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SUMMARY RECORD OF THE 28th MEETING

Chairman: Mr. TUERK (Austria)

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The meeting was called to order at 10 a.m.

AGENDA ITEM 145: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIRST SESSION (A/44/10, A/44/409 and Corr.1 and 2, A/44/475)

AGENDA ITEM 142: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (A/44/73-S/20381, A/44/75-S/20388, A/44/77-S/20389, A/44/123-S/20460, A/44/465)

1. Mr. MIKULKA (Czechoslovakia), referring to articles 13, 14 and 15 of the draft Code of Crimes against the Peace and Security of Mankind, adopted provisionally by the Commission, said that in general Czechoslovakia approved of the approach taken towards the determination of a threat of aggression in article 13, consisting in the enumeration of the constituent elements of the act capable of verification. Nevertheless, the link with article 12 should be strengthened, and the fact that the Security Council was entitled to determine, on a mandatory basis, the existence of any threat to the peace must be duly reflected in the text.

2. Article 14 was also well founded. The dividing line between acts of intervention and other types of actions had been drawn accurately. Acts of intervention did not necessarily involve the use of armed force, but they had a serious effect on the free exercise of a State's sovereign rights. The inclusion of article 15, which was based on the relevant provisions of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, was also logical and deserved approval.

3. Unlike article 12, articles 13 to 15 did not contain provisions personalizing responsibility for the acts in question, which gave rise to interpretation difficulties and could even give the impression that the crimes were being dealt within the meaning of article 19 of the draft on State responsibility. Czechoslovakia had therefore welcomed the fact that the Chairman of the Commission had explained that the Commission had the intention to draft a common chapeau for all the crimes in the relevant chapter, attributing penal responsibility for the crimes to individuals.

4. On the issue of the gravity of crimes, which had been considered in depth by the Commission, Czechoslovakia, while accepting that not all violations of the law of armed conflicts necessarily had the character of crimes against the peace and security of mankind, doubted that the degree of gravity was the most suitable criterion for differentiation. The process of narrowing down the problem to the issue of gravity or the mass character of violations entailed a risk of overlooking the very nature of crimes that were characterized as crimes against the peace and security of mankind. The substance of such crimes could be fully disclosed only in the light of their interaction with the wrongful conduct of the State itself, whose consent - even if tacit - was the key to comprehension of the problem. Where there was no hope that a State would punish its nationals for their crimes, other members of the international community must take the place of the State in question. All reprehensible actions that must not go unpunished should therefore fall within the scope of the draft Code.

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(Mr. Mikulka, Czechoslovakia)

5. Czechoslovakia could accept the approach taken by the Special Rapporteur in response to the wishes of the majority of the Commission's members that consisted in drawing up a general definition followed up by an indicative list of war crimes.

6. The use of nuclear weapons would be a crime in virtually any circumstances, even if only because the use of such weapons would inevitably imply a series of war crimes, such as the mass annihilation of the civilian population and the destruction of property and of the environment.

7. Czechoslovakia shared the views expressed by the Special Rapporteur on the issue of crimes against humanity, and considered extremely pertinent the reference to the Memorandum by the British Military Government. The dividing line between such crimes and common crimes punishable only under national law was drawn more accurately than in the case of war crimes.

8. The approach taken by the Commission towards defining the crimes of genocide and apartheid - consisting in reproducing the provisions of the relevant conventions - was appropriate, as was the inclusion of the crime of slavery and other forms of bondage and forced labour analogous to slavery.

9. The problem of the forcible transfer of populations called for thorough and comprehensive study. Czechoslovakia was therefore surprised by the simplifying views expressed by some members of the Commission, who had tried to draw a parallel between the crimes of the Nazi régime and the transfer of the population of the countries occupied by the Allied Powers, which had been exceptional measures designed to maintain a lasting, stable peace.

10. Czechoslovakia shared the Special Rapporteur's view that attacks on individuals were not solely a matter of physical ill-treatment, but could also consist in humiliating or degrading acts. It further agreed that attacks on public or private property not justified by military necessity should be included among the crimes against humanity. The idea of including among crimes against humanity acts causing serious and intentional harm to the human environment also deserved attention.

11. It was too early to consider the issue of the implementation of the draft Code. The Commission should concentrate on the unresolved issues relating to definitions of crimes, and defer consideration of procedural issues to a later stage. Czechoslovakia wished to urge the Commission to continue its work on the draft Code on a priority basis, and believed that the corresponding item should be included in the agenda of the forty-fifth session of the General Assembly.

12. Mr. HAFNER (Austria), referring to the draft Code of Crimes against the Peace and Security of Mankind, drew attention to the confusion that could be caused by having two different articles with the same numbers; the Commission had provisionally adopted articles 13, 14 and 15, while the Special Rapporteur had submitted new articles 13 and 14. The articles in question should therefore be renumbered.

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(Mr. Hafner, Austria)

13. Austria wished to associate itself with the delegations that had endorsed the use of the qualification "serious" in relation to war crimes. If the definition included a reference to Additional Protocol I of 1977, account must be taken of the fact that part V, section II, of the Protocol distinguished between common breaches and grave breaches, because use of the criterion of gravity to characterize a breach would result in the exclusion of certain violations of the Protocol from the scope of the draft articles. In any case, in the English version the words "serious violation" should be replaced by the words "grave breach".

14. As to the definition of war crimes, Austria would prefer a combination of the first and second alternatives for article 13. The first alternative would not be clear enough for States that were not parties to the instruments referred to in the article, and the expression "laws or customs of war" would give rise to interpretation difficulties. On the other hand, both an indicative enumeration of war crimes and the restriction of the use of the expression "war crime" to the draft Code were certainly to be supported. The first paragraph might therefore read: "within the meaning of the present code, any grave breach of the rules of international law applicable in armed conflict constitutes a war crime". At the same time, the term "international conflict" should be defined more precisely for the purposes of the draft Code. A reference to the instruments referred to in the second pargraph of the first alternative might be helpful but should not prejudge the use of the expression "war or international conflict" in other contexts.

15. The structure for the enumeration of war crimes in draft article 13 (A/44/10, para. 140) was very attractive and deserved serious consideration. But the use of the expression "non-military targets" aroused serious conceptual doubts. On the other hand, it seemed appropriate to include attacks on the civilian population among the war crimes listed. Although the list of those crimes was not intended to be exhaustive, it would be useful if it singled out the crime that came before all others in article 85 of Additional Protocol I. Finally, concerning prohibited weapons, his delegation concurred with the view set forth in paragraph 131 of the Commission's report.

16. The distinction made between war crimes and crimes against humanity was justified. The interpretation of the word "humanity" in paragraph 152 of the Commission's report in the sense of "the human race" as a whole was acceptable, but it would be necessary to review the equivalent expressions to the English terms "mankind" and "humanity" in the other official languages.

17. In draft article 14, paragraph 1, the definition of genocide had to be brought into strict conformity with the Convention for the Prevention and Punishment of the Crime of Genocide. His delegation supported the formulation of that paragraph as it appeared in footnote 75 of the Commission's report, since it only reproduced article II of the 1948 Convention. Consequently, it was difficult to understand the opinion expressed in paragraph 160 of the Commission's report that the text, unlike that of the Convention, did not provide an exhaustive list.

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(Mr. Hafner, Austria)

18. He fully endorsed the inclusion of apartheid among the crimes against humanity, but thought that a more general formulation, from which the bracketed words "as practised in southern Africa" were deleted, would help to avoid the impression that the provision envisaged only that particular situation. The first alternative of the article on apartheid raised problems for States not bound by the International Convention on the Suppression and Punishment of the Crime of Apartheid, and its general reference to "the institution of any system of government based on racial, ethnic or religious discrimination" lacked the precision necessary for any legal rule. Consequently, his delegation favoured the second alternative of the article with the deletion of the words "as practised in southern Africa".

19. The provision on slavery proposed by the Special Rapporteur in draft article 14, paragraph 3, raised the more general problem of distinguishing between crimes against humanity and the violation of human rights and fundamental freedoms. It was essential to amend the provision's general reference to forced labour, because, for example, in its current form it was open to the interpretation that States which obliged practising lawyers to defend destitute persons before criminal courts without adequate remuneration were committing a crime against humanity, since that could be considered to be "forced labour" according to the jurisprudence of the human rights organs established under the European Convention on Human Rights.

20. His delegation welcomed draft article 14, paragraph 4, relating to the expulsion or forcible transfer of populations, but did not believe that there was any valid reason to restrict the scope of that provision to expulsion or forcible transfer from "occupied territories". It considered that the entire text needed further refinement.

21. Several problems were raised by draft article 14, paragraph 5, which concerned other inhuman acts, including the destruction of property. The intention of the formulation appeared to be to include only specific attacks on property in aggravating circumstances of a quantitative and qualitative nature. It remained to be clarified whether acts performed by private individuals should be included. That question would have to be examined in the context of the general structure of the draft Code, which seemed to exclude such an extension to the behaviour of private persons.

22. The provision contained in draft article 14, paragraph 6, coincided to some extent with article 19 of part one of the draft articles on State responsibility. His delegation wondered whether crimes against humanity should be tantamount to international crimes as defined in article 19 of the draft articles on State responsibility, or whether the former should be more restricted in scope than the latter. It would be appropriate to take into account the arguments put forward by the representative of Denmark on behalf of the Nordic countries concerning the relationship between crimes against humanity and international crimes related to State responsibility.

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(Mr. Hafner, Austria)

23. The accuracy of the formulation of draft article 14, paragraph 6 also aroused certain doubts. In particular, the definition of a vital human asset might be open to very subjective and divergent interpretations.

24. The second part of the report was devoted to articles which the Commission had provisionally adopted. Draft article 13 dealt with the threat of aggression. His delegation was generally in favour of the existing text, but still believed that it was necessary to formulate the article as precisely as possible. The use of the word "measures" in the text seemed to be too restrictive, since it might exclude acts which the article should address. To take an example from the nineteenth century, the German Chancellor Bismarck had inspired a press campaign in 1875 that had induced other States to consider that there had been a threat of war. The crisis had been overcome only when Bismarck himself had insisted that it had been a false alarm. That attitude had certainly constituted an act that had made another State believe that force would be used against it; it was therefore advisable to redraft the provision on the "threat of aggression" in a way which would cover such cases as well.

25. His delegation had reserved its position regarding draft article 14, on intervention. The Commission had decided to make use of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. It had been confirmed in that attitude by the Judgment of the International Court of Justice in the case of Nicaragua versus the United States of America. However, the Commission had reproduced only the first part of the definition contained in the Declaration, evidently proceeding from the view that the other acts covered therein would not constitute crimes against humanity. The current definition in draft article 14 must not try to define intervention for the purposes of general international law. It should be borne in mind that formulations elaborated by the Commission, even on a provisional basis, had a certain impact on the shaping of international law.

26. Mr. SUN Lin (China) said that discussion of the topic of the draft Code of Crimes against the Peace and Security of Mankind at the latest session of the International Law Commission had focused mainly on certain fundamental issues concerning war crimes and crimes against humanity. In proposing the new articles 13 and 14 and in the commentaries thereto, the Special Rapporteur had provided an excellent basis for the Commission's consideration.

27. China was in favour of a general definition of war crimes, followed by an indicative list of acts that constituted such crimes. That would avoid the practical difficulties involved in drawing up an exhaustive list and would leave room for new crimes to be added to the list with the future development of international law. In addition, judicial organs would get clear guidance for the implementation of the Code.

28. The concept of gravity should be introduced into the definition of war crimes, because only those acts that were grave violations of the rules of war should fall within the ambit of the Code. Of course, minor violations of the rules of war

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(Mr. Sun Lin, China)

should give rise to responsibility under the applicable international law, on the basis of their nature and degree of gravity. The concept of gravity itself should be based on the nature rather than on the consequences of the crime, as had been done in the four Geneva Conventions and the Additional Protocols thereto. His delegation preferred the expression "the rules of international law applicable in armed conflicts" to the expression "the laws or customs of war". Consequently, it favoured the Special Rapporteur's second alternative of article 13 on war crimes.

29. With regard to article 14, it was necessary first to establish a general definition of crimes against humanity, which would then be followed by a list of concrete acts. Because of the complexity of the concept and the continual development of international practice, the elaboration of a definition of crimes against humanity and a list of concrete acts would meet with considerable difficulties. Genocide and racial discrimination undoubtedly constituted crimes against humanity, whatever the intention or motive of the perpetrator might be. That was confirmed by the Convention for the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of Apartheid, and other international instruments. On the other hand, "forced labour", the "forcible transfer of populations" and harm to the human environment should not be characterized indiscriminately as crimes against humanity regardless of the intentions or motives involved. For example, if "forced labour" was imposed not on racial or religious grounds, but in the interest of society and in conformity with normal judicial or other lawful procedures, it should by no means be regarded as a crime against humanity. Similarly, the transfer of some inhabitants from certain areas, which was decreed by a State through normal procedures for reasons of public or social interest, should be regarded as a measure beneficial to society. The key point was to distinguish between different sets of circumstances and clearly draw the line between legal and illegal conduct. The provisions of article 14 lacked sufficient precision and therefore needed improvement.

30. His delegation welcomed the fact that the Special Rapporteur had for the first time included international drug trafficking in the list of crimes punishable under the Code. As had been pointed out in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, illicit drug trafficking was an international crime which endangered the peace and sovereignty of States and adversely affected the normal order of societies. The Convention had also established universal jurisdiction over that crime and imposed on States the obligation of "extradition or prosecution". His country had signed and ratified the Convention.

31. With regard to article 13, entitled "Threat of aggression", the elements constituting a threat should be clearly stipulated in the text, in order to facilitate its implementation by judicial bodies. One indispensable element was the intention of the act. The threat of aggression could take different forms, such as a declaration, communication or demonstration of force. Like many other crimes, the threat of aggression must simultaneously embody the two elements of

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(Mr. Sun Lin, China)

intention and action. Of course, there should be objective criteria by which to judge the existence of the intention of the threat of aggression. The current text was inadequate, and clearer terms were needed.

32. The main problem with regard to article 14, on intervention, was whether the word "armed" should be introduced in order to qualify the crime of intervention. In international practice, there were numerous examples of intervention in the form of subversion without the use of force. Accordingly, the word "armed" which appeared in brackets in the draft article should be deleted. Similarly, it was not necessary to retain the word "seriously" in the text, because the activities to which the article referred were in themselves serious enough to constitute punishable crimes.

33. His delegation approved the inclusion of colonial domination and other forms of alien domination in the draft Code. The text of article 15 was basically acceptable.

34. His delegation hoped that the Committee would recommend to the General Assembly that it should request the Commission to give the necessary priority to the consideration of the topic, so that the draft Code could be completed at an early date.

35. Mr. HILLGENBERG (Federal Republic of Germany) said that the Commission had considered the draft Code of Crimes against the Peace and Security of Mankind on the basis of the seventh report of the Special Rapporteur. After adopting general principles and defining the concept of aggression (art. 12), the Drafting Committee had submitted definitions of the concepts of threat of aggression (art. 13), intervention (art. 14) and colonial domination and other forms of alien domination (art. 15).

36. His delegation had fundamental doubts concerning the method by which international obligations of States were indiscriminately transformed into criminal acts. International law lacked sufficiently precise definitions of punishable acts. If national courts were assigned the responsibility of adjudicating such acts, States might be inclined to impose their own interpretations of international law.

37. It was not enough to define reprehensible conduct in vague terms and leave the rest in the hands of criminal courts. Accordingly, a code of crimes against the peace and security of mankind would require the establishment of an impartial and objective organ in the form of an international criminal court.

38. The Commission should confine itself to offences which in international practice were unambiguously regarded as war crimes or crimes against humanity. Only serious violations of the laws or customs of war constituted war crimes. That followed, inter alia, from the fact that the Geneva Conventions of 1949 and the Additional Protocols of 1977 referred to grave breaches. It might be asked what the draft Code was really intended to accomplish, since the obligation to prosecute

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(Mr. Hillgenberg, Federal Republic of Germany)

criminal offences was already embodied in the aforementioned Conventions. The indicative list defining the category of serious violations which the Special Rapporteur had included in his seventh report made ambiguous his reference to the applicable rules and generally recognized principles of international law (A/CN.4/419, p. 3, second alternative). He questioned the value of a list as such. An attempt had been made in an additional paragraph to deal with the questions of the use of weapons and the conduct of hostilities in a way that would not do justice to the complexity of the issue.

39. The proposed definition of crimes against humanity did not present any problem, inasmuch as it was based on existing norms, particularly with regard to the crimes of genocide, slavery and forced labour. The question arose as to whether it might not be appropriate to work out a comprehensive definition of criminal acts systematically carried out against populations, groups or minorities. Genocide and expulsion, persecution and the systematic destruction of property clearly fell within the scope of such a definition. However, such a list would by no means be exhaustive.

40. With regard to the definition of "threat of aggression" in article 13, his delegation's previous remarks, concerning the responsibility of the Security Council to determine the existence of an act of aggression, and the impossibility of submitting such questions to the criminal courts of any country, still applied. In addition, it should be pointed out that the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the 1974 Definition of Aggression and General Assembly resolution 42/22 of 18 November 1987 on the enhancement of the effectiveness of the principle of refraining from the threat or use of force in international relations did not refer to the concept of "threat of aggression".

41. The definition of the concept of threat which appeared in the commentary was excessively broad. Moreover, the formulation used did not clearly define the form of injustice inherent in a State's assertion of its own interests by attacking the independence of other States. In that case, too, it would be helpful to have recourse to the doctrine and practice of States. The commentary contained only generalities. Moreover, the last sentence showed that the Commission was not sure whether the article reflected its intentions.

42. There were precedents for article 14 on intervention, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, in the definition of aggression adopted by the General Assembly and in the Judgment of 27 Jun 1986 of the International Court of Justice. Article 14 adopted a wide definition of the concept of intervention, but added some restrictions. According to the commentary, the purpose had been to avoid too broad a definition of offences and instead to enumerate activities that constituted intervention. That was a praiseworthy approach because it showed that the elements in a definition of criminal offences were different from those that came into the rules of

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(Mr. Hillgenberg, Federal Republic of Germany)

international law. However, he was still doubtful that individual acts constituting offences had been defined with sufficient precision.

43. The ban on the establishment or maintenance by force of colonial domination or any other form of alien domination, established in article 15, was concerned in part with historical facts. The forcible denial of the right of peoples to self-determination, however, continued to be a basic form of injustice which was rightly condemned by the community of nations. None the less, his delegation considered it unacceptable to attempt to redefine that basic right by representing certain forms of oppression as less reprehensible than others or by including the violation of economic interests. For that reason, it could not support the remarks in paragraph (3) of the commentary on the expression "any other form of alien domination". In that context as in others, his delegation opposed any attempt to advance political objectives indirectly by way of the definition of crimes. The Commission itself had on other occasions been of the same opinion.

44. His Government would study the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The preliminary views expressed in the current debate showed that there were still divergences. It would be best to pause for reflection, analyse what had been said and take up the matter the following year, preferably in informal consultations in the Committee, without rushing into a premature decision. His delegation still had problems with some important elements of the draft and felt there was still no basis for consensus. The Committee should therefore examine the draft very closely and draw up recommendations. In the mean time, Governments could study the draft and submit their comments as to its further treatment.

45. His delegation had misgivings on some points in the draft. In particular, the right to inspect the diplomatic bag in cases where its misuse was suspected had been deleted from article 28. The Commission had not accepted the compromise wording proposed by the Federal Republic of Germany for the second paragraph. The text adopted by the Commission made only the consular bag subject to inspection, as already established in article 35 of the 1963 Vienna Convention on Consular Relations.

46. His delegation had repeatedly expressed the view in the Committee that the main purpose of the draft articles should be to close gaps in the Vienna Conventions without affecting the substance of article 27 of the 1961 Vienna Convention on Diplomatic Relations or of article 35 of the 1963 Vienna Convention. The draft was precise in that respect but some its provisions were impracticable, such as the proposed immunity of the courier from civil jurisdiction (art. 18, para. 2) and the inviolability of temporary accommodation (art. 17). Moreover, it was going too far to equate privileges in the transit State with those in the receiving State, as did articles 13 to 21. The courier's privileges and immunities in the transit State should be based strictly on the principle of functional necessity.

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(Mr. Hillgenberg, Federal Republic of Germany)

47. On other points, the draft articles accorded with the views expressed by his delegation. Article 27, for instance, specifically established that the dispatch of the diplomatic bag should not be unduly delayed by bureaucratic obstacles. Furthermore, article 28, paragraph 2, contained an important clarification: not only was official correspondence inviolable, as established in the Vienna Convention on Diplomatic Relations, but the diplomatic bag as a whole. That precluded any possible misinterpretation based on the fact that the 1961 Convention mentioned official correspondence but not other articles intended for official use by a mission.

48. Mr. CALERO RODRIGUES (Brazil) reiterated his delegation's doubts about the possibility of achieving success in drafting a Code of Crimes against the Peace and Security of Mankind. The work of the Commission and the accomplishments so far only increased its skepticism. It was becoming increasingly clear that the most that could be expected was a revised and slightly improved version of the document that in 1954 had inappropriately been called a Code. The best would be for the Commission to complete the text on the understanding that the result would be a preliminary draft which would only serve as a basis for a more complete and meaningful document.

49. An analysis of the matter indicated that the crimes dealt with in articles 13, 14 and 15 adopted by the Commission, namely, the threat of aggression, intervention and colonial and other forms of alien domination, respectively, were crimes that could only be committed by States. The link between the act of the State and the criminal responsibility of the individual did not appear in the texts. A provision to that effect was indispensable, because without it the meaning of the draft articles was difficult to grasp.

50. With regard to article 15, the strict formulation adopted by the Commission was adequate. The crime consisted in the establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations. Colonial domination was one example of such domination. The special mention was justified because colonial domination, although a shadow of what it had been, was still to be reckoned with. The only point that probably required further consideration was the relationship between the situation (the domination) and the criminal acts (its establishment or maintenance).

51. His delegation also generally approved of draft article 14. However, the reference to intervention could be dispensed with. Intervention was a wide concept and the draft article dealt with it only in part. Since the general concept of intervention and that limited concept did not coincide, the use of the word "intervention" could well be avoided. It went without saying that fomenting subversive or terrorist activities should indeed be considered a crime against peace (and that included organizing, assisting or financing such activities or supplying arms for them). However, the last part of paragraph 1 of article 14

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(Mr. Calero Rodrigues, Brazil)

("thereby [seriously] undermining the free exercise by that State of its sovereign rights") was superfluous. The crime should be characterized by the objective description of the acts.

52. Article 13 established the threat of aggression as a crime. As it had stated before, his delegation was not convinced that the threat of aggression should be considered a crime under the Code. Wrongful acts of a State entailed the responsibility of that State. Only in some cases did the seriousness of the act and its particular characteristics call for the attribution of responsibility to individuals. The threat of aggression was not one of such cases. Furthermore, the Charter of the United Nations did not refer expressly to threats of aggression but did mention threats to peace. Obviously a threat of aggression was a threat to peace. According to the Charter, it was for the Security Council to determine the existence of any threat to the peace and to decide on the measures to be taken to maintain international peace and security. That brought into play the general rules of State responsibility, including the obligation of reparation. Accordingly, it was not necessary to invoke the exceptional rules of criminal international law calling for individual responsibility. His delegation therefore believed that article 13 should not be included in the Code.

53. With regard to the questions of war crimes and crimes against humanity, the new versions of the articles did not bring in significant new elements. Accordingly, he maintained the opinions stated by his delegation during the Sixth Committee's 1986 debate on war crimes and crimes against humanity.

54. Mr. TÊTU (Canada) said that the elaboration of a Code of crimes against the peace and security of mankind was a complicated task. It dealt with the worst type of offence for which there was individual criminal responsibility, for example, genocide and the most serious war crimes, together with crimes against international peace and security. The fact that those offences were not contained in an international convention or clearly established group of conventions gave rise to complications; the concepts had evolved over many years and were reflected in both conventional and customary international law. Moreover, they continued to evolve, to which should be added the fact that various national and ad hoc tribunals had prosecuted those types of crimes, creating a set of precedents.

55. The draft articles produced by the International Law Commission and the accompanying commentaries provided a useful and fascinating review of the subject. There were several instruments relating to the matter in international law, and the Code should list the offences included in the major accepted international instruments. To those should be added the draft articles elaborated by the Commission, such as the obligation to prosecute or to grant extradition, as well as the traditional safeguards. That would provide the international community with a useful and practical guide. However, to go beyond such an effort would involve many more years of work and could not be expected to produce a Code that would be broadly accepted in the short term. For example, some offences, such as attacks on the human environment, inhuman acts including destruction of property and international trafficking in narcotic drugs had not yet achieved the status of

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(Mr. Têtu, Canada)

crimes against humanity in any broadly accepted international instrument. Their consideration should be kept separate in order to facilitate the work on the other parts of the Code.

56. The listing of crimes against peace was a particularly delicate aspect since it involved State actions contrary to the United Nations Charter for which persons bore individual responsibility. The classic offence in that connection was waging a war of aggression or a war in violation of international agreements. In 1974, the General Assembly had adopted its definition of aggression. The application of penalties to individuals with respect to wars of aggression had proved a difficult undertaking; to attempt to apply such penalties to categories such as the threat of aggression, intervention, colonial domination and other forms of alien domination would also be extremely difficult. The latter concepts were perhaps better left to the realm of State responsibility, where mechanisms existed, especially in the Security Council, to deal with such breaches.

57. With reference to the type of tribunal that would have jurisdiction in the matter, his delegation recalled that decisions of the Security Council under Chapter XII of the Charter were binding upon Member States and, presumably, on organs of those States, including national courts. However, if the international community reached agreement on the provisions of a Code, most would agree that an international criminal court or other form of international jurisdiction would be the best means of implementing and applying such an instrument. The question arose, therefore, of the relationship between the international court or jurisdiction and the Security Council, especially in respect of application and interpretation of the Charter. Although his delegation recognized the need for the independence of any international court from political organs, it also recognized the need to ensure consistency and credibility in interpreting and implementing the Charter. That problem would be particularly acute in the case of such crimes as aggression.

58. Mr. ROBINSON (Jamaica) said that, as it had been decided that the Code of crimes against the peace and security of mankind should cover only the most serious international offences, the violation in draft article 13 must also be serious. In that connection, paragraph 102 of the International Law Commission's report referred to the opposition of some members to the introduction of the concept of gravity, pointing out that the concept was not a part of the laws of war and that a belligerent State was entitled to try members of the enemy's armed forces for any violation of the laws of war, even a minor one. However, what was certain was that belligerent States would still be capable of trying someone for committing a less grave offence, notwithstanding the fact that war crimes were defined in the Code as serious offences. In such a case, jurisdiction to institute such proceedings would emanate from the domestic law of each belligerent State and not from the Code. In that context, and although it might be recognized that domestic courts had exclusive or concurrent jurisdiction with an international criminal tribunal to deal with offences under the Code, the Code should include only the most serious international crimes. Furthermore, it was clear that the International Law

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(Mr. Robinson, Jamaica)

Commission would at some stage have to decide on the relationship between the Code and other instruments such as the four 1949 Geneva Conventions on the laws of war and their two 1977 Additional Protocols.

59. In his delegation's view, the term "laws or customs of war" was outmoded, and it therefore supported the second alternative "rules of international law applicable in armed conflict", which covered both rules based on customary international law and those based on conventional international law such as the four 1949 Geneva Conventions and their 1977 Additional Protocols. Moreover, the term "armed conflict" should be understood to cover not only international armed conflict but also, as mentioned in article 1 (4) of Additional Protocol I, situations in which people were fighting against colonial domination and alien occupation and against racist régimes in exercise of their right of self-determination.

60. Concerning the method of definition of a war crime, there had been much discussion of whether to use a general definition or an exhaustive, or merely illustrative, list which would inevitably be fast outstripped by the development of modern technology. In that connection, he preferred the second version of article 13 submitted by the Special Rapporteur, but considered that the element of intention, which was one of the requirements for regarding certain acts as war crimes, should be included in the section of the Code on general principles. Of course, there might be specific crimes for which intention would not be a requirement.

61. As the list of war crimes would arouse controversy, the definition of war crimes should be confined to paragraphs (a) and (b) of the second alternative of article 13, and paragraph (c) should be deleted. When it had considered the definition of jus cogens in article 50 of the draft articles on the law of treaties (A/6309/Rev.1), the Commission had been opposed to formulating a list of examples of jus cogens, because although such a list would have been merely indicative, misunderstandings might have arisen as to the position concerning other cases not mentioned in the article. With regard to article 13, even if the list was indicative, in practice it would be treated as exhaustive, particularly because it was a relatively long list of acts. Therefore, it should be left to the courts invested with jurisdiction to determine on the basis of the general definitions in paragraphs (a) and (b) what acts were war crimes. The courts would be helped by relevant case law, State practice and treaty law. In that context, the indicative list in paragraph (c) or a simplified version thereof should be transferred to the commentary to article 13; that would offer guidance to the courts as to the kind of act that constituted a war crime.

62. The list approach would be more appropriate for the definition of crimes against humanity, which, as they were not necessarily subsumed under the concept of war crimes, should be treated separately.

63. His delegation supported the inclusion of the crime of genocide as a crime against humanity, but a problem might arise for parties to those articles who were also parties to the 1948 Convention on the Prevention and Punishment of the Crime

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(Mr. Robinson, Jamaica)

of Genocide, because, whereas that Convention established an exhaustive list of acts constituting genocide, the draft Code only established an indicative list. If problems arose, the Code should prevail.

64. His delegation accepted the second alternative of the definition of apartheid in the second alternative of article 14. That alternative, while based on the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, did not make an express reference to it, thereby encouraging broader participation. But the phrase "as practised in southern Africa" should be deleted so that policies and practices of racial segregation would always constitute apartheid, however practised. Tribal and customary apartheid should not be included in the draft Code.

65. His delegation not only supported the inclusion of slavery in the list of crimes against humanity, but was also prepared to consider a definition of slavery wider than that of the 1956 Supplementary Convention. But consideration should be given as to whether such forms of slavery as debt bondage ought to be treated as crimes against humanity. Furthermore, more information was needed on "civic service", a feature of the economic life of some countries, to distinguish it from forced labour.

66. It was doubtful whether attacks on property met the criterion for a crime against humanity, i.e., a serious violation of rules of the international law applicable to armed conflicts. The Commission must resist the temptation to pick offences from the 1948 Geneva Conventions and their Additional Protocols and label them crimes against humanity when in fact they did not meet the test of being a serious violation of the rules of war.

67. Ecological crime in the form of serious and intentional harm to the environment should be included in the list of crimes against humanity. However, paragraph 6 of draft article 14 should be reformulated without the reference to "vital human asset"; damage to cultural property was already included in the draft Code, and it was therefore difficult to understand why that paragraph should cover anything other than the human environment.

68. His delegation agreed with the Special Rapporteur that international traffic in drugs should be treated as a crime against humanity and a crime against peace, although, given the nature of the crimes defined in the draft Code, only the most serious acts should be considered.

69. As far as the implementation of the Code was concerned, his delegation favoured the establishment of an international criminal tribunal. The idea of jurisdiction being given to national courts with multinational membership was unworkable, as was the use of national courts as courts of first instance with the right of appeal to an international tribunal. Instead, an international criminal tribunal with exclusive jurisdiction over Code offences should be created, or national courts and an international criminal tribunal should be invested with such

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jurisdiction, but not with the latter as an appellate body. His delegation preferred the first alternative, although, in the latter case, the Code would have to decide how the principle of non bis in idem would apply.

70. Mr. MONAGAS LESSEUR (Venezuela) preferred the second alternative of article 13 of the draft Code on crimes against the peace and the security of mankind, because it was more complete and precise than the first alternative in that it included in paragraph 1 the concept of gravity set forth in the 1949 Geneva Conventions and Additional Protocol I. Furthermore, the second alternative incorporated the modern concept of "armed conflict" instead of the term "war". Moreover, the reference in the second alternative to "rules of international law applicable in armed conflict", took into account both treaty law and common law.

71. The indicative list in paragraph (c) of the second alternative of article 13 must be improved; for example, the adjective "intentional" was used for certain crimes and not for others, a situation that must be rectified. It was also necessary to add other crimes, for example attacks against the civilian population, mistreatment or inhuman treatment inflicted upon prisoners of war, the deportation of defenceless persons and, in particular, the use of nuclear weapons, which, owing to its gravity, might be included in a separate article.

72. His delegation supported the proposal by the Special Rapporteur to differentiate between the concept of war crimes and that of crimes against humanity; however, if crimes against humanity were committed in time of war, they could be included in the category of crimes of war. The list of crimes against humanity in article 14 should be treated in a separate chapter, with articles for each of the crimes. A provision defining what was meant by a crime against humanity could head such a chapter.

73. Although the drafting on the crime of genocide was adequate, it was important to clarify the meaning and the scope of the expression "national group".

74. The second alternative of paragraph 2 of article 14 on apartheid was preferable, although the expression "as practised in southern Africa" should be deleted, because it restricted the scope of application of the article to a specific geographic area. Moreover, paragraph 2 (d) of the second alternative of article 14 should include all types of property and not just landed property.

75. He supported the inclusion in the Code, as a crime against humanity, of slavery or any other form of bondage, especially forced labour, the expulsion of populations from their territory, their forcible transfer or any serious and intentional harm to a vital human asset, such as the human environment. He also supported the provision referring to inhuman acts committed against any population, or against individuals on social, political, racial, religious or cultural grounds.

76. In conclusion, he said that the international traffic in narcotics should be characterized in the Code, as a way of strengthening the provisions of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

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77. Mr. GODET (Observer for Switzerland), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that the task of the International Law Commission was to draft sufficiently precise rules in accordance with the principle of nulla poena sine lege. Punishable conduct must be clearly defined, since precision and predictability were indispensable requirements of criminal law. Consequently, he supported the inclusion in the draft Code of provisions such as article 7 and article 8, although he felt that paragraph 2 of the latter article was insufficiently precise.

78. The fundamental idea underlying the Code was to declare certain conduct punishable under national or international jurisdiction, with the intention of increasing security and maintaining peace. That criterion was acceptable, but it nevertheless posed certain difficulties. Crimes against peace were, by definition, committed by States, and it was not certain that a breach of the rules obliging States to maintain peace was itself sufficient justification for the prosecution of individuals. The question also arose whether the treatment of certain acts of States as criminal might not lead, paradoxically, to a diminution of the international responsibility of the State. In his view, the relationship between State responsibility and individual punishment must be studied more closely.

79. The draft Code laid down that States parties should undertake to try or extradite an individual alleged to have committed a crime against the peace and security of mankind. Consequently, upon entry into force, the Code would institute a "universal jurisdiction", establishing the jurisdiction of the national courts and obliging States to co-operate in the judicial sphere. However, the question arose whether that undertaking at the national level ought to be backed up by the establishment of an international criminal court, as provided for in paragraph 3 of article 4. In principle, the idea was acceptable, provided that the jurisdiction of a court of that kind did not exclude the jurisdiction of the national courts, to the detriment of national prosecution efforts. The court might essentially function as an international court of appeal, or as a forum in which to resolve conflicts of jurisdiction between States. The problem was an extremely delicate one, on which the Swiss Observer Mission had not yet formed a final opinion. In any case, the question was by no means an urgent one, and must yield precedence to the definition of the crimes referred to in the draft Code.

80. The definition of aggression proposed was based on that contained in General Assembly resolution 3314 (XXIX), which was a text addressed to a political organ. Moreover, under Article 39 of the Charter of the United Nations, it was for the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression. Consequently, the problem was to determine whether a national judge was bound by the decision of the Security Council. Although in certain respects that might seem desirable, it was well known that the Security Council was sometimes rendered powerless by the exercise of the right of veto. Furthermore, the obligation for national courts to refer to the decisions of the Security Council would raise problems of sovereignty for countries that were not members of the United Nations. It was one thing for a national judge to decide to base himself on decisions taken by the Security Council; that he should have to do so, was quite another matter. All things considered, the Swiss Observer Mission

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(Mr. Godet, Observer, Switzerland)

considered that it would be better to delete paragraph 5 of article 12, which was printed within square brackets. Subparagraph (h) of paragraph 4 raised similar difficulties.

81. With regard to article 13, the Swiss Observer Mission wondered whether it was justifiable to include the threat of aggression as a separate crime in the draft Code. It was difficult to condemn when the threat had not been translated into action, or to distinguish the threat from the preparatory acts. Furthermore, as various delegations had pointed out, treatment of the threat of aggression as a crime might lead to more frequent recourse to force on the ground of self-defence. The question also arose whether the threats of aggression described in article 13 that did not lead to an act of aggression constituted sufficiently serious conduct to be considered a crime against peace. Consequently, the International Law Commission should continue to ponder whether it was appropriate to include the threat of aggression in the scope of application of the Code.

82. The main difficulty raised by article 14 was the definition of intervention. In that regard, it might be useful to refer to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)). As the International Law Commission pointed out in the commentary to article 14, intervention must include an element of coercion, thereby undermining the free exercise of sovereignty by the State. Nevertheless, only the most serious forms of intervention must be treated as a crime. Only coercion involving the use of armed force was sufficiently serious to constitute a crime against peace.

83. Article 15 condemned colonial domination imposed by force. There, too, the element of coercion was necessary if the offence was to be classified among crimes against peace. The Swiss Observer Mission did not consider that the concept of foreign domination should be taken to include so-called "neo-colonialism", which, while it was to be condemned from the political standpoint, was not a concept established in law. In any case, "neo-colonialism" was not always imposed by force, and often resulted from economic disparities between countries. Even colonialism was, strictly speaking, an imprecise legal concept. In that regard, the Swiss Observer Mission reminded the Committee that the work of the United Nations Conference on Succession of States in respect of Treaties had revealed the difficulty of establishing a strictly legal distinction between secession and the process of accession to independence by a former colony. Consequently, although colonialism was a recognized political concept, as was attested by the Declaration on the Granting of Independence to Colonial Countries and Peoples, its extension to the criminal sphere could run up against difficulties in application.

84. In conclusion, he informed the Committee that the Swiss Observer Mission would make available to anyone so desiring its written observations on the draft articles 13 and 14 contained in the seventh report by the Special Rapporteur.

The meeting rose at 12.25 p.m.

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