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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (1995)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session prepared by the Secretariat

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INTRODUCTION

1. At its fiftieth session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 22 September 1995, to include in the agenda of the session the item entitled "Report of the International Law Commission on the work of its forty-seventh session" 1/ and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 12th to 25th and 44th meetings, held between 12 and 30 October and on 22 November 1995. 2/ At the 12th meeting, on 12 October, the Chairman of the Commission at its forty-seventh session, Mr. P. S. Rao, introduced the report of the Commission. At its 44th meeting, on 22 November, the Sixth Committee adopted draft resolution A/C.6/50/L.7, entitled "Report of the International Law Commission on the work of its forty-seventh session". The draft resolution was adopted by the General Assembly at its 87th meeting, on 11 December 1995, as resolution 50/45.

3. By paragraph 14 of resolution 50/45, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the Commission's report at the fiftieth session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of six sections (A to F) corresponding to chapters II to VII of the report of the Commission.

TOPICAL SUMMARY

A. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

1. General remarks

(a) Background to the current work of the Commission on the draft Code

5. It was recalled that the atrocities committed during the Second World War had led the Assembly, in 1947, to ask the Commission to consider the elaboration of a draft code on the subject and that the project together with the related endeavours on international criminal jurisdiction and the definition of aggression had a long and tortuous history within the United Nations system. The remark was also made that 48 years after the adoption of General Assembly resolution 177 (II), of 21 November 1947, in which the Assembly had directed the International Law Commission to prepare a draft code of offences against the peace and security of mankind, it could not be denied that efforts had been made

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1/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10).

2/ Ibid., Sixth Committee, 12th to 25th and 44th meetings.

by the international legal community to respond to the Assembly's expectations; at the same time it could not be denied that these efforts had thus far been in vain. The slow progress on the draft Code was attributed to the fact that the matters involved related to a sphere of international law which, during the past 50 years, had been dealt with almost exclusively in the Security Council on the basis of political rather than legal considerations.

6. As regards the purpose of the future Code, the remark was made that, although it was difficult to achieve consensus on the crimes to be covered, the instrument would undoubtedly help in strengthening the rule of law and combating the most serious crimes against international peace and security. The view was expressed that it was not easy to determine which acts or activities should fall within the ambit of the Code as long as ambiguity remained about the object or objects protected by the future instrument. It was suggested that the two main objectives of the Code - the maintenance of peace within the international community and the protection of human lives - should be reflected in the general provisions of the instrument and a clear distinction drawn between the interests being protected and the acts or activities violating the social order which constituted crimes against the peace and security of mankind, with crimes against the status quo within the international community protected by the norms of jus cogens being clearly included. In this connection, the view was also expressed that the Code should not rely unduly on existing treaties because it dealt with crimes which constituted violations of jus cogens.

7. Work on the draft Code was considered to be particularly relevant given the very serious crimes which were being committed in various parts of the world and the great interest being shown in the establishment of an international criminal court. The remark was made that a comprehensive legal instrument for the suppression of exceptionally serious crimes was urgently needed in view of the increase in serious crimes against the peace and security of mankind, perpetrated by individuals who very often acted with impunity. It was also said that, while the Commission had dedicated long years to establishing regimes for international responsibility and international liability which reflected the prevailing view that States were primarily responsible for their own acts and for the acts of individuals, recent events in Bosnia, Rwanda and elsewhere had demonstrated that individuals could also violate the sovereignty of a State, harm its interests or injure its subjects and that it was therefore necessary to consider the responsibility of individuals for acts which in the past had generally been attributed to States, given the inadequacy of the national law of many countries in addressing such crimes. It was further remarked that recent tragic events in the former Yugoslavia and in Rwanda had demonstrated the need for a Code of crimes against the peace and security of mankind which would enable the international community to put an end to the tragic phenomenon of impunity and to discourage flagrant violations of human rights wherever and whenever they occurred. Achieving that objective, it was suggested, required not only the establishment of an international criminal court but also the adoption of a Code that would effectively prevent and punish crimes against humanity and world civilization.

(b) The Commission's pace of work and the orientation of its future efforts

8. Several delegations noted with appreciation the significant progress achieved by the Commission during its forty-seventh session in the examination of the draft Code and the commendable efforts of the Special Rapporteur in proposing realistic solutions by limiting the number of crimes. According to one view, the proposed reduction in the number of crimes to be brought within the ambit of the Code was, in principle, a positive development responsive to concerns previously expressed on the entire exercise. The Commission was clearly capable of meeting the urgent demands of the international community for legal expertise in this area. According to another view, the value of the Code had been somewhat diminished by the cutting of major sections and there was a risk that the process of truncation might continue.

9. The Commission's major achievements were considered to be the clarification, for the purposes of the application of the Code, of the principles aut dedere aut judicare and non bis in idem, and the definition of the Code's sphere of international application by national and international courts. Those achievements were described as invaluable advances in view of the sensitivity of the problems which arose regarding the extradition of persons accused of international crimes.

10. At the same time, it was noted that neither States nor the Commission itself had as yet reached agreement on the main issues, namely, which crimes should be defined as "crimes against the peace and security of mankind", whether the list of such crimes should be reduced or enlarged, and what the legal nature of the document in its final form should be. Concern was also expressed that, at its forty-seventh session, the Commission had failed to make spectacular progress on the draft Code and, indeed, had postponed the completion of its work on that topic until 1996, thereby displaying less diligence and efficiency than it had done in the case of the international criminal court.

11. As to future work, the view was expressed that the prospects for the completion of the draft Code during the coming year had been enhanced by the decision to limit the number of crimes to be covered, which would greatly facilitate wide acceptance of the end product. It was noted however that important matters of principle and technical questions remained unresolved and clarification of the current text was required.

12. Further intensive efforts were viewed as necessary to establish with greater clarity the elements of the crimes involved; to complement them with rules and procedures for evidence; to provide prescriptions and criteria for investigation and surrender; and to establish a proper balance between any international criminal justice system and national criminal justice systems on the one hand and the United Nations Charter system on the other. It was also suggested that work on the Code should seek to ensure due process and safeguard the principles relating to human rights, on which contemporary criminal law was based. With reference to the fact that the Drafting Committee had worked simultaneously on parts I and II of the draft during the past year, the view was expressed that priority should have been given to the completion of part II, which would have been of particular assistance in the ongoing project on the international criminal court.

13. Concern was expressed that it might prove difficult to conclude the second reading of the draft Code at the next session, in view of the many problems that still remained. The Commission was urged, on the one hand, to take the time required to achieve accuracy and to ensure that the result was fully satisfactory and responsive to the expectations of the international community and, on the other hand, to concentrate on well-understood and legally definable crimes and to produce a defensible and lean draft text, in order to gain the widest possible acceptance by States.

14. Some delegations sounded a note of caution with respect to future work on the draft Code. Emphasis was placed on the need not only to ensure that justice was done but also to achieve universal recognition of the extreme seriousness of the acts under consideration - a process which was fraught with obstacles and difficulties and therefore called for a positive and prudent approach in order to balance considerations of principle and practicalities and thereby avoid the production of one more document for the archives of jurisprudence. The view was also expressed that members of the Commission should be wary of developing concepts which would conflict with States' interests or impinge on the sovereignty of States, for that would be an obstacle to the universal acceptance of the Code.

15. The adoption of norms to prevent and punish international crimes against the conscience and survival of mankind was described as an extremely important and politically sensitive task, in which the different criminal law theories and practices of various countries had to be borne in mind and which called for the progressive development of international law. The remark was also made that, while criminal law at the municipal level was backed by rules of evidence that enforced discovery and permitted interrogation in municipal criminal law systems, such rules were lacking at the international level where the procedures differed and greater opportunities existed for the obstruction of justice through corruption or suppression of evidence.

16. On the nature of the future Code and its method of adoption, attention was drawn to existing divergences of opinions: some favoured a declaration by the international community that certain actions were of such enormity as to merit characterization as international crimes and others favoured a Code containing clear provisions for use in criminal trials against individuals, two approaches which appeared to be mutually exclusive. For some, the Code should be binding and take the form of a convention containing sufficiently precise provisions to ensure its effective implementation in the prosecution of individuals. Such a convention, it was stated, should be elaborated, at the appropriate time, in the framework of a conference of plenipotentiaries. For others, the Code, like the statutes of the international tribunals for the former Yugoslavia and Rwanda, should be adopted by a resolution of the Security Council, which was the competent body in the matter, since aggression, genocide, crimes against humanity, war crimes and international terrorism were threats to international peace and security. A further view was that, although an international convention that would be binding on a significant number of States would be the desirable outcome, one could envisage another type of instrument, such as a declaration or model principles, as referred to in paragraph 46 of the report of the Commission, as an important step towards developing morality in international law.

2. Scope ratione materiae of the future Code

(a) General observations

17. The scope ratione materiae of the future Code was described as an issue of fundamental importance which would continue to give rise to controversy. The view was expressed that only the most serious international crimes should be included, as seemed to be the prevailing view in the Commission, and that in order to secure broad acceptance, it was best to limit the scope of the instrument to crimes which evoked strong international condemnation.

18. Further comments included: (a) that the scope ratione materiae of the draft Code should be determined based on the purpose of the instrument; (b) that peace and security issues should be accorded the greatest attention by the international community on the basis of the most relevant legal considerations and should not be subject to mathematical or political calculations; and (c) that the Code should only deal with crimes recognized as such under established rules of international and customary law whose application would not depend on whether the instrument was adopted in the form of a convention.

19. On the criteria to be applied to determine which crimes to include in the Code, the view was expressed that the method followed by the Special Rapporteur in reducing the list of crimes from 12 to 6 seemed realistic and reasonable in principle, although the vague wording could give rise to difficulties in practice. However, it was also stated that the selection of the Special Rapporteur was unacceptable, since the crimes which he proposed to exclude were as political and debatable as the six he had retained.

20. The Commission was invited to continue to seek broad agreement on objective criteria for defining not only serious international crimes, but also those which qualified as crimes against the peace and security of mankind. It was suggested that such criteria should be reflected in the Code and should include the extreme seriousness of the crime and the general agreement of the international community regarding its character as a crime against the peace and security of mankind. Attention was also drawn to the need to apply consistent criteria in the draft statute of an international criminal court and in the draft Code.

21. According to one view, the gravity or significance of a particular crime should be the sole criterion for inclusion in the Code.

22. According to another view, the crimes to be covered should meet two criteria, namely, be actual crimes against the peace and security of mankind, and be suitable for regulation by the type of instrument under consideration. In this context, the remark was made that not every major breach of international law or morally reprehensible act could be defined as a crime against the peace and security of mankind, and the scope of the Code should be limited to crimes that corresponded to the legal rules accepted by States, were considered serious enough to be defined as crimes against the peace and security of mankind, and translated into acts sufficiently identifiable to appear in a

criminal text. The matter should be dealt with only from a legal, not a political perspective.

23. According to a third view three criteria should be used for the selection of crimes and for the jurisdiction of the international criminal court: crimes 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, it was suggested that only four crimes could be included in the Code - namely, aggression, genocide, crimes against humanity and serious war crimes - and that 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.

24. Under a fourth approach, the draft Code should cover only those crimes that posed a serious and imminent threat to international peace and security. More specifically, it was said that the crimes should be those that were directed against the fundamental interests of the international community and the conscience of mankind and consequently threatened peace and security and should also be sufficiently serious to justify the concern of the entire international community. Along the same lines, the view was expressed that the draft Code should focus only on the most serious international offences, to be determined by reference to general criteria, such as the political character of the crime and the possibility that the latter might endanger international peace and security, as well as to the relevant conventions and declarations. It was suggested that, since international peace was repeatedly being violated at the local and regional levels, thereby endangering the international legal order, an in-depth analysis should be made of the phenomena which threatened international peace and security. It was also suggested that the Code should be seen as a preventive and punitive international instrument for the protection of the international legal order, which meant that only certain crimes should be included, particularly since each State could deal with crimes within its own sphere of competence.

25. According to another approach, six principles should be applied in order to decide which crimes should be included in the draft: the conduct should be of sufficient gravity; it must offend universal sensibilities and constitute a serious threat to the peace and security of mankind; the definitions must be formulated with the precision and rigour required for criminal law, in accordance with the principle nullum crimen sine lege; the conduct must be covered by existing rules of international and customary treaty law; the Code must confine itself to defining crimes whose perpetrators were directly responsible by virtue of existing international law; and the crimes must relate primarily to the area covered by international crimes of States where individual criminal responsibility would be a legal consequence of the unlawful conduct attributable to the State, although the criminal responsibility would be incurred only by individuals.

26. Under yet another approach, crimes against peace and crimes against security should be analysed separately and treated as two separate categories with a view to clarifying 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. It was also suggested that the distinction should apply 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. It was further suggested that 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, which should also be taken into consideration with regard to penalties.

(b) The restrictive approach recommended by the Special Rapporteur 3/

27. A number of delegations expressed support for the Special Rapporteur's recommendation to limit the list of crimes against the peace and security of mankind to those which were difficult to challenge, namely, acts that were so serious that they would unquestionably fall into the category of crimes against the peace and security of mankind. The view was expressed that the Commission needed to strike a balance between legal idealism and political realism, and the Special Rapporteur's approach was commended as appropriately leaning towards the latter, as likely to facilitate the work of the Committee and as justified in view of the lack of consensus on certain crimes in the draft Code. The remark was made that, bearing in mind that the aim of the 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 which 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.

28. Several delegations welcomed the proposal of the Special Rapporteur to eliminate from the draft Code various articles which had appeared in the earlier version - with reference being made to the practical reasons cited in the Special Rapporteur's thirteenth report - and to retain the remaining six crimes in the draft. It was said in particular that this restrictive approach would avoid devaluing the concept of crimes against the peace and security of mankind, that crimes incapable of precise definition or which had political rather than legal implications should be left out and that the six crimes proposed for deletion, however reprehensible, had no place in the Code and could only impede the preparation of a generally acceptable instrument. With reference to the obstacles encountered in the preparation of the draft and the seemingly insurmountable differences of view on the subject in the Sixth Committee, the view was expressed that the Special Rapporteur's proposal to limit the number of crimes to six seemed to have received the support of many members of the Committee.

3/ The comments made concerning specific articles of part II are reflected in paragraphs 84 to 168 below.

29. While welcoming the Special Rapporteur's intention to limit the list of crimes to those whose inclusion would be hard to challenge, namely, aggression, genocide, war crimes, crimes against humanity, international terrorism and illicit traffic in narcotic drugs, some delegations expressed doubts about the last two. Attention was drawn to the consensus which had clearly developed in the Commission in favour of including the first four crimes in the draft Code, subject to finding adequate solutions to definitional problems, particularly as regards aggression, with support being expressed for 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. The remark was made that, while a comprehensive Code encompassing all the articles adopted by the Commission on first reading would be more effective for the strengthening of international law, the Special Rapporteur's suggestion was, in principle, acceptable as a way of promoting consensus and facilitating acceptance of the Code by the international community.

30. Other delegations, while understanding the considerations which had led the Special Rapporteur to reduce the list of crimes, pointed out that a restrictive list of crimes was no guarantee of acceptance by States, nor of consensus on its contents, as noted in paragraph 55 of the report of the Commission. It was suggested that the question of leaving out certain crimes should be examined at greater length, since the crimes in question constituted serious offences against the human conscience and threats to the peace and security of mankind.

31. Still other delegations expressed concern that the general outcome of the debate on the draft Code as it had progressed thus far was unsatisfactory and viewed as regrettable the proposed deletion of several crimes which had been considered important enough to merit inclusion at the first reading stage, particularly since some of those crimes, such as terrorism, had, in the meanwhile, assumed even greater importance. The view was also expressed that there was no justification for excluding from the draft Code serious crimes such as intervention, colonialism, apartheid, mercenarism and international terrorism.

32. With reference to the claim that odious crimes such as apartheid and colonial domination should not figure in the Code because they had disappeared, the remark was made that recent scientific progress had led to the opposite conclusion, and that, for example, the exploitation of new sources of wealth was expected to be reserved for a few countries having the requisite financial and technical resources. It was also observed that, while most of the crimes which the Special Rapporteur had proposed for deletion reflected practices that no longer existed, deterrence considerations justified the inclusion in the Code of practices which might reappear.

33. As regards the argument that some of the crimes excluded, such as intervention and colonial domination and other forms of alien domination, were already covered by conventions or General Assembly declarations, the view was expressed that the legal instruments in force should serve as working documents on the basis of which the Commission ought to continue its work of codification and progressive development of international law.

34. The remark was also made that the Special Rapporteur had been obliged to select the incontrovertible crimes to be included in the Code on the basis of the reservations or views of a small number of States, which were not representative of the international community's position, since the majority of developing countries had failed to submit comments on the draft articles adopted on first reading. The weight to be given to the written comments of Governments was queried, bearing in mind that Governments preferred to express their opinions in the Sixth Committee.

35. As to the claim that a more comprehensive Code would become a dead letter and would never be applied, the view was expressed that a restrictive Code might prefigure a world in which the rich would grow steadily richer and the poor poorer and that a comprehensive instrument having not only a repressive value but also a dissuasive value would usher in a world governed by the force of law, not by the law of force.

36. The Commission's decision to adopt the recommended approach gave rise to a parallel divergence of views. Some delegations considered it as wise and realistic and as likely to increase the acceptability of the Code and to contribute to its universality, which would be of great importance when the draft was converted into a treaty. The remark was also made that 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. It was further observed that the restrictive approach corresponded to the view prevailing in the Ad Hoc Committee on the Establishment of an International Criminal Court, where the majority of States seemed inclined to limit the competence rationae materiae of the future court to a "hard core" of crimes under general international law which offended the conscience of mankind as a whole.

37. Support was expressed for 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, as well as for its decision to refer to the Drafting Committee only the corresponding four articles, which attested to a realistic, rather than a political, concept of crimes against the peace and security of mankind. At the same time, support was expressed by some delegations for the Commission's decision to continue consultations on two other crimes, namely, illicit traffic in narcotic drugs and wilful and severe damage to the environment.

38. Other delegations felt that the Commission had too drastically reduced the list of crimes, thereby confirming its tendency to concentrate more on codification than on the progressive development of international law. The view was expressed that the decision to exclude some crimes from the draft because they had not been defined with the precision required by criminal law was ill-advised as it entailed a risk of trivializing certain acts. Reference was made in this context to mercenary activities and to colonial domination and other forms of alien domination. Concern was expressed that States which, in recent years, had considered the establishment of an international criminal court as a priority were now invoking in favour of the exclusion of certain crimes from the Code the argument that the future court should not be overburdened with matters that could be handled at the national level. It was suggested that these

difficulties could be overcome by supplementing the list of crimes set forth in the Code with a list of violations characterized as international crimes under treaty law and customary international law, without prejudice to the competence ratione materiae of the international criminal court. The view was further expressed that, while there might be reasons for keeping certain violations outside the jurisdiction of the future court, including such violations in the Code would make it possible for the criminal tribunals to characterize certain acts as crimes and punish the perpetrators.

39. Some of the delegations favouring a restrictive list observed that the exclusion of specific crimes did not detract from their seriousness nor alter their status as crimes under international law. The remark was also made that reducing the number of crimes covered by the Code was without prejudice to the criminal nature of other acts committed by individuals and punishable under existing international instruments. Such acts should be dealt with through existing international instruments or, if necessary, through amendments to those instruments, and a provision to that effect could be included in the resolution by which the Code would eventually be adopted.

40. The Special Rapporteur's suggestion that some of the crimes which had been deleted could be dealt with under the crimes of aggression or international terrorism met with a measure of support. It was noted that, by asking the Drafting Committee, at its discretion, to deal with articles 17, 18, 20, 23 and 24, the Commission had clearly recognized the need to reconsider these corresponding crimes from a global perspective and from the point of view of their components. The question was raised, however, whether the Commission attached the same importance to those crimes as to illicit traffic in narcotic drugs and wilful and severe damage to the environment. There was on the other hand, a view that the Commission's request to the Drafting Committee could only increase the difficulties and delay the conclusion of the work.

41. Some delegations felt that the Code should envisage the possibility of supplementing or amending the list of crimes, as necessary, in the future. Attention was drawn to the idea, referred to in paragraph 41 of the report of the Commission, of "provisionally restricting" the scope of the Code to the six crimes identified by the Special Rapporteur in order to facilitate consensus. The view was expressed that it would be appropriate to include in the Code a mechanism for the progressive addition of crimes on which a broad international consensus might one day emerge or for the deletion of specific crimes - a compromise formula which would make it possible to take account of developments in the world community. It was suggested that the possibility of changing or amplifying the Code, which should not be considered as a definitive or immutable legal instrument, should be provided for in the convention establishing the Code, in the Code itself or in an accompanying General Assembly resolution.

3. Relationship between the draft Code and the proposed international criminal court

42. There were different views on the question of the link between the draft Code and the draft statute for an international criminal court. Attention was drawn to General Assembly resolution 46/54, of 9 December 1991, in which the

Assembly invited the Commission, within the framework of its work on the draft Code, to consider proposals for the establishment of an international criminal court. The view was expressed that the two instruments were closely related and that any weakening of the draft Code would correspondingly weaken the role of a permanent court. Regret was expressed that the draft Code should have been dissociated from the draft statute, given that the court had originally been envisaged as a legal body in which the Code would be applied.

43. The remark was made that there was an inextricable link between the completion of the Code and the establishment of an international criminal jurisdiction and that the Code would be better implemented by an international criminal court than by national courts. It was also stated 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 Commission was encouraged to make every effort to complete its work on the draft Code, in order to provide the proposed international criminal court, on which work seemed to be proceeding well, with a reliable and comprehensive legal instrument for the suppression of exceptionally serious crimes. Concern was also expressed that the minimalist tendency which sought to eliminate the essential link between the Code and the proposed international criminal court led to the exclusion of the criminal responsibility of the State, an approach which was unacceptable, particularly for third-world countries.

44. On the other hand, the view was expressed that the deliberations on the draft statute for an international criminal court had reached a critical phase and that any attempt to link the Code, with its many controversial elements, to the court would only detract from or even retard the success of those deliberations. The remark was made that the draft Code and the proposed international criminal court were two different projects which were not necessarily related, since progress on one was not dependent on progress on the other.

45. Some delegations commented on the substantive relationship between the draft Code and the draft statute without suggesting a formal linkage between the two instruments. The view was expressed that the Code and the future court shared a common purpose of enabling national courts or an international body to punish particularly abhorrent crimes committed by States or individuals and that the two drafts should therefore correspond as closely as possible, especially with respect to the definition of crimes and the nature and degree of punishments, the more so as the international criminal court was envisaged as complementary to national courts. Along the same lines, it was suggested that it would be appropriate to study the relationship between a convention embodying a Code of crimes and the establishment of an international criminal jurisdiction in considering the difficult problems relating to the establishment of a new system of penal law in the Code, including definitions of the crimes covered, jurisdiction to try the accused, mechanisms to bring the accused to trial, provisions for trial proceedings, safeguards for the rights of the accused and norms to govern the imposition of penalties in the event of conviction.

46. The remark was on the other hand made that the work carried out on the draft Code, within the realm of positive law, and on the draft statute for an international criminal court, as an instrument of procedural law, called into

question the relationship between the two. It was suggested that the approach to the elaboration of the Code should be reviewed and that attention should focus on the crimes to be included therein, rather than on the definition of the crimes which fell within the jurisdiction of the court, because recent work had endowed the draft statute with a character that came more within the realm of positive law. Concern was expressed that, since the Code was meant to provide substantive international criminal laws on the basis of which the court could determine individual criminal responsibility, there was a risk, if the crimes were defined in both instruments, not only of duplication of work, but also of discrepancies which would hamper the effective functioning of the international criminal court. The purpose and necessity of the Code were furthermore queried on the ground that the rationale for such an instrument was part of a policy to facilitate international prosecution where national jurisdiction did not suffice and that this rationale was called into question by the progress made in the negotiations regarding the establishment of an international criminal court. Attention was drawn to the risk that the Commission, a body composed of independent experts, might draw up a draft Code that differed from the statute of a court painstakingly negotiated by Governments. The Commission was therefore invited not to waste its valuable energy and its scarce time on an idea which had been overtaken by events.

47. Several delegations commented on the need to harmonize the provisions of the draft Code and of the draft statute, particularly the definitions of crimes, bearing in mind that the Code would constitute the applicable substantive law for the court. It was suggested that the principles of non bis in idem and non-retroactivity must be formulated in identical terms in both instruments. Also in favour of the harmonization of the two instruments, it was said: (a) that the Code would have to complement the future system of an international criminal jurisdiction and promote the unification of domestic criminal law and practice concerning the prosecution of perpetrators of the most serious crimes against international law; (b) that there was a parallel trend in the Ad Hoc Committee on the Establishment of an International Criminal Court and in the Commission towards a reduced list of crimes including genocide, crimes against humanity and serious war crimes; and (c) that there were issues which were relevant to both the Code and the court, for example, the role of the Security Council in determining the existence of an act of aggression. Emphasis was placed in this context on the need to coordinate the discussions held in the two above-mentioned bodies and to strengthen cooperation between States and the Commission, maintaining an ongoing dialogue through flexible and informal channels. In order to ensure the harmonization of the provisions of the draft Code and of the draft statute with a view to achieving a more coherent and integrated structure, it was suggested, inter alia, (a) that the Commission, in preparing the final draft of the Code, should have before it all the documentation relating to the draft statute for an international criminal court; and (b) that, if necessary, it should be allowed to review some of the provisions of the draft statute in the light of the final outcome of its work on the draft Code.

4. Comments on specific articles

(a) Part I

Article 1. Definition

48. Several delegations favoured the inclusion of a general, conceptual definition of the notion of crime against the peace and security of mankind. The remark was made in this connection that, while it had been a pragmatic decision to list such crimes before attempting to define them, the time had come to consider a conceptual definition, which would give greater stability to the Code, particularly if the goal was to draw up a list of crimes which might subsequently be revised. Concern was expressed, however, that a conceptual definition might give rise to interpretations which would exclude certain crimes from the scope of the Code.

49. In favour of the inclusion of a general definition of the crimes covered by the Code, it was said that not all crimes against the peace and security of mankind were of a massive nature and that whether an act met the criterion of extreme gravity or posed a serious and immediate threat to the peace and security of mankind was often evident only when the act was viewed against the background of the conditions obtaining at the time of its commission. The remark was also made that the minimalist criterion adopted by the Special Rapporteur made it necessary to give a general definition of the concept of crime against the peace and security of mankind, which would constitute the common denominator of the crimes to be retained in the Code and allow the exclusion of others and would ensure that the selection was based on objective criteria that took into account the nature and consequences of the acts in question.

50. More specifically, the suggestion was made that the definition could be based on the seriousness of the crimes concerned, the gravity of the threat they posed to the established legal order, and their transboundary nature. There was a proposal to revise article 1 to read as follows: "The Code defines crimes which, by reason of their exceptional gravity and the international concern they engender, constitute crimes against the peace and security of mankind", or "The Code applies to crimes of exceptional gravity and international concern which, as defined herein, constitute crimes against the peace and security of mankind". It was further suggested that since the twin elements of exceptional gravity and international concern were useful in defining particular crimes, the definition of a particular crime might still require express reference to one or both of those elements.

51. The phrase "under international law" gave rise to divergent comments. While its placement between square brackets was viewed as questionable, it was also considered dispensable since, when the Code was eventually approved, the crimes to which it referred would become part of international criminal law.

Article 2. Characterization

52. Some delegations supported the retention of article 2. The view was expressed that the provision should reflect the principle that the

characterization of an act as a crime against the peace and security of mankind resulted from the application of international law and was independent of internal law. The remark was made that the principle in question was a corollary of the notion that the crimes under consideration were crimes of international law, as had been recognized since the time of the Nürnberg Tribunal. It was also observed that, unlike conventional or customary international law, national law had, of necessity, a limited role, as the Commission had acknowledged in its preparation of the draft statute of an international criminal court, since the provisions of national law could not be applied where they conflicted with international law.

53. Attention was at the same time drawn to the need to ensure coordination between international law and national law and to avoid any ambiguity. Emphasis was accordingly placed on the obligation of States parties to the future Code to adapt their criminal legislation to the commitments flowing from that instrument so as to rule out the possibility that an action characterized as an international crime under the Code might fall outside the category of punishable acts under the legislation of a State party to the Code. It was therefore suggested that the following words should be added at the end of article 2: "without prejudice to the obligation of the States parties to adapt their legislation to the provisions of this Code".

54. The remark was also made that, 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. That possibility, it was noted, was not excluded by the existing text of article 2.

Article 3. Responsibility and punishment

55. The view was expressed that, 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.

56. It was suggested that article 3 should expressly refer to intent to reflect the requirement of mens rea as a general principle of criminal law, allowance being at the same time made for exceptional cases of strict liability when intent was not required. However, the view was also expressed that the notion of criminal 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.

57. As regards paragraph 2, the view was expressed that, since the list of crimes was a restrictive one, the existing provisions concerning the prosecution of individuals guilty of complicity should be retained. There was also a suggestion to reformulate the definitions of crimes contained in paragraph 2 along the lines of article 3, paragraph 3, so as to incorporate the notion of attempt to commit those crimes.

58. Some delegations felt that the principles relating to complicity and attempt which appeared in paragraphs 2 and 3 of article 3 required further consideration, together with the culpability requirements referred to in articles 11 to 13. While the difficulties involved in defining crimes under

international law in a manner precise enough to meet the rigorous standards of criminal law were duly recognized, it was nevertheless felt that those paragraphs of article 3 lacked the precision and rigour required under the principle of nullum crimen sine lege and did not offer a firm basis for unambiguously establishing individual responsibility. The view was also expressed that the provisions under consideration should be more specific since they would give rise to almost limitless personal liability to prosecution and reflected an unduly comprehensive notion of complicity and attempt. It was further remarked that 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.

59. As to penalties, an element which together with the identification of crimes and the conferment of jurisdiction was viewed as essential to ensure the effectiveness of the Code and its consistency with the principle nullum crimen sine lege, nulla poena sine lege, some delegations favoured the inclusion of a general provision establishing a scale of penalties to be applied by the court on the basis of the seriousness of the crime. It was suggested that there should be a general provision on the nature of possible penalties, following the model of article 24 of the Statute of the International Tribunal for the former Yugoslavia. Attention was further drawn to the need to ensure that the provisions on penalties were consistent with those of the draft statute for an international criminal court.

60. More specific comments included: (a) the remark that a maximum penalty should be established, with the actual penalty being left to the judge to determine in the light of attenuating or aggravating circumstances; (b) the observation that instead of dealing with penalties in each article of part II, the Code should provide in a general article for maximum and minimum penalties; and (c) the suggestion that the general provision on penalties should, as far as possible, provide for the maximum penalty of life imprisonment and leave it to the international criminal court to determine other terms, depending on the circumstances of each case.

61. Other delegations felt that the Commission should try to specify for each crime penalties with maximum and minimum limits, as required by the principle nullum crimen, nulla poena sine lege. The remark was also made that it would be contrary to that principle to set a maximum penalty and allow national courts to hand down the punishment at their discretion without exceeding that limit. There was also a view that, although the Commission seemed to prefer the adoption of one set of maximum and minimum penalties applicable to all crimes, the matter required further study since, in accordance with the principle of legality, the type and extent of punishment must be determined in the light of the constituent elements of each crime.

62. With respect to penalties, attention was drawn to the relationship between the draft Code and the draft statute for an international criminal court. The remark was made that, together with the definition of crimes, the question of penalties was crucial both for the preparation of the draft Code and for the establishment of an international criminal court and that the provisions of the relevant instruments concerning penalties should be consistent.

63. As regards the role of national law in this area, it was observed that the applicable penalties could be established by reference to the national legislation of the State in which the crime had been committed, with the death penalty being expressly excluded. It was also observed that a reference could be made to the scale of penalties established by the internal law of the State in whose territory the act had been committed, which implied that that State would have enacted appropriate legislation on the matter. While the possibility was envisaged of making States responsible for establishing effective penal provisions in their legislation, which would solve the problem at both the national and the international levels, preference was expressed for a formula whereby the Code itself would set maximum and minimum penalties to avoid wide disparities under the national law of various States.

Article 4. Motives

64. No comments were made concerning this draft article.

Article 5. Responsibility of States

65. This article was viewed as an important reminder that individual criminal responsibility was without prejudice to any responsibility under international law which a State might incur for an act attributable to it. The Commission was commended for having clearly taken the position that 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. The remark was made that it was essential not to exclude the responsibility of the State for damage caused by its agents in consequence of their criminal acts, taking into account, inter alia, article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. It was also suggested that establishing an international regime of individual responsibility for crimes against the peace and security of mankind should not overshadow the fact that States bore primary responsibility for preventing such acts.

66. As regards the concept of criminal responsibility of the State, the view was expressed that only individuals could be brought to trial and that the concept in question, which was discussed both in the context of the draft Code and in that of State responsibility, did not correspond either to the reality of international relations or to the international law established by the International Convention on the Prevention and Punishment of the Crime of Genocide. The remark was however made that a State could be involved in an international crime, such as aggression or State terrorism. Other comments included: (a) that if any criminal responsibility could be attributed to a State, penalties would have to be specified; (b) that the principle societas delinquere non potest ruled out punitive sanctions; (c) that the Security Council could impose sanctions under international treaty law - the Charter of the United Nations; and (d) that the sensitive problem of State responsibility in relation to the international crimes covered by the Code would require consideration at some point.

67. As regards the relationship between the draft Code and the Commission's draft articles on State responsibility, the remark was made that developments in

international law over the past 50 years indicated various levels of responsibility for States and individuals: State responsibility for internationally wrongful acts; State responsibility for internationally wrongful acts which would constitute international crimes under article 19 of Part One of the Commission's draft articles on State responsibility; individual responsibility for international crimes under treaty law or general international law; and individual responsibility for international crimes which, under future treaty law or general international law, would constitute crimes against the peace and security of mankind. While it was recognized that the interplay between State responsibility and individual responsibility was unclear, the point was made that, where the individual was a government functionary acting on behalf of the State, State responsibility would probably arise in addition to individual responsibility in respect of acts by the individual which constituted crimes against the peace and security of mankind. It was also stressed that there was a link between article 5 and article 19 of Part One of the draft articles on State responsibility since the actions of individuals contributed significantly to the perpetration of crimes by States.

68. According to one view, 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. In that connection, attention was drawn to article 10 of Part Two of the Commission's draft articles on State responsibility, which 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. The wording of article 5 of the draft Code, under which "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", was therefore viewed as incorrect since such prosecution was an integral part of the satisfaction provided. The hope was expressed that during its second reading of the draft Code, the Commission would consider the problem in the context not only of article 5 but also of the definition of general criteria for the identification of crimes against the peace and security of mankind.

Article 6. Obligation to try or extradite

69. The wording of article 6 was described as acceptable in principle, although attention was drawn to the need to ensure its consistency with the relevant provisions of the draft statute of an international criminal court, the International Covenants on Human Rights and the world's various legal systems.

70. Regarding paragraph 2, the remark was made that a clearer definition of extradition and requests for extradition would be desirable, assuming the provision did not become moot as a result of the establishment of an international criminal court.

71. Concerning paragraph 3, some delegations expressed support for the establishment of an efficient international mechanism for trying the most serious violations of international law. The view was expressed that, despite the commitment of national authorities to fight against such violations, the international criminal court would, in the foreseeable future, become an

instrument for deterring potential perpetrators. The remark was made that, while the first objective of the Code was to formulate a series of norms of international law that could be applied by States and particularly by States' courts, the second objective was to apply those rules internationally, with the Code being used for that purpose by the international criminal tribunals and above all by the future international criminal court. Emphasis was therefore placed on the importance of formulating a precise international criminal Code that could be applied, not by ad hoc tribunals, but by an international criminal court.

72. While the Commission's position with regard to the establishment of an international criminal court was viewed as well taken, it was pointed out that such a court should not serve to discourage States from exercising their own jurisdiction over the crimes in question or from taking primary responsibility for rendering justice in those cases. The view was also expressed that prosecution and punishment of the crimes included in the Code should be left to national systems, except where a threat to international peace and to the order of a State was involved.

Article 7. Non-applicability of statutory limitations

73. The principle of non-applicability of statutory limitations for war crimes was described as an integral part of the general principles of criminal law and as having as such its place in the general provisions of the draft Code. The remark was also made that the seriousness of the crimes envisaged in the Code justified their imprescriptibility.

Article 8. Judicial guarantees

74. Appropriate judicial guarantees were viewed as essential to ensure that the trial took place before an impartial tribunal. The wording of the provision was described as acceptable in principle, although attention was drawn to the need to ensure consistency with relevant provisions of the draft statute of an international criminal court, the International Covenants on Human Rights and the world's various legal systems.

Article 9. Non bis in idem

75. The article was described as calling for further study, since the current wording might contradict the constitutional provisions of some Member States.

Article 10. Non-retroactivity

76. The provision was described as acceptable in principle, subject to the proviso reflected in the second sentence of paragraph 74 above.

Article 11. Order of a Government or a superior

77. There were no specific comments concerning this draft article.

Article 12. Responsibility of the superior

78. There were no specific comments concerning this draft article.

Article 13. Official position and responsibility

79. There were no specific comments concerning this draft article.

Article 14. Defences and extenuating circumstances

80. There were no specific comments concerning this draft article.

(b) Part II

81. Several delegations emphasized the importance, bearing in mind the maxim nullum crimen, nulla poena sine lege, of ensuring that the definition of each crime conformed to the standards of precision and rigour required by criminal law and that the Code, as a legal instrument, was clear and understandable for the persons protected and effective in respect of the potential culprits. The hope was expressed that in its second reading of Part II, the Commission would refine its definitions of crimes in order to approximate standards of criminal law as closely as possible, notwithstanding differences as to the crimes to be retained and their definition.

82. The remark was made that the Code, as an instrument separate from the statutes of international courts, should define substantive law, applicable by both national and international courts. It was also said that the definitions must be sufficiently open to allow the Code to be applied in a variety of circumstances, while maintaining the important legal tradition that the constituent elements of crimes should be enumerated in detail in order to avoid future problems of interpretation. Attention was drawn to the need to avoid referring in the definitions to relevant provisions of the Charter of the United Nations to prevent any risk of a conflict of competence between two United Nations organs.

83. As regards the relationship, in terms of the identification of crimes, between article 19 of Part One of the draft articles on State responsibility and the Code, the remark was made that there was no reason why the lists of offences appearing in the two texts should be identical, even though there might and should be some degree of overlap between them: for example, the definition of aggression in the context of article 19 would cover aggression in general, while the Code might provide for individual responsibility only for a war of aggression under the Nürnberg Principles.

Article 15. Aggression

84. Some delegations supported the inclusion of the crime of aggression which, it was recalled, was, by its very nature and in the light of the legislative history of the draft Code, a key element of the latter. Along the same lines, the remark was made that aggression constituted the quintessential crime in international relations and, consequently, the "hard core" of the draft Code. It was further noted that the inclusion of the crime of aggression was supported

by the entire Commission, notwithstanding the well-known definitional difficulties involved.

85. Other delegations reserved their position pending the completion of a sufficiently clear definition of the crime of aggression, a task which had to be conducted in the light of the provisions of the Charter relating to the mandate of the Security Council. In this context, the view was expressed that determining individual responsibility for the crime of aggression gave rise to serious obstacles which appeared increasingly insurmountable.

86. More specifically, the task of defining aggression in terms precise enough to establish individual responsibility and ensure safeguards against arbitrary application was described as particularly elusive. The view was expressed that 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. It was suggested 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. While the Commission was commended for its realistic and constructive consideration of the issue, it was at the same time encouraged to go further and, on the basis of Article 39 of the Charter and General Assembly resolution 3314 (XXIX) of 14 December 1974 on the Definition of Aggression, determine which acts constituted aggression and, most importantly, whether it was the State, the individual, or both, which committed aggression.

87. There were different views concerning the extent to which the above-mentioned Definition of Aggression should be reflected in article 15. Some delegations took the view that the said definition met the Commission's needs, had proved to be flexible and practical over the years and offered the best approach for the purpose of the Code. They therefore considered it pointless to seek a new definition. It was also recalled that the 1974 Definition had been incorporated in the Protocol of Amendments to the Inter-American Treaty of Reciprocal Assistance, which suggested that it had entered the realm of treaty law and should as such be taken into account by the Commission. Drawing upon the 1974 Definition was viewed as compatible with the role of the Security Council in determining the existence of an act of aggression since the scope of the draft Code was limited to individuals and did not cover States - which did not however detract from the need to indicate as clearly as possible the conditions under which an individual was liable for his contribution to aggression by a State.

88. Other delegations observed that the definition of aggression in the draft Code should be a legal one, even if it was based on the 1974 Definition. The latter definition was viewed as too political and lacking the necessary legal precision. Emphasis was placed on the need to focus on individual criminal responsibility, which the 1974 Definition did not do since it referred to aggression by a State. Along the same lines, the remark was made that the said definition concerned 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; additional efforts were therefore needed to define those elements of fact and personal behaviour

that, taken together, constituted the most serious of the crimes against the peace and security of mankind.

89. As regards the scope of the definition, the view was expressed that if the Commission decided to retain individual criminal responsibility for the crime of aggression, it might wish to cover only wars of aggression to ensure a solid legal basis for such responsibility. In this context, it was noted that neither the 1974 Definition nor Article 2, paragraph 4, of the Charter, on which the Commission had drawn, provided a sufficient basis for drafting a criminal law definition or reflected the historical roots of the crime of waging aggressive war which had been recognized in the aftermath of the Second World War. However, the view was also expressed that, with the adoption of the Charter and earlier instruments making war illegal, it was no longer necessary to make a distinction between "acts of aggression" and "wars of aggression". It was further stated that acts of aggression such as the invasion or annexation of territory were not simply wrongful acts and were sufficiently serious to constitute crimes under the draft Code. The remark was also made that no distinction should be made between an act of aggression and a war of aggression, as long as the act concerned had given rise to consequences so grave that they had threatened the peace and security of mankind. It was further observed that covering only wars of aggression would be inadequate, given contemporary realities.

90. The view was expressed that any qualification of individual behaviour as a crime of aggression would seem to require a prior determination that a State had committed an act of aggression and that such a determination would necessarily have far-reaching implications for international peace and security, so that the question arose whether it could be made without engaging the responsibility of the Security Council. The remark was made that, under Article 39 of the Charter, the Security Council had responsibility for determining whether an act of aggression had been committed, which meant that a determination by the Council that an act of aggression had taken place was a prerequisite for the commencement of trial proceedings relating to the crime of aggression. Attention was also drawn to the primacy of the Charter in international law and to the need to take account of the realities of international life, including the role and work of the Security Council.

91. Regarding the character of aggression and the determination of the existence of an act of aggression by the Security Council, emphasis was placed on the need to differentiate between the functions of the Council and those of a judicial body in assessing the criminal responsibility of individuals, since the Council had no jurisdiction over the accused. The remark was made that, 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, it was recognized that intervention by a political body could give rise to legal and institutional difficulties: a successful challenge to such a determination might result in a judicial decision that was contrary to the Council's ruling, leading to what was described as an inconceivable situation: objections might be raised with regard to due process if the accused did not have the right to question the Security Council's decisions; and 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.

92. Against this background, emphasis was placed on the need to strike a proper balance between the primary responsibility attributed by the Charter to the Security Council for the maintenance of international peace and security, on the one hand, and the independence of the judicial body entrusted with the prosecution and punishment of aggression, on the other. The view was expressed that the final decision on the matter should be taken, not by a political body such as the Security Council, but by a legal body. It was suggested that, since the question of aggression and the role of the Security Council had serious political connotations, it might be useful to harmonize the approach of the Commission with that developed in the framework of the debate on the draft statute for an international criminal court. The arguments in favour of the establishment of an international criminal court as a necessary concomitant to the Code were viewed as particularly cogent in the case of the crime of aggression.

93. The text of article 15 as adopted by the Commission on first reading was supported by some delegations. In response to the argument that the 1974 Definition was of a political nature, it was recalled that the International Court of Justice, in its judgment in the Nicaragua case, had referred expressly to that definition as an expression of customary international law.

94. Paragraph 1 of draft article 15 was described as a step in the right direction, even though its wording could be further improved. It was suggested to delete therefrom the words "as leader or organizer" since the proposed inclusion of the twin criteria of exceptional gravity and international concern in a previous article would be sufficient to identify the kind of individuals capable of committing aggression.

95. Paragraph 4 was considered as not entirely satisfactory. The view was expressed that subparagraphs (a) to (g) were unnecessary and that a comprehensive definition, rather than providing exhaustive lists of examples, should confine itself to indicating the constituent elements of the crime, with the court determining whether or not the definition applied in a particular case.

96. With reference to paragraph 4 (h), regarding the determination by the Security Council of the existence of an act of aggression, and paragraph 5, which stipulated that any such determination by the Council was binding on national courts, the remark was made that the former provision had the disadvantage of appearing to impose in advance upon a judicial organ, namely the court, a decision taken by a political organ, namely the Security Council, especially if read in conjunction with the latter provision.

97. Also in relation to paragraph 5, the view was expressed that the role of the Security Council in determining the existence of an act of aggression required further scrutiny. The remark was made that, 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 since that would not serve justice and could, in certain cases, be considered as letting political considerations determine the course of justice. It was also pointed out that 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; that the purpose of the draft Code was to codify substantive law, particularly as it applied to the qualification of the criminal conduct of individuals; and that the crime of aggression should be dealt with solely by an international court - which implied the deletion of paragraph 5. This provision was viewed as contrary to the principles of the separation of powers and the independence of the judiciary, since, by means of the veto, it allowed a political organ such as the Security Council to obstruct the regular functioning of a judicial organ. Paragraph 5 was described as different in nature from paragraph 2 of article 23 of the draft statute for an international criminal court, which 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; the latter provision was described as purely procedural in nature and having no bearing on the definition of the crime of aggression.

98. With regard to paragraph 6, the remark was made that a safeguard clause of that type would go a long way towards defining the scope of the crime and would allow due account to be taken of the two situations mentioned in paragraph 75 of the Commission's report concerning "the decline in the number of situations qualifying as internal affairs" and "the emergence of situations, affecting human rights in particular, in which the internal jurisdiction exception was unwarranted".

99. There was an expression of support for retaining paragraph 7.

100. The Special Rapporteur's efforts to provide a new text for article 15 that would give the concept of aggression a workable structure and definition in the context of criminal law were noted with appreciation by several delegations.

101. The new proposed definition was described as precise and satisfactory, notwithstanding claims that it was too general for the purposes of criminal law. The remark was made that one of the aims of the Code was to provide clear definitions which not only reflected current rules of international law, but also demonstrated the stringency demanded by criminal law. In that connection, the highly simplified definition of aggression was described as a positive achievement, demonstrating that it was possible to define aggression in legal terms, even though further clarity and precision were required.

102. As regards the new version of paragraph 1, the view was expressed that the stylistic improvement in the definition should be reflected in paragraph 1 of articles 21, 22, 24 and 25 in order to ensure consistency. It was noted however that the new version, unlike the previous one, did not cover individuals who themselves committed acts of aggression. Attention was also drawn to the need to emphasize those aspects which made it possible to attribute a crime to an individual, including one acting on behalf of a State.

103. Paragraph 2, which was based on Article 2, paragraph 4, of the Charter, was viewed as providing an adequate basic definition of aggression reflecting jus cogens and as expressing with the necessary clarity what constituted

aggression, namely material use of armed force by a State against another State, thus obviating the need for any additional reference to "an act of aggression under international law". The view was expressed in this context that any use of force against the territorial integrity or political independence of any State could be equated with aggression.

104. While noting that the new text of paragraph 2 reflected established language, some delegations viewed this language as too vague and ambiguous for the purposes of criminal law, as unduly broad and as potentially encompassing even minor intrusions or violations of territorial integrity. They considered it incorrect to equate any use of force against the territorial integrity or political independence of any State with an act of aggression under Article 39 of the Charter and further observed that certain intrusions without the permission of an affected State might be necessary to conduct non-combatant evacuation operations, hostage rescue or demonstrations of navigational or overflight rights under international law, which were not criminal acts. It was therefore suggested that the general definition set forth in paragraph 2 should be accompanied by a list of specific acts of aggression. It was also suggested that some elements of the 1974 Definition which had been reflected in other instruments, such as the Protocol of Amendments to the Inter-American Treaty on Reciprocal Assistance, should be included in the final text. Attention was also drawn to a previous proposal concerning 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".

105. The omission in the proposed new text of the remaining paragraphs of article 15 as adopted on first reading was described as an improvement, bearing in mind that those paragraphs had been lifted from the 1974 Definition, which was intended as a guide for the political organs of the United Nations rather than as a basis for instituting criminal proceedings before judicial bodies.

106. On the other hand, the arguments adduced in favour of the elimination of paragraphs of the 1974 Definition were described as unconvincing. The view was expressed that the new definition left out the legal elements which distinguished aggression from other acts and was too succinct and general. The remark was made that the list of acts of aggression contained in paragraph 4 of article 15, as adopted on first reading, would have helped to clarify the principle set forth in paragraph 2. It was suggested to add a non-exhaustive list of cases of aggression, possibly based on certain paragraphs of the 1974 Definition. The remark was also made that, according to the new version of article 15, acts such as the bombing of a State's territory, the blockading of its ports or coasts or attacks on its armed forces did not constitute aggression if authorized by the Security Council in accordance with Chapter VII of the Charter of the United Nations.

107. The deletion of paragraphs 4 (h) and 5 referring to the Security Council was described as appropriate, since a political body should not impede the functioning of a judicial body. The new text was viewed as having the merit of doing away with the requirement of a Security Council decision regarding the existence of a crime. It was stressed in this connection that no legal

principle entitled the Security Council to intervene in an international criminal proceeding, and that a Security Council determination was not binding, under the Charter of the United Nations, on an international court, since Council decisions did not take precedence over international agreements. The remark was further made that the Commission should not codify any inegalitarian system which might exist with respect to the Security Council.

108. In contrast, the view was expressed that the definition should be more rigorous with respect to the role of the Security Council. The new proposed text was criticized for failing to refer to the relevant provisions of the Charter regarding the Security Council's crucial role in the definition of aggression, which meant that judicial authorities might consider that an act constituted aggression, and hence a crime against the peace and security of mankind, while the Security Council, which was primarily responsible for the maintenance of international peace and security under the Charter, might disagree. It was suggested that progress could be achieved more quickly on the matter if the Commission accepted as aggression any act determined as such by the Security Council rather than seeking to define the phenomenon.

Article 16. Threat of aggression

109. Some delegations supported the Special Rapporteur's proposal to eliminate the article on the threat of aggression, a concept which, in their view, had not been defined satisfactorily and lacked the precision and rigour required by criminal law. The view was also expressed that while it was logical to hold responsible those individuals that led a State to commit aggression - possibly the most serious example of wrongful conduct on the part of a State - it would be excessive to apply the same criterion to the mere threat of aggression. It was suggested that the threat of aggression could perhaps find a place in the articles on aggression or terrorism.

110. Other delegations, however, favoured the retention of article 16, with emphasis being placed on the relevance of the conduct addressed therein to the contemporary needs and the legitimate concerns of the international community regarding threats of aggression, the prohibition of the threat of force under Article 2, paragraph 4, of the Charter, and the role of the Security Council in determining the existence of threats to the peace and responding thereto in accordance with Article 39 of the Charter. The remark was made that the latter provision referred specifically to "any threat to the peace", thereby establishing a rule for intervention by the Security Council; that if any threat to the peace could be the object of action by the Security Council under the Charter, the threat of aggression, too, could be the object of action by the Council; and that planning and preparing for military action eventually led to acts of aggression. The view was also expressed that it was imperative to retain the concept of the threat of aggression in the draft Code since the prohibition of aggression and of the threat of aggression was a rule of international law having the character of jus cogens and bearing in mind that the concept in question presented no more difficulties than those of attempt, incitement and complicity.

Article 17. Intervention

111. Some delegations favoured the deletion of article 17 on the ground that the definition of intervention contained therein was imprecise and lacked the precision and rigour required by criminal law and might be difficult to apply, particularly with respect to evidence. The remark was made that intervention might be armed, in which case it would be covered by aggression, or unarmed, in which case it would include many acts which were difficult to define rigorously for many reasons, one being the fact that, according to the new norms of international law, not every act of intervention was unlawful. Reference was made in this connection to the field of human rights. It was further remarked that taking a stand against the inclusion of intervention in the Code implied no disregard for the principle of non-intervention, which was one of the fundamental principles of international law.

112. Other delegations felt that intervention could be covered in the article on aggression, as an element to be taken into account in determining that aggression had occurred, or in the article on terrorism, bearing in mind that the most explicit contemporary manifestations of intervention were the subversive terrorist activities covered in article 24. It was recalled that non-intervention was recognized as a fundamental principle of international law in international instruments, in the practice of the International Court of Justice and in General Assembly resolutions.

113. Still other delegations felt that there were sufficient grounds for devoting an article of the Code to intervention and described the proposed elimination of article 17 as disturbing and premature. The view was expressed that, although intervention did not constitute an international crime from the point of view of lex lata, it should not be discarded as a possible international crime from the point of view of the progressive development of international law, especially since individuals who resorted to intervention did so under the protection of the State. The remark was also made that non-intervention, a corollary of the principle of sovereign equality of States, had been recognized as a fundamental principle of international law by the International Court of Justice, which, in its judgment in the Nicaragua case, had determined that States had the sovereign right to choose their political, economic, social and cultural systems and that intervention was unlawful when, to prevent such a choice, coercive means such as an embargo or the breaking off of economic and trade relations were used. This definition of intervention, it was stated, could scarcely be considered as vague.

Article 18. Colonial domination and other forms of alien domination

114. Some delegations supported the Special Rapporteur's proposal to do away with article 18 on the ground that colonialism had been eliminated and that colonial domination as well as other forms of alien domination had not been defined with the necessary precision. The remark was made that while such phenomena were abhorrent and unacceptable, they were fortunately a matter of the past. It was also pointed out that, although colonial domination was a political fact, it would be virtually impossible to indicate a precise action for which individuals could be incriminated. While sympathy was expressed for

the motives that had led the Commission to consider the inclusion of an article on colonial domination, the retention of such an article was viewed as an unrealistic move which would diminish the acceptability of the Code.

115. Other delegations took the opposite view. Concern was expressed that the omission of colonialism and other forms of alien domination on the ground that they belonged to the past would entail a great risk. The remark was also made that with the adoption by the General Assembly, in 1960, of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the crimes under consideration had entered the domain of jus cogens. The Commission was therefore urged to study the views of members of the Committee and to reconsider the exclusion of article 18.

Article 19. Genocide

116. Genocide was described as the least problematic of the crimes proposed for inclusion in the Code. Many delegations expressed support for its retention in the draft, with some commenting that it clearly met the criteria for such retention.

117. The definition of the crime of genocide was also described as raising the least number of technical issues. It was observed that when a treaty in force, such as the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), had established that certain acts were crimes against the peace and security of mankind, it should be relatively easy for the Commission to incorporate such provisions into the Code. Emphasis was placed on the desirability of referring to relevant treaties, such as the Genocide Convention, in defining the crimes to be included in the draft.

118. Several delegations agreed with the Special Rapporteur that the definition of genocide should be based on the one contained in the Genocide Convention, with the comment being made that the Convention should provide the sole basis for the definition to be included in the Code. The Convention was considered to provide a clear definition which was sufficient for the purpose of the present exercise, was widely accepted by the international community and reflected customary international law. The remark was made that the International Court of Justice had declared in its 1951 advisory opinion that the provisions of the Genocide Convention were a part of customary international law and that it would be appropriate to make the definition of genocide consistent with those provisions. It was also observed that a significant distinction had been made in the draft statute for an international criminal court between genocide under the treaty law which had originally defined it and genocide as an international crime under general international law and that genocide clearly constituted an international crime, whether or not it was included in the Code.

119. Several delegations also endorsed the new text of article 19 proposed by the Special Rapporteur, which included the concepts of incitement, complicity and attempt. The remark was made that the proposed new article 19 had moved closer towards covering all acts punishable under the Genocide Convention, including acts of direct and public incitement to commit genocide, and that it should be extended to include complicity in genocide in order to bring article 19 fully into alignment with the Genocide Convention. The remark was

also made that the proposed changes brought the text closer to that used in the statute of the International Tribunal for the former Yugoslavia and the statute of the International Tribunal for Rwanda. The view was expressed that the modification of article 19 to include incitement to commit genocide and the attempt to commit genocide was justified by the extreme gravity of the crime.

120. On the other hand, the view was expressed that the definition of genocide and other relevant crimes would have to be reviewed carefully before being included in the draft Code. It was suggested that the definition of that crime needed to be improved taking into account the views of various countries. Attention was drawn to the concern of members of the Ad Hoc Committee on the Establishment of an International Criminal Court about the lack of protection offered by the Genocide Convention to political and social groups, with the view being expressed that those concerns would be addressed in great measure if acts committed against members of such groups, a systematic campaign of killing for example, could be considered as crimes against humanity. There was a further suggestion that the points raised by Governments in their written comments could largely be met by interpretative statements.

121. It was recalled that article IX of the Genocide Convention provided for the compulsory jurisdiction of the International Court of Justice in the case of disputes between contracting parties relating to the responsibility of a State for genocide. That article was viewed as a welcome reminder of the need to provide for compulsory third-party settlement in all multilateral law-making conventions. Given the seriousness of the crime, the view was expressed that the draft Code should contain a provision similar to article IX of the Genocide Convention, which would confer compulsory jurisdiction upon the future international criminal court in respect of genocide.

Article 20. Apartheid

122. Several delegations suggested that in view of its historical connotations, the concept of apartheid should be replaced by a more widely applicable notion, such as "institutionalized racial discrimination", to ensure broader coverage of all forms of institutionalized racism of similar gravity. It was observed that the prohibition and condemnation of apartheid remained a valid principle of international law; that, as a result of the political changes in South Africa, apartheid no longer met the criteria for inclusion in the draft Code; that the world was not, however, free from institutionalized racial or ethnic discrimination; and that it was important that such actions should be covered by the Code as massive and systematic violations of human rights in order to prevent their continuation or emergence in other contexts. Similarly, the remark was made that the end of apartheid did not mean the disappearance of racism and discrimination, that the Code should maintain a provision classifying as crimes any acts of that nature carried out by persons in the exercise of their functions and based on legal provisions and that it would be appropriate to include in article 21 a reference to the "institutionalization of racial discrimination".

123. Other delegations, however, preferred to retain the crime of apartheid, bearing in mind that the crime could resurface. In their view, the omission of that crime based on the premise that it was now only of historical interest

would entail a great risk. The view was also expressed that 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. A question was raised with regard to the contention that since the scope of apartheid had been territorially limited the phenomenon was not worthy of inclusion in the Code; it was deemed to be resting on a flawed argument since 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 remark was made 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 or their territorial extent and that it would thus be a disservice to future generations to exclude the crime of apartheid from the list of crimes. The view was also expressed that, although the crime of apartheid had originally been limited to South Africa and its causes had been eliminated, the crime as such had not disappeared and acts and policies which constituted apartheid must be regarded as international crimes.

124. The Committee was urged not to accept the compromise suggested in the Commission's report of excluding apartheid from the Code and, instead, addressing situations of institutionalized racial discrimination as systematic violations of human rights. The view was expressed that the crime of apartheid could not justifiably be accorded secondary status given the Security Council resolutions declaring apartheid a threat to international peace and security, the General Assembly resolutions condemning the policies and practices of apartheid as a crime against humanity and the International Convention on the Suppression and Punishment of the Crime of Apartheid, which had been ratified or acceded to by 99 States. It was suggested that the crime of apartheid should be restored to the list of "core crimes", with its definition broadened to cover institutionalized racial discrimination. The remark was made in this connection that the germ of genocide could be discerned in the historical phenomenon of racial discrimination, so that excluding that crime from the list would weaken the legal defences against it, and that, by its very nature, racial discrimination readily lent itself to systematic State and institutional patronage.

Article 21. Systematic or mass violations of human rights

125. The view was expressed that the question of whether the Code should include systematic or massive violations of human rights or crimes against humanity needed to be studied in greater depth. The definition of the crime of systematic or mass violations of human rights was described as raising many problems. It was suggested that the existing definition should be further refined in order to avoid any ambiguity in its practical application and should contain objective elements by which it could be established without any doubt when that crime had been committed. Concern was expressed that if the definition contained in the draft adopted on first reading was used, many acts which did not have grave consequences for the world and could be dealt with by domestic courts would be included in the Code.

126. Some delegations welcomed the new version of article 21 proposed by the Special Rapporteur, which was described as an improvement and as broadly acceptable. The remark was however made that the phrase "in a systematic manner or on a mass scale", which had appeared in the text of article 21 adopted on first reading, had been deleted from the new version of the article, although the second paragraph stated that "a crime against humanity means the systematic commission of any of the following acts". It was suggested that the seriousness and mass character of such crimes should be further emphasized in the commentary. The view was also expressed that the original intention to regroup crimes against humanity as recognized by customary law on the basis of the Charter of the Nürnberg Tribunal, which applied only in time of war, and systematic and massive violations of human rights, represented an attempt to further the progressive development of international law. Attention was drawn, however, to the statutes of the international tribunals for the former Yugoslavia and Rwanda and the draft statute of an international criminal court in which crimes against humanity were defined as part of customary law in their original meaning on the basis of the Charter of the Nürnberg Tribunal.

127. Several delegations endorsed the Special Rapporteur's proposed change in the title from "Systematic or mass violations of human rights" to "Crimes against humanity". Attention was drawn to the use of the latter term in both public international law and domestic law and to the supporting legal doctrine and precedents, including the criminal legislation and penal codes of various countries, the law and the Charter of the Nürnberg Tribunal as well as the statutes of the international ad hoc tribunals. The view was also expressed that the crimes listed under article 21 as adopted on first reading had mistakenly attributed to individuals the capacity to violate human rights. It was considered to be 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, they could appropriately be referred to as crimes against humanity. The new title was described as providing greater clarity and removing any doubt as to when the jurisdiction of national courts ended and that of the international court began. It was also considered to be preferable not only because it left aside the question of the scale of such crimes, but also because it allowed for the possibility of regarding forced disappearances of persons as an international crime. While the new title was described as an improvement, it was suggested that the massive and systematic nature of the crimes concerned should still be reflected in the title or specifically referred to in the definition; it was also suggested that the concept should be specifically limited to crimes committed in a situation of armed conflict and deliberately directed against a civilian population.

128. On the other hand, some delegations preferred the previous title, which was described as more precise than the one proposed by the Special Rapporteur. In support of the earlier version, it was argued that other crimes in the Code could also be regarded as crimes against humanity, particularly genocide and war crimes, and that the new title might give rise to confusion, since all of the crimes defined in the Code would be crimes against mankind. The remark was also made that the reference to systematic or massive violations of human rights had

been intended to indicate the gravity of the offence. It was at the same time suggested that the proposal to incorporate the twin concepts of exceptional gravity and international concern in article 1 would facilitate the removal of the term "massive" from the title.

129. A number of delegations commented on the general criterion to be met by crimes to come within the purview of article 21. It was considered important to indicate that the article dealt with massive and systematic violations, since the idea was that violations qualified as international crimes when they were carried out on a certain scale. It was suggested that 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 - an issue which 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. It was additionally stated that no conduct should be included as a crime in the Code unless it threatened or was likely to threaten the peace and security of mankind. The remark was also made that in order for human rights violations to be punishable by an international criminal court, it had to be proved not only that they were systematic and conducted on a massive scale, but also that they were of an exceptional nature.

130. It was noted that, in formulating the Nürnberg Principles, the Commission had asserted that to be considered a crime against humanity, an act must have been committed in execution of or in connection with any crime against peace or any war crime. The question was raised as to whether the Commission wished to maintain that limitation or whether it felt that the concept had evolved during the past 50 years and that the category of crimes against humanity had acquired an independent status. The view was expressed that there was no need under customary international law to link crimes against humanity with armed conflict and that crimes against humanity could be committed during times of peace as well. Along the same lines, the remark was made that 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. It was suggested that it would be appropriate to ensure that the list included acts which had not been committed in the context of an armed conflict. However, the view was also expressed that it would be preferable to consider only crimes committed in a situation of armed conflict and intentionally aimed at a civilian population. The remark was made that crimes against humanity were generally linked to wars and armed conflict, and that there were insufficient grounds for extending their application to times of peace.

131. As regards the first paragraph, the view was expressed that the text should cover, first and foremost, the most serious violations of human rights such as wilful killing, torture and enforced disappearances, provided those acts were committed by individuals acting as agents or representatives of a State or acting with its authorization or support. It was suggested that in such instances the seriousness of the crime would derive precisely from the fact that the perpetrator enjoyed the protection or authorization of the State. However, the view was also expressed that, although attention had thus far been

concentrated primarily on the relation between the public authorities and citizens with regard to human rights, it was nevertheless clear that human rights could be violated not only by the authorities, but also by other groups in society, such as terrorists, and that the time had come to examine that question. It was stated that there was in fact a solid body of legal norms which provided the opportunity to include acts of terrorism in the category of crimes against humanity, with reference being made to the statute of the International Tribunal for Rwanda. Support was expressed for the Special Rapporteur's proposal that acts of terrorism could be considered crimes against humanity. It was suggested that the circle of potential perpetrators should not be limited to agents or representatives of the State and that the provision should be reformulated so as to include acts committed by any individual, in which case the phrase "as an agent or a representative of the State or as an individual" could be deleted.

132. With regard to the second paragraph, the comment was made that the list of acts constituting crimes against humanity was acceptable. It was also remarked that all the acts referred to in that paragraph had been taken from the charter of the Nürnberg Tribunal and were widely recognized.

133. As regards the second subparagraph, the view was expressed that systematic or mass violations of human rights should only encompass the most serious abuses, including torture and forced disappearances. It was also remarked that the imposition of the death penalty or of preventive detention measures provided for by the legislation of a democratic State should not be regarded as coming within the ambit of the second subparagraph. Doubts were further expressed as to the need to include torture in the list and it was suggested to include a descriptive list in a commentary or in an article or section on interpretation.

134. Regarding the third subparagraph, it was suggested that the text should also mention establishing or maintaining over persons a status of slavery, servitude or forced labour as well as institutionalization of racial discrimination. Some delegations felt that the gap which had been left by the deletion of apartheid from the list of crimes should be filled by including in the third subparagraph a reference to the "institutionalization of racial discrimination" or "institutionalized racial or ethnic discrimination".

135. With regard to the fourth subparagraph, the view was expressed that it was inappropriate to refer simply to "persecution" as a crime without setting the context in which an act of persecution became a crime against humanity. It was accordingly felt preferable to refer to "persecution on social, political, racial, religious or cultural grounds".

136. As regards the fifth subparagraph, some delegations endorsed the Special Rapporteur's proposal to retain the act of deportation or forcible transfer of population, which appeared in the article as adopted on first reading. Some delegations further suggested that the provision should apply to deportation or forcible transfer of population on social, political, racial, religious or cultural grounds, which constituted a violation of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, and should also be characterized as a crime. The occupation of territories, the establishment of settlements and the displacement and persecution of indigenous

peoples were cited as additional current examples of blatant violations of human rights. The comment was however also made that certain involuntary transfers of population were legally acceptable, for example, when based on considerations of health or a country's economic development or to protect a population against military attack.

137. Regarding the sixth subparagraph, some delegations expressed concern regarding the use of the phrase "all other inhumane acts", which was described as too vague and imprecise to be included in a criminal Code. The remark was made that this general reference diluted the precise and well-defined nature of the article. It was also said that the phrase "all other inhumane acts", in addition to being very vague and elastic, was to some extent influenced by geography, since attitudes varied in different parts of the world as to what acts were inhumane.

138. Several delegations felt that the practice of involuntary or forced disappearances should be specifically mentioned in article 21. The comment was made that this practice was a major humanitarian concern in many parts of the world. Attention was drawn to the decision of the Inter-American Court of Human Rights in the Velásquez Rodríguez case in 1987 in which forced disappearances of persons were regarded as grave violations of human rights, entailing the international responsibility of the State. Although the Court had not termed such disappearances an international crime, the subject was considered to merit in-depth consideration in the context of the progressive development of international law. It was at the same time recognized that the practice was difficult to define since it was based on information in respect of which no evidence could be brought. It was suggested that guidance could be provided by the definitions of forced disappearance contained in General Assembly resolution 47/133 of 18 December 1992 or in the Inter-American Convention on the Forced Disappearance of Persons of 1994, according to which forced disappearance consisted of the deprivation of liberty of one or several persons, committed by agents of the State or by persons acting with the authorization or support of the State, followed by lack of information or refusal to recognize that deprivation of liberty or to give information on the whereabouts of the disappeared person.

Article 22. Exceptionally serious war crimes

139. The inclusion of war crimes in the draft Code was described as fully justifiable. The view was expressed that only the most serious war crimes should be included, with a distinction drawn between all the cases envisaged in the 1949 Geneva Conventions and those that were grave violations and with a reservation expressed regarding Additional Protocol I to the Geneva Conventions. The view was also expressed that the relevant provision should have a narrow and clearly defined scope 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.

140. On the other hand, regret was expressed that the Special Rapporteur should show reluctance to consider the 1977 Protocols to the Geneva Conventions of 1949 as a part of positive international law. It was recalled that over two thirds of the nations of the world were parties to those Protocols, which was evidence

of the existence of a general practice. In favour of a proposal to expand the scope of article 22 to include internal armed conflicts, the remark was made that, although the notion of grave breaches of the Geneva Conventions clearly applied only to acts committed in international armed conflicts, failure to cover internal armed conflicts would be a serious omission, given the number of conflicts of that nature in recent years. Also in support of treating serious atrocities committed within national borders as international crimes, it was remarked that events in the former Yugoslavia and in Rwanda had 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. With reference to the argument that it had heretofore been generally accepted that neither article 3, common to the Geneva Conventions nor Additional Protocol II to those Conventions, which did not contain provisions on serious crimes, could provide a foundation for universal jurisdiction, attention was drawn to article 4 of the statute of the International Tribunal for Rwanda, which expressly included both provisions, thereby setting aside an 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. It was suggested that the draft Code should take its inspiration from that precedent.

141. The definition of war crimes contained in article 22 was described as conforming to established international practice. However, the view was also expressed that 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. It was suggested that the Geneva Conventions of 1949 would provide appropriate guidance, subject to the possibility of updating certain criteria on the basis of the statute of the International Tribunal for the former Yugoslavia. Some delegations specifically suggested that the definition should be based both on the 1949 Geneva Conventions and on the statutes of the international tribunals for the former Yugoslavia and for Rwanda.

142. The new article 22 proposed by the Special Rapporteur was described as a major step forward and as a significant improvement in the definition of war crimes. The new version was also considered to be better organized in conceptual terms and more consistent with the statutes of the two ad hoc international tribunals and the draft statute of the proposed international criminal court.

143. More specifically, it was noted that in the new version the title had been changed to "War crimes" and some substantive changes made as a follow-up to the Special Rapporteur's conclusion that the reservations expressed concerning the new concept of exceptionally serious war crimes were valid and that it was difficult, in practice, to establish a clear dividing line between the "grave breaches" defined in the 1949 Geneva Conventions and Additional Protocol I and the "exceptionally grave breaches" specified in the article as adopted on first reading. Several delegations endorsed the Special Rapporteur's proposal to change the title of article 22 from "Exceptionally serious war crimes" to "War crimes". The use of the term "war crimes" was also considered to be preferable to "exceptionally serious war crimes" since it would cover more cases. The view was also expressed, however, that war crimes should not necessarily be equated

with crimes against the peace and security of mankind and that it would be preferable to cover only the most serious war crimes in the Code. It was further suggested that the addition of the general criteria of exceptional gravity and international concern in relation to the crimes contained in the Code would render unnecessary the use of the qualification "exceptionally serious".

144. As regards the introductory paragraph of article 22, the reservations expressed on the novel concept of exceptionally serious war crimes were reiterated. It was also suggested that the words "exceptionally serious" should be deleted.

145. Regarding paragraph 1, some delegations welcomed the reference to the Geneva Conventions of 1949. Defining war crimes as "grave breaches of the Geneva Conventions of 1949" was described as helpful. The reference to the Geneva Conventions was considered to be preferable to a mention of "international humanitarian law" - which was characterized as vague and too general - despite the risk that the new text might be interpreted to mean that punishment of exceptionally serious war crimes was contingent on the States in question being parties to the Geneva Conventions. On the other hand, the reference to grave breaches of the Geneva Conventions was viewed as unduly restrictive because it did not cover Additional Protocol I and, more importantly, because it would not apply to States which were not parties to the Geneva Conventions but were none the less bound by the rules of customary international law applicable to armed conflict. Emphasis was placed on the need to mention, in addition to the Geneva Conventions, Additional Protocols I and II, or at least common article 3 of the Geneva Conventions. Objections were raised however against mentioning other international instruments, particularly Additional Protocol I to the Geneva Conventions, on the ground that since the Protocol was generally conventional in nature and had only limited customary value in public international law, its inclusion in the definition of war crimes might impede acceptance of the Code by States.

146. Other delegations indicated a preference for referring to "international humanitarian law" rather than to the Geneva Conventions of 1949. A suggestion was made to formulate the text as follows: "grave breaches of [the Geneva Conventions of 1949 and Additional Protocol I] [the rules applicable in armed conflict set forth in international agreements] and the generally recognized principles and rules of international law which are applicable to armed conflict".

147. Additional comments concerning paragraph 1 included the remark that the expression "inhuman treatment" used in paragraph 1 (b) should be made more specific; and the observation that the offences covered by paragraphs 1 (f) and (g) were not sufficiently serious to be considered war crimes.

148. With regard to paragraph 2, some delegations welcomed the reference to the violations of the laws or customs of war. Support was expressed for the inclusion of the word "serious" in the introductory sentence of paragraph 2. The remark was made that only crimes which constituted serious violations of the rules and customs of war should be included. Some delegations expressed a

preference for an exhaustive list in paragraph 2 to ensure respect for the principle nullum crimen sine lege.

149. A number of delegations felt that additional violations should be included in the definition of war crimes contained in article 22, some of which had appeared in the earlier version of this provision. The deletion of the paragraph concerning the use of unlawful weapons was viewed as unfortunate as it undermined the international community's efforts to prohibit the use of weapons of mass destruction, which had led to the signing of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, and which were expected to culminate in a ban on the use or threat of nuclear weapons. Support was also expressed for the inclusion of a provision regarding the use of toxic and other weapons intended to cause unnecessary suffering, which would include weapons having indiscriminate effects.

150. Several delegations felt that the article should, as it did in its earlier version, characterize as a crime the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory. These violations were described as among the most reprehensible of war crimes. The view was expressed that the corresponding provision (paragraph 2 (b)) of the article as adopted on first reading had received considerable support and should be retained in the current version. It was pointed out that paragraph 4 (a) of article 85 of Additional Protocol I to the 1949 Geneva Conventions rightly prohibited the "transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory". Thus, it was stated, the corresponding reference in article 22 as adopted on first reading was solidly grounded and should be included in the new text in some appropriate way, even though the new version of article 22 already had certain formulations tending in that direction.

151. The view was expressed that the definition of war crimes in article 22 should encompass the long-term siege of populated places and places declared safe areas by the Security Council, interruptions in the supply of humanitarian and medical aid, the cutting off of utilities, blocking of roads, railways and telecommunications services, threats against the security of United Nations forces and restrictions on their freedom of movement. The remark was made that all those acts had been condemned under international law in the context of the former Yugoslavia and should be considered crimes under article 22. It was also suggested that the Code should also include the crime of rape, bearing in mind the events in Bosnia and Herzegovina where the mass and systematic rape of women and girls had constituted part of the practice of ethnic cleansing directed against the non-Serb population and was not merely a case of imposing measures intended to prevent births within that group but constituted an outright war strategy. There was also a suggestion to include enforced disappearances in the category of war crimes, given the suffering that had resulted from that phenomenon in recent years.

Article 23. Recruitment, use, financing and training of mercenaries

152. A number of delegations agreed that the recruitment, use, financing and training of mercenaries should be excluded from the list of crimes covered by the draft Code, with the view being expressed that these criminal activities were too topical to be included in the Code. Some of these delegations also agreed that the activities in question could still be dealt with under the article on aggression since they presupposed an armed intervention, or possibly under the article on terrorism.

153. However, other delegations felt that the Code should include the activities of mercenaries, not only because they posed a threat to peace and stability, but also because certain criminal activities, such as terrorism and trafficking in drugs, people and arms, were related to the recruitment of mercenaries.

Article 24. International terrorism

154. Several delegations favoured the inclusion of a provision on international terrorism in the draft Code, with one of them stressing that such inclusion would not affect the ability of the Security Council to take measures in response to situations constituting a threat to international peace and security. They referred to the increased frequency of acts of international terrorism, in particular the taking of the lives of innocent people. Special concern was expressed regarding terrorism directed against cities and villages in small developing countries. Terrorist acts were described as crimes of an exceptionally serious nature which threatened the peace and security of mankind. More specifically, it was stated that international terrorism could constitute a crime against the peace and security of mankind when the terrorist acts were particularly grave and massive in character. It was also stated that the crime should be included as a separate category within the Code, given the great importance attached to combating an increasingly dangerous phenomenon.

155. Other delegations, however, felt that the question of the inclusion of international terrorism should be the subject of a full exchange of views. While international terrorism was viewed as serious enough to be characterized as a crime against the peace and security of mankind, the view was expressed that it would be very difficult to draft a general definition with sufficient detail for the purposes of criminal law. While due note was taken of the Commission's understandable interest in such heinous crimes, doubts were expressed as to the advisability of covering them in the draft Code, bearing in mind the lack of consensus among States on a definition of terrorism. While it was suggested that a legal definition, divorced from any political or conceptual considerations, would facilitate the inclusion of the crime in the draft Code, the remark was made that terrorism could not easily be defined in a way that was generally acceptable and that it might therefore be better to abandon the search for a definition and deal primarily with clearly identifiable acts of terrorism which could be condemned. The remark was also made that, while there was still no generally acceptable definition of terrorism, the piecemeal approach of identifying specific categories of acts which were condemned by the entire international community was a practical way of combating the phenomenon. It was suggested that a definition of terrorism could be attempted along the lines of the international conventions on the subject.

156. Still other delegations felt that the exclusion of international terrorism, which was described as basically different from the other crimes covered by the Code, would in no way affect the determination of States to take decisive action to combat the phenomenon. In their opinion, international terrorism fell short of the requisite criteria to be considered as a crime against the peace and security of mankind and, moreover, was sufficiently dealt with in other conventions based on the principle aut dedere aut judicare. The remark was made 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 should be prosecuted on the basis of an existing instrument. It was therefore suggested that the international community should endeavour to urge States to become parties to the relevant conventions. The remark was also made that since a number of international treaties had been established which provided for alternative methods of combating terrorist acts at the national or international levels, there was no need to include that crime among those falling under the jurisdiction of the international criminal court. While sympathy was expressed for the motives which had led the Commission to express interest in the crime of international terrorism, concern was expressed that including such a crime within the scope of the Code would be unrealistic at the present juncture.

157. As regards the wording of article 24 as adopted on first reading, it was suggested: (a) that the words "as an agent or representative of a State" be deleted so as to enlarge the circle of potential perpetrators; (b) that the unnecessary restriction implied in the words "against another State" be eliminated; (c) that the phrase "to compel the aforesaid State to grant advantages or to act in a specific way", which had an unduly restrictive effect, should be deleted; and (d) that consideration be given to the possibility of including in the article the saving provision in paragraph 7 of article 15 (on aggression) as adopted on first reading, which preserved the right of peoples to struggle for self-determination and independence.

158. The new version of article 24 proposed by the Special Rapporteur was described by some delegations as providing a reasonable and objective definition and a good basis for further consideration. Some delegations noted with satisfaction that the scope of the initial text had been expanded to encompass terrorist acts by individuals, including private individuals acting on behalf of groups or associations which were not necessarily affiliated with a State. The view was expressed, however, that since, as experience showed, terrorism occurred in various forms, the worst of which was perhaps "State terrorism", the reference to "international terrorism" should be re-examined.

159. With regard to paragraph 2 of the proposed new text, it was suggested to replace the words between square brackets by the word "terror".

Article 25. Illicit traffic in narcotic drugs

160. Some delegations felt that illicit traffic in narcotic drugs (which one of them described as international traffic between neighbouring countries and between distant countries by air or sea, regardless of whether such traffic crossed the territorial sea of other countries, the high seas or national or international airspace) should be included in the Code bearing in mind the

magnitude of the problem; the severity of the damage and resulting injury, including the negative impact on the economy and public health of every country; as well as the well-established and increasingly insidious relationship between illicit trafficking in narcotic drugs and international terrorism. The view was expressed that the damage caused and the family and political instability generated must be addressed at the legal level. It was also said that illicit traffic in drugs, when massive in character, constituted a crime against humanity and that illicit traffic in narcotic drugs was a modern form of genocide as well as a crime against the security of mankind. The remark was further made that illicit traffic in narcotic drugs should be the subject of international criminal jurisdiction when it was on a large scale, transboundary in nature and posed a serious threat to the established institutions in a State or region. It was suggested that the essential requirement for drug trafficking to be classified as a crime of that nature should be the constant and massive flow of such drugs. The remark was on the other hand made that it would be unnecessary to provide in article 25 that the drug trafficking must be on a large scale or in a transboundary context if appropriate criteria were included in article 1. Attention was further drawn to the need to supplement the strong measures taken at the national level to fight illicit drug trafficking by bringing the crimes in question within the ambit of the Code. It was also stated that the international community must be able to combat such traffic legally, under the principle aut dedere aut judicare, and that conflicts of jurisdiction must be resolved.

161. Other delegations, while viewing the Commission's interest in such heinous crimes as quite legitimate, expressed doubts regarding their inclusion in the draft Code. It was suggested that a full exchange of opinions on the question was necessary. Attention was drawn to the view reflected in paragraph 113 of the Commission's report that, given the existence of the 1988 United Nations Convention on the subject of drug trafficking, it was necessary before deciding whether or not to retain article 25 in the draft, to consider the relationship between the jurisdiction of national legal systems under that Convention and the proposed international jurisdiction under the Code. Emphasis was also placed on the need to scrutinize closely the relationship of the article with existing relevant conventions such as the 1988 Convention, ways of implementing mutual legal assistance among States to prosecute offenders and prevent money laundering, and the relationship between the jurisdiction of national legal systems and the proposed international criminal jurisdiction. The hope was expressed that, since narco-terrorism could have a destabilizing effect on some countries, in particular those in the Caribbean region, the Commission would make every effort to find a satisfactory solution to that important issue.

162. Still other delegations felt that illicit trafficking in narcotic drugs should be left out of the Code. The arguments adduced in favour of the exclusion of international terrorism, as summarized in paragraph 156 above, were also expressed in the current context. Attention was further drawn to the international instruments which provided for a system of exercise of national jurisdiction bolstered by inter-State cooperation and to the principle of complementarity contained in the draft statute for an international criminal court 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. The remark was also made

that illicit traffic in narcotic drugs fell short of the requisite criteria to be considered as a crime against the peace and security of mankind and was furthermore sufficiently dealt with in other conventions. It was suggested that the seriousness and the deleterious social and economic effects of illicit trafficking in narcotic drugs could be addressed at the national level by enacting penal legislation and preventive measures to combat it and that it might be possible to address specific issues relating to those matters through enhanced bilateral and multilateral cooperation. The decision to continue consultations on the inclusion of illicit drug trafficking was described as unlikely to produce results since the crimes concerned were not crimes against the peace and security of mankind.

163. The new simplified version of article 25 proposed by the Special Rapporteur elicited a number of comments. While support was expressed for the inclusion of the words "on a large scale" and "or in a transboundary context" in paragraph 1, it was suggested that the reason for the deletion of the words "within the confines of a State" should be given in the commentary. As regards the reference to "individuals" in the same paragraph, the view was expressed that drug trafficking, whether carried out by agents of a State, individuals or organizations, could negatively affect international relations. It was therefore suggested that State agents or representatives, in addition to individuals, should be expressly referred to in the text. The remark was made that paragraphs 2 and 3 were inspired by the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and that the article should expressly provide for the requirement of intent in the commission of the crime. It was suggested that the words "contrary to internal or international law" in paragraph 2 should be deleted because the basis for criminalizing the acts referred to in paragraphs 2 and 3 was the Code itself, and not necessarily internal or international law. The remark was also made that, if the Code was implemented by a treaty, then States parties would probably have an obligation to take the legislative measures necessary to criminalize the various crimes under domestic law; in such a situation, the criminalization of illicit traffic in drugs under domestic law would result from the Code itself and the treaty or other instrument in which it was embodied. It was pointed out that the phrase "contrary to internal or international law" entailed a risk that the provision would have no application if a State's domestic law failed to criminalize such traffic or if international conventional law or international customary law failed to proscribe it. It was therefore considered appropriate to omit the phrase, thereby making the Code itself the basis for the criminalization of the acts referred to in paragraph 2.

Article 26. Wilful and severe damage to the environment

164. Several delegations favoured the inclusion in the draft Code of wilful and severe damage to the environment as one of the separate core crimes, with reference being made to the magnitude, seriousness and severity of the consequences in terms of damage and injury caused as well as the contemporary needs of the international community. The view was expressed that there were sufficient grounds for including the concept of wilful and severe environmental damage in the Code and that, although some cases might be punishable under other provisions of the Code, the specific nature of the crime called for separate treatment. The remark was also made that the conduct concerned clearly met all

the conditions universally understood under criminal law for the definition of a crime, namely, a physical initiative which was in violation of the law and which gave rise to an injury, there being a causal link between the act and the outcome. With reference to the constant battle against desertification, it was further remarked that environmental damage had all the characteristics of the crimes to be included in the Code, such as "seriousness", "massiveness" and "effects on the foundations of the international legal order". Attention was drawn to the inclusion of serious damage to the environment as an international crime under article 19 of Part One of the draft articles on State responsibility.

165. In support of the inclusion of that type of crime in the draft Code, attention was drawn to the Chernobyl catastrophe resulting in the violation of the most sacred of human rights, the right to life; to the effects of war on the environment in Croatia, which had been the subject of a conference held at Zagreb in 1993; and to the illicit dumping of toxic waste in the territory of or in waters under the national jurisdiction of certain countries, with the view being expressed that such abuse must not be allowed to continue with impunity. The view was expressed that this type of harm was bound to acquire increasing importance in the future and represented not only an increasingly common phenomenon but also a serious threat to current and future generations. The remark was also made that the likelihood of such damage occurring was not so remote as to be discounted and that it was only by treating such damage as a distinct crime that the institutional weaknesses inherent in international society in that respect could be overcome and the municipal practice of concurrent indictments avoided.

166. Some among the delegations referred to above emphasized that only certain kinds of environmental damage constituted a threat to the peace and security of mankind and should therefore come within the ambit of the Code. The Commission was invited 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. In this connection, the view was expressed that the required scale of the damage in order to determine the existence of criminality would be guaranteed by the proposed requirement of exceptional gravity and international concern. The view was further expressed that wilful and severe environmental damage resulting from acts committed in situations of armed conflict or in times of peace could constitute a threat to the peace of mankind which might not be covered, or might be covered inadequately, under the other categories. The remark was made that certain forms of wilful and grave damage to the environment, such as damage caused by nuclear explosions, wilful nuclear pollution, poisoning of vital international watercourses, deliberate contamination of rivers, lakes or seas or the dumping of chemical or radioactive waste in a State's territory or territorial waters could constitute crimes against the peace and security of mankind. Concern was voiced that the nuclear Powers might prove unable to defuse and destroy nuclear devices and that improper disposal of massive quantities of nuclear material and devices could cause an environmental disaster of frightening proportions. The hope was also expressed however that by the time the Code entered into force there would probably be a comprehensive test-ban treaty which would make it easier to adopt an article on the subject.

167. Other delegations felt that the Commission should give further consideration to the possibility of bringing within the ambit of the Code the crime of wilful and severe damage to the environment and welcomed the decision to establish a working group to examine the issue and prepare a suitable text.

168. Still other delegations expressed doubts about the inclusion of "environmental crimes". The view was expressed that wilful and severe damage to the environment might be punishable under other international legal instruments or under other articles of the draft Code, thereby eliminating the need to make it a separate category. It was further suggested that the inculpation of individuals for damage to the environment would be better left to national laws reflecting international standards.
