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SUMMARY RECORD OF THE 29th MEETING

Chairman: Mr. TUERK (Austria)

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

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

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

1. Ms. CHATOOR (Trinidad and Tobago) said that the elaboration of a draft Code of Crimes against the Peace and Security of Mankind reflected concern over the flagrant violations of internationally accepted norms by both individuals and States. The taking of hostages, assaults by mercenaries and terrorists, violence against internationally protected persons and the hijacking of civilian aircraft were examples of acts which caused suffering to innocent persons and damage to property, and which posed a serious threat to international peace and security.

2. The draft Code should be restricted to the most serious and unlawful activities which threatened the interests of mankind. Her delegation welcomed the decision by the International Law Commission to define and articulate each offence in a separate provision.

3. The definition of a war crime was fraught with difficulties. It would be useful to formulate a general definition, followed by an indicative list of war crimes which could be added to as circumstances changed, and to provide useful guidelines to domestic courts which would be called upon to enforce the law. It would also be useful to examine the feasibility of including in the Code penalties for ordinary breaches.

4. Her delegation supported the distinction between war crimes and crimes against humanity. While crimes against humanity should constitute a separate category of offences, consideration should be given to their inclusion in the category of war crimes when they were committed in time of war. It might be useful to enumerate the characteristics of a crime against humanity and to differentiate between "intention" and "motive". Her delegation supported the view, expressed by the Special Rapporteur in paragraph 156 of the Commission's report, that in the case of crimes against humanity, the motive was all the more unacceptable in that it attacked values involving human dignity.

5. Apartheid should be included as a crime against humanity and be dealt with separately, rather than incorporated in the more general term "racial discrimination". With regard to the proposed inclusion of harm to vital human assets such as the human environment, her delegation believed that much more research needed to be undertaken on the notion of "vital assets", since determining what was a "vital human asset" was very subjective.

6. Her delegation appreciated the Commission's decision to request the Special Rapporteur to prepare a draft provision on international drug trafficking as a crime against humanity. Such trafficking posed a serious threat to mankind because

(Ms. Chatoor, Trinidad and Tobago)

of its harmful effects on the health of individuals and on the established order of countries. Her delegation also supported the Special Rapporteur's decision to deal with the question in two provisions, namely, under the heading of crimes against peace and under that of crimes against humanity.

7. Her delegation supported the establishment of an international criminal court which would have jurisdiction over individuals and entities. The jurisdiction of such a court would be derived from its own statute. Judges could be appointed on the basis of their moral standing, their legal qualifications and their status as representatives of the world's legal systems. The Code would be less open to varying interpretations when applied by such a body. An international criminal court need in no way undermine the sovereignty of any State or minimize the primary role of its own national judicial system.

8. There were already certain offences which could be the subject of international criminal jurisdiction. Activities against the safety of diplomats and other internationally protected persons, torture and genocide could be considered offences against the peace and security of mankind.

9. Her delegation welcomed the provisional adoption by the Commission at its forty-first session of draft article 13 on the threat of aggression, draft article 14 on intervention and draft article 15 on colonial domination and other forms of alien domination. There were often more subtle forms of influence or control than armed intervention. The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, adopted by the General Assembly at its twentieth session, stated, inter alia, that no State had the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, were condemned.

10. Mr. BELLOUKI (Morocco), referring to the draft Code of Crimes against the Peace and Security of Mankind, noted that the International Law Commission had adopted provisionally at its forty-first session three draft articles, with their commentaries, on the threat of aggression (art. 13), intervention (art. 14) and colonial domination and other forms of alien domination (art. 15).

11. With regard to the threat of aggression, the objective element must be the key to the proposed text. With regard to intervention, his delegation agreed with the Commission that the element of coercion was fundamental. That element was obvious when force was used, in which case attenuating circumstances should not be taken into account. The draft article on colonial domination and other forms of alien domination reflected an established principle: the inadmissibility of attempts against the right of self-determination.

12. In his seventh report, the Special Rapporteur had given a general definition of war crimes, followed by an indicative list. The text of the new second

(Mr. Bellouki, Morocco)

alternative represented a compromise, in that it took into account the evolution of international law by referring to the "rules of international law applicable in armed conflict". The proposed list of crimes covered a wide range of reprehensible acts but omitted any explicit mention of the use of nuclear weapons, which had all the characteristics both of a war crime and of a crime against humanity.

13. Concerning crimes against humanity, the Special Rapporteur had proposed a draft article which included the following crimes: genocide, which clearly deserved its characterization as a crime against humanity, and apartheid, in respect of which his delegation preferred the second alternative proposed by the Special Rapporteur. The draft should draw its inspiration from the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, without specifically mentioning it.

14. With regard to slavery, other forms of bondage and forced labour, there was no question that slavery and the slave trade were serious crimes under international law. The proposed text should be expanded to cover that phenomenon in all its manifestations.

15. With regard to the expulsion or forcible transfer of populations and related crimes, his delegation supported the distinction made between population transfers for humanitarian reasons and transfers covered by the proposed text.

16. In referring to other inhuman acts, including the destruction of property, the Commission was seeking to protect human beings from unnecessary cruelty. The prohibition must, in particular, cover property which formed part of the common heritage of mankind.

17. The draft text on harm to vital human assets such as the human environment reflected the emergence of environmental crime as a crime against humanity. Developing countries were often victims of that crime.

18. His delegation welcomed the general agreement reached in the Commission to qualify international traffic in narcotic drugs as a crime against humanity, given its detrimental effects on the health and well-being of mankind as a whole. The legal means available at both the domestic and international levels to combat that crime must be strengthened, especially in view of the fact that drug traffickers had established links with other criminals such as terrorists and mercenaries.

19. That situation prompted consideration of the inclusion of mercenarism as a crime against the peace and security of mankind, especially in view of the imminent adoption of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

20. The creation of an international criminal court was an idea that required careful thought and a clear analysis of the environment in which the court would function. The draft Code raised a number of concerns, but his delegation was convinced that the Special Rapporteur, in communication with his colleagues of the

(Mr. Bellouki, Morocco)

International Law Commission and the representatives of the Sixth Committee, would be able to eliminate its controversial elements.

21. Mr. MIRZAEE (Islamic Republic of Iran), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that war had always been an undesirable phenomenon. History had shown that avoiding war and achieving peace had invariably been a major problem for mankind. In the twentieth century, the international community had outlawed war of aggression by adopting a number of legal instruments. Some of those who had been found guilty in the First World War had been prosecuted and punished, and the idea had been given further impetus after the Second World War by the Charter and judgements of the Nürnberg Tribunal.

22. By mandating the International Law Commission to elaborate a draft Code of Crimes against the Peace and Security of Mankind, the international community had affirmed the desire to set up a permanent judicial mechanism for taking action against those who breached the peace and resorted to war, violated internationally accepted norms of war and committed crimes against humanity.

23. His delegation urged the Commission to deal with the topic as a matter of priority and hoped that the first reading of the draft Code would be completed by 1991.

24. The easing of international and regional tensions had created favourable conditions for international co-operation in a number of fields. The draft Code under discussion could become a vital instrument for preventing the use of force in international relations. The Code of Crimes could be a suitable way of strengthening peace and security in the world.

25. The Commission had provisionally adopted three new articles: article 13 (Threat of aggression), article 14 (Intervention) and article 15 (Colonial domination and other forms of alien domination).

26. His delegation shared the view of many members of the Commission that violations of the laws of war must be of a very serious nature to be regarded as a crime against the peace and security of mankind. That approach was in conformity with the existing definitions of war crimes in articles 146 and 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and with article 85 of Additional Protocol I.

27. In the case of certain crimes, for example attacks on persons or property, the criterion of their gravity might be required for them to be included in the list of war crimes, but in other cases, such as the use of nuclear weapons, it did not apply. The use of nuclear weapons must be the subject of a separate article in the draft Code.

28. His delegation preferred the use of the phrase "rules of international law applicable in armed conflict" to "laws or customs of war", because it covered the struggle of peoples against colonial domination, foreign occupation or racist régimes in the exercise of the right to self-determination.

(Mr. Mirzaee, Islamic Republic of Iran)

29. With regard to the method for defining war crimes, his delegation supported the idea of a general definition followed by the indicative list of war crimes.

30. The same approach should be followed in defining all three categories of crimes that were to be incorporated in the draft Code.

31. His delegation was grateful to the Commission for the attention it had given to the proposal of the Islamic Republic of Iran to consider the inclusion of the use of chemical weapons in the draft Code and welcomed paragraph 131 of the report of the International Law Commission (A/44/10), which referred to the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.

32. His delegation had supported on previous occasions the inclusion of the use of nuclear weapons in the list of war crimes because of the disastrous consequences thereof. Although the question had strong political implications, the Commission should assume its responsibility to contribute to the codification and progressive development of international law.

33. His delegation supported the inclusion of the crime of genocide in the list of crimes against humanity and agreed with the Special Rapporteur on preparing a non-exhaustive list of acts based on the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. As to the inclusion of the problem of apartheid, his delegation preferred the second alternative presented by the Special Rapporteur.

34. His delegation welcomed the agreement reached in the Commission to include the crime of slavery in the list of crimes against humanity. But, as had been pointed out by the Special Rapporteur, the inclusion of other forms of bondage required further study. The inclusion of the expulsion of populations in the list of crimes against humanity also had his delegation's support. His Government agreed with the Special Rapporteur that a distinction should be made between transfers for humanitarian reasons and the transfer referred to in the draft Code, which was an inhuman act that should be included among the draft articles.

35. His delegation supported the inclusion of narcotic drugs in the Code of international trafficking and looked forward to the preparation of a draft on that topic by the Special Rapporteur. It also thought that the Commission should take into account the results reached during consideration of the topic, which had been assigned to the Sixth Committee under a new item.

36. The Commission had preferred to limit implementation of the draft Code to the criminal responsibility of individuals; such implementation should not be difficult. The Code could be implemented through national courts, either by trial of the alleged criminals in the States where they were found or through their extradition to the States of origin or to the States in which the crimes had been

(Mr. Mirzaee, Islamic Republic of Iran)

committed. In such circumstances it might be useful to establish an international court. For example, in a case where a State was not willing either to try or to extradite the alleged criminal, it might submit the case to the international court. In other words, so far as the criminal responsibility of individuals was concerned, the international court would function in parallel with the national courts, but not as an appeal court for reviewing the decisions of national courts, which would be at variance with the sovereignty of States.

37. The question as to whether individuals could really commit crimes against the peace and security of mankind must be addressed. Crimes such as aggression, threat of aggression, intervention, colonial domination and the use of nuclear weapons could be committed only by States or individuals who abused State authority. In such cases, both the States and the individuals should be held responsible.

38. His delegation had participated in the debate on the topic of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier in previous years and would therefore confine itself to some general remarks. The draft articles were the result of the Commission's efforts to harmonize and unify the existing régimes based on the Vienna Conventions and to develop specific and more precise rules for situations not covered by existing conventions. The work of the Commission was an appropriate response to the requirements of the day. With regard to the forum for adopting the draft articles, his delegation supported the convening of an international conference which would provide an opportunity for participation by international organizations and for completing the draft articles. As to the venue and date of the conference, his delegation was flexible and would go along with the majority but, given the precedents, it would be preferable to adopt the convention in Vienna.

39. Mr. SOTIROV (Bulgaria), referring to the draft Code of Crimes against the Peace and Security of Mankind, recalled that 50 years had elapsed since the beginning of the Second World War, the most destructive war in the history of mankind. That conflict had given rise to new types of crimes, which were set forth in a series of international legal instruments constituting the legal basis of the relevant contemporary international law. Clearly, the destructive and inhuman character of that war had led the General Assembly to include in the mandate of the Commission the task of preparing the draft Code.

40. Eliminating the danger of nuclear war was of primary importance for the international community and the United Nations. The elaboration and implementation of the draft Code would constitute a step in that direction. The draft Code would become an important element in the United Nations system for maintaining international peace and security. For all those reasons, its elaboration was of great political, legal and moral importance.

41. War crimes were one of the most important groups to be included in the draft Code. His delegation fully supported the Special Rapporteur in his endeavour to include the concept of gravity in the definition of war crime. It supported the second alternative of article 13 on war crimes and fully supported the view

(Mr. Sotirov, Bulgaria)

expressed by the German Democratic Republic in that respect. Both alternatives were general definitions of war crimes. It was necessary to include an indicative list of war crimes after the general definition and the list proposed by the Special Rapporteur was a good basis. He reaffirmed the position of Bulgaria that the use of weapons of mass destruction and especially nuclear weapons should be included in a separate article. Given its importance, that crime should be placed at the top of the indicative list.

42. Referring to crimes against humanity, his delegation welcomed the inclusion of genocide and apartheid as two separate crimes. It was justifiable to place those crimes at the beginning of draft article 14 because of their inhuman and degrading character. As stated in paragraph 159 of the report of the Commission, genocide might be regarded as the prototype of a crime against humanity. As for the crime of apartheid, his delegation would prefer the second alternative of paragraph 2 in draft article 14. Paragraph 3 as a whole was acceptable; nevertheless, his delegation had doubts as to the appropriateness of defining slavery alongside forced labour. His delegation supported the broad definition of slavery given in the Supplementary Convention of 7 September 1956, on the Abolition of Slavery, of the Slave Trade and Institutions and Practices Similar to Slavery. It also welcomed the inclusion of the crimes enumerated in paragraph 6 of draft article 14. The explicit reference to the human environment was of utmost importance given the seriousness of the problem. The wording of that paragraph should be brought into line with that of article 19 in the first part of the draft article on State responsibility and article 55 of Additional Protocol I to the 1949 Geneva Conventions. A good example of the great importance attached by Bulgaria to that issue was the meeting on the protection of the environment in progress at Sofia.

43. His delegation was satisfied with draft articles 13, 14 and 15 on threat of aggression, intervention and colonial domination and other forms of alien domination, respectively. In regard to article 13, the preparation of a separate article for threat of aggression was welcome. Nevertheless, the text needed further improvement as the element of threat of aggression was not defined with sufficient precision. It was also necessary to improve the relationship between articles 13 and 12. His delegation favoured deletion of the word "armed" placed in square brackets in paragraph 1 of article 14. If that word was kept, the article would not cover the other forms of intervention which were equally efficient, especially those involving economic measures. In that respect, he supported the views reflected in paragraph (6) of the commentary on that article.

44. Bulgaria supported the decision of the Commission to request the Special Rapporteur to prepare a draft provision on international drug trafficking for its next session and hoped that the discussion on new agenda item 152 would provide the Commission with enough material for its deliberations on that matter. It also supported the decision of the Commission that each crime should be the subject of a separate article.

45. Implementation of the draft Code was of great importance. His delegation, together with others, considered that it would be premature for the Commission to

(Mr. Sotirov, Bulgaria)

consider the question of setting up an international criminal jurisdiction for individuals and that priority should be given to speedy completion of the definition of crimes. In conclusion, the topic should be considered by the Commission as a matter of priority at its forty-second session, and be included as a separate item on the agenda of the forty-fifth session of the General Assembly.

The meeting was suspended at 11 a.m. and resumed at 11.20 a.m.

46. Mr. VAN DE VELDE (Netherlands) said that the draft Code of Crimes against the Peace and Security of Mankind was an attempt to define criminal offences of a particular nature, in terms of gravity and of the status of the offender, but the offences still fell within the realm of criminal law. Although the purpose was to protect the peace and security of mankind, the offences would always, with the possible exception of those affecting the environment, be committed in respect of certain persons or groups of persons; if that were so, there was no obvious reason not to entrust implementation of the Code to national criminal law systems, acting where necessary through international co-operation (for example, in the case of extradition). In fact many of the crimes deemed fit for inclusion in the draft, such as genocide, fell within the jurisdiction of national courts. The same applied to certain crimes which the Commission had decided not to include on the list, such as mercenarism, hijacking and the taking of hostages. In view of the tremendous difficulties to be dealt with in order to establish an effective international criminal jurisdiction, and given the absence of a truly convincing argument to do so, it would be preferable for the Commission to concentrate on the substantive provisions of the Code. In order to ensure uniform application of its provisions, consideration should be given to devising a mechanism for introducing into domestic criminal proceedings a truly international legal opinion on them. It was, however, still premature to deal with that aspect.

47. With reference to draft articles 13, 14 and 15, regarding threat of aggression, intervention and colonial and other forms of alien domination respectively, his delegation endorsed the criteria applied by the Commission regarding the serious nature of the offence. Nevertheless in the case of draft article 12, on aggression, the question arose as to whether the definitions of offences were sufficiently precise for them to be applied in criminal proceedings. As to threat of aggression, it might be useful to compare it with the concept of threat as it appeared in some treaties drawn up in connection with terrorism, such as the conventions on hijacking and the taking of hostages. Generally speaking, those conventions employed the concept of threat both as a secondary and separate offence and as an element of the primary offence in order to describe an activity which was aimed at achieving a prohibited goal. Those precedents served to illustrate that criminal law was not so much geared to combat threats as isolated phenomena, but rather to prevent them, or to punish the perpetrators of threats in order to prevent the prohibited goal from being achieved. In the current case, the prohibited goal was not aggression as such, as aggression was already illegal under the Code, but rather another goal that the threat of aggression sought to achieve, namely, to force the threatened State to follow or avoid a certain line of action. It could be argued that that was implicit in the text of draft article 13, since

(Mr. van de Velde, Netherlands)

paragraph 3 of the relevant commentary stated that the threat was that the State should believe that force would be used against it if certain demands were not met. If that was so, it would certainly be better to say so clearly in the definition of the crime. His delegation agreed with the members of the Commission who had felt that a national court would not be free to consider allegations of the crime of aggression or threat of aggression in the absence of any consideration or finding by the Security Council.

48. His delegation would be in favour of including the bracketed words in draft article 14 which had been adopted provisionally by the Commission, although, for the purposes of criminal justice, that draft article gave a definition of intervention that was more restrictive than that given in General Assembly resolution 2625 (XXV). In that context, and for the purposes of instituting criminal proceedings, it was not possible clearly to define concepts such as "subversive activities" or "economic coercive measures". Including, for instance, the Concept of economic coercion into the concept of intervention would require a clear-cut definition of the extent of sovereign rights of States in that area which was clearly impossible. Interdependence was the answer. Moreover, economic relations between States were governed by a host of interrelated legal régimes which had to be taken into account when including any provision on intervention in the draft Code.

49. The inclusion of the crime of colonial domination in draft article 15 was fully justified; it would however be necessary to amend the English version slightly for purposes of precision, to read: "... of colonial domination or of any other form ...".

50. With regard to the draft article on the status of the diplomatic courier and the diplomatic bag not accompanied by a courier, he pointed out that, if courier communications were to be governed by an additional treaty, which inevitably would not be ratified by all the same States that were party to the Conventions of 1961, 1963, 1969 and 1975, there would be a risk of the prevailing law becoming more fragmented. The draft optional protocols on couriers and bags of special missions and of international organizations of a universal character, and the distinction between couriers and ad hoc couriers and between the diplomatic bag and the consular bag would contribute further to such fragmentation. As a result, the courier and the diplomatic bag might well be subject to different provisions during the same trip.

51. Although abuse of the diplomatic bag had increased in recent decades, the draft articles would broaden the scope for abuse by explicitly forbidding the examination of the bag by electronic or other technical devices and restricting the application of article 28, paragraph 2, to consular bags.

52. Given the provisions of articles 13, 17, 28, 30 and 31, the draft articles would seem to favour the sending State and impose an onerous burden on the receiving and transit States, instead of balancing the interests of them all.

(Mr. van de Velde, Netherlands)

53. The privileges and immunities of the courier should be restricted to those absolutely required by his job, which was simply to accompany the diplomatic bag. It was therefore unnecessary for article 17 to establish that the temporary accommodation of a diplomatic courier carrying a diplomatic bag was inviolable, since it should be borne in mind that the courier enjoyed personal inviolability in the performance of his functions and the bag was inviolable wherever it was. Article 17 should thus be deleted.

54. Article 20, the first paragraph of which provided that the diplomatic courier should be exempt from personal examination, was also unnecesary. The purpose of the provision was unclear since article 16, establishing that the diplomatic courier should enjoy personal inviolability, appeared to cover exemption from personal examination. On the other hand, it would be undesirable to claim exemption for diplomatic couriers from the personal examination required of all passengers, including diplomats, at airports. And article 20, paragraph 2, was also superfluous since a courier required no exemption from inspection of his personal baggage in order to do his job.

55. As regards article 21, the privileges and immunities of the courier should and must end as soon as he had finished carrying out his function, i.e. when he had delivered the diplomatic bag to its destination in the receiving State and a reasonable period for him to leave that State or the transit State had elapsed, or when he had left the territory of the State with the bag in his charge. As the privileges and immunities of the courier derived from his function, there was no reason to distinguish between different kinds of courier as article 23 did, since the captain of a ship or an aircraft carrying a bag should enjoy the same legal status as an ordinary courier. Article 23 seemed too limited in scope, for in practice the function of ad hoc courier was often entrusted to crew members other than the captain.

56. On the subject of article 28, his delegation could not agree that the inviolability of the diplomatic bag went beyond a prohibition on opening or detaining it. It believed that, provided the bag was not opened or detained and the inviolability of the mail was respected, the use of X-rays or sniffer dogs to detect the presence of illegal objects was permissible. When the bag was accompanied by a courier, the courier should be able at most to withhold consent to the examination, thus preventing courier and bag from continuing their journey by that route. He favoured the deletion of the word "consular" in article 28, paragraph 2, thus permitting all official bags to be opened in the presence of authorized representatives of the sending State, or returned to their place of origin if the authorities of that State refused the request. Furthermore, different provisions for diplomatic and for consular bags were not merely pointless but liable to fragment the applicable legal régime. The simple repetition of several existing provisions and the failure to include new concepts could prove unacceptable to many States, undermine the possible coherence and uniformity of legal protection for all official couriers and, paradoxically, reduce the level of acceptance of the draft articles. In any event, if the draft articles were incorporated into a treaty, provisions on the binding settlement of disputes arising from its interpretation or application should also be included.

(Mr. van de Velde, Netherlands)

57. Regarding the recommendation by the International Law Commission that the General Assembly should convene an international conference of plenipotentiaries to study the draft articles and optional protocols and conclude a convention on the subject, he felt that more time was needed to consider the latest modifications to the draft articles, and to the optional protocols in particular. He felt it was premature to decide which body should conclude the convention. If in future it was found necessary to decide whether a conference should be convened, his delegation would prefer the Sixth Committee to finalize the draft for adoption by the General Assembly.

58. Sir Arthur WATTS (United Kingdom) said that, as a concept, the entire international community supported the preparation of a draft Code of Crimes against the Peace and Security of Mankind, in view of the serious violations of international law that took place.

59. Nevertheless, a considerable number of delegations, his own among them, had serious doubts about the way in which the International Law Commission was approaching the subject. The starting point should be that the goal was to draw up a Code of Crimes, similar to a penal code, containing a list of crimes. That implied that the provisions of the Code of Crimes must be drafted in unambiguous terms, that the conduct it singled out must not merely be delictual but merit the special sanction of the criminal law, and that the conduct must be of individuals. Furthermore, the Code must deal with conduct which was internationally criminal, i.e. serious breaches of international law and not mere infractions. It was not enough, however, for them to be serious breaches of international law: they must be crimes "against the peace and security of mankind".

60. Measured against those requirements, the work of the Commission left much to be desired. The draft under preparation was not sufficiently specific to form the basis of a criminal code; its treatment of the question of individual responsibility was unclear and unsatisfactory; it was not concerned solely with conduct of such seriousness as to give rise to international criminal responsibility; and it was not limited to "crimes against the peace and security of mankind".

61. Pending the conclusion of the first reading of the draft articles, which was necessary since all the provisions of the Code were interrelated, he could offer some brief preliminary comments on four points. First, it was important to include the concept of gravity in war crimes. To deal with that question and the list of crimes, recourse could be had to the important concept of "grave breaches" as used in the Geneva Conventions and the additional Protocols of 1977. Secondly, he had doubts about the inclusion of certain kinds of conduct under the heading of crimes against humanity. Even in the case of such crimes as genocide, whose inclusion in the Code was uncontroversial, important questions of definition remained to be resolved. For example, the draft Code departed undesirably from the definition of genocide in the 1948 Convention. Thirdly, articles 13, 14 and 15, provisionally approved by the Commission at its forty-first session, were, according to footnote 87 of the Commission's report, limited to a definition of the acts

(Sir Arthur Watts, United Kingdom)

constituting crimes without dealing with the attribution of those crimes to individuals. That question was evidently central to the Commission's work and must be resolved quickly. Fourthly, in connection with the enforcement of the Code, it was regrettable that the Commission had again avoided an in-depth discussion of the question of international criminal jurisdiction.

62. Despite his criticisms, he was aware of the difficulties which the Commission and its Special Rapporteur faced in their attempt to eliminate the horrors caused by the most serious violations of international law.

63. Mr. ALVAREZ (Uruguay) said that the draft Code of Crimes against the Peace and Security of Mankind was concerned with international crimes which, according to the most eminent writers, were delictual acts assailing the fundamental and basic values of international society. The draft Code was a catalogue of major crimes such as war crimes and crimes against humanity (genocide, apartheid and the modern forms of slavery). Other types of crimes affecting the peace and security of mankind which had assumed great prominence in recent years should be added to the list, such as mercenarism, serious damage to the environment and even illicit drug trafficking. If they were included in the draft Code, the guidelines for categorizing them laid down in the original Conventions on the subjects should be respected.

64. His delegation broadly approved the method followed in drafting the Code but stressed that the formulation of a list of crimes should go beyond a narrowly defined enumeration because the text should be capable of incorporating acts regarded by the international community as crimes. The draft should also contain principles establishing a generic definition of crimes against the peace and security of mankind, and the specific context within which such a category of crimes would be assembled.

65. With regard to the definition of war crimes, he favoured the procedure of adopting a general definition for such crimes, followed by an indicative list embracing, in broad outline, the war crimes referred to in the 1949 Geneva Conventions and the Additional Protocols thereto.

66. The description of the crime of threat of aggression required some redrafting. Although the course adopted had been correct (determination of the constituent elements of a threat in the draft article itself), the text of article 13, as provisionally adopted by the Commission at its forty-first session, included a series of subjective elements which were not entirely clear. Thus, the reference to "good reason ... to believe that aggression is being seriously contemplated" led to a real grey area concerning the discretion of a State to verify the facts and, more importantly, to uncertainty as to who should be the impartial third Party mentioned by the Commission in paragraph 4 of its commentary on article 13. It was unclear whether that impartial third Party should be a national judge, an international judge or even the Security Council.

67. Although the text of article 14, as provisionally adopted by the Commission at its forty-first session, did not give rise to any problems, it might perhaps be

(Mr. Alvarez, Uruguay)

redrafted, particularly with respect to the definition of "subversive or terrorist activities".

68. He drew attention to the explicit reference, in article 15, to the Charter of the United Nations and to the right of peoples to self-determination as enshrined therein. That reference aroused doubts as to the scope of the draft article.

69. With regard to the issue of which jurisdiction was applicable to cases of crimes against the peace and security of mankind, his country had been a strong advocate of the establishment of an international criminal jurisdiction and had for that reason taken part, in 1951, in the Committee charged with the task of formulating the statute of an international court. The 1951 draft statute had not been adopted, pending the adoption of a Code of offences against the peace and security of mankind. Nevertheless, his delegation felt that the current state of international affairs was more conducive to the identification of a pragmatic solution which would not exclude the possible future establishment of a universal forum. On that pragmatic basis, it would be possible to consider jurisdiction as being exercised by the respective national courts, while at the same time explicitly providing for a system of reports, with committees or working groups responsible for studying them. That system had proved its effectiveness in the context of the United Nations and, particularly, in connection with the protection of individual rights. However, it would not be appropriate to establish an international appeal court with the task of reviewing decisions taken by national courts of first instance.

70. In conclusion, he noted that the Commission could, in accordance with the broad mandate conferred upon it under General Assembly resolution 177 (II), consider the possible creation of an international jurisdiction, provided that its statute fell within the system established by the Code, whether as a part of its normative provisions or as an additional protocol.

71. Mr. BELHAJ (Tunisia) believed that the draft Code of Crimes against the peace and security of mankind, far from being fated to become a dead letter, was of major importance in the ordering of international legal affairs. As a stage in the progressive development of international law, the draft Code could serve as a valuable reference document until it entered into force. Furthermore, its legal value was not necessarily dependent upon its entry into force. It could, indeed, be seen initially as an expression of the teachings of the most highly qualified publicists of the various nations, to be applied by the International Court of Justice as a subsidiary means for the determination of rules of law, as stipulated in Article 38, paragraph 1 (d), of the Statute of the Court. Neither did his delegation believe that the Code should be used only for reference purposes: when circumstances permitted the establishment of an international court with competence in criminal matters, in connection with which detailed consideration should be given to the opinion expressed in paragraph 214 of the report of the Commission, the fact that the Code already existed as a binding international legal instrument with the same force as those referred to in Article 38, paragraph 1 (a), of the Statute of the Court, would facilitate the work of the judges.

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72. With regard to the content ratione personae of the draft Code, the Commission, which in the current stage of its work had concentrated on the criminal responsibility of individuals, should, at a later stage, give more detailed consideration to the question of State responsibility.

73. Use of the concept of gravity as a determining factor for war crimes would entail the introduction of a subjective element which was out of place in the draft Code. His delegation shared the opinion of the Special Rapporteur, as stated in paragraph 96 of the Commission's report.

74. The reference to laws or customs of war in Article 13 could give rise to misunderstandings. The expression "armed conflict" was more precise and covered both new situations and those envisaged in Additional Protocol I to the Geneva Convention. Moreover, a list of crimes, however precise, would never be exhaustive and would not contribute to a better understanding of the phenomenon. It would therefore be wrong to introduce an element of uncertainty, which would require the inclusion of a clause such as the so-called "Martens clause" of the third preambular paragraph of the 1907 Hague Convention. The opinion of the first Special Rapporteur on the matter was perfectly logical; the Commission could adopt a general definition of the crimes, leaving to the judge the task of investigating whether he was in the presence of "war crimes". His delegation therefore believed that paragraphs (a) and (b) of the second alternative for article 13 were adequate without the addition of any list.

75. With regard to crimes against humanity, his delegation agreed with the Commission that the word "humanity" should be interpreted as meaning the "human race", rather than as a moral concept. The crime of apartheid was covered appropriately in the draft Code. He preferred the second alternative for Article 14, paragraph 2, as proposed by the Special Rapporteur, subject to the reservation, expressed in paragraph 163 of the report, that it would be preferable not to cite the source of the provision expressis verbis in the text of the draft article.

76. The inclusion of the expulsion of populations among crimes against humanity was commendable; his delegation did not believe that it could be confused with the crime of genocide or that of apartheid. They were distinct crimes which required distinct treatment. The establishment of settlers in an occupied territory was a highly topical problem, and not a day passed without the occupation, by force of arms and on the basis of allegedly divine laws, of lands which could not be considered as "res nullius", because their owners were there to defend their ancestral heritage. Those who encouraged the establishment of settlers in occupied territories were criminals and should be considered as such for the purposes of the Code of which they were, furthermore, the first sponsors.

77. His delegation was pleased that slavery and other similar phenomena were included in article 14, paragraph 3, as crimes against humanity. However, the draft article should be more precise, particularly with regard to the expressions "other forms of bondage" and "forced labour". Although there was no reason to exclude forced labour from the list of crimes against humanity, his delegation, for

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strictly practical reasons, believed that great care must be exercised and called upon the Commission to study the question in more detail.

78. Paragraph 5 of article 14 was a positive and thoroughly pertinent contribution. His delegation shared the opinion of the member of the Commission who had suggested that the "destruction of dwellings" should be added to the list of acts in paragraph 5. It was also appropriate to include serious attacks on the human environment. In that connection, the concept of environmental crime, which needed to be studied in detail, should be linked to the idea of State responsibility in its broadest sense, entailing an analysis of the collective responsibility of States for an economic system which induced certain individuals or groups of individuals to resort, sometimes purely for reasons of survival, to carry out attacks against the environmental heritage of mankind. A provision should also be introduced on the international traffic in narcotic drugs, which required more exhaustive study.

79. Referring to draft articles 13, 14 and 15, provisionally adopted by the Commission at its forty-first session, he welcomed the inclusion, as an independenc element, of the threat of aggression, which must be understood as a serious situation threatening international peace and security. The approach which consisted in determining the components of the threat was appropriate, since it provided the judge with concrete objective criteria. With regard to the misgivings expressed by some members of the Commission as to the judge's freedom to determine the existence of a threat of intervention without the Security Council having done so previously, he thought that the judge should not feel bound by the deliberations of an essentially political body, but should work on the basis of the facts.

80. In article 14, the requirement that intervention had to be "armed" intervention was not very realistic, since there were forms of intervention such as economic coercion that could be as serious as, or more serious than, armed intervention. Nor was it necessary to use the term "seriously" to qualify intervention, since fomenting subversive or terrorist activities and organizing, assisting or financing such activities were in themselves very serious acts. Consequently, his delegation recommended the deletion of the two words between square brackets in article 14, paragraph 1.

81. Lastly, he expressed surprise at the explicit reference to consensus in paragraph 76 of the Commission's report. He stressed that General Assembly resolution 3314 (XXIX) had not been adopted "by consensus", but "without a vote", and he called on the Commission to express itself with the precision required by the reality of the facts.

82. Mr. VOICU (Romania) said that he wished, first of all, to make some observations of a historical nature in connection with the background to item 142. He pointed out that the first attempt to elaborate a draft Code of Offences against the Peace and Security of Mankind had originated in a memorandum prepared at the request of the United Nations Secretariat by a Romanian jurist, Vespasiano Pella. The memorandum was in the Yearbook of the International Law Commission, 1950, volume II (A/C.4/39). Beginning in 1947, the General Assembly had requested the

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Commission to elaborate a draft Code of Offences against the Peace and Security of Mankind. In 1954, the Commission had submitted a draft Code together with commentaries. The General Assembly had postponed its consideration pending a definition of aggression. The Assembly had adopted a definition in 1974. Seven years later, the Assembly had once again invited the Commission to continue its work on the draft Code.

83. Instances of the threat of force, the use of force, interference in the internal affairs of States, and violation of the independence and security of States demonstrated the need for and importance of a Code of Crimes against the Peace and Security of Mankind. In elaborating the Code, the Commission must define the responsibility of States and persons, and prepare a comprehensive list of crimes against the peace and security of mankind. The Code must contain a general definition of the concept of crime against the peace and security of mankind.

84. The list of crimes against the peace and security of mankind must include internationally wrongful acts, such as the planning, preparation and waging of a war of aggression, the establishment or maintenance by force of colonial domination, genocide, apartheid and violations of the laws and customs of war. The Code should also refer to the constituent acts of a conspiracy which had as its objective the perpetration of crimes against the peace and security of mankind, incitement to commit such crimes, attempts, and complicity.

85. The Code would have the positive effect of deterring persons and certain political régimes from committing such serious crimes as apartheid, genocide and other crimes against the peace and security of mankind.

86. His delegation considered that the Code should provide for punishment of not only acts committed by persons, but also those committed by States. The question of the responsibility of States for crimes committed by them had not been resolved by the Commission. The limitation of the responsibility of persons was a provisional measure. Some crimes, such as aggression, apartheid and annexation, could be committed only by States.

87. Turning to the draft articles provisionally adopted by the Commission and contained in paragraph 217 of its report, he said that the expression "under international law" between square brackets in article 1 should appear in the text, because crimes against the peace and security of mankind were crimes under international law. The content of article 2 confirmed that interpretation, because the characterization of an omission as a crime against the peace and security of mankind was independent of internal law. The text of article 2 deserved support. The second sentence should be maintained; the clarification was useful. Whether an act or omission was punishable or not under internal law did not affect that characterization.

88. His delegation fully supported article 5 under which no statutory limitation could apply to a crime against the peace and security of mankind. Romania was a party to the Convention on the Non-Applicability of Statutory Limitations to War

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Crimes and Crimes against Humanity, of 26 November 1968. Article 121 of the Romanian Penal Code provided that the statute of limitations did not extinguish criminal responsibility in the case of offences against the peace and security of mankind.

89. Some drafting improvements could be made to article 6. In the chapeau to the article, the word "minimum" and the expression "with regard to the law and the facts" could be deleted. The word "minimum" could give rise to confusion concerning the guarantees.

90. His delegation reserved the right to make further comments on the texts submitted for consideration.

91. His delegation thought that complicity should be dealt with under the general principles. The Commission should maintain the broad meaning given to complicity in international law. With respect to attempts, the Commission should choose between the various solutions offered under internal law and determine the criterion on the basis of which reference could be made to attempts. As the draft Code referred to the most serious crimes, it was clear that attempts should also be punished.

92. As to the threat of aggression, the subject of article 13, his delegation was in favour of the characterization of the threat of aggression as a separate crime. The threat of aggression was referred to in the 1954 draft Code, in Article 2, paragraph 4, of the Charter, concerning the prohibition of the use of force, and repeatedly in General Assembly resolution 42/22 of 18 November 1987, entitled "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations".

93. The text of article 13 was too succinct. The term "threat of aggression" meant a threat in the form of declarations, communications, demonstrations of force or any other measures likely to give the Government of a State reason to believe that aggression was being seriously prepared against it. However, the word "seriously" was subject to contradictory interpretations and should preferably be deleted from the text.

94. Article 14, relating to intervention, deserved further detailed consideration. In the first place, it was necessary to choose between punishing subversive or terrorist activities only when arms were used and punishing all activities of that nature. The second option was preferable, since experience clearly revealed the existence of other forms of intervention, such as economic pressure against developing countries, which did not come within the category of armed activities.

95. The qualification of attacks on the free exercise by a State of its sovereign rights involved difficulties. Fomenting subversive or terrorist activities and organizing or financing such activities were very serious acts in themselves, and further qualification could weaken the content of article 14. Therefore, the word "seriously" should be deleted.

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96. The text of article 14 would be substantially improved if the Commission based it more directly on the provisions of the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, adopted by the General Assembly in resolution 36/103.

97. Account should also be taken of the obligation of every State to refrain from any interference in the internal affairs of another State in a form incompatible with the purposes and principles of the Charter of the United Nations. The Commission should also consider interference aimed at preventing a State from pursuing its own path of socio-economic development or exercising its sovereign rights, or at obtaining some advantage from it.

98. His delegation continued to support the maintenance of item 142 as a separate agenda item.

99. Mr. MICKIEWICZ (Poland) said that for historical, political and legal reasons, Poland had continuously supported the work on the draft Code of Crimes against the Peace and Security of Mankind, and had sponsored the relevant resolutions of the General Assembly. The completion of the draft Code would make a decisive contribution to preventing the recurrence of the most odious crimes in the history of mankind. It was appropriate to recall that the current year's deliberations coincided with the fiftieth anniversary of the outbreak of the Second World War, which had begun in and against Poland. Perhaps that was why Poland attached special importance to international peace and security, and to strict observance of the fundamental rules of international law.

100. The draft Code should consolidate all the elements contained in the Charter of the Nürnberg Tribunal and other international instruments, while taking into account the new circumstances and demands of the present era. His delegation was satisfied with draft articles 13, 14 and 15 proposed by the Commission, dealing respectively with the threat of aggression, intervention and colonial domination and other forms of alien domination. Without prejudice to that view, it believed that the Security Council should discharge its duty under the Charter of the United Nations of determining whether a given act constituted a threat of aggression. In addition, his delegation was in favour of maintaining the word "seriously" in article 14. Moreover, it was of the view that the draft Code should include colonial domination and other forms of alien domination, although the term was perhaps too vague for purposes of penal legislation.

101. With regard to war crimes, his delegation was in favour of the concept of gravity being maintained, in conformity with the 1949 Geneva Conventions and Additional Protocol I. It also agreed with the use of the words "rules of international law applicable in armed conflict", which appeared in the second alternative of the first version of article 13 proposed by the Special Rapporteur. The classical notion of war was less precise and might help the aggressor avoid the application of humanitarian law.

(Mr. Mickiewicz, Poland)

102. With regard to the definition of war crimes, his delegation was in favour of a general definition being formulated, followed by a list, possibly of an indicative nature, of the acts constituting war crimes. The proposals contained in the Commission's report constituted a good starting point for such a list.

103. With respect to crimes against humanity, his delegation supported the inclusion of such crimes in a separate category. Although distinction between war crimes and crimes against humanity was sometimes not easy, the formulation of their content would make it possible to avoid any confusion. The future definition of crimes against humanity should cover not only mass crimes, but also those perpetrated against individual victims when they formed part of a systematic persecution.

104. He was in favour of a separate provision on genocide, based on the Convention for the Prevention and Punishment of the Crime of Genocide. He also supported the inclusion of apartheid, and preferred the second version of the proposed text. Any geographical reference should be avoided, since it might limit the application of that provision. Slavery and all other forms of bondage, especially forced labour, should also be included in the draft. His delegation was in agreement with the proposed text. The inclusion of forced labour was an important new development. That crime had been perpetrated on a major scale during the Second World War, and also after it. The proposals concerning expulsion of populations from their territory or their forcible transfer required profound consideration. A distinction must be made between deportation of people in the framework of a policy of genocide and transfers of population for humanitarian reasons, on the basis of international agreements. The Charter of the Nürnberg Tribunal provided that intent to deport was an important constituent element of the crime.

105. His delegation was in favour of the Code including other inhuman acts, including destruction of property. That would be consistent with the spirit of the Nürnberg Principles. The description of the crime should also include destruction of the cultural and spiritual heritage of mankind, as well as serious environmental damage. It also supported the idea of including in the Code the use of weapons of mass destruction, in particular the use of nuclear weapons. The inclusion of such crimes would increase the preventive value of the Code. At the same time, the relevant provisions should be precise and should avoid any possible reference to politically controversial questions. Lastly, he expressed the view that the elaboration of the draft Code must not depend upon the question of the establishment of an international tribunal being resolved. The draft Code must be completed as soon as possible in order to enhance the rule of law in international relations.

106. Mr. PAMBOU TCHIVOUNDA (Gabon) said that the elaboration of the Code of Crimes against the Peace and Security of Mankind was making slow headway. Perhaps the Commission preferred to keep progress in that respect in step with the progress actually made in terms of universal awareness. Today's world, made up of nation-States, needed to attain a new awareness of unity and humanity. The road was a long one, but even the obstacles encountered did not obscure the encouraging

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signs already apparent in various sectors of international law, for example, the draft Code of Crimes against the Peace and Security of Mankind.

107. The Commission's method of drawing up an enunciative list of crimes did not resolve the question of the conceptual definition of crimes against the peace and security of mankind, in that the criterion of "gravity", because of its subjective nature, limited the power of the competent bodies to categorize acts. Owing to that method of a posteriori definition, it did not appear possible that a suitable interpretation of the concept which would have the advantages of generality and of objectivity could be formulated. Any definition of that nature proposed by the Commission would be based on past or present acts, but not of future acts. Consequently, any defintion that was formulated of war crimes or crimes against humanity could only be provisional, and hence incomplete.

108. The appearance of individuals before a criminal court should not present any problems, since States could not incur criminal responsibility. Accordingly, it would be better for the Commission to confine itself to studying the criminal responsibility of individuals. In that context, the competence of the criminal court with respect to individuals could only extend to acts committed against other individuals, although it was not clear that the perpetrators of a crime against the peace and security of mankind acting in an official capacity, such as that of head of State or Government, could appear before such a court. He therefore wondered whether, at the initiative of individuals or non-State institutions, the court could institute proceedings against the perpetrators of crimes against the peace and security of mankind.

109. That question was not devoid of meaning if it was borne in mind that the threat of aggression, intervention and colonial domination were concepts subject to characterization and had to possess at least two elements: in the first place, attribution of the threat of aggression, intervention in the internal or external affairs of a State or establishment or maintenance by force of colonial domination to an entity organized at least in the form of a State, in other words, to its authorities and not to individuals; secondly, the right of the injured State to obtain reparation under the traditional mechanisms of international public law. Thus, draft articles 13 and 14 were consistent with the Judgment of the International Court of Justice on military and paramilitary activities in and against Nicaragua. Consequently, it was foreseeable, if not inevitable, that the draft articles on State responsibility and the draft Code of Crimes against the Peace and Security of Mankind should have points in common. It was apparent that they presented the same problems; thus, the distinction between crimes and delicts of the State in the former was similar, to some extent, to the distinction between crimes of war and crimes against humanity in the latter. Moreover, the juridical and practical problem of the penalty applicable to the perpetrator of crimes of the State or crimes against humanity arose in both drafts. In that context, the international community hoped that the Commission would draw up a scale of penalties in the draft Code of Crimes against the Peace and Security of Mankind.

The meeting rose at 1.10 p.m.