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Chairman:	Mr. LEHMANN	(Denmark)
later:	Mr. CAMACHO (Vice-Chairman)	(Ecuador)

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The meeting was called to order at 3.20 p.m.

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

1. Mr. SIDI ABED (Algeria) said that chapter II on the draft Code of Crimes against the Peace and Security of Mankind was the most important section of the Commission's report (A/50/10). It was unfortunate that the draft Code had been dissociated from the draft statute of an international criminal court, given that the court had originally been envisaged as a legal body in which the draft Code would be applied. He regretted, too, that the Commission had been unable to complete its study of the draft Code as promptly and as efficiently as it had done in the case of the international criminal court.

2. His delegation favoured a general, conceptual definition of the crimes to be covered in the Code and believed that the list of crimes should be limited to those which were difficult to challenge as crimes against the peace and security of mankind. The definition must be sufficiently open to allow the Code to be applied in a variety of circumstances, yet it was important to maintain the legal tradition that crimes, and the penalties applied to them, should be enumerated in detail. The "provisional restriction" referred to in paragraph 41 of the report should make it possible to reach consensus on the six crimes identified by the Special Rapporteur.

3. The Commission should not engage in the pointless exercise of seeking a new definition of aggression. The definition contained in General Assembly resolution 3314 (XXIX) would meet the Commission's needs. He agreed with the reasons given in paragraphs 68 and 69 of the Commission's report for deleting article 15, paragraphs 4 (h) and 5: no legal principle entitled the Security Council to intervene in an international criminal proceeding, nor was any Security Council determination binding, under the Charter of the United Nations, on an international court, since Council decisions did not take precedence over international agreements. While such an inegalitarian system might exist, that fact did not justify its codification by the Commission.

4. With regard to the crime of genocide (art. 19), the Convention on the Prevention and Punishment of the Crime of Genocide offered a clear definition which was sufficient for the draft Code.

5. Terrorist acts were crimes of an exceptionally serious nature which threatened the peace and security of mankind. A legal definition, divorced from any political or conceptual considerations, would facilitate the inclusion of the crime of international terrorism in the draft Code. He concurred with the opinion expressed in paragraph 107 of the report and was pleased that the crime had been included in the draft Code; only political considerations could argue for its exclusion. The definition proposed by the Special Rapporteur was a reasonable and objective one, although its drafting could be improved further.

6. His delegation hesitated to have apartheid removed from the list of crimes; however, because of the historical connotations of the word, a more acceptable term should be found to define the crime. In addition, the colonization of an occupied territory and the alteration of its demographic composition were among the most reprehensible of war crimes and should be included in the draft Code.

7. Mr. MIKULKA (Czech Republic) said that the lack of consensus on certain crimes in the draft Code justified the approach taken by the Special Rapporteur. The Code's content ratione materiae would be a major factor in determining a State's attitude towards adoption of the draft text. It was therefore best to limit the scope of the Code to the most serious crimes which evoked strong international condemnation. What must be codified was not all crimes by individuals under international law, but only the "crimes of crimes", in the words of the Commission's report, although that expression should not be interpreted as implying a hierarchy of categories of crimes.

8. To reduce the number of crimes covered by the Code was not to deny the criminal nature of other acts committed by individuals and punishable under existing international instruments. Such crimes should be dealt with through existing international instruments, or, if necessary, by amendments to those instruments, a situation which would be reflected in the resolution by which the Code was eventually adopted. However, crimes listed in the Code should include, above all, those covered under established rules of international and customary law whose application did not depend on whether the Code was adopted in the form of a convention. The Commission should concentrate on crimes for which the guilty parties were directly responsible under general international law and which were defined as crimes independently of domestic law and without the need to determine whether the State was party to a given international convention.

9. The Commission had considered the criteria to be used in establishing the definitive list of crimes. Not all crimes against the peace and security of mankind were of a massive nature, and criteria such as extreme gravity or a serious and immediate threat to the peace and security of mankind were often evident only when such acts were viewed against the background of the conditions obtaining at the time of their commission. A definition of crimes against the peace and security of mankind that was both general and specific would therefore be very useful.

10. The Code should, above all, define international crimes committed by States so that the criminal responsibility of individuals who had participated in such crimes would be linked to the responsibility of the State. Draft article 5, on responsibility of States, was therefore of particular importance, although the drafting could still be improved. In that connection, he noted that article 10 of the Commission's draft articles on State responsibility stated that "in cases where the internationally wrongful act arose from the ... criminal conduct of officials or private parties ... punishment of those responsible" might constitute one form of satisfaction. It was therefore incorrect to state in the draft Code that "Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it", since such prosecution was an integral part of the satisfaction provided. He hoped that during its second reading of the draft Code, the Commission would consider that

problem in the context not only of article 5 but also of the definition of general criteria for crimes against the peace and security of mankind.

11. With regard to the characterization of an act or omission as a crime against the peace and security of mankind, he hoped that article 2 of the draft Code would be retained. The independence of such a characterization from national law was a corollary of the idea that such crimes were crimes of international law, as had been recognized since the time of the Nürnberg Tribunal. That fact was reflected in the wording of article 1 of the draft code, although he failed to understand why the words "under international law" had been placed in square brackets. The adoption of the first sentence of article 2 as currently worded did not imply an elimination of the role of national law. However, unlike the conventional or customary rules of international law, national law had, by necessity, a limited role, as the Commission had acknowledged in its preparation of the draft statute of an international criminal court. The provisions of national law could not be applied where they conflicted with international law. Thus the classification of an act or omission as a crime against the peace and security of mankind under general international law was independent of national law, and that precedence of international over national law should be explicitly confirmed in article 2.

12. All national law had a common basis in the areas of the protection of fundamental rights and of criminal procedure. Therefore, although international law provided a sufficient basis for the classification of crimes, related matters, such as questions of punishment, might require recourse to national law. However, that possibility was not excluded by the existing text of article 2.

13. As to whether the notion of criminal intent should be referred to in draft article 3, he felt that intent was implicit in the nature of the acts covered by the article and that it would be sufficient to deal with the matter in the commentary. Considering the limited nature of the list of crimes, he felt that the existing provisions concerning the prosecution of individuals guilty of complicity should be retained.

14. It was to be hoped that in its second reading of Part II of the draft Code the Commission would refine its definitions of crimes in order to approximate standards of criminal law as closely as possible. Since the statutes of existing or future international courts contained or would contain their own definition of crimes and penalties, he did not agree with those members of the Commission who felt that it would be possible to dispense with any such definition. On the contrary, as an instrument separate from the statutes of international courts, it was the Code that should define substantive law, which must apply to both national and international courts. The question of penalties could be discussed in a general provision rather than in the provisions dealing with specific crimes.

15. The inclusion of the crime of aggression was supported by the entire Commission, and the difficulties in defining that crime were well known. The solution did not lie in adopting the definition set out in General Assembly resolution 3314 (XXIX), which defined an act committed by a State and,

consequently, did not include the necessary elements for prosecuting individuals who had contributed to the preparation or commission of an act of aggression. The first paragraph of draft article 15 was a step in the right direction, but its wording could be further improved.

16. The provisions of article 15, paragraph 4 (h), regarding the determination by the Security Council of acts of aggression, and paragraph 5, which stipulated that any such determination by the Council was binding on national courts, had given rise to discussions regarding the Council's role. A distinction must be drawn between the role of the Security Council in the area of substantive law and its role with respect to procedure before an international criminal court. The purpose of the draft Code was to codify substantive law, particularly as it applied to the qualification of the criminal conduct of individuals. His delegation believed that the crime of aggression should be dealt with solely by an international court, and therefore favoured the elimination of paragraph 5.

17. Paragraph 2 of article 23 of the draft statute for an international criminal court stipulated that a complaint directly related to an act of aggression could not be brought under the statute unless the Security Council had first determined that a State had committed the act of aggression which was the subject of the complaint. His delegation believed the provision was purely procedural in nature and had no bearing on the definition of the crime of aggression.

18. Like most of the members of the Committee, his delegation supported the Special Rapporteur's proposal to eliminate the crime of the threat of aggression, which had not been defined in satisfactory fashion, and to suppress the article that dealt with colonial and other forms of alien domination on the grounds that colonial domination had been eliminated and the concept of alien domination was too imprecise. His delegation endorsed the new text of draft articles 19 and 21.

19. While his delegation approved of the new text of draft article 22, it hoped that the article as drafted would not be interpreted to mean that punishment of exceptionally serious war crimes was contingent on the States in question being parties to the Geneva Conventions of 1949. With regard to draft article 23, his delegation supported the Special Rapporteur's decision to eliminate the crime of recruitment of mercenaries and agreed that the acts originally dealt with in that article could be prosecuted as crimes of aggression.

20. His delegation shared the belief that, unlike the crimes of aggression, genocide, other crimes against humanity or war crimes, which could be prosecuted on the basis of international law, international terrorism and drug trafficking should be prosecuted on the basis of existing instrument. Accordingly, the international community should endeavour to urge States to become parties to the relevant conventions. While wilful and severe damage to the environment should not be included as a crime in the draft Code, certain elements of those crimes could be reflected in the article on war crimes.

21. Mr. HOLTER (Norway), speaking on behalf of the Nordic countries, said that those countries fundamentally favoured a code of crimes against the peace and security of mankind but believed that because important matters of principle and

technical questions remained unresolved, further clarification of the current draft Code was required. The crimes to be included in the draft Code should fulfil two criteria: they should actually constitute crimes against the peace and security of mankind, and they should be suitable for regulation by that type of instrument.

22. He welcomed the proposal by the Special Rapporteur to limit the number of crimes to be included in the Code to 6 of the 12 crimes adopted on first reading. The Nordic countries believed that in order for the Code to become a successful instrument of international law, it should focus on the most serious crimes against the peace and security of mankind and therefore be relatively limited in scope.

23. Ms. FERNÁNDEZ GURMENDI (Argentina) said that the draft Code of Crimes against the Peace and Security of Mankind was of particular relevance at a time when very serious crimes were being committed in various parts of the world and when great interest was being shown in the establishment of an international criminal court. Her Government endorsed the Commission's decision to restrict the draft Code to crimes of indisputable seriousness and to concentrate on four among them, namely aggression, genocide, crimes against humanity and war crimes.

24. Such a restricted approach had been considered by many to constitute "legal surgery", yet surgery was often the only way to save a patient. In the case at hand, the deletions resolutely effected by the Commission had been based on developments in international relations and were absolutely necessary to preserve the draft Code's viability and acceptability. The restrictive approach also corresponded to the view prevailing in the meetings of the Working Group on a draft statute for an international criminal court, where the majority of States seemed to favour limiting the competence rationae materiae of the court to a "hard core" of crimes under general international law which offended the conscience of mankind as a whole.

25. The draft Code and the proposed international criminal tribunal were two different projects which were not necessarily related, since progress on one was not dependent on progress on the other. Furthermore, her delegation shared the view of the United States of America that emphasizing the connection between the draft Code and the draft statute of the court might jeopardize progress towards the establishment of the court. Nevertheless, it was not possible to ignore the close ties between the two, especially since the prevailing view within the Working Group was that the statute of the court should include a list of crimes that came within its competence, thereby changing the statute from a strictly descriptive or procedural instrument to one which incorporated substantive norms of criminal law.

26. Thus, in a few months time, States and the International Law Commission would be working to define the same crimes. It was to be hoped that each forum would avail itself of the work of the other. The observations of the representative of Austria were particularly relevant in that regard, and her delegation agreed that it was important to strengthen cooperation between States and the Commission, maintaining an ongoing dialogue through flexible and informal channels.

27. Turning to the four crimes on which the Commission would be focusing its attention, she said that her Government had not yet reached a final decision with regard to the crime of aggression, but was not, in principle, disposed to set aside prematurely that which the Commission had characterized as the quintessential crime against the peace and security of mankind. Nevertheless, determining individual responsibility for the crime of aggression gave rise to serious obstacles which appeared increasingly insurmountable.

28. By virtue of its mandate under the Charter, the Security Council must make a prior determination of an act of aggression. At the same time, intervention by a political body could give rise to legal and institutional difficulties. For example, a successful challenge to such a determination might result in a judicial decision that was contrary to the Council's ruling, a situation which was inconceivable. Furthermore, if the accused party did not have the right to question the Security Council's decisions, objections might be raised with regard to due process. The range of defences available to the accused would in that case be severely limited or almost non-existent, particularly where the accused was a head of State or Government.

29. The crime of genocide raised the least number of technical issues. Her delegation endorsed the decision to proceed on the basis of the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide, which had gained wide acceptance.

30. With regard to crimes against humanity and war crimes, her Government shared the view that serious atrocities committed within national borders should be considered as international crimes. Events in the former Yugoslavia and in Rwanda demonstrated the need for serious consideration of the criminal aspects of international humanitarian law applicable in non-international armed conflicts, bearing in mind that such conflicts seemed to occur with much greater frequency than international armed conflicts.

31. War crimes should, therefore, include crimes committed in non-international armed conflicts. Until recently, it had been generally accepted that neither article III, common to all the Geneva Conventions, nor the second Protocol, additional to those Conventions, which did not contain provisions on serious crimes, could provide a foundation for universal jurisdiction. Article 4 of the Statute of the International Tribunal for Rwanda expressly included both provisions, setting aside that argument, which was not totally convincing from a legal point of view, and remedying, at least in that case, one of the main weaknesses of international law. The draft Code of Crimes should take its inspiration from that precedent.

32. Her delegation endorsed the proposed change in the title of article 21 of the draft Code from "Systematic or mass violations of human rights" to "crimes against humanity". She wondered whether the list should also include certain acts committed in times of peace. Serious crimes against civilian populations which were carried out in a regular and systematic manner in times of peace might endanger peace and, consequently, international peace and security, and should therefore be included in the list of crimes against humanity.

33. Mr. POSTICA (Romania) said that recent tragic events in the former Yugoslavia and in Rwanda had demonstrated, more than ever, the need for a code of crimes against the peace and security of mankind and for the international community to put an end to the tragic phenomenon of impunity. By doing so, it would discourage flagrant violations of human rights wherever and whenever they occurred. In order to achieve that objective, it was necessary not only to establish an international criminal court but also to adopt a code of crimes that would effectively prevent and punish crimes against humanity and world civilization.

34. The crime of aggression, which had been the subject of extensive debate, continued to raise serious difficulties for two main reasons. Firstly, it had not been defined in any other conventional instrument; and secondly, aggression seemed to affect States or Governments, rather than individuals. His delegation believed that a broad definition of the term and a non-exhaustive list of acts of aggression would provide a better basis for future discussions on that topic.

35. With regard to other articles in the draft Code, his delegation endorsed the new text of draft article 19 proposed by the Special Rapporteur and supported the proposal to refer to the crimes mentioned in article 21 as "crimes against humanity". His delegation was of the view that article 22, which dealt with war crimes should include only the most serious of such crimes.

36. Lastly, while he understood the reasons that had led the Commission to express interest in the crimes of racial discrimination, colonial domination, international terrorism and illicit trafficking in narcotic drugs, it would be unrealistic for the Commission to extend the scope of its work to include such crimes at present.

37. Mr. DEL MAR (Philippines) said that in a world where confrontation between the super-Powers no longer took centre stage, the work of the International Law Commission was assuming particular importance. Its report on the work of its most recent session demonstrated the potential role international law could play in providing guidance on specific issues.

38. The Commission had dedicated long years to establishing regimes for international responsibility and international liability, highlighting the prevailing view that States were primarily responsible for their own acts and for the acts of individuals. However, recent events in Bosnia, Rwanda and elsewhere had made it clear that there was a need to consider the responsibility of individuals for acts which had, in the past, generally been attributed to States. Individuals could also violate the sovereignty of a State, harm its interests or injure its subjects.

39. Most countries did not have adequate national legislation to deal with such occurrences. In many cases, particularly in countries which followed the restrictive rule of territorial jurisdiction, an individual could plot to or actually destabilize another country without fear of criminal prosecution. In his own country, no criminal action could be instituted against an individual who committed an act of aggression against another country or intervened in its sovereign affairs, acts clearly prohibited under international law. Furthermore, in many States, as in his own, it would be very difficult to invoke

international law in the absence of internal law because the rights of the accused to procedural and substantive due process would have to prevail. In the case of terrorism or drug trafficking, unless part of the act had been committed within its territorial jurisdiction, the Philippine Government would find it difficult to provide grounds for prosecution.

40. The territorial restrictions of the Philippine penal code gave rise to extreme situations. For example, a Filipino who committed mass murder, even of other Filipinos, outside Philippine territory could never be brought to trial in his own country. Internal law in the Philippines did not reflect modern realities, in particular the fact that Filipino workers were victimized en masse through illegal recruitment or abusive employment practices outside the territorial jurisdiction of the country. While it could punish crimes such as piracy and white slavery, his Government was unable to punish other crimes against the peace and security of mankind.

41. States should do more to strengthen the efforts of the International Law Commission to attribute individual responsibility for crimes against humanity. Much progress had been made in that direction in terms of administrative arrangements, extradition procedures and mutual legal assistance among States. Yet much remained to be done. States must re-examine their domestic law in order to remedy any lacunae in that area. The Philippines was currently considering major reforms to its penal code, which would bring it up to date with contemporary realities and ensure that the Government could fulfil its obligations to respect the sovereignty, political independence and territorial integrity of other countries.

42. Establishing an international regime of individual responsibility for crimes against States should not overshadow the fact that States bore primary responsibility for preventing such acts. The Commission had made itself clear on that point: a State could not be absolved of responsibility for an act by virtue of the fact that it was attributable to individuals who might or might not be agents or subjects of that State.

43. His delegation endorsed the Commission's position with regard to the establishment of an international criminal tribunal. Such a tribunal should not, however, serve to discourage States from exercising their own jurisdiction over the crimes in question or from taking primary responsibility from rendering justice in those cases.

44. Mrs. DASCALOPOULOY-LIVADA (Greece) said that at its forty-seventh session, the International Law Commission had failed to make spectacular progress on the draft Code of Crimes against the Peace and Security of Mankind. Indeed, the completion of its work on that topic had had to be postponed until 1996.

45. Her delegation could not fully support the decision of the Special Rapporteur to reduce the number of crimes under the draft Code. While a proponent of neither the minimalist or maximalist school, it considered that the gravity or significance of a particular crime should be the sole criterion for inclusion in the Code.

46. There could be no doubt that aggression constituted the quintessential crime in international relations and, consequently, the "hard core" of the draft Code. As currently worded, paragraph 2 of article 15 reflected the relevant Article of the Charter of the United Nations and therefore provided an adequate basic definition of aggression. The list of acts of aggression contained in paragraph 4 of article 15, which had been deleted, would have helped to clarify the principle set forth in paragraph 2 and to eliminate, in so far as possible, the risk that cases of minor importance might fall within the scope of the general definition.

47. At the same time, paragraph 4 had not been entirely satisfactory. In particular, there was need for further scrutiny of the role of the Security Council in determining the existence of an act of aggression. While the Council's determination in that regard must be binding on national courts, the reverse should not be true: a national court should not be prevented, in the absence of a determination from the Security Council, from deciding that an act of aggression had or had not been committed. That would not serve justice and could, in certain cases, be considered as letting political considerations determine the course of justice.

48. She wished to recall her delegation's proposal with regard to the consequences of aggression, namely, unlawful occupation, annexation and succession, which read: "Deliberate failure to respect the mandatory decisions of the Security Council, designed to put an end to an act of aggression and to wipe out its unlawful consequences, is a crime against peace".

49. There was no doubt that the crime of genocide belonged in the draft Code. Her delegation endorsed the Special Rapporteur's proposed definition, which included the concepts of incitement and attempt, thus bringing it closer to that provided under the Convention on genocide and that used in the statute of the International Criminal Tribunal for the former Yugoslavia and the Statute of the International Tribunal for Rwanda.

50. The crimes listed under article 21, as adopted on first reading, had mistakenly attributed to individuals the capacity to violate human rights. It was widely accepted within the Sixth Committee that States had an obligation to respect and protect human rights and, by implication, that only States could violate such rights. Individuals could only commit crimes in violation of criminal law. Where such crimes were committed in a systematic or massive way and were of such gravity as to affect the entire international community, it was appropriate to speak of crimes against humanity. Her delegation therefore supported the proposed change of the title of article 21 to "Crimes against humanity". Under that new title, the article could justifiably encompass the conduct of individuals acting in their personal capacity and not as agents or representatives of a State.

51. Her delegation also endorsed the Special Rapporteur's decision to change the title of article 22 from "Exceptionally serious war crimes" to "War crimes". The new version of the article was better organized in conceptual terms and was more consistent with the statutes of the two ad hoc international tribunals and the draft statute of the proposed international criminal court. Nevertheless, the article ought to include the crime of establishment of settlers in an

occupied territory and changes to the demographic composition of an occupied territory, which had been in the earlier version of the article.

52. Her delegation was not in favour of including international terrorism as a crime under the draft Code. That subject was covered by a number of conventions dealing with particular crimes on the basis of the principle of aut dedere aut judicare. However, the draft Code should include the crime of illicit trafficking in narcotic drugs. Nevertheless, it should be pointed out that crimes of that nature did not, as a rule, threaten international peace and security.

53. It was regrettable that article 16, on the "threat of aggression", had been eliminated from the draft Code. That phrase was explicitly mentioned in paragraph 4 of Article 2 of the Charter. Furthermore, like the prohibition of aggression, prohibition of the threat of aggression was a rule of international law having the character of jus cogens. It was therefore imperative that the concept of the threat of aggression should remain in the draft Code. It presented no more difficulties than the concepts of attempt, incitement and complicity. Article 16, as adopted on first reading, was a commendable effort.

54. While most of the crimes which the Special Rapporteur had proposed for deletion reflected practices which no longer existed, that did not justify their absence from the draft Code. Nothing precluded such acts from being repeated, and their inclusion in the Code would have a deterrent value. Wilful and severe damage to the environment, in particular, was bound to acquire increasing importance in the future; depending on their scope, such acts could constitute a real threat to the peace and security of mankind.

55. Mr. BOS (Netherlands) said that there was a parallel trend in both the Working Group on a draft statute for an international criminal court and the work of the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind to reduce the list of crimes included in the Code to 6 of the originally adopted 12. The Netherlands Government had continually held the position that the Code of Crimes should be limited to the most serious crimes imaginable and that the international criminal court should have jurisdiction only with respect to those very serious crimes. Accordingly, a very close relationship should be established between the identification of crimes, the creation of the international criminal court and the acceptance of the court’s jurisdiction for the crimes identified.

56. In discussions in the Sixth Committee regarding the first draft of the Code, his delegation had proposed three criteria for the selection of crimes and for the jurisdiction of the international criminal court. According to those criteria, the only crimes that should be included where those which violated the "conscience of mankind", those whose character made it clear that no national procedures could be applied, and those which involved the personal criminal liability of the individual. On that basis, his delegation believed that only four crimes could be included in the Code of Crimes, namely, aggression, genocide, crimes against humanity and serious war crimes; the crimes of international terrorism and drug trafficking should not be put on the same level as large-scale violations of humanitarian norms such as those that had occurred in the former Yugoslavia or Rwanda.

57. In the case of the crime of terrorism, a number of international treaties had been established which provided for alternative forms of combating terrorist acts at the national or international levels. Accordingly, there was no need to include that crime among those falling under the jurisdiction of the international criminal court. Similarly, in the case of the crime of drug trafficking, international instruments had provided for a system of the exercise of national jurisdiction bolstered by inter-state cooperation.

58. One of the leading principles in the discussions of the Working Group on a draft statute for an international criminal court had been the principle of complementarity, which implied, inter alia, that priority should normally be given to national jurisdictions, or if necessary, international cooperation between such jurisdictions, in responding effectively to crimes. That principle implied also that the international criminal court should be competent only with respect to those crimes that might not be effectively addressed by national jurisdictions. Only when that principle was sufficiently respected would the results of the work of the Working Group be acceptable to Governments.

59. Finally, he welcomed the suggestion that a special mechanism should be established to ensure the harmonization of the provisions of the draft Code and the draft statute with a view to achieving a more coherent and integrated structure. In order to avoid holding discussions on that very important topic in two different forums, every effort should be made to coordinate the discussions held in each forum.

60. Mr. Camacho (Ecuador), Vice-Chairman, took the Chair.

61. Mr. VARSO (Slovakia) said that Slovakia's past experiences had led it to attach great importance to questions relating to the peace and security of mankind; in its foreign policy it supported all activities to promote friendly and constructive cooperation among States.

62. The report of the International Law Commission showed that much work remained to be done on the draft Code of Crimes against the Peace and Security of Mankind. On the content ratione materiae of the draft Code, his delegation felt that the main issue was to determine the purpose of the Code; otherwise, there were liable to be sterile discussions on whether a given crime should be included in the Code. Questions of the peace and security of mankind should be accorded the greatest attention by the international community on the basis of the most relevant legal considerations and, above all, should not be subject to mathematical or political calculations.

63. Since international peace was repeatedly being violated at the local and regional levels, endangering the international legal order, his delegation shared the view that an in-depth analysis should be made of the phenomena which threatened international peace and security. It felt that the Code should be seen as a preventive and punitive international instrument for the protection of the international legal order. That meant that only certain crimes should be included, particularly since each State could deal with crimes within its own sphere of competence.

64. It would be useful to reflect the two main objectives of the Code - the maintenance of peace within the international community and the protection of human lives - in the general provisions of the Code and to draw a clear distinction between what was being protected and acts or activities which violated the social order, the latter being considered as crimes against the peace and security of mankind. Crimes against peace should be analysed separately from crimes against security and, on that basis, separated into two categories. That distinction would help clarify terms often used in the report - seriousness, massive nature and violation of the international legal order - which could hardly be used to define crimes against peace, since a crime against peace was a crime wherever it took place, and on whatever scale, whereas in the case of crimes against humanity, it was relevant to determine the seriousness or scale of the acts or activities to determine whether they endangered the security of mankind.

65. The distinction also applied in respect of individuals who committed such crimes: while a crime against humanity could be committed by an individual who had no connection with the authorities of a State, a crime against peace could not be perpetrated, without support from a State. A distinction should be made between crimes committed by State representatives (both crimes against peace and crimes against the security of mankind) and crimes committed by other individuals (crimes against the security of mankind). Crimes committed by State representatives were all the more serious in that they involved the abuse of power; that aspect should also be taken into consideration with regard to penalties.

66. It was difficult to determine which acts or activities should be included in the specific articles of the Code so long as ambiguity remained about the object or objects protected by the Code. However, crimes against the status quo within the international community protected by the norms of jus cogens should clearly be included. It was obvious that aggression should be included among acts against peace, and his delegation was in favour of the Special Rapporteur's new wording. Similarly, genocide, war crimes and crimes against humanity when they were of a grave and massive nature should be included among acts or activities against the security of mankind. Illicit traffic in narcotic drugs, which was a modern form of genocide, also belonged in the category of crimes against the security of mankind.

67. His delegation agreed that the crimes in the Code should be formulated on the basis of the principle nullum crimen, nullum poena sine lege since, as a legal instrument, the Code must be clear and understandable for the persons protected and effective in respect of the potential culprits. His delegation also agreed that judges should play a central role in considering evidence and testimony regarding crimes committed, and that the judiciary must be independent from all political considerations which might influence its decisions.

68. Mr. LA GRANGE (South Africa) said that his delegation had taken due note of the assumptions underlying the draft Code. The Code should be sufficiently precise to meet the requirements of the principle nullum crimen sine lege: only the most serious international legal crimes should be included; the Code should be effective in enhancing international peace and security; and it should strengthen international law. However, it was his delegation's unwavering

opinion that the crime of apartheid could not justifiably be accorded secondary status. The Committee hardly needed to be reminded of the Security Council resolutions which had declared that apartheid constituted a threat to international peace and security, and of the General Assembly resolutions in which the policies and practices of apartheid had been condemned as a crime against humanity. The International Convention on the Suppression and Punishment of the Crime of Apartheid was in itself justification for maintaining article 20 of the draft Code. As of 15 July 1994, 36 States had signed the Convention and 96 had ratified or acceded to it.

69. The seriousness of the consequences of apartheid, which were still being felt daily by a majority of the people of South Africa, offered a legal basis for the inclusion of article 20. Apartheid's reach stretched well beyond the borders of South Africa, and had had a devastating impact on the countries and peoples of southern Africa. The contention that, since the scope of apartheid had been territorially limited, the phenomenon was therefore not worthy of inclusion in the Code rested on a flawed argument. His delegation felt that certain actions and policies were of legal relevance for the purposes of the Code because their intrinsic nature threatened the peace and security of mankind and because of the extreme seriousness of their consequences, regardless of when the actions had taken place on their territorial extent. It would thus be a disservice to future generations to exclude the crime of apartheid from the list of crimes.

70. Mr. SURIE (India) said that his delegation was not satisfied with the general outcome of the debate on the draft Code of Crimes against the Peace and Security of Mankind as it had progressed thus far, and he regretted that the latest text proposed by the Special Rapporteur had not included several crimes which had been considered important enough to merit inclusion in the first reading and before. Some of those crimes, such as terrorism, had assumed even greater importance and ought to have been included.

71. The Indian Government had repeatedly emphasized the close link between the draft Code and the statute for an international criminal court. Any weakening of the draft Code would correspondingly weaken the importance of a permanent court.

72. Regarding specific crimes, his delegation believed that the definition of aggression in the draft Code should be a legal one, even if it was based on the definition of aggression contained in General Assembly resolution 3314 (XXIX). Many of the proposals put forward in the Commission could provide the necessary material for such an exercise. In addition, there should be no distinction between an act of aggression and a war of aggression, provided that such an act had given rise to consequences so grave that they had threatened the peace and security of mankind. Merely emphasizing wars of aggression would be inadequate, given contemporary realities. Definitions of genocide and other relevant crimes would also have to be reviewed carefully before being included in the draft Code.

73. With regard to crimes against humanity, his delegation felt that the criterion of systematic and mass violations of human rights was necessary for such violations to be incorporated as a crime in the Code. In the case of such

crimes a basic question to be considered by the Commission was the threshold or point at which a violation which would otherwise fall within domestic jurisdiction became a matter of international concern. That issue was complicated by the absence of any universal agreement at the international level, and also by the lack of consensus on applicable standards, inadequate appreciation of the context of such violations, and the absence of credible and impartial means of establishing facts. Moreover, no conduct should be included as a crime in the Code unless it had threatened or was likely to threaten the peace and security of mankind.

74. Much more work needed to be done on the definition of war crimes, taking into account the comments and views of States and the laws and customs of armed conflict. The scope of the Code should be narrow and clearly defined, and should not deal with situations arising out of internal conflict, as the Code was meant to deal with crimes affecting international peace and security.

75. His delegation attached great importance to combating the fast-growing threat of terrorism and believed that that crime should be included as a separate category within the Code. The scope of the crime of terrorism should be enlarged by bringing within its ambit terrorist acts by individuals, as well as acts sponsored by others. A definition of terrorism could be attempted along the lines of the international conventions on the subject. In view of the increasingly insidious relationship between terrorism and illicit trafficking in narcotic drugs, his delegation supported the inclusion on illicit traffic in narcotic drugs as a crime under the Code.

76. His delegation felt that prosecution and punishment of the crimes to be included in the Code were best left to national systems. However, where a crime posed a threat to international peace and the order of a State or States, it should be tried under the Code by an international criminal court.

77. In sum, he noted that the international criminal court and the Code must jointly provide a basis for a non-discriminatory, objective and universal international criminal justice system. The absence of any specific crime from the draft Code in second reading could not alter its status as a crime under international law. The draft Code required further intensive review in order to establish greater clarity of the elements of the crimes involved; complement them with rules and procedures for evidence; provide prescriptions and criteria for investigation and surrender; and establish a proper balance between any such international criminal justice system and national criminal justice systems on the one hand and the United Nations Charter system on the other.

78. Mr. MÜLLER (Germany) strongly endorsed the view that the list of crimes to be included in the draft Code should contain only those offences whose characterization as crimes against the peace and security of mankind was generally accepted. Bearing in mind that the aim of the draft Code was to make possible the prosecution and punishment of individuals who had perpetrated crimes of such gravity that they victimized mankind as a whole, it seemed a sound approach to reduce the list to a "hard core" of crimes. Such a reduction would make it easier for the draft Code to become operative in the future, possibly in conjunction with the establishment of a permanent international criminal court. The German Government did not take the view that the crimes

removed from the list by the Special Rapporteur did not constitute serious wrongdoings, but it felt that a restrictive and concise list would have a greater chance of general acceptance by the international community.

79. If the draft Code was to become operational and form the cornerstone of an international system for the enforcement of criminal law, it would have to spell out clearly the general rules establishing individual criminal responsibility. His delegation welcomed the fact that the Commission had addressed the issue of personal responsibility in its consideration of article 3.

80. Nevertheless, the article dealing with responsibility and punishment should have been more specific. Given the wording with regard to complicity and attempt in article 3, paragraphs 2 and 3, personal liability to prosecution would appear to be almost limitless. The current wording seemed to reflect an unduly comprehensive notion of complicity and attempt. An overly broad notion of participation in a crime would make the draft Code difficult to implement and therefore reduce its prospects for acceptance by the international community.

81. While appreciating that it was extremely difficult to define crimes under international law in a manner precise enough to meet the rigorous standards of criminal law, his delegation nevertheless felt that the provisions envisaged in article 3, paragraphs 2 and 3, lacked the precision and rigour required under the principle of nullum crimen sine lege. They did not seem to offer a firm basis for unambiguously establishing individual responsibility.

82. Recalling also the principle of nulla poena sine lege, he reminded the Committee that individual responsibility did not merely require an abstract definition of a crime before an individual could be punished for it. The individual should also know what kind of penalty was applicable to his action. Welcoming the fact that the Commission had discussed the inclusion of penalties in the draft Code, he said that the draft Code should contain a general provision on the nature of possible penalties. Article 24 of the Statute of the International Tribunal for the Former Yugoslavia might serve as an example for such a provision.

83. With regard to article 15, on aggression, he expressed appreciation for efforts that had been made to give that concept a structure and definition that would be workable in the context of criminal law. Aggression must form an integral part of the draft Code. However, the task of defining aggression in terms precise enough to establish individual responsibility and ensure safeguards against arbitrary application seemed particulary elusive. The last part of the definition contained in the new text of article 15, paragraph 2, reflected the established language that had often been used by the United Nations, but was too vague and ambiguous for the purposes of criminal law.

84. Additional efforts were needed to define those elements of fact and personal behaviour that, taken together, constituted the most serious crimes against the peace and security of mankind. It seemed clear that any qualification of individual behaviour as a crime of aggression had to be preceded by a determination that a State had committed an act of aggression. Such a determination would necessarily have far-reaching implications for

international peace and security, and he wondered whether it could be made without engaging the responsibility of the Security Council.

85. Regarding draft article 26, on wilful and severe damage to the environment, the Commission would have to develop practical criteria for establishing conclusively whether, in a given case, the extremely serious charge of a crime against the peace and security of mankind was justified.

86. Ms. FLORES (Uruguay) said that despite the difficulties in achieving consensus on crimes to be included in the draft Code, there was no doubt that that instrument would help in strengthening the rule of law and combating the most serious crimes against international peace and security. Further work on the Code should seek to ensure due process and safeguard the principles relating to the human rights on which contemporary criminal law was based.

87. Two important elements must be borne in mind; first, that the formulation of the draft Code was not an isolated exercise and, second, that there was a need for precise definitions of each crime. The question of the relationship between the Code and the international criminal court had been raised repeatedly. The General Assembly, in its resolution 46/54, had invited the Commission, within the framework of the draft Code, to consider further the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court. The provisions of the Code must therefore be coordinated and harmonized with the provisions of the draft statute of the court, bearing in mind that the Code would constitute the applicable substantive law for the court.

88. The link between article 19 of Part One of the draft articles on State responsibility should also be taken into account, since the actions of individuals contributed significantly to the perpetration of crimes by States.

89. Article 1 of the draft Code should be reviewed and should include a general definition of the crimes included in the Code, and as well as a clear statement of the characteristics of such crimes, with a view to providing objective criteria.

90. Her delegation understood the considerations which had led the Special Rapporteur to reduce the number of crimes to be included in the draft Code from 12 to 6, particularly since some of the crimes deleted, such as threat of aggression and the recruitment, use, financing and training of mercenaries, could be included under the crimes of aggression or international terrorism. However, it was premature to drop other crimes, such as intervention or wilful and severe damage to the environment, from the Code. The crime of wilful and severe damage to the environment was of particular importance not only for current but also for future generations, and although some cases might be punishable under other provisions of the Code, the specific nature of the crime called for separate treatment. Moreover, as noted in paragraph 55 of the report, a restrictive list of crimes was no guarantee of acceptance by States, nor of consensus on its contents.

91. Although the Special Rapporteur had deleted six paragraphs of the text relating to the crime of aggression, which were based on General Assembly

resolution 3314 (XXIX), her delegation felt that some elements of that resolution should be included in the final text. Those elements had been reflected in other instruments, such as the Protocol of Amendments to the Inter-American Treaty on Reciprocal Assistance.

92. Her delegation supported the Special Rapporteur's solution with regard to the title of article 21 and also his suggestion that enforced disappearances should be included in that article.

93. Her delegation felt that a clear definition of each crime and the establishment of penalties with maximum and minimum limits for all the crimes listed in the Code were essential in accordance with the principle of nullum crimen, nulla poena sine lege.

94. Mr. SZÉNÁSI (Hungary) said that his delegation agreed with the Special Rapporteur that the scope of the draft Code of Crimes against the Peace and Security of Mankind should be reduced to six crimes, namely aggression, genocide, systematic or mass violations of human rights, exceptionally serious war crimes, illicit traffic in narcotic drugs and wilful and severe damage to the environment. The first four, which were due to be considered on a priority basis at the next session of the Commission, needed further discussion, improvement and refinement. In that connection, Hungary endorsed the Special Rapporteur's intention to return to the wording "crimes against humanity" and "war crimes" to describe the third and fourth items on the list, respectively.

95. Regarding draft article 26, on wilful and severe damage to the environment, that offence could be punishable under other articles, such as those on aggression or war crimes, or under other international legal instruments. In view of the particular importance Hungary attached to environmental issues, however, his delegation welcomed the Commission's decision to establish a working group to consider including the crime of environmental damage in the draft Code.

96. Hungary had a special interest in the matter of State succession and its impact on the nationality of natural and legal persons, owing to its geopolitical situation. The Hungarian Government welcomed the fact that the relevant principles and rules would relate both to the codification and the progressive development of international law, and shared the Special Rapporteur's view that a study of the effects of State succession on the nationality of natural persons was more urgent and should take priority over the separate problem of the nationality of legal persons. Hungary also endorsed the principle of the obligation of the predecessor State not to withdraw the nationality of the person concerned, the obligation of the successor State to grant its nationality to a well-defined category of persons, and the obligation of both States to grant a right of option.

97. He welcomed the progress that had been made in the area of State responsibility. With regard to countermeasures, the wording of draft article 13 was acceptable. In article 14, while his delegation agreed that most of the prohibited countermeasures contained in subparagraphs (a) to (d) were also covered by subparagraph (e), it would nevertheless be preferable to spell out those important rules. On the matter of dispute settlement, his delegation

endorsed the Special Rapporteur's proposal to establish a new dispute settlement obligation for States parties in relation to disputes that had arisen after the taking of countermeasures, although it believed that many States would be reluctant to accept such a compulsory system. That was particularly true of article 7, which provided for unilateral action by any party to bring the case to the International Court of Justice for a ruling on the validity of an arbitral award.

98. Regarding international liability for injurious consequences arising out of acts not prohibited by international law, Hungary continued to believe that the issue was crucial in identifying and reaffirming the emerging provisions of international environmental law. It was sometimes difficult to make a clear distinction between "soft" and "hard" law in the field, but what was currently considered "soft" would most likely become "hard" in the future. Therefore his delegation supported the Commission's view that there existed a general obligation to prevent or minimize the risk of causing significant transboundary harm. Hungary had always been ready to conduct negotiations and cooperate in good faith with any of its neighbours on issues relating transboundary harm, and had always been willing to seek the assistance or mediation of any international organization in the field.

99. With regard to the law and practice relating to reservations to treaties, he hoped that, with the completion of political decolonization and the end of the cold war, the question of reservations could be addressed in a calmer atmosphere.

The meeting rose at 6.20 p.m.