. It also regretted that the efforts to achieve a conceptual definition of crimes against the peace and security of mankind had been abandoned.

33. In conclusion, he wished to commend and encourage the more realistic approach adopted by the Commission in its treatment of the topic. The draft Code could serve as a useful guide for the Preparatory Committee on the Establishment of an International Criminal Court, although there should be no functional links between the two drafts texts.

34. Mr. NAGAMINE (Japan) said that his delegation heartily welcomed the adoption of the draft Code of Crimes against the Peace and Security of Mankind and believed that war crimes and other acts against humanity must be banned once and for all in the interests of international peace and security. The timely adoption of the draft Code responded to such a need within the international community. His delegation was also gratified that the members of the Commission had responded to the need to ensure the widest possible acceptance of the draft Code by limiting the crimes within its scope. The fact that, under article 20, subparagraph (g), long-term and severe damage to the natural environment was established as a war crime enhanced the credibility of the draft Code by ensuring its consistency with current international law. The inclusion of crimes against United Nations and associated personnel likewise ensured its consistency with the view that such attacks posed a direct threat to international peace and security. Having ratified the 1994 Convention on the Safety of United Nations and Associated Personnel, his Government was gratified that such crimes were included within the scope of the draft Code.

35. The draft Code and the draft statute of the international criminal court should be consistent wherever they overlapped, failing which the former would not be assured of gaining wide acceptance. The establishment of an international criminal court could be equally affected by a lack of consistency. The draft Code should be adopted as a treaty, as it had elements in common with other international conventions. In order to avoid duplication and maintain consistency, however, consideration might be given to integrating parts of the draft Code into the draft statute, or, alternatively, adopting the draft Code in

the form of a General Assembly declaration. The decision lay with the Sixth Committee.

36. Mr. AL-BAHARNA (Bahrain) said that the adoption by the International Law Commission of a draft Code covering only five categories of the most serious international crimes should not in any way affect the international character of other equally grave crimes. He recalled the process whereby the number of categories had been reduced over the years from 12 as well as the reasons for the most recent decision, which were given in the introduction to chapter II of the Commission's report (A/51/10). The Commission had noted in particular that the inclusion of certain crimes did not affect the status of other crimes under international law.

37. His delegation had always been in favour of including the original 12 categories of crimes but would accept the present reduced list in order to secure wider acceptance by Governments of the draft Code, which certainly covered the acts considered by the international community to be the "crimes of crimes".

38. It was regrettable that in an instrument of such importance the Commission had been unable to decide on the form the draft Code should take. The General Assembly itself would have to decide whether it should be a binding instrument or a mere declaration. His delegation believed that it should take the form of a convention or a multilateral treaty adopted either by the General Assembly or by a conference of plenipotentiaries. In view of the financial implications the first choice might be more convenient. In any event, in order to ensure prosecution of the crimes in question, the draft code must become a legally binding criminal code, with a machinery for its implementation. It would seem therefore that, if the General Assembly established a permanent criminal court, its statute should contain a provision for the application of the draft Code. Accordingly it would be appropriate for the Preparatory Committee on the Establishment of an International Criminal Court to consider the question of the draft Code. The two topics were clearly linked, since they addressed similar issues and similar crimes. Furthermore, as currently worded the court's draft statute could be amended to include the crimes covered by the draft Code.

39. The Commission had had that connection in mind at its forty-sixth session when it had pointed to the need for harmonization of the draft Code and the draft statute in order to avoid contradiction between the articles common to the two texts, and it had subsequently approved the recommendations of its Drafting Committee in that connection. The draft Code had been restricted to the "crimes of crimes" and, like the draft statute, it now focused exclusively on crimes committed by individuals.

40. However, members of the Commission had argued that if the draft Code was to be implemented by the international criminal court, it would have to state specific penalties for each crime, in accordance with the principle of nulla poena sine lege. But other members and the Special Rapporteur had pointed out that the criterion of extreme gravity was a sufficient definition for the crimes against the peace and security of mankind. As a result, article 3 (Punishment) was formulated in general terms but did not rule out the application of any form of penalty by the competent court implementing the Code. It had been pointed

out, for example, that the Nürnberg trials had found that crimes against peace were crimes under customary law, although such law made no provision for penalties. The Commission appeared to have accepted that position.

41. With regard to the first three articles of the draft Code, he had previously stated his delegation's position in favour of a text which provided a comprehensive definition of the concept of a crime against the peace and security of mankind and specified the punishments, including maximum penalties, in accordance with the principle of nulla poena sine lege. However, having now considered the text adopted in second reading and the commentaries thereto, as well as the arguments of the members of the Commission, he was inclined to set aside his previous reservations and support the Commission's conclusions on the three articles.

42. The Commission had had great difficulty in agreeing on a definition of the crime of aggression (article 16). The definition adopted in first reading had been almost the same as the one contained in General Assembly resolution 3314 (XXIX), but it had been subjected to much criticism by Governments. The Commission had now adopted a shorter version of the definition. The first consideration underlying the present text was that, in a code dealing only with individual responsibility, the crime of aggression could be committed only by individuals. Since the responsibility of individuals was clearly distinguished from the responsibility of the State committing the aggression, there was no need to provide a definition of aggression by a State. But the present text provided that an individual could be guilty of the crime of aggression only if aggression had been committed by a State. It was thus a characteristic of the crime of aggression that there was always a relationship between the crime committed by an individual and the actual commission of aggression by a State. The second consideration was that the definition contained in resolution 3314 (XXIX) had not been intended as a legal text for use in a criminal code because it was considered "unsatisfactory" for the purpose of determining the criminal responsibility of an individual.

43. The definition of the crime of genocide contained in article 17 included the two basic elements of requisite intent (mens rea) and the prohibited act (actus reus). The text had in fact been taken from article II of the Genocide Convention which, as the commentary to article 17 noted, was generally recognized as the authoritative definition of the crime of genocide. His delegation supported the Commission's position on the inclusion of the crime and on its definition.

44. The main innovation in article 18, as its new title "crimes against humanity" indicated, was that all the acts listed in the article were considered to be crimes and not just violations of human rights. The article had been generally welcomed, although the Special Rapporteur's proposed deletion of the element of "systematic or massive violation" from the definition had given rise to disagreement in the Commission. His delegation agreed in general with the definition of crimes against humanity; however, it thought that "wilful killing" might be more suitable than "murder" because of the seriousness and massive nature of the crimes in question. It was moreover glad that its suggestion that the crime of torture should be included without any examples had been acted upon. The Commission had also accepted his delegation's request that

"reduction to slavery" should be replaced by "enslavement" and that the crime of persecution should be qualified by the phrase "on physical, racial, religious or ethnic grounds". It had also been a good move to replace the former article on apartheid with subparagraph (f), on institutionalized discrimination.

45. Article 19, covering a fifth crime now added to the four major crimes, was based on the Convention on the Safety of United Nations and Associated Personnel, adopted by the General Assembly in 1994. In its commentary to the article, the Commission stated that it had decided to include that category of crimes in the Code because they were of concern to the international community as a whole, being committed against persons who represented it and risked their lives to protect its fundamental interest in maintaining the international peace and security of mankind. Some members of the Commission had objected to the inclusion of article 19 on the grounds that far more serious crimes had intentionally been excluded from the Code. Nevertheless, his delegation had no hesitation in supporting the Commission's decision to include it.

46. On draft article 20, he recalled that in its statement to the Sixth Committee the previous year, his delegation had favoured replacing the expression "in violation of international humanitarian law", used in subparagraphs (a), (b), (c), (d) and (f), with the expression "grave breaches of the 1949 Geneva Conventions". However, it was now more inclined to accept the wording of the article as adopted because of its wider conceptual scope and application. As for subparagraph (e), the phrase "in violation of the laws or customs of war" could perhaps be qualified by the word "serious"; however, that subparagraph took the form of an exhaustive list. In subparagraph (g), the addition of the phrase "long-term and severe damage to the natural environment" and of the proviso that "such damage occurs" was to be welcomed. Although the cumbersome drafting of the article adopted on first reading had not been entirely eliminated in the new version, his delegation supported article 20.

47. Mr. Escovar-Salom (Venezuela) resumed the Chair.

48. Mr. LAVALLE VALDÉS (Guatemala) said that, but for an extrinsic circumstance, the Sixth Committee's consideration of the draft Code of Crimes against the Peace and Security of Mankind would have been confined to the tasks of studying its provisions with a view to adopting it and deciding whether the text should take the form of a declaration by the General Assembly or a multilateral treaty open for universal signature. The fact was, however, that the draft Code did not exist in isolation; it was closely interrelated with the draft statute for an international criminal court. The two texts covered much of the same ground and often complemented one another.

49. The two texts were complementary in that some provisions of the draft Code filled serious gaps in the draft statute, by establishing, in articles 2, 5, 6, 7, 14 and 15, general principles of criminal law. Other lacunae in the draft statute that could be filled, at least partially, by provisions of the draft Code were those relating to the definition and characterization of the crimes covered by the statute, which largely coincided with those covered by the Code in articles 17 to 20.

50. Conversely, articles 8, 9 and 12 of the draft Code referred to an international criminal court, and were therefore complemented by the draft statute. Furthermore, the draft statute seemed destined to take the form of a treaty establishing the Court, whereas it remained unclear whether the draft Code would ultimately take the form of a multilateral treaty or a declaration.

51. Given the extent to which the two draft texts overlapped, his delegation had serious doubts as to the desirability of transforming the draft Code into either a declaration or a convention separate from the convention establishing the international court. Furthermore, if the General Assembly should transform the draft Code into a declaration or a treaty before the conference to adopt the statute of the court had completed its work, that would be tantamount to interference in the work of the conference. Consequently, without in any way seeking to belittle the draft Code, his delegation recommended that at the present session the General Assembly, rather than losing time in a lengthy consideration of its provisions, should request the Preparatory Committee on the Establishment of an International Criminal Court to take due account of the Code in the performance of its mandate.

52. Mr. CAFLISCH (Observer for Switzerland) said it was a propitious coincidence that the Commission had completed its work on the draft Code just as the Preparatory Committee was about to embark on the task of defining the crimes falling within the jurisdiction of an international criminal court, determining the question of complementarity, formulating general criminal provisions and elaborating the court's rules of procedure. All those points were covered by the Code, which should therefore be transmitted by the General Assembly to the Preparatory Committee for utilization in the drafting of the statute of the court. That did not mean that the Preparatory Committee should necessarily and invariably be bound to follow the Code, but the existence of the latter should expedite the deliberations of the former, thereby enabling a diplomatic conference to be convened in the near future.

53. However, the purpose of the draft Code was not solely to contribute to the establishment of the court. The Code must also have the independent function of dictating or suggesting to States not parties to the Statute guidelines for conduct where crimes against the peace and security of mankind were concerned. The idea that individuals could be guilty of international crimes which all States were under an obligation to punish must become firmly rooted in States' consciousness. Accordingly, the General Assembly must not confine itself to transmitting the draft Code to the Preparatory Committee, but should also take note thereof.

54. Of the crimes enumerated in articles 16 to 20 of the draft Code, the most controversial category was undoubtedly crimes of aggression committed by individuals. To begin with, the very nature of the crime was open to question: in his delegation's view, aggression was a State crime rather than a crime of an individual. If that was not the case, as was implied by the text prepared by the Commission, it was doubtful whether the act characterized as a crime, as defined in article 16, reflected the current state of customary law. Admittedly, article 6 (a) of the Nürnberg Charter and article 5 (a) of the Tokyo Charter referred to crimes against peace and, thus, to aggression. Unlike article 16 of the Code, however, those provisions referred to the planning,

preparation, launching or conduct of a war of aggression, and not simply to the much broader concept of "aggression". Lastly, the concept of aggression as a crime of an individual raised a problem that was resolved neither by article 16 nor by the commentary thereto. No doubt it was for the competent international or national court to decide whether a crime of aggression had been committed by an individual, but it remained to be ascertained whether that decision could be taken freely - which, in the case of national courts, might lead to abuses - or whether it could and must be taken only if the act of aggression by the State linked to the individual crime had previously been determined by the Security Council.

55. Broadly speaking, his delegation endorsed the principles of international criminal law set forth in articles 5 to 7 and 11 to 15 of the draft Code. However, it wished to make two comments on those provisions. First, it attached great importance to the non bis in idem principle, and would have wished to see circumstances in which a national court was empowered to reopen cases already tried by a court of another State limited more rigorously than they were under article 12, paragraph 2 (b). Secondly, his delegation considered that it was not enough, in articles 14 and 15 to refer laconically to "the general principles of law": the rule of nullum crimen, nulla poena sine lege required that those principles should be explicitly spelt out.

56. Article 2, paragraph 3 (f), referred to an individual "directly and publicly" inciting another individual to commit an international crime. While it was clear why the incitement must be "direct", it was less easy to see why it must be "public" in order for it to be punishable. His delegation had serious doubts as to the validity of the explanation contained in paragraph (16) of the commentary, according to which private incitement to commit a crime would be covered by the concept of participation set forth in subparagraph (e).

57. Article 10, paragraph 2, provided that the Code could serve as the legal basis for extradition by one State party to another State party with which the former had no extradition treaty. It added that, in such cases, extradition "shall be subject to the conditions provided in the law of the requested State". That was undoubtedly true: if the requested State wished to use the Code as the basis for extradition, that was entirely its own affair. It thus had no need for the authorization provided for in article 10, paragraph 2; that provision might even be regarded as an incitement to States to disregard their own law. In his delegation's view, article 10, paragraph 2, should not have been included in the Code.

58. In spite of those comments, some of them critical, his delegation's overall impression of the draft Code was nevertheless favourable.

VISIT BY THE PRESIDENT, JUDGES AND REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

59. The CHAIRMAN welcomed to the Committee the President of the International Court of Justice, Mr. Mohammed Bedjaoui, two judges of the Court, Mr. Luigi Ferrari Bravo and Mr. Abdul G. Koroma, and the Registrar of the Court, Mr. Eduardo Valencia Ospina. He then invited the President of the Court to address the Committee.

60. Mr. BEDJAOUI (President of the International Court of Justice) said that the recent revival of interest in the International Court of Justice, after a period of neglect, was continuing, as could be seen from the entry in its General List of a new case by Botswana and Namibia. That case had been referred to the Court by notification to the Registry of a special agreement, a method that typified the flexibility of the Court. However, the notification of a special agreement was not the only way in which a State could declare its acceptance of the Court's compulsory jurisdiction; a State could also avail itself of the forum prorogatum, an extremely flexible, though underused, instrument which also offered firm guarantees for the sovereignty of States. It offered access to the Court to all those States still hesitant about accepting the Court's compulsory jurisdiction by the more formal means of a declaration made in accordance with Article 36, paragraph 2, of the Statute of the Court, a compromissory clause in a treaty or a special agreement.

61. The forum prorogatum was an ancient institution by virtue of which the parties to a dispute agreed to an extension of a court's ordinary jurisdiction to cover certain aspects of their dispute which would not normally fall within that jurisdiction. In effect, it was an affirmation that jurisdiction was based on the will of the parties. The Permanent Court of International Justice, and subsequently the International Court of Justice, had adapted the forum prorogatum in such a way as to take account of the specificities of the international legal order while opening the way to the international judicial settlement of disputes and respecting the sovereign will of the parties. By reason of the non-binding character of the jurisdiction of the Court, the forum prorogatum possessed a broader content in the international legal order than it did in the internal legal order. Judges in The Hague had suggested that it could serve as a basis, in the absence of any other, for its jurisdiction in respect of disputes which would otherwise not fall within that jurisdiction. In other words, if a State filed in the Registry of the Court an application instituting proceedings against a State which had not accepted the Court's compulsory jurisdiction, that application could be interpreted as an offer of judicial settlement that the respondent State was free to accept or reject. If the State accepted, the Court would find that it had jurisdiction to deal with the dispute. Therefore, in the context of the International Court of Justice, the forum prorogatum did not so much designate an extension of the Court's jurisdiction as it did the retroactive establishment of that jurisdiction.

62. He wished to emphasize that that original way of establishing jurisdiction was quite in conformity with the Charter of the United Nations, the Statute of the Court and the Rules of the Court. For example, Article 36, paragraph 1, of the Statute of the Court stated that the jurisdiction of the Court comprised all cases which the parties referred to it. Article 40 of the Statute provided another important illustration of the openness of the Court, stipulating that, although the Court could only become seized of a matter if a special agreement or application was addressed to the Registrar and the subject of the dispute and the parties were indicated, there was no requirement for the applicant State to refer to the provision on which it claimed to found jurisdiction of the Court.

63. The term "forum prorogatum" had been used for the first time by the Permanent Court of International Justice in 1934, when Article 35 of the Rules of Court, concerning the references to be included in an application instituting

proceedings, was being revised. Reference by the applicant State to the basis of the Court's jurisdiction remained optional, and subsequent Rules continued to avoid making such a reference obligatory.

64. In its first judgment, in the Corfu Channel case in 1948, the International Court of Justice had acknowledged, albeit implicitly, that a case could be brought before it not only by the notification of a special agreement or an application based on the compulsory jurisdiction of the Court, but also by an application not based on such compulsory jurisdiction. The Court had specified that there was nothing to prevent "the acceptance of jurisdiction ... from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement". That did not mean that, in seeking to facilitate the applicant State's access to the Court, the interests of the other State were not protected. Indeed, since the revision of the Rules of Court in 1978, special precautions had been taken to do just that. Article 38, paragraph 5, provided that, in a case where the applicant State's intention was to found the jurisdiction of the Court upon consent not yet given by the State against which the application was made, the application was transmitted solely to that State, thereby forestalling any undue political exploitation of the case or untimely publicity. The same Article stated that, as long as consent had not been given, the application could not be entered in the General List and no action could be taken unless the respondent State consented to the Court's jurisdiction for the purposes of the case.

65. The institution of the forum prorogatum in no way called into question the well-established principle of the consent of a State to the jurisdiction of the Court. The manner in which a State gave its consent was relatively unimportant, but once consent had been given, it could not be withdrawn.

66. One of the cardinal principles of the international judicial settlement of disputes was consensualism, a corollary of the sovereign equality of States. Thus the Permanent Court, in its second judgment, had emphasized the importance of consensualism as the only basis of its jurisdiction. Before the aforementioned revision in 1978 of the Rules of Court by the International Court of Justice, applications in which it was recognized that the State against which those instruments had been invoked had not accepted the jurisdiction of the Court had been entered in the General List. The Court had then been obliged to order the entries removed from the General List, as its jurisdiction was not accepted by the State concerned. The consent of the State remained a sine qua non of the Court's jurisdiction; however, the form of that consent and the time at which it was given were of secondary importance. The forum prorogatum removed the formalities from the process of giving such consent.

67. The principle that unequivocal consent was essential, but that it did not need to be expressed in any particular form, had been upheld in various judgments of the Permanent Court of International Justice, as in the Rights of Minorities in Upper Silesia case, and of the International Court of Justice, as in the Corfu Channel case. In the Mavrommatis Palestine Concessions case, the Permanent Court, while recognizing that its jurisdiction could not extend to acts not covered by article 2 of the Mandate for Palestine, had recognized the adequacy, for the purposes of establishing its jurisdiction, of the declaration by the respondent State that it accepted the decision of the Court on a question

which, in the view of the Court, did not otherwise fall within its jurisdiction. In the case of Rights of Minorities in Upper Silesia, the Permanent Court had ruled that the submission of arguments on the merits, when no reservations were expressed with regard to the question of jurisdiction, had to be regarded as an unequivocal indication of the State's desire to obtain a decision on the merits of the suit.

68. The International Court of Justice had also had occasion to rule on the existence of the express or implicit consent of the respondent State to its jurisdiction, most recently in its Judgment of 11 July 1996, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia). Nevertheless, while the Court was exceedingly careful in its investigations to determine the will of the parties without being excessively formal in that respect, it was also very firm in its interpretation of the legal effects of such consent. It had on several occasions ruled that, once freely expressed, consent to its jurisdiction could no longer be revoked by the respondent State. The irrevocability of consent was another important characteristic of the forum prorogatum, in accordance with the principle of non-contradiction. If a State did not respect its undertakings, it was internationally responsible with respect to the State in which it had fostered an erroneous conviction. That principle had been upheld by both the Permanent Court of International Justice and the International Court of Justice on various occasions. Thus, they had fashioned an original and flexible jurisdictional instrument, the forum prorogatum, using the only material at their disposal, namely, the principle of the consent of the parties to their jurisdiction.

69. It was only in 1952, however, in the Anglo-Iranian Oil Co. case, that the International Court of Justice first defined the principle of forum prorogatum, highlighting the requirement of consent. The Court had subsequently confirmed its case-law on the topic, not only in contentious proceedings, such as the Barcelona Traction case, but also in advisory proceedings, such as the South West Africa case. In the latter case, the Court had observed that South Africa had given its consent by participating in the proceedings and addressing the merits.

70. While he sought to encourage States to use the Court in The Hague, or to use it more often, he also wished to avoid two pitfalls: one was the submission of artificial cases to the Court, or exploitation of the Court for political purposes, and the other was the abandonment by States of the traditional methods of recognizing the Court's jurisdiction in accordance with Article 36 of its Statute. The forum prorogatum, as a manifestation of the sovereign will of the parties, was just one of the many ways to express consent to the jurisdiction of the Court. Its principal advantage was its flexibility, in that it allowed States to consent to its jurisdiction after a dispute had arisen. Its weakness was that it did not offer predictability on the question of the jurisdiction of the Court. He therefore invited delegations to regard the forum prorogatum as a useful complement to, but not a substitute for, the other, more formal methods of accepting the jurisdiction of the Court.

The meeting rose at 1.05 p.m.