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SUMMARY RECORD OF THE 33rd MEETING

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

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

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

1. The CHAIRMAN announced that the report of the International Law Commission (A/51/10 and Corr.1) would be considered in four sections. He invited delegations to comment first on chapter II, concerning the draft Code of crimes against the peace and security of mankind.

2. Mr. AKBAR (Pakistan) said, with reference to the definition of the crimes against the peace and security of mankind, that it would be preferable to concentrate on legally definable crimes and to avoid areas which were controversial or where abuses might occur. Terrorism could take many different forms, and international terrorism was only one of them. It was therefore essential to re-examine the definition of terrorism in order to include, for example, State terrorism.

3. Pakistan supported the Commission's solution, which restricted the scope of the Code to five categories of crimes, but it would like to have certain crimes such as the recruitment, use, financing and training of mercenaries, colonial domination and other forms of foreign domination restored to the list. Systematic or mass violations of human rights should constitute a separate category and be dealt with in a separate article, for that would enhance the scope of the universal principles contained in the Charter of the United Nations. During their examination of the topic the members of the Commission should ensure that the concepts which they were developing were consistent with the principle of State sovereignty, in order to facilitate the adoption of the Code and its universal acceptance.

4. Mrs. ŠKRK (Slovenia) said that the Code of crimes against the peace and security of mankind would complement the functioning of the future international criminal court and also serve domestic legal systems by unifying the criminal law and practice concerning the crimes which were considered to be the most serious crimes under international law. From that perspective, the structure of the draft Code was well-founded.

5. Slovenia fully supported the principle of the supremacy of international law with regard to direct and individual responsibility for crimes against the peace and security of mankind. It also believed that the rules and principles applicable to individual responsibility - and to the various forms of complicity - envisaged in article 2 were clearly drafted and consistent with the rules of international law. However, the attempt to commit a crime should be the subject of a separate paragraph of article 2, and the Commission should also consider the case of an individual who had intended to commit a crime but voluntarily renounced his intention.

6. Turning to article 3, she said that punishment should depend not only on the consequences of a crime but also on the subjective circumstances of the culpability of its perpetrator, such as motive, intent and the various forms of depravity and cruelty.

7. Article 8, on jurisdiction, was one of the key provisions of part one of the draft Code. In it the Commission confirmed the principle of universal jurisdiction over crimes against the peace and security of mankind, except for the crime of aggression, which would fall under the jurisdiction of the future international criminal court. However, the provision which envisaged jurisdiction from the standpoint of the nationality of the alleged perpetrator was not clear: the State victim of the aggression should also have jurisdiction to try the crime if its criminal legislation so required.

8. The Slovene delegation was in favour of the inclusion of the obligation to extradite or prosecute and of the possibility of extraditing alleged perpetrators. However, that amounted to prejudging the legal nature of the future Code. At present only a treaty - and not a declaration - could serve as the legal basis for extradition or the obligation to prosecute or extradite. For that reason her delegation reiterated its view that the Code should take the form of a treaty.

9. As other delegations had already pointed out, there must be no conflict between the treatment of the fundamental principles of criminal law such as minimum judicial guarantees, non bis in idem and non-retroactivity in the draft Code and in the statute for an international criminal court.

10. It was unacceptable that extenuating circumstances such as the age of the alleged offender should be addressed within the framework of grounds for lessening the degree of culpability. The Slovene delegation had already raised on several occasions the question of the responsibility of juvenile perpetrators of the most serious crimes as an issue deserving special treatment in strict conformity with human rights and humanitarian principles.

11. Her delegation regretted that neither the draft Code nor the draft statute mentioned the non-applicability of statutory limitations to war crimes, genocide and crimes against humanity. The Commission ought to take that point into account, for the purpose of such non-applicability was to facilitate the prosecution of the alleged perpetrators of the most heinous crimes.

12. The Slovene delegation fully supported the Commission’s decision to limit the scope of the draft Code to five categories of crimes. It was glad that institutionalized discrimination on racial, ethnic or religious grounds resulting in serious disadvantaging a part of the population had been included in the list. The Commission had also done well to include the grave offences and the acts and atrocities covered by Additional Protocols I and II to the 1949 Geneva Conventions among the war crimes dealt with in draft article 20.

13. However, it was not convinced by the Commission’s approach to the definition of war crimes, which had to be committed "in a systematic manner or on a large scale". For example, war crimes which caused serious and long-term damage to the environment, such as attacks on nuclear power stations or dams, constituted crimes against the peace and security of mankind according to the draft Code. It would be difficult for such crimes to be committed "in a systematic manner or on a large scale".

14. With regard to the final form of the draft Code, the Slovene delegation believed that it should be adopted by means of a treaty: it had always considered that it should be separate and independent from the statute for an international criminal court. That should not preclude the Preparatory Committee on the Establishment of an International Criminal Court from drawing on the provisions of the draft Code and the commentaries thereto in order to complete its work before April 1998.

15. Ms. LIND (Norway), speaking also on behalf of Denmark, Finland, Iceland and Sweden, expressed appreciation for the impressive amount of work accomplished by the International Law Commission at its forty-eighth session and the fact that the Commission had been able to complete the second reading of the draft Code of Crimes against the Peace and Security of Mankind. Four of the five categories of crimes defined in the draft were universally recognized as being part of customary international law and, as such, were already binding on all States. The fact that the draft Code focused on the most serious international crimes should prove very significant for the consideration of the draft statute for an international criminal court. The fulfilment by the Commission of its mandate and its decision to concentrate on those main crimes should give a strong impetus to the work on the international criminal court.

16. The inclusion of a provision on crimes against United Nations and associated personnel reflected the increase in such crimes in recent years and highlighted the importance of the new Convention on the Safety of United Nations and Associated Personnel. It was fortunate that acts of warfare causing severe damage to the environment had been included in article 20 (g) and recognized as crimes against the peace and security of mankind, even though the definition given of such acts was not entirely satisfactory.

17. Overall, the Nordic countries were satisfied with the outcome of the Commission's work, which should be considered further in the context of national legislation and in the relevant international forums.

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

19. Mr. GALICKI (Poland) noted that almost 50 years had passed since the General Assembly had requested the International Law Commission to prepare a draft Code of offences against the peace and security of mankind and to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal. It had therefore become necessary to take into account new events, new categories of crimes, new political factors and new rules of international law which had been adopted in the meantime. Those developments seemed to be well reflected in the final text of the draft Code; he welcomed the improvements made to it, particularly the reduction of the scope of the draft to five categories of crimes, which increased the chances of its being accepted by a majority of States.

20. The draft statute for an international criminal court had also been one of the Commission's major tasks, which had been taken over first by the Ad Hoc Committee and later by the Preparatory Committee. There could be no doubt that the list of crimes covered by the draft Code and the jurisdiction of an international criminal court were closely linked. That was why the Commission

had proposed that the Code should be incorporated into the statute of an international criminal court. He was convinced that the draft Code would be a very useful instrument for the precise definition of the crimes falling within the court's jurisdiction.

21. The catalogue of crimes against the peace and security of mankind had special symbolic importance for his country, in the light of its history. He fully supported the inclusion in that list of crimes against United Nations and associated personnel, as it was essential for the international community to protect those who acted on its behalf.

22. Lastly, in order to ensure the widest possible acceptance of the draft Code, it should take the form of an international treaty, either as a separate international convention or as part of the statute of an international criminal court, as suggested by the Commission. He did not, however, reject the final possibility recommended by the Commission, namely, the adoption of the Code as a declaration by the General Assembly which could be further improved and reshaped into a binding instrument. He was convinced that the adoption of the Code would help to provide a solid basis for the principle of individual responsibility for the most serious crimes, which would thus be universally recognized as such in international law.

23. Mr. MOMTAZ (Islamic Republic of Iran) said that, as the draft Code adopted by the Commission identified only five crimes against the peace and security of mankind, its scope had been drastically reduced. In its quest for compromise, the Commission had sacrificed juridical idealism, i.e., an exhaustive codification of international crimes, to political expediency. He shared the regrets expressed on that score by some members of the Commission and noted that the draft Code represented a retreat from the draft on State responsibility. For instance, article 20, paragraphs (b) and (c), characterized a number of violations of international law as international crimes, whereas the individuals who gave the necessary orders and those who carried them out were not covered by the Code, which was regrettable.

24. Nevertheless, he noted with satisfaction that, for the Commission, the exclusion of certain crimes did not affect the status of other crimes under international law. A case in point was intervention, a crime referred to in the Judgement of the International Court of Justice in the case Military and Paramilitary Activities in and against Nicaragua, which touched on areas where State sovereignty allowed each State to act as it saw fit. Intervention, which in the Court's view was illegal when it utilized coercive means, could take less blatant forms than the use of armed force, such as unilateral recourse to economic sanctions - a less dramatic but much more effective means, especially in relations between States of unequal power. As recourse to such means was currently tending to increase, at the risk of endangering international peace and security, the inclusion of the crime of intervention in the internal affairs of States would certainly have played a considerable deterrent role.

25. However that might be, he wished to make some observations on the 20 articles of the draft Code. With regard to the provisions on the scope and application of the Code, he said that, as only five offences had been identified, it might be helpful to include a definition of crimes against the

peace and security of mankind. Such a definition could guide the progressive development of international law in that area and lead to the inclusion of new offences within the scope of the Code. One possibility might be to revert to the criterion of extreme gravity proposed by the Special Rapporteur, Mr. Doudou Thiam, in his third report in 1985 for characterizing crimes against the security of mankind. Another possibility might be to choose the definition of State crimes which the Commission had proposed in the draft articles on State responsibility, namely, any breach of an "international obligation ... essential for the protection of fundamental interests of the international community ...".

26. Turning again to the definition of crimes against international peace and security, he said it was regrettable that article 20 of the Code applied only to war crimes committed in a systematic manner or on a large scale. That new criterion and the extreme gravity criterion were extremely subjective and might cause difficulties if applied. A case in point was the characterization of attacks against works or installations containing dangerous forces as a crime. The same was true of other violations of the law of armed conflict mentioned in the new draft, i.e., the employment of poisonous weapons calculated to cause unnecessary suffering or the wanton destruction of cities, towns or villages not justified by military necessity.

27. On the other hand, he noted with satisfaction that the transfer by an occupying Power of its own civilian population into the territory which it occupied was included in the list of crimes. Nevertheless, it was regrettable that the new draft did not characterize the employment of illegal arms as a crime, and that it referred only to weapons calculated to cause unnecessary suffering, such as poisonous weapons. The advantage of the old formula was that it had covered biological and chemical weapons, the ban on which, while originating in conventional law, was now considered to reflect a well established custom.

28. His delegation, finally, welcomed the fact that the new draft Code prohibited the use of means of warfare not justified by military necessity with the intent to cause long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population. It considered that that provision was implicitly aimed at nuclear weapons, whose use inevitably entailed such consequences.

29. With regard to armed conflict not of an international character, the acts listed in article 20, paragraph (f) were, with the exception of acts of terrorism, already covered by article 3 of all four Geneva Conventions of 1949. The preambular part of that article stated that in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict would be bound to apply, as a minimum, the provisions of the article. In its judgement handed down in the affair concerning Military and Paramilitary Activities in and against Nicaragua, the International Court of Justice had rightly considered that article as the expression of "fundamental general principles of humanitarian law" (para. 218). Respect for those provisions was clearly required. The question was whether the characterization as a crime proposed in the draft Code was based on customary law. It was true, as the Commission had pointed out, that, in the Statute of the International Tribunal for Rwanda, the Security Council had expanded the

characterization of crime to include acts committed during the internal conflict which had wracked that country. The Security Council had innovated, since the provisions of the Protocol Additional to the four Geneva Conventions of 1949 (Protocol II) made no mention of the notion of "grave infraction", the legal basis for the characterization as a crime of such acts and for the application of the principle of universal jurisdiction.

30. In these circumstances, the characterization as crimes of the acts listed in article 20, paragraph (f), raised certain difficulties: such acts were not on the same scale as violations of international humanitarian law, such as the genocide which had taken place in Rwanda and the ethnic cleansing in the former Yugoslavia. It should also be pointed out that the horrors committed in Rwanda and in Bosnia and Herzegovina were already covered by articles 17 and 18 of the draft Code, which were devoted to the crime of genocide and to crimes against humanity, respectively.

31. Turning to the provisions ratione personae of the draft Code, he noted that the structure of the Code rested entirely on the notion of individual international crime, which had long been established in international criminal law. Certain crimes, such as genocide, arbitrary or forced deportation and settlement in occupied territory, could not be the acts of mere individuals and constituted both crimes of State and crimes of individuals. The question was whether the official capacity of the author of the crime and the fact that he had acted on orders relieved him of all criminal responsibility. According to article 5 of the draft Code, the fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order did not relieve him of criminal responsibility, which would negate the very principle of the criminal responsibility of the individual. The solution proposed was therefore quite satisfactory, particularly since it provided for attenuating circumstances.

32. In arriving at its judgement, the tribunal must evaluate a number of elements, but it appeared that the decisive criterion was in fact that of the subordinate’s freedom of action, since mitigating circumstances were recognized only if the individual had the possibility of disobeying and not carrying out the order received without exposing himself to certain death.

33. As for the reverse situation, that of the hierarchical superior dealt with in article 6, the proposed solution and the accompanying commentary were equally satisfactory. The criminal responsibility of subordinates and of superiors who ordered the execution of acts characterized as crimes would certainly be such as to dissuade those who might be tempted to commit one of the crimes covered in the draft Code.

34. It was regrettable that the draft Code merely touched on the question of penalties. While recognizing that it was virtually impossible to establish a scale of punishment for each crime or a uniform system of penalties, his delegation nevertheless regretted the absence of any position on that point, which was hardly consistent with the principle nulla poena sine lege and that of nullum crimen sine lege.

35. Since the same degree of gravity was attached to all acts characterized as crimes in the draft Code, the Code could contain a provision of a general nature by virtue of which States committed themselves to impose on the authors of such acts the heaviest punishments in their arsenal of penalties. That was the approach adopted in many of the conventions to combat terrorism, and more particularly, in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. It also had the advantage of not encroaching on the prerogatives of States, while at the same time guaranteeing that individuals judged to be guilty would be, on account of the extreme gravity of their acts, dealt with in an exemplary manner. His delegation therefore proposed that article 3 of the draft Code should be modified accordingly.

36. In conclusion, he suggested that, in order to maintain the parallel, the modalities for the adoption of the draft Code should be the same as those used for the adoption of the Statute for the International Criminal Court.

37. Mr. ELARABY (Egypt) recalled that, at its previous session, the Commission had restricted the scope of the draft Code of Crimes against the Peace and Security of Mankind by reducing to five the number of crimes covered by the Code, in order to facilitate a consensus. The Egyptian delegation wished to make a number of comments on that subject.

38. Firstly, the draft Code did not contain a sufficiently precise definition of what was meant by crime against the peace and security of mankind and merely listed, following the example of the Charter of the Nuremberg Tribunal, a number of acts which could be considered to be threats against the peace and security of mankind. That restrictive approach could be seen in article 1 of the draft Code, which provided that "the present Code applies to the crimes against the peace and security of mankind set out in Part II". The Commission had explained that it had chosen that approach in order to speed up its decision, but it was possible that, at the same time, it might have overlooked the need to have a clear text of general application, qualities which would ensure greater precision and more effective application. That matter needed to be re-examined.

39. His delegation supported in part the approach followed by the Commission in its previous sessions, namely, to retain only those crimes whose gravity could not easily be contested, as well as crimes of a clearly political nature which posed a threat to international peace and security and therefore to exclude crimes, such as piracy, trafficking in women and children, racial discrimination, recruitment of mercenaries and foreign intervention. It was regrettable that the Commission had neglected to make separate provision, as it had envisaged in its previous session, for grave damage that was deliberately caused to the environment. In view of their destructive effects, however, such acts deserved to be covered. It might have been possible to characterize them as crimes against the peace and security of mankind, in cases where they had been committed deliberately, repeatedly and systematically, and had caused serious harm to individuals and to the environment. He considered as excessively restrictive the three conditions set out by the Commission for damage deliberately caused to the environment to be characterized as crimes of war falling under the Code (armed conflict, intention, prohibited means).

40. He also regretted that the Commission had decided to remove the threat of aggression from the list of crimes, especially since his delegation had requested the retention of that item, which was of great importance to the maintenance of international peace and security.

41. Noting that the draft Code did not contain a precise definition of the crime of aggression, he recalled that his delegation had suggested the use of the definition of aggression contained in General Assembly resolution 3314 (XXIX), which would have given international legitimacy to that definition and contributed to the more effective harmonization of the work of the United Nations. Those who had opposed those views had argued that, unlike the above-mentioned resolution, the draft Code dealt firstly with the responsibility of individuals. His delegation remained convinced that there was all the more reason for the Commission to extend the definition of aggression given by the General Assembly to individual responsibility, since article 4 of the draft Code did not prejudge the responsibility of the State for crimes committed against international peace and security. Moreover, without a definition of aggression, application of article 16 would be difficult, since an international or national tribunal would have difficulty in trying individuals for crimes that were not defined, even in cases where the Security Council had declared that aggression had taken place.

42. His delegation welcomed the fact that the Commission had reproduced the definition of the crime of genocide contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide and that it had extended that definition to include complicity in genocide, conspiracy to commit genocide, incitation to commit genocide and attempted genocide.

43. His delegation also welcomed the amendments which the Commission had made on second reading to article 18, particularly subparagraph (k) thereof concerning other inhumane acts, as they clarified the provision. He was pleased to note that, in the same article, the Commission had again added to the list of crimes against humanity those which were the subject of various conventions, such as the forced disappearance of persons, rape, enforced prostitution and other forms of sexual abuse. On the other hand, subparagraph (f) concerning the crime of institutionalized discrimination on racial or ethnic grounds should be reviewed in detail, as earlier international conventions on human rights did not include that crime and subparagraph (e) addressed the same issue. Subparagraph (f) could therefore be deleted.

44. Concerning article 19, the decision to include crimes against United Nations and associated personnel in the draft Code had been taken at the Commission's most recent session and States had not had time to consider the article in question or to comment on its content and form. The problem of personnel security had prompted the General Assembly to conclude, in 1994, the Convention on the Safety of United Nations and Associated Personnel. Article 19 should be carefully considered in the light of that Convention with a view to ascertaining the extent to which its inclusion in the draft Code was justified.

45. With regard to article 20, the Commission had broken new ground compared with previous years by deciding that a war crime would constitute a crime against the peace and security of mankind only when committed in a systematic

manner or on a large scale. That new criterion might entail the constitution of two categories of war crime, namely those which falling within the jurisdiction of the proposed international criminal court and those constituting crimes against the peace and security of mankind, which, to be considered as such, must have been committed in a systematic manner. His delegation believed that it would have been preferable to refer directly to the 1949 Geneva Conventions and their Additional Protocols. Moreover, the crimes included under article 20, subparagraph (f), namely acts in violation of international humanitarian law applicable in armed conflict not of an international character, were included under paragraph 3 common to all four Geneva Conventions. He therefore questioned whether the draft Code should cover such acts.

46. It was still too early to take a decision concerning the final form of the draft Code. States required a little more time to consider and comment on the draft as presented by the Commission.

47. Mr. YEPEZ (Venezuela), referring first to article 3 of the draft Code, said he feared that penalties would be heterogeneous if the determination of punishment were left to States. Furthermore, it was inappropriate to define penalties in the draft statute of the international criminal court, which should contain the rules governing its establishment and functioning. It was therefore regrettable that the draft Code said nothing about the penalties applicable to each of the crimes it covered, and did not even indicate minimum and maximum penalties. It could, for example, state that the penalty applicable to a crime against the peace and security of mankind should be at least equivalent to that provided for under the internal law of the country of which the accused was a national. As for maximum penalties, his Government wished to exclude the death penalty and life imprisonment, which were prohibited by the Venezuelan constitution.

48. Article 7 merely stated that the official position of an individual who committed a crime against the peace and security of mankind did not relieve him of criminal responsibility or mitigate punishment. That position could, however, have been regarded as an aggravating circumstance in that abuse of authority increased the responsibility of the accused.

49. His delegation accepted the restriction on the number of crimes covered by the draft Code, provided that it could be revised and updated after its entry into force. It would therefore be helpful if the final provisions authorized its revision by a conference of plenipotentiaries, which could be held every five or 10 years.

50. His delegation believed that the draft Code should be adopted in the form of an international convention that was separate from all other international instruments, including the draft statute of the international criminal court. On the other hand, it would set standards which the court could follow in judging and punishing conduct characterized as a crime against the peace and security of mankind. It should be adopted at a conference of plenipotentiaries, thereby serving as testimony to the political will of Member States. The Secretariat could prepare draft final articles that established a procedure for revision of the future Code, defined the relationship between the latter, the draft statute of the international criminal court and international conventions

or treaties, and prohibited the formulation of reservations with a view to ensuring the universality and integrity of the Code.

51. Mr. ENKHSAIKHAN (Mongolia) said he welcomed the Commission's adoption of the draft Code, which was the culmination of work conducted over almost half a century. He noted that the draft Code listed only five types of crime, presumably in the interest of facilitating its adoption by Governments, and welcomed the inclusion of crimes against United Nations and associated personnel as being the least that the international community could do, given the nature of the Organization's mission.

52. His delegation was not entirely happy, however, with article 16, on the crime of aggression. In its view, the scope of the draft Code was substantially narrowed by the fact that the article focused exclusively on the role of the individual in acts of aggression committed by a State. The provision was drafted in such a way that aggression perpetrated by States would go unpunished by the international criminal court. Punishments would depend on the discretion of victorious States or the international body having primary responsibility for the maintenance of international peace and security, which could establish ad hoc judicial bodies and would have full latitude to define, on a case-by-case basis, their scope and application, as well as the degree of responsibility of States or their representatives. Nevertheless, his delegation was aware that the draft articles under consideration appeared to be the most acceptable solution at the current stage. It hoped, however, that a review would be undertaken when the time came.

53. He regretted that the draft articles did not recognize damage to the environment as a separate crime and that it was simply included in article 20 on war crimes. It was incomprehensible that such a crime should be recognized in the case of armed conflict and not in the absence of conflict. The Commission cited lack of precedents in international law as a compelling reason for its exclusion from the list of crimes. However, there were sufficient case studies and international agreements to serve as a basis for codification. The international community should seek to preempt a catastrophe that would compel it to conclude and negotiate promptly an international convention, as it had done after the Second World War and the Chernobyl tragedy, for instance. It should nevertheless bear in mind that a criminal act comprised acts of both commission and omission, actus rea and mens rea (the criminal act and intent to harm), a consideration which it should not overlook. His delegation proposed that the question of environmental crimes should be considered again in an appropriate forum in parallel with the further consideration of the draft Code.

54. Concerning other draft articles, if the draft Code were to be an instrument separate from the draft statute of the international criminal court, the draft articles should spell out the general rules and principles that established individual criminal responsibility and should define minimum penalties. In that connection, bearing in mind that the draft Code and the international criminal court would form part of a single international legal regime, he hoped that the court's statute would provide more specific guidance on issues which were not clearly defined in, or omitted from, the draft Code. Significant portions of the articles of the Code could be included in the statute with a view to ensuring that the two instruments were consistent, an issue to which he hoped

the Preparatory Committee on the Establishment of an International Criminal Court would give careful consideration.

55. Since most of the crimes listed in the draft Code had been included in treaties or become part of customary law, the draft Code should take the form of an international convention, in order to avoid weakening the authority of existing instruments.

56. Mrs. LADGHAM (Tunisia), noting that the Commission had considerably reduced the scope of the draft Code said she wondered whether such a minimalist approach was really appropriate, given the objective sought. Of the 12 crimes listed in the text adopted on first reading, the Commission had retained just four, namely aggression, genocide, crimes against humanity and war crimes, which had been supplemented at the Commission's most recent session by crimes against United Nations and associated personnel. However, the Commission had not totally excluded the other crimes since apartheid and wilful and severe damage to the environment had been mentioned in articles 18 and 20 of the draft.

57. Her Government regretted that the Commission had not retained the crime of terrorism, despite the number of delegations favouring its inclusion. The Chairman of the Commission had indicated that, in accordance with the criteria listed in article 18, acts of terrorism could be included among crimes against humanity, insofar as they had been committed systematically or on a large scale with the instigation of a government, organization or group. Her Government still believed that the Commission should have included a separate article giving a general definition of international terrorism. Moreover, if the Commission had characterized acts of terrorism as a crime and included them in the Code it would have provided additional proof of the international community's determination to wage a relentless war on terrorists.

58. The question of applicable penalties was another area in which the Commission had erred on the side of caution. It had limited itself to a very general provision which left it to the competent court to determine the applicable penalty, taking into account the nature and gravity of the crime and, where appropriate, any attenuating circumstances. Three options had nevertheless been put forward by Governments during the 1995 deliberations: setting maximum and minimum penalties, setting only a maximum penalty and setting a penalty for each crime. Her delegation preferred the last option. Arguing from the position that the sentence handed down would depend on the judicial system in which the case was brought, the Commission had shied away from being precise. Her delegation would have preferred the Commission to have provided a more detailed indication of the penalties that could be incurred, in the manner of most national penal codes.

59. Her delegation advocated the adoption of the draft Code in the form of a binding instrument which would be incorporated into the statute of a future international criminal court. The General Assembly could instruct the Preparatory Committee on the Establishment of an International Criminal Court to examine ways in which the draft Code could be thus incorporated.

60. Mr. VARŠO (Slovakia) said that the draft Code currently before the Committee had a dual purpose: to prevent crimes which threatened universally

recognized human values and to punish them by establishing ways in which their perpetrators would be judged.

61. His delegation supported the Commission's decision to retain only the most serious crimes, especially as it had stated in paragraph 46 of its report (A/51/10 and Corr.1) that it was understood that the inclusion of certain crimes in the Code did not affect the status of other crimes under international law. That decision was also in keeping with the well-established thinking in the international community that the Code should refer only to crimes whose "extraordinary" nature merited exceptional juridical treatment.

62. Article 8 of the draft Code laid down the principle of the concurrent jurisdiction of national courts and a future international criminal court. His Government believed that international jurisdiction should have priority, at least insofar as the crime of aggression was concerned. It nevertheless recognized that, until the international criminal court became a reality, the issue would remain theoretical. But there was no time like the present for considering the factors that needed to be taken into account in order to forestall a conflict between international and national jurisdictions. To the extent possible, and for several reasons, it was important to avoid judging crimes in an artificial environment, far from the place where they had been committed: first, it was preferable that the victims of criminals should be able to attend the trial; second, holding the trial in situ would help prevent the same crime from being repeated in the region concerned; and third, by making itself acquainted with local rules and customs, the court could better understand the context in which the crimes had been committed and thus arrive at a more objective decision. Once that assumption was made, the issue of the priority of competences would acquire almost secondary importance.

63. The draft Code should form part of the statute of a future international criminal court, but whatever form it took it was essential to ensure, at all costs, that it did not go unheeded.

64. Mr. SWAMI (India) said his delegation regretted that the text adopted by the Commission on second reading had excluded several crimes which his Government considered important and which had been included in the text adopted on first reading. The draft Code in its current form did not meet the expectations of the international community.

65. The crimes of intervention, colonialism, apartheid and terrorism should be considered as crimes against the peace and security of mankind, and as such they should be included in the Code. Their inclusion would ensure that the Code had universal value and provide a guarantee against the future occurrence of such crimes.

66. In article 16, contrary to its definitions in articles 17, 18 and 19, the Commission had defined the crime of aggression in very rudimentary terms. The definition was so vague that it made it very difficult to draw any conclusions about the individual responsibility of the perpetrators, which after all was the purpose of the article. His delegation believed that the Commission should define aggression in the Code, even if such a definition was based on the one adopted by the General Assembly in its resolution 3314 (XXIX) of 1974.

67. His delegation was satisfied with the definition of the crime of genocide, but the matter of effective prosecution remained a problem. With respect to crimes against humanity, the basic question revolved around knowing precisely when a violation of the principles of humanitarian law or human rights, which would normally fall within a domestic jurisdiction, would become a matter of international concern. The question was very complex and required general agreement at the international level. It would be naive to believe that the simple fact of characterizing certain types of behaviour as crimes would be sufficient to eliminate them. Moreover, however abhorrent an act might be, it should not come within the purview of the Code unless it threatened or was likely to threaten the peace and security of mankind.

68. With respect to war crimes, it was important to make clear that the Code should deal only with international armed conflicts involving serious violations of international law committed in a systematic manner or on a large scale; it should clearly exclude any attempt to cover non-international armed conflicts.

69. His delegation attached great importance to the topic of international terrorism, which should form a separate category in the Code.

70. Substantial additional work was required to arrive at a text which could command wide agreement.

71. Mrs. FLORES (Mexico) said that she would have preferred a clear separation between the provisions on the general principles of criminal law and those on the procedures to be followed. Moreover, the draft would be improved by the inclusion of other principles, particularly with respect to the age of individual criminal responsibility and the statute of limitations. Likewise, the provisions on applicable penalties, individual responsibility, defences and extenuating circumstances should be further developed.

72. Her delegation had serious reservations about draft article 12, entitled "Non bis in idem". While it was intended to set forth the principle that an individual could not be tried and convicted more than once for the same crime, the article provided for so many exceptions that its effect was virtually nullified. The text should therefore be carefully reworked and its applicability should be limited only in truly exceptional circumstances.

73. Her Government was pleased that the Commission had included the crime of aggression in the Code, but felt that aggression should be defined as proposed by the Special Rapporteur in the Commission's report on the work of its forty-seventh session (A/50/10). Conversely, it believed that, despite their seriousness, crimes against United Nations and associated personnel were out of place in the draft Code.

74. The crimes dealt with in articles 17, 18 and 20 should be defined more precisely, although her Government was pleased that the definition of war crimes in article 20 included the acts listed in Protocol I Additional to the 1949 Geneva Conventions.

75. Lastly, Mexico felt that the General Assembly should instruct the Preparatory Committee on the Establishment of an International Criminal Court to

consider the draft Code, with a view to incorporating it into the statute of the future international criminal court.

76. Mr. CHUNG (Republic of Korea) said, with reference to both the draft Code and the draft statute of an international criminal court, that acts of aggression were among the most heinous crimes. He welcomed the progress made towards establishing a permanent international criminal court, as well as the completion of the draft Code, which represented the outcome of over 40 years' work.

77. The draft Code should be incorporated into the statute of the court, for three reasons: first, both substantive and procedural law preferably should be dealt with in the same text, since that would observe the principle of nullum crimen sine lege and would facilitate the work of the international criminal court; second, the adoption of the Code as an international convention could place the court in an awkward position if it had to decide which laws applied to a State which was a party to its statute but not necessarily to the Code; and third, the fact that the Commission had considerably narrowed the scope of the Code would make it easy to include the latter in the statute.

78. Both the Code and the statute defined the crime of aggression without specifically referring to "war", whereas the Nürnberg Charter had referred to the concept of a "war of aggression". A distinction should be made between a "war of aggression" and an "act of aggression", since those two concepts differed not in substance but in magnitude: an act of aggression could involve participation in only one or some of the phases of aggression, giving rise to individual criminal responsibility in each phase, whereas a war of aggression could involve participation in all phases of aggression.

79. The General Assembly had adopted two resolutions on the definition of aggression, to which the Commission did not refer in its commentary: resolution 95 (I) (Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal) and resolution 177 (II) (Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal). Resolution 177 (II) directed the Commission to formulate, not to comment on, the principles affirmed by the General Assembly. Those resolutions could become sources of law for the definition of crimes of aggression under public international law, since the Commission had already drawn upon them in formulating the seven principles on crimes of aggression which were reflected in articles 16, 17, 18 and 20 of the draft.

80. With respect to the crime of the threat of aggression, his delegation did not share the Commission's view that the concept was too nebulous; on the contrary, a threat of aggression backed by an action was just as serious as an act of aggression, and enabled a State to invoke Article 39 of the Charter of the United Nations. Consequently, his delegation supported the definition proposed by another delegation in that regard, which appeared as the fifth alternative in the report of the Preparatory Committee on the Establishment of an International Criminal Court (A/51/22, vol. II). In addition, General Assembly resolution 3314 (XXIX) of 14 December 1974 contained a definition of aggression that deserved to be given due consideration because its normative

content made it a suitable guideline for the Commission, if not a legally binding text.

81. With respect to crimes against humanity, his delegation endorsed the extension of the definition of such crimes to include those committed in time of peace as well as those committed in time of war. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which had been one of the sources of the draft Code, had already broadened the definition of crimes against humanity. His delegation therefore supported the draft Code to the extent that it reaffirmed the concept of crimes against humanity as defined by the Nürnberg Tribunal.

82. Mr. BAKER (Israel) said that the first issue he wished to raise was that of the form which the Code should take and the relation between the Code and the statute of the international criminal court.

83. Israel felt that it was necessary to observe two principles: that the Code should achieve the widest possible acceptance, and that there should be no discrepancy or inconsistency between the provisions of the Code and those of the statute of the court. There was an indissoluble link between the Code and the statute, since they had a common purpose, which was to ensure that the perpetrators of abhorrent crimes did not go unpunished. However, they dealt with different situations: the court was intended to try individuals when national justice systems were unavailable or ineffective, while the Code was intended to define the most serious crimes which could serve as a basis for prosecution, either in national courts or in an international criminal court. The Code should therefore be adopted as a declaration of the General Assembly, since that would encourage its acceptance by the largest possible number of States. The declaration could also serve as a basis for the definition of the crimes to be included in the statute. That approach would help to ensure broad acceptance of the Code and consistency between the Code and the statute.

84. With respect to the draft Code itself, he noted with satisfaction that the number of crimes had been reduced to five. He then analysed some of the articles, beginning with article 2. Subparagraph (b) or (d) of paragraph 3 should be made more precise, or an additional subparagraph should be included, to indicate more explicitly that an individual could be held responsible for a crime committed through a third party.

85. Although the explanation given by the Commission in its commentary on article 3 was satisfactory, the article raised issues similar to those discussed in the context of the future statute of the international criminal court with regard to penalties and, in particular, restitution, compensation and confiscation of instruments serving the purpose of crime. In the context of the draft Code, the question nevertheless remained whether guidelines should be included for the jurisdictions in which persons would be tried.

86. Similarly, with regard to article 14, since the Code defined the crimes themselves, the defences available to individuals charged with such crimes must be defined with equal precision.

87. Article 7 was not sufficiently clear and should be reformulated along the lines of article 5 so as to emphasize that persons who had given an order to commit crimes were subject to the same punishment as those to whom they had given the order. That would avoid a contradiction between articles 5 and 7.

88. Article 12, paragraph 2(a)(i), meant that States must not only take measures to ensure that the crimes enumerated in the draft Code were part of their national law, but also must ensure that such crimes were characterized using the same terminology as that used in the Code. Difficulties might arise for a State whose penal code did not characterize such crimes as "crimes against a peace" and "war crimes", even if it classified as crimes the specific offences mentioned in articles 16 to 20. An individual who committed a crime must be responsible for the full extent of his criminal conduct, and the Commission should give some thought to that matter.

89. With regard to Part II of the draft Code, his delegation understood the logic set out in the commentary of the Commission regarding article 16. However, as long as the definition of the international crime of aggression - aggression by a State - continued to be elusive, the question of individual criminal responsibility for such a crime could not be considered separately. As had been done in the case of the other crimes dealt with in Part II of the draft Code, the crime of aggression for which individual criminal responsibility arose must be directly related to the components of the crime, and the components must be defined.

90. With regard to the crime of genocide, dealt with in article 17, the delegation of Israel could only state that it was the most abhorrent of the crimes dealt with in the Code. It had been the central principle of the debate since the first session of the International Law Commission.

91. The Commission had added new elements to article 18. Any crime added to those originally listed in the Charter of the Nürnberg Tribunal must be exceptional crimes warranting definition as crimes against humanity. It was not the objective of the draft Code to be original or to develop substantive law between States, but rather, to establish the criminal responsibility of individuals for acts of a most serious and abhorrent nature. The exclusion of a crime did not in any way imply that it was not a violation of international law, but merely that the crime remained within the sphere of specific treaty relationships and did not belong on the "pedestal" of the crimes dealt with in the draft Code.

92. The Israeli delegation was puzzled by the inclusion of article 19. Although it did not question the seriousness of crimes against United Nations and associated personnel, his delegation believed that they were not among the most serious crimes and it recalled the existence of the Convention on the Safety of United Nations and Associated Personnel adopted in 1994.

93. Like other Member States, Israel considered article 20 to be complex and sometimes confusing because it attempted to include all the major conventional sources of international law, irrespective of the extent to which they had been accepted as law by the international community. The definition in article 20 should be based on those acts which had been defined as grave breaches in

customary law or in conventions which embodied customary law. The inclusion in the article of additional elements must be regarded as exceptional, since those States which had not accepted instruments defining such crimes presumably would have similar difficulties subscribing to a code in which they were also included. If war crimes were to be defined as intended by the Commission in its commentary on article 20, then consideration should be given to whether the acts detailed in the article really were of such seriousness as to be specifically included in the Code.

94. In conclusion, the burning issue was what the impact of the draft Code would be on the negotiations regarding the establishment of the international criminal court and what the relationships between the Code and the court would be - relationships which States should have the opportunity to assess pending the resumption of discussions on the establishment of the new institution.

95. Mr. Escovar-Salom (Venezuela), Chairman, resumed the Chair.

96. Mr. CRISOSTOMO (Chile) welcomed the adoption of the draft Code, which represented many years of effort. He was pleased that the Commission had reduced to five the number of the most serious crimes constituting threats to international peace and security. The five crimes (aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes) were acts which had been defined in international law, whether conventional or customary law. The greater the number of States that acknowledged the existence of such crimes, the more quickly the Code would be adopted and implemented.

97. With regard to the crime of aggression, the Code drew an important distinction between aggression and the crime of aggression. According to Chapter VII of the Charter, which gave the Security Council the ability to determine the existence of an act of aggression, aggression could only be perpetrated by a State. However, article 16 of the draft Code provided that an act of aggression was an act perpetrated by an individual.

98. Crimes against Red Cross personnel - who often were more vulnerable than United Nations personnel - also should be included in the category of crimes against United Nations and associated personnel.

99. The Chilean delegation believed that the statute of the international criminal court, although closely related to the Code, should be independent from it in order to encourage their adoption by many States. To integrate the Code with the court's statute would only keep the international community waiting longer at a time when it was so eager to see a universal criminal jurisdiction become a reality. Although it was too early to determine what form the Code should take, it should, given its importance to the international community, be included in an international treaty to which all States would subscribe.

100. In conclusion, he said that a legal rule guaranteeing respect for individual rights was absolutely essential in order to restore and maintain the peace and security of mankind. The prompt adoption and implementation of the Code therefore represented a milestone in the evolution of international law.

The meeting rose at 6.15 p.m.