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Draft Code of Crimes against the Peace and Security of Mankind. Titles and texts of articles adopted by the Commission at its forty-eighth session - reproduced in Yearbook...1996, vol. II (Part Two), para.50

Topic:
Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

Extract from the Yearbook of the International Law Commission:-
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is understood that the inclusion of certain crimes in the Code does not affect the status of other crimes under international law, and that the adoption of the Code does not in any way preclude the further development of this important area of law.

B. Recommendation of the Commission

47. The Commission considered various forms which the draft Code of Crimes against the Peace and Security of Mankind could take; these included an international convention, whether adopted by a plenipotentiary conference or by the General Assembly; incorporation of the Code in the statute of an international criminal court; or adoption of the Code as a declaration by the General Assembly.

48. The Commission recommends that the General Assembly select the most appropriate form which would ensure the widest possible acceptance of the draft Code.

C. Tribute to the Special Rapporteur, Mr. Doudou Thiam

49. At its 2454th meeting, on 5 July 1996, the Commission, after adopting the text of the articles of the draft Code against the Peace and Security of Mankind on second reading, adopted the following resolution by acclamation:

The International Law Commission,

Having adopted the draft Code of Crimes against the Peace and Security of Mankind,

Expresses to the Special Rapporteur, Mr. Doudou Thiam, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft Code by his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft Code of Crimes against the Peace and Security of Mankind.

D. Articles of the draft Code of Crimes against the Peace and Security of Mankind

50. The text of, and commentaries to, draft articles 1 to 20 as finally adopted by the Commission at its forty-eighth session are reproduced below.

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

PART ONE

GENERAL PROVISIONS

Article 1. Scope and application of the present Code

1. The present Code applies to the crimes against the peace and security of mankind set out in part two.

2. Crimes against the peace and security of mankind are crimes under international law and punish-

able as such, whether or not they are punishable under national law.

Commentary

(1) As the first article in the draft Code of Crimes against the Peace and Security of Mankind, article 1 addresses as a preliminary matter the scope and application of the provisions of the Code.

(2) *Paragraph 1* restricts the scope and application of the Code to those crimes against the peace and security of mankind that are set out in part two. This provision is not intended to suggest that the Code covers exhaustively all crimes against the peace and security of mankind, but rather to indicate that the scope and application of the Code are limited to those crimes dealt with in part two.

(3) The phrase "crimes against the peace and security of mankind" should be understood in this provision of the Code as referring to the crimes listed in part two. The Commission considered adding to the end of paragraph 1 the phrase "hereinafter referred to as crimes against the peace and security of mankind" so as to dispel any possible misunderstanding. It, however, felt that such an addition would make the paragraph unnecessarily cumbersome.

(4) The Commission decided not to propose a general definition of crimes against the peace and security of mankind. It took the view that it should be left to practice to define the exact contours of the concept of crimes against peace, war crimes and crimes against humanity, as identified in article 6 of the Charter of the Nürnberg Tribunal.³³

(5) *Paragraph 2* addresses two fundamental principles relating to individual responsibility for the crimes against the peace and security of mankind under international law.

(6) The opening clause of paragraph 2 indicates that international law provides the basis for the criminal characterization of the types of behaviour which constitute crimes against the peace and security of mankind under part two. Thus, the prohibition of such types of behaviour and their punishability are a direct consequence of international law.

(7) This provision is consistent with the Charter and the Judgment of the Nürnberg Tribunal.³⁴ Article 6 of the Charter authorized the Nürnberg Tribunal to try and punish individuals for three categories of crimes under international law, namely crimes against peace, war crimes and crimes against humanity. In its Judgment, the Nürnberg Tribunal recognized the existence of duties incumbent upon individuals by virtue of international law. "That international law imposes duties and liabilities upon individuals as well as upon States has long been

³³ Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

³⁴ The General Assembly unanimously affirmed the Nürnberg Principles in its resolution 95 (I).

recognized.”³⁵ The Nürnberg Tribunal also recognized that individuals could incur criminal responsibility and be liable to punishment as a consequence of violating their obligations under international law. In this regard, the Nürnberg Tribunal expressly stated “that individuals can be punished for violations of international law.”³⁶

(8) The Commission recognized the general principle of the direct applicability of international law with respect to individual responsibility and punishment for crimes under international law in Principle I of the Nürnberg Principles. Principle I provides that “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.” As indicated in the commentary to this provision, “The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law.”³⁷ This principle was also articulated in article 1 of the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954 (hereinafter referred to as the “1954 draft Code”).³⁸

(9) The concluding clause of paragraph 2 confirms that international law applies to crimes against the peace and security of mankind irrespective of the existence of any corresponding national law. The result is the autonomy of international law in the criminal characterization of the types of behaviour which constitute crimes against the peace and security of mankind under part two.

(10) The said clause states that the characterization, or the absence of characterization, of a particular type of behaviour as criminal under national law has no effect on the characterization of that type of behaviour as criminal under international law. It is conceivable that a particular type of behaviour characterized as a crime against the peace and security of mankind in part two might not be prohibited or might even be imposed by national law. It is also conceivable that such behaviour might be characterized merely as a crime under national law, rather than as a crime against the peace and security of mankind under international law. None of those circumstances could serve as a bar to the characterization of the type of conduct concerned as criminal under international law. The distinction between characterization as a crime under national law and characterization as a crime under international law is significant since the corresponding legal regimes differ. This distinction has important implications with respect to the *non bis in idem* principle addressed in article 12.

(11) This provision is consistent with the Charter and the Judgment of the Nürnberg Tribunal. The Charter of the Nürnberg Tribunal expressly referred to the relationship between international law and national law with respect to the criminal characterization of particular conduct only in relation to crimes against humanity. Article 6,

subparagraph (c) of the Charter characterized as crimes against humanity certain types of conduct “whether or not in violation of the domestic law where perpetrated”. In its Judgment, the Nürnberg Tribunal recognized in general terms what is commonly referred to as the supremacy of international criminal law over national law in the context of the obligations of individuals. In this regard, the Nürnberg Tribunal stated that “the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State”.³⁹

(12) The Commission recognized the general principle of the autonomy of international law over national law with respect to the criminal characterization of conduct constituting crimes under international law in Principle II of the Nürnberg Principles which stated as follows: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”

(13) It must be pointed out that the clause under consideration concerns only the criminal characterization of certain types of conduct as constituting crimes against the peace and security of mankind under part two. It is without prejudice to national competence in relation to other matters of criminal law or procedure, such as the penalties, evidentiary rules, etc., particularly since national courts are expected to play an important role in the implementation of the Code.

Article 2. Individual responsibility

1. A crime against the peace and security of mankind entails individual responsibility.

2. An individual shall be responsible for the crime of aggression in accordance with article 16.

3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:

(a) Intentionally commits such a crime;

(b) Orders the commission of such a crime which in fact occurs or is attempted;

(c) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;

(d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;

(e) Directly participates in planning or conspiring to commit such a crime which in fact occurs;

(f) Directly and publicly incites another individual to commit such a crime which in fact occurs;

(g) Attempts to commit such a crime by taking action commencing the execution of a crime which

³⁵ *Nazi Conspiracy and Aggression: Opinion and Judgment* (Washington, United States Government Printing Office, 1947), p. 52.

³⁶ *Ibid.*

³⁷ *Yearbook . . . 1950*, vol. II, p. 374, document A/1316, para. 99.

³⁸ See footnote 12 above. Article 1 stated that “Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished”.

³⁹ *Nazi Conspiracy and Aggression . . .* (see footnote 35 above), p. 53.

does not in fact occur because of circumstances independent of his intentions.

Commentary

(1) The principle of individual responsibility for crimes under international law was clearly established at Nürnberg. The Charter of the Nürnberg Tribunal provided for the trial and punishment of persons who committed crimes against peace, war crimes or crimes against humanity.⁴⁰ The Nürnberg Tribunal confirmed the direct applicability of international criminal law with respect to the responsibility and punishment of individuals for violations of this law:

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals . . . In the opinion of the Tribunal, [this submission] must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized.⁴¹

The Nürnberg Tribunal further concluded that "individuals can be punished for violations of international law".⁴² The principle of individual responsibility and punishment for crimes under international law recognized at Nürnberg is the cornerstone of international criminal law. This principle is the enduring legacy of the Charter and the Judgment of the Nürnberg Tribunal which gives meaning to the prohibition of crimes under international law by ensuring that the individuals who commit such crimes incur responsibility and are liable to punishment. The principle of individual responsibility and punishment for crimes under international law was reaffirmed in the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991⁴³ (art. 7, para. 1 and art. 23, para. 1) and the statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994⁴⁴ (art. 6, para. 1 and art. 22, para. 1). This principle was also reaffirmed by the Commission in the Nürnberg Principles (Principle I) and in the 1954 draft Code (art. 1). The punishment of individuals for the crimes covered by the Code is addressed in article 3 (Punishment) and discussed in the commentary thereto.

(2) The principles of individual criminal responsibility which determine whether an individual can be held accountable for a crime against the peace and security of mankind are set forth in articles 2 to 7 of part one. As the first article in this series of articles, article 2 deals with a number of important general principles concerning indi-

vidual criminal responsibility. Paragraph 1 establishes the general principle of individual responsibility for the crimes covered by the Code. Paragraph 2 reaffirms this principle with respect to the crime of aggression as provided in article 16 which deals with the forms of participation. Paragraph 3 addresses the various forms of participation by which an individual incurs responsibility for the other crimes listed in part two of the Code.

(3) *Paragraph 1* reaffirms the principle of individual responsibility for crimes under international law with respect to crimes against the peace and security of mankind. This is clearly indicated by the recognition of the fact that such a crime "entails individual responsibility". Notwithstanding the scope and application of the Code provided for in article 1, paragraph 1, article 2, paragraph 1, is formulated in general terms to reaffirm the general principle of individual criminal responsibility with respect to all crimes against the peace and security of mankind irrespective of whether such crimes are listed in the Code. The Commission considered that it was important to reaffirm this general principle in relation to all crimes against the peace and security of mankind to avoid any question concerning its application to crimes of such a character that were not listed in part two. The Commission adopted a restrictive approach to the inclusion of crimes in part two while recognizing that there might be other crimes of the same character that were not presently covered by the Code.

(4) Paragraph 1 also indicates that the scope of application of the Code *ratione personae* is limited to "individuals" meaning natural persons. It is true that the act for which an individual is responsible might also be attributable to a State if the individual acted as an "agent of the State", "on behalf of the State", "in the name of the State" or as a *de facto* agent, without any legal power. For this reason, article 4 (Responsibility of States) establishes that the criminal responsibility of individuals is "without prejudice to any question of the responsibility of States under international law."

(5) *Paragraph 2* deals with individual responsibility for the crime of aggression. In relation to the other crimes included in the Code, paragraph 3 indicates the various manners in which the role of the individual in the commission of a crime gives rise to responsibility: he shall be responsible if he committed the act which constitutes the crime; if he attempted to commit the act; if he failed to prevent the commission of the act; if he incited the commission of the act; if he participated in the planning of the act; if he was an accomplice in its commission. In relation to the crime of aggression, it was not necessary to indicate these different forms of participation which entail the responsibility of the individual, because the definition of the crime of aggression in article 16 already provides all the elements necessary to establish the responsibility. According to that article, an individual is responsible for the crime of aggression when, as a leader or organizer, he orders or actively participates in the planning, preparation, initiation or waging of aggression committed by a State. The crime of aggression has particular features which distinguish it from the other offences under the Code. Aggression can be committed only by individuals who are agents of the State and who use their power to give orders and the means it makes available in order to

⁴⁰ Charter of the Nürnberg Tribunal, art. 6.

⁴¹ *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), p. 52.

⁴² *Ibid.*, p. 53.

⁴³ Hereinafter referred to as the "International Tribunal for the Former Yugoslavia". Reference texts are reproduced in *Basic Documents, 1995* (United Nations publication, Sales No. E/F.95.III.P.1).

⁴⁴ Hereinafter referred to as the "International Tribunal for Rwanda". Security Council resolution 955 (1994) of 8 November 1994, annex.

commit this crime. All the situations listed in paragraph 3 which would have application in relation to the crime of aggression are already found in the definition of that crime contained in article 16. Hence the reason to have a separate paragraph for the crime of aggression in article 2.

(6) *Paragraph 3* addresses the various ways in which an individual incurs responsibility for participating in or otherwise contributing significantly to a crime set out in articles 17 (Crime of genocide), 18 (Crimes against humanity), 19 (Crimes against United Nations and associated personnel) or 20 (War crimes), namely, by the commission of a crime (subparagraph (a)), by complicity in a crime (subparagraphs (b) to (f)) or by the attempt to commit a crime (subparagraph (g)). Participation only entails responsibility when the crime is actually committed or at least attempted. In some cases it was found useful to mention this requirement in the corresponding subparagraphs in order to dispel possible doubts. It is of course understood that the requirement only extends to the application of the Code and does not purport to be the assertion of a general principle in the characterization of participation as a source of criminal responsibility.⁴⁵

(7) *Subparagraph (a)* addresses the responsibility of the individual who actually "commits such a crime". This subparagraph provides that an individual who performs an unlawful act or omission is criminally responsible for this conduct under the subparagraph. As recognized by the Nürnberg Tribunal, an individual has a duty to comply with the relevant rules of international law and therefore may be held personally responsible for failing to perform this duty. Subparagraph (a) is intended to cover two possible situations in which an individual "commits" a crime by means of an act or an omission depending on the rule of law that is violated. In the first situation, an individual incurs criminal responsibility for the affirmative conduct of performing an act in violation of the duty to refrain from performing such an act. In the second situation, an individual incurs criminal responsibility for an omission by failing to perform an act in violation of the duty to perform such an act. While recognizing that the word "commit" is generally used to refer to intentional rather than merely negligent or accidental conduct, the Commission decided to use the phrase "intentionally commits" to further underscore the necessary intentional element of crimes against the peace and security of mankind. The principle of individual criminal responsibility under which an individual who commits a crime is held accountable for his own conduct set forth in subparagraph (a) is consistent with the Charter of the Nürnberg Tribunal (art. 6), the Convention on the Prevention and Punishment of the Crime of Genocide (art. II), the Geneva Conventions of 12 August 1949,⁴⁶ the statute of the International Tribunal for the Former Yugoslavia (art. 7, para. 1) and the statute of the International Tribunal for Rwanda

(art. 6, para. 1). This principle is also consistent with the Nürnberg Principles (Principle I) adopted by the Commission.

(8) *Subparagraph (b)* addresses the responsibility of the superior who "orders the commission of such a crime". This subparagraph provides that an individual who orders the commission of a crime incurs responsibility for that crime. This principle of criminal responsibility applies to an individual who is in a position of authority and uses his authority to compel another individual to commit a crime. The superior who orders the commission of the crime is in some respects more culpable than the subordinate who merely carries out the order and thereby commits a crime that he would not have committed on his own initiative. The superior contributes significantly to the commission of the crime by using his position of authority to compel the subordinate to commit a crime. The superior who orders the subordinate to commit a crime fails to perform two essential duties which are incumbent upon every individual who is in a position of authority. First, the superior fails to perform the duty to ensure the lawful conduct of his subordinates. Secondly, the superior violates the duty to comply with the law in exercising his authority and thereby abuses the authority that is inherent in his position.

(9) The principle of the criminal responsibility of a superior for purposes of the Code applies only to those situations in which the subordinate actually carries out or at least attempts to carry out the order to commit the crime, as indicated by the phrase "which in fact occurs or is attempted". In the first case, the criminal responsibility of a superior is limited to situations in which a subordinate actually carries out the order to commit a crime. This limitation on the criminal responsibility of a superior for the crimes contained in articles 17 to 20 is a consequence of the limited scope of the Code which covers only those crimes under international law which are of such a character as to threaten international peace and security, as discussed in paragraph (6) above. Notwithstanding the absence of criminal responsibility under the Code, the superior who gives an order to commit a crime which is not carried out would still be subject to the penal or disciplinary measures provided by national law. In the second case, the criminal responsibility of a superior is extended to include situations in which a subordinate attempts and fails to carry out the order to commit a crime since the subordinate would incur criminal responsibility in such a situation under subparagraph (g). It would clearly be a travesty of justice to hold the subordinate responsible for attempting to commit a crime pursuant to the order of his superior while permitting the superior to escape responsibility as a result of the subordinate's failure to successfully carry out the orders. The principle of individual criminal responsibility under which an individual who orders the commission of a crime is held accountable for that crime set forth in subparagraph (b) is consistent with the Geneva Conventions of 12 August 1949,⁴⁷ the statute of the International Tribunal for the Former Yugoslavia (art. 7, para. 1) and the statute of the International Tribunal for Rwanda (art. 6, para. 1). As indicated in paragraph (6) above, the limitations contained in this subparagraph do not affect the application of the general principles of

⁴⁵ This limitation does not in any way affect the application of the general principles independently of the Code or of similar provisions contained in other instruments, notably article III of the Convention on the Prevention and Punishment of the Crime of Genocide.

⁴⁶ See the article common to the four Geneva Conventions: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; Geneva Convention relative to the Treatment of Prisoners of War, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146.

⁴⁷ Ibid.

individual criminal responsibility independently of the Code or of a similar provision contained in another instrument.

(10) *Subparagraph (c)* addresses the responsibility of the superior who “fails to prevent or repress the commission of such a crime” by a subordinate “in the circumstances set out in article 6”. This subparagraph reaffirms the responsibility of a superior for the failure to perform his duty to prevent or repress the commission of a crime by his subordinate in the circumstances set out in article 6 (Responsibility of the superior). This principle of individual criminal responsibility is addressed in article 6 and discussed in the commentary thereto.

(11) *Subparagraph (d)* addresses the criminal responsibility of the accomplice who “assists . . . in the commission of such a crime”. This subparagraph provides that an individual who “aids, abets or otherwise assists” in the commission of a crime by another individual incurs responsibility for that crime if certain criteria are met. The accomplice must knowingly provide assistance to the perpetrator of the crime. Thus, an individual who provides some type of assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable under subparagraph (d). In addition, the accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way. In such a situation, an individual is held responsible for his own conduct which contributed to the commission of the crime notwithstanding the fact that the criminal act was carried out by another individual. The principle of individual criminal responsibility for complicity in the commission of a crime set forth in subparagraph (d) is consistent with the Charter of the Nürnberg Tribunal (art. 6), the Convention on the Prevention and Punishment of the Crime of Genocide (art. III, subpara. (e)), the statute of the International Tribunal for the Former Yugoslavia (art. 7, para. 1) and the statute of the International Tribunal for Rwanda (art. 6, para. 1). This principle is also consistent with the Nürnberg Principles (Principle VII) and the 1954 draft Code (art. 2, para. 13 (iii)).

(12) The Commission concluded that complicity could include aiding, abetting or assisting *ex post facto*, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime.

(13) *Subparagraph (e)* addresses the responsibility of the planner or the co-conspirator who “participates in planning or conspiring to commit such a crime”. This subparagraph provides that an individual who participates directly in planning or conspiring to commit a crime incurs responsibility for that crime even when it is actually committed by another individual. The term “directly” is used to indicate that the individual must in fact participate in some meaningful way in formulating the criminal plan or policy, including endorsing such a plan or policy proposed by another. The planner who formulates the detailed plans for carrying out a crime is in some respects more culpable than the perpetrator who carries out a plan to commit a crime that he would not otherwise have committed. Similarly, the individuals who conspire to commit

a crime contribute significantly to the commission of the crime by participating jointly in formulating a plan to commit a crime and by joining together in pursuing their criminal endeavour. The phrase “which in fact occurs” indicates that the criminal responsibility of an individual who, acting alone or with other individuals, participates in planning a crime set out in articles 17 to 20 is limited to situations in which the criminal plan is in fact carried out. Subparagraph (e) of article 2 sets forth a principle of individual responsibility with respect to a particular form of participation in a crime rather than creating a separate and distinct offence or crime.⁴⁸

(14) Subparagraph (e) is intended to ensure that high-level government officials or military commanders who formulate a criminal plan or policy, as individuals or as co-conspirators, are held accountable for the major role that they play which is often a decisive factor in the commission of the crimes covered by the Code. This principle of individual responsibility is of particular importance for the crimes set forth in articles 17 to 20 which by their very nature often require the formulation of a plan or a systematic policy by senior government officials and military commanders. Such a plan or policy may require more detailed elaboration by individuals in mid-level positions in the governmental hierarchy or the military command structure who are responsible for ordering the implementation of the general plans or policies formulated by senior officials. The criminal responsibility of the mid-level officials who order their subordinates to commit the crimes is provided for in subparagraph (b). Such a plan or policy may also require a number of individuals in low-level positions to take the necessary action to carry out the criminal plan or policy. The criminal responsibility of the subordinates who actually commit the crimes is provided for in subparagraph (a). Thus, the combined effect of subparagraphs (a), (b) and (e) is to ensure that the principle of criminal responsibility applies to all individuals throughout the governmental hierarchy or the military chain of command who contribute in one way or another to the commission of a crime set out in articles 17 to 20.

(15) The principle of individual criminal responsibility for formulating a plan or participating in a common plan or conspiracy to commit a crime was recognized in the Charter of the Nürnberg Tribunal (art. 6), the Convention on the Prevention and Punishment of the Crime of Genocide (art. III, subpara. (b)), the statute of the International Tribunal for the Former Yugoslavia (art. 7, para. 1 (planning)) and the statute of the International Tribunal for Rwanda (art. 6, para. 1 (planning)). The Commission also recognized conspiracy as a form of participation in a crime against peace in the Nürnberg Principles (Principle VI) and more generally in the 1954 draft Code (art. 2, para. 13 (i)).⁴⁹

⁴⁸ This is consistent with the Judgment of the Nürnberg Tribunal which treated conspiracy as a form of participation in a crime against peace rather than as a separate crime. *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), p. 56.

⁴⁹ Instead of the French term *complot*, the Commission preferred the term *entente*, which was taken from article III of the Convention on the Prevention and Punishment of the Crime of Genocide and differed, in French at least, from the term used in the 1954 draft Code and in Principle VI of the Nürnberg Principles. *Entente* and *complot* were both translations of the word “conspiracy”, which was used in the English version of the subparagraph.

(16) *Subparagraph (f)* addresses the responsibility of the instigator who “incites another individual to commit such a crime”. This subparagraph provides that an individual who directly and publicly incites another individual to commit a crime incurs responsibility for that crime. Such an individual urges and encourages another individual to commit a crime and thereby contributes substantially to the commission of that crime. The principle of individual criminal responsibility set forth in this subparagraph applies only to direct and public incitement. The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion. The equally indispensable element of public incitement requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large. Thus, an individual may communicate the call for criminal action in person in a public place or by technological means of mass communication, such as by radio or television.⁵⁰ This public appeal for criminal action increases the likelihood that at least one individual will respond to the appeal and, moreover, encourages the kind of “mob violence” in which a number of individuals engage in criminal conduct. Private incitement to commit a crime would be covered by the principle of individual criminal responsibility relating to individuals who jointly plan or conspire to commit a crime set forth in subparagraph (e). The phrase “which in fact occurs” indicates that the criminal responsibility of an individual for inciting another individual to commit a crime set out in articles 17 to 20 is limited to situations in which the other individual actually commits that crime, as discussed in paragraph (6) above. The principle of individual criminal responsibility for incitement was recognized in the Charter of the Nürnberg Tribunal (art. 6 (instigation)), the Convention on the Prevention and Punishment of the Crime of Genocide (art. III, subpara.(c)), the statute of the International Tribunal for the Former Yugoslavia (art. 7, para. 1 (instigation)) and the statute of the International Tribunal for Rwanda (art. 6, para. 1 (instigation)). This principle was also recognized by the Commission in the 1954 draft Code (art. 2, para. 13 (ii)).

(17) *Subparagraph (g)* addresses the responsibility of an individual who “attempts to commit such a crime”. This subparagraph provides for the criminal responsibility of an individual who forms the intent to commit a crime, commits an act to carry out this intention and fails to successfully complete the crime only because of some independent factor which prevents him from doing so. Thus, an individual incurs criminal responsibility for unsuccessfully attempting to commit a crime only when the following elements are present: (a) intent to commit a particular crime; (b) an act designed to commit it; and (c) non-completion of the crime for reasons independent of the perpetrator’s will. The phrase “by taking action commencing the execution of a crime” is used to indicate that the individual has performed an act which constitutes a

significant step towards the completion of the crime. The phrase “which does not in fact occur” recognizes that the notion of attempt by definition only applies to situations in which an individual endeavours to commit a crime and fails in this endeavour. The Commission decided to recognize this exception to the requirement that a crime in fact occurred which applies to the other principles of individual criminal responsibility set forth in paragraph 3 for two reasons. First, a high degree of culpability attaches to an individual who attempts to commit a crime and is unsuccessful only because of circumstances beyond his control rather than his own decision to abandon the criminal endeavour. Secondly, the fact that an individual has taken a significant step towards the completion of one of the crimes set out in articles 17 to 20 entails a threat to international peace and security because of the very serious nature of these crimes. The principle of individual criminal responsibility for attempt was recognized in the Convention on the Prevention and Punishment of the Crime of Genocide (art. III, subpara. (d)). This principle was also recognized by the Commission in the 1954 draft Code (art. 2, para. 13 (iv)).

Article 3. Punishment

An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime.

Commentary

(1) As discussed in the commentary to article 2, the Charter and the Judgment of the Nürnberg Tribunal clearly established the principle that an individual not only incurs responsibility, but is also liable to punishment for conduct which constitutes a crime under international law. The Charter provided for the punishment of individuals responsible for violations of international law which constituted crimes under international law, namely, crimes against peace, war crimes or crimes against humanity. In its Judgment, the Tribunal explicitly recognized that “individuals can be punished for violations of international law”. It also emphasized that “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁵¹ Thus, international criminal law performs the same three essential functions as national criminal law, by providing the rule of law which establishes the standard of conduct for individuals, by providing for the principle of individual responsibility and for the principle of punishment for violations of that standard and, accordingly, a deterrent against such violations.

(2) Article 3 consists of two closely related provisions. The first provision sets out the general principle whereby anyone who commits a crime against the peace and security of mankind is responsible for that crime. The second, more specific, provision concerns the punishment which

⁵⁰ The tragic events in Rwanda demonstrated the even greater effect of communicating the call for criminal action by technological means of mass communication which enable an individual to reach a much larger number of people and to repeat the message of incitement. See final report of the Commission of Experts established pursuant to Security Council resolution 935 (1994) (document S/1994/1405, annex).

⁵¹ *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), p. 53.

such responsibility entails, namely, the applicable penalty, which must be proportionate to the character and gravity of the crime in question.

(3) The character of a crime is what distinguishes that crime from another crime. A crime of aggression is to be distinguished from a crime against humanity, which is to be distinguished from a war crime. The gravity of a crime is inferred from the circumstances in which it is committed and the feelings which impelled the author. Was the crime premeditated? Was it preceded by preparations (stratagem or ambush)? The gravity is also inferred from the feelings which impelled the individual, and which are generally called the motive. It, too, is inferred from the way in which it was executed: cruelty or barbarity. An individual may not only have intended to commit a criminal act, but also, in so doing, to inflict maximum pain or suffering on the victim. Hence, while the criminal act is legally the same, the means and methods used differ, depending on varying degrees of depravity and cruelty. All of these factors should guide the court in applying the penalty.

(4) The authors of the Code have not specified a penalty for each crime, since everything depends on the legal system adopted to try the persons who commit crimes against the peace and security of humanity.

(5) In the case of a system of universal jurisdiction, it is each State declaring that it is competent that will determine the applicable penalty; the penalty may, for example, involve a maximum and a minimum, and may or may not admit extenuating or aggravating circumstances.

(6) In this case, the court may, in applying the penalty, determine from the scale of penalties established by the State the most appropriate penalty and decide whether or not there are extenuating or aggravating circumstances.

(7) If, on the other hand, jurisdiction lies with an international court, the applicable penalty shall be determined by an international convention, either in the statute of the international court or in another instrument if the statute of the international court does not so provide. It is, in any event, not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment. This is in accord with the precedent of punishment for a crime under customary international law or general principles of law as recognized in the Judgment of the Nürnberg Tribunal⁵² and in article 15, paragraph 2, of the International Covenant on Civil and Political Rights.

Article 4. Responsibility of States

The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

⁵² *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), pp. 49-51.

Commentary

(1) Although, as made clear by article 2, the Code addresses matters relating to the responsibility of individuals for the crimes set out in part two, it is possible, indeed likely, as pointed out in the commentary to article 2, that an individual may commit a crime against the peace and security of mankind as an "agent of the State", "on behalf of the State", "in the name of the State" or even in a de facto relationship with the State, without being vested with any legal power.

(2) The "without prejudice" clause contained in article 4 indicates that the Code is without prejudice to any question of the responsibility of a State under international law for a crime committed by one of its agents. As the Commission already emphasized in the commentary to article 19 of the draft on State responsibility, the punishment of individuals who are organs of the State

certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs.⁵³

The State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime.

Article 5. Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.

Commentary

(1) Crimes under international law by their very nature often require the direct or indirect participation of a number of individuals at least some of whom are in positions of governmental authority or military command. This is particularly true with respect to the crimes under international law which are of such gravity or magnitude, are committed on such a massive or widespread scale or are committed on such a planned or systematic basis as to constitute a threat to international peace and security and thereby qualify for inclusion in the Code.

(2) The principles of individual criminal responsibility set forth in article 2 address the various ways in which an individual incurs criminal responsibility for directly or indirectly contributing to the commission of a crime covered by the Code. The provisions concerning superior orders, command responsibility and official position contained in articles 5 to 7 are intended to ensure that the principles of individual criminal responsibility apply equally and without exception to any individual throughout the governmental hierarchy or military chain of command who contributes to the commission of such a crime.

⁵³ *Yearbook* . . . 1976, vol. II (Part Two), p. 104, para. (21) of the commentary to article 19.

Thus, for example, a governmental official who plans or formulates a genocidal policy, a military commander or officer who orders a subordinate to commit a genocidal act to implement such a policy or knowingly fails to prevent or suppress such an act and a subordinate who carries out an order to commit a genocidal act contribute to the eventual commission of the crime of genocide. Justice requires that all such individuals be held accountable.

(3) Article 5 addresses the criminal responsibility of a subordinate who commits a crime while acting pursuant to an order of a Government or a superior. The governmental official who formulates a criminal plan or policy and the military commander or officer who orders the commission of a criminal act in the implementation of such a plan or policy bear particular responsibility for the eventual commission of the crime. However, the culpability and the indispensable role of the subordinate who actually commits the criminal act cannot be ignored. Otherwise the legal force and effect of the prohibition of crimes under international law would be substantially weakened by the absence of any responsibility or punishment on the part of the actual perpetrators of these heinous crimes and thus of any deterrence on the part of the potential perpetrators thereof.

(4) The plea of superior orders is most frequently claimed as a defence by subordinates who are charged with the type of criminal conduct covered by the Code. Since the Second World War the fact that a subordinate acted pursuant to an order of a Government or a superior has been consistently rejected as a basis for relieving a subordinate of responsibility for a crime under international law. In this regard, the Charter of the Nürnberg Tribunal provided in article 8 that

The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.⁵⁴

Most of the major war criminals tried by the Nürnberg Tribunal raised as a defence the fact that they were acting pursuant to the orders of their superior. The Nürnberg Tribunal rejected the plea of superior orders as a defence and stated:

The provisions of this Article [article 8] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment.⁵⁵

The defence of superior orders has been consistently excluded in the relevant legal instruments adopted since the Charter of the Nürnberg Tribunal, including the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal) (art. 6),⁵⁶ Control Council Law No. 10 (art. 4)⁵⁷ and, more recently, the statute of the Interna-

tional Tribunal for the Former Yugoslavia (art. 7) and the statute of the International Tribunal for Rwanda (art. 6). The absence of a defence based on the mere existence of superior orders was also recognized by the Commission in the Nürnberg Principles (Principle IV) and the 1954 draft Code (art. 4).

(5) Notwithstanding the absence of any defence based on superior orders, the fact that a subordinate committed a crime while acting pursuant to an order of his superior was recognized as a possible mitigating factor which could result in a less severe punishment in the Charter of the Nürnberg Tribunal and the subsequent legal instruments referred to in the preceding paragraph. The mere existence of superior orders will not automatically result in the imposition of a lesser penalty. A subordinate is subject to a lesser punishment only when a superior order in fact lessens the degree of his culpability. For example, a subordinate who is a willing participant in a crime irrespective of an order of his superior incurs the same degree of culpability as if there had been no such order. In such a situation, the existence of the superior order does not exert any undue influence on the behaviour of the subordinate. In contrast, a subordinate who unwillingly commits a crime pursuant to an order of a superior because of the fear of serious consequences for himself or his family resulting from a failure to carry out that order does not incur the same degree of culpability as a subordinate who willingly participates in the commission of the crime. The fact that a subordinate unwillingly committed a crime pursuant to an order of a superior to avoid serious consequences for himself or his family resulting from the failure to carry out that order under the circumstances at the time may justify a reduction in the penalty that would otherwise be imposed to take into account the lesser degree of culpability. The phrase "if justice so requires" is used to show that even in such cases the imposition of a lesser punishment must also be consistent with the interests of justice. In this regard, the competent court must consider whether a subordinate was justified in carrying out an order to commit a crime to avoid the consequences resulting from a failure to carry out that order. Thus, the court must weigh the seriousness of the consequences that in fact resulted from the order having been carried out, on the one hand, and the seriousness of the consequences that would have most likely resulted from the failure to carry out the order under the circumstances at the time, on the other. At one end of the scale, the court would have no reason to show any mercy for a subordinate who committed a heinous crime pursuant to a superior order in the absence of an immediate or otherwise significant risk of serious consequences resulting from the failure to comply with that order. At the other end of the scale, a court may decide that justice requires imposing a lesser punishment on a subordinate who committed a serious crime pursuant to a superior order only to avoid an immediate or otherwise significant risk of equally or more serious consequences resulting from a failure to comply with that order.⁵⁸

⁵⁴ Charter of the Nürnberg Tribunal, *supra* note 33.

⁵⁵ *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), p. 53.

⁵⁶ *Documents on American Foreign Relations* (Princeton University Press, 1948), vol. VIII, pp. 354 et seq.

⁵⁷ Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

⁵⁸ See H. Lauterpacht, "The law of nations and the punishment of war crimes", *The British Yearbook of International Law* 1944, vol. 21 (1944), p. 73.

(6) Article 5 reaffirms the principle of individual criminal responsibility under which a subordinate is held accountable for a crime against the peace and security of mankind notwithstanding the fact that he committed such a crime while acting under the orders of a Government or a superior. It also reaffirms the possibility of considering superior orders as a mitigating factor in determining the appropriate punishment when justice so requires. The text of the article is based on the relevant provisions contained in the Charter of the Nürnberg Tribunal, the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda. It is intended to reaffirm the existing rule of international law under which the mere fact that an individual committed a crime while acting pursuant to the order of his Government or his superior will not shield him from criminal responsibility for his conduct but may constitute a mitigating factor in certain situations when justice so requires.

Article 6. Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

Commentary

(1) Military commanders are responsible for the conduct of members of the armed forces under their command and other persons under their control. This principle of command responsibility was recognized in the Convention respecting the Laws and Customs of War on Land (The Hague Convention IV of 1907)⁵⁹ and reaffirmed in subsequent legal instruments.⁶⁰ It requires that members of the armed forces be placed under the command of a superior who is responsible for their conduct. A military commander may be held criminally responsible for the unlawful conduct of his subordinates if he contributes directly or indirectly to their commission of a crime. A military commander contributes directly to the commission of a crime when he orders his subordinate to carry out a criminal act, such as killing an unarmed civilian, or to refrain from performing an act which the subordinate has a duty to perform, such as refraining from providing food for prisoners of war which results in their starvation. The criminal responsibility of a military commander in this first situation is addressed in article 2. A military commander also contributes indirectly to the commission of a crime by his subordinate by failing to prevent or repress the unlawful conduct. The criminal responsibility of a military commander in this second situation is addressed in article 6.

⁵⁹ See article I of the Regulations annexed thereto.

⁶⁰ Article 43 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter Protocol I), and article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter Protocol II).

(2) The criminal responsibility of a military commander for failing to prevent or repress the unlawful conduct of his subordinates was not provided for in the Charter of the Nürnberg Tribunal or recognized by the Tribunal. However, this type of criminal responsibility was recognized in several judicial decisions after the Second World War. The United States Supreme Court, in the *Yamashita* case, gave an affirmative answer to the question whether the laws of war imposed on an army commander a duty to take such appropriate measures as were within his power to control the troops under his command and prevent them from committing acts in violation of the laws of war. The court held that General Yamashita was criminally responsible because he had failed to take such measures.⁶¹ Similarly, the United States Military Tribunal, in *The German High Command Trial*, stated that

Under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal, violates a moral obligation under International Law. By doing nothing he cannot wash his hands of international responsibility.⁶²

In addition, in the *Hostages Trial*, the United States Military Tribunal stated that

a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about.⁶³

For its part, the Tokyo Tribunal decided that it was the duty of all those on whom responsibility rested to secure proper treatment of prisoners and to prevent their ill-treatment.⁶⁴

(3) An individual incurs criminal responsibility for the failure to act only when there is a legal obligation to act and the failure to perform this obligation results in a crime. The duty of commanders with respect to the conduct of their subordinates is set forth in article 87 of Protocol I. This article recognizes that a military commander has a duty to prevent and to suppress violations of international humanitarian law committed by his subordinates. This article also recognizes that a military commander has a duty, where appropriate, to initiate disciplinary or penal action against alleged offenders who are his subordinates. The principle of individual criminal responsibility under which a military commander is held responsible for his failure to prevent or repress the unlawful conduct of his subordinates is elaborated in article 86 of Protocol I. This principle is also contained in the statute of the International Tribunal for the Former Yugoslavia (art. 7) and the statute of the International Tribunal for Rwanda (art. 6).

(4) Article 6 confirms the individual criminal responsibility of the superior who is held accountable for a crime against the peace and security of mankind committed by his subordinate if certain criteria are met. The text of this

⁶¹ See *Law Reports of Trials of War Criminals* (15-volume series, prepared by the United Nations War Crimes Commission) (London, H.M. Stationery Office, 1947-1949) vol. IV, p. 43; and *United States Reports* (Washington, D.C.), vol. 327 (1947), pp. 14-15.

⁶² *Law Reports* ... (see footnote 61 above), vol. XII, p. 75.

⁶³ *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Nuernberg, October 1946-April 1949)* (15-volume series) (Washington, D.C., US Government Printing Office, 1949-1953), case No. 7, vol. XI, p. 1303.

⁶⁴ *Law Reports* ... (see footnote 61 above), vol. XV, p. 73.

article is based on the three instruments mentioned in the preceding paragraph. The article begins by referring to the fact that a crime has been committed by a subordinate does not relieve his superiors of their own responsibility for contributing to the commission of the crime. It recognizes that the subordinate incurs criminal responsibility for his direct participation in the criminal conduct as set forth in article 2. It further recognizes that holding a subordinate accountable for the perpetration of a crime does not relieve his superiors of any criminal responsibility they may have incurred by failing to perform their duty to prevent or repress the crime. The duty of a superior to repress the unlawful conduct of his subordinates includes the duty, where appropriate, to initiate disciplinary or penal action against an alleged offender. The criminal responsibility of a superior for the failure to perform the duty to punish a subordinate who engages in unlawful conduct was expressly recognized in the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda. The principle of the individual criminal responsibility of a superior only applies to the conduct of his subordinate or other person under his control. Thus, a superior incurs criminal responsibility only when he fails to prevent or repress the unlawful conduct of such individuals. The reference to "his superiors" indicates that this principle applies not only to the immediate superior of a subordinate, but also to his other superiors in the military chain of command or the governmental hierarchy if the necessary criteria are met. The reference to "superiors" is sufficiently broad to cover military commanders or other civilian authorities who are in a similar position of command and exercise a similar degree of control with respect to their subordinates.⁶⁵ In addition, the reference to "a crime against the peace and security of mankind" indicates that the responsibility of a superior for the unlawful conduct of his subordinate extends not only to war crimes, but also to the other crimes listed in part two of the Code.

(5) Article 6 provides two criteria for determining whether a superior is to be held criminally responsible for the wrongful conduct of a subordinate. First, a superior must have known or had reason to know in the circumstances at the time that a subordinate was committing or was going to commit a crime. This criterion indicates that a superior may have the *mens rea* required to incur criminal responsibility in two different situations. In the first situation, a superior has actual knowledge that his subordinate is committing or is about to commit a crime. In this situation, he may be considered to be an accomplice to the crime under general principles of criminal law relating to complicity. In the second situation, he has sufficient relevant information to enable him to conclude under the circumstances at the time that his subordinates are committing or are about to commit a crime. In this situation, a superior does not have actual knowledge of the unlawful conduct being planned or perpetrated by his subordinates, but he has sufficient relevant information of a general

nature that would enable him to conclude that this is the case. A superior who simply ignores information which clearly indicates the likelihood of criminal conduct on the part of his subordinates is seriously negligent in failing to perform his duty to prevent or suppress such conduct by failing to make a reasonable effort to obtain the necessary information that will enable him to take appropriate action. As indicated in the commentary to article 86 of Protocol I, "this does not mean that every case of negligence may be criminal . . . [T]he negligence must be so serious that it is tantamount to malicious intent".⁶⁶ The phrase "had reason to know" is taken from the statutes of the ad hoc tribunals and should be understood as having the same meaning as the phrase "had information enabling them to conclude" which is used in Protocol I. The Commission decided to use the former phrase to ensure an objective rather than a subjective interpretation of this element of the first criterion.

(6) The second criterion requires that a superior failed to take all necessary measures within his power to prevent or repress the criminal conduct of his subordinate. This second criterion is based on the duty of a superior to command and to exercise control over his subordinates. A superior incurs criminal responsibility only if he could have taken the necessary measures to prevent or to repress the unlawful conduct of his subordinates and he failed to do so. This second criterion recognizes that there may be situations in which a military commander knows or has reason to know of the unlawful conduct of his subordinates, but he is incapable of preventing or repressing this conduct. The Commission decided that, for the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures. Thus, a superior would not incur criminal responsibility for failing to perform an act which was impossible to perform in either respect.

Article 7. Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Commentary

(1) As indicated in the commentary to article 5, crimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required to commit the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would

⁶⁵ "Unfortunately history is full of examples of civilian authorities which have been guilty of war crimes; thus not only military authorities are concerned." (C. Pilloud and others. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949: Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (Geneva, ICRC, Martinus Nijhoff, 1987), p. 1010, footnote 16.)

⁶⁶ *Ibid.*, p. 1012.

be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.

(2) The official position of an individual, including a head of State, was excluded as a defence to a crime under international law or as a mitigating factor in determining the commensurate punishment for such a crime in the Charter of the Nürnberg Tribunal which in article 7 states:

The official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.⁶⁷

(3) In accordance with this provision, the Nürnberg Tribunal rejected the plea of act of State and that of immunity which were submitted by several defendants as a valid defence or ground for immunity:

It was submitted that . . . where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this submission] must be rejected.

. . . The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

. . . [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.⁶⁸

(4) The official position of an individual has been consistently excluded as a possible defence to crimes under international law in the relevant instruments adopted since the Charter of the Nürnberg Tribunal, including the Charter of the Tokyo Tribunal (art. 6), Control Council Law No. 10 (art. 4) and, more recently, the statute of the International Tribunal for the Former Yugoslavia (art. 7) and the statute of the International Tribunal for Rwanda (art. 6). The absence of such a defence was also recognized by the Commission in the Nürnberg Principles (Principle III) and the 1954 draft Code (art. 3).

(5) Article 7 reaffirms the principle of individual criminal responsibility under which an official is held accountable for a crime against the peace and security of mankind notwithstanding his official position at the time of its commission. The text of this article is similar to the relevant provisions contained in the Charter of the Nürnberg Tribunal, the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda. The phrase "even if he acted as head of State or Government" reaffirms the application of the principle contained in the article to the individuals who occupy the highest official positions and therefore have the greatest powers of decision.

⁶⁷ See footnote 33 above.

⁶⁸ *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), pp. 52-53.

(6) Article 7 is intended to prevent an individual who has committed a crime against the peace and security of mankind from invoking his official position as a circumstance absolving him from responsibility or conferring any immunity upon him, even if he claims that the acts constituting the crime were performed in the exercise of his functions. As recognized by the Nürnberg Tribunal in its Judgment, the principle of international law which protects State representatives in certain circumstances does not apply to acts which constitute crimes under international law. Thus, an individual cannot invoke his official position to avoid responsibility for such an act. As further recognized by the Nürnberg Tribunal in its Judgment, the author of a crime under international law cannot invoke his official position to escape punishment in appropriate proceedings. The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence.⁶⁹ It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility.

(7) The Commission decided that it would be inappropriate to consider official position as a mitigating factor in the light of the particular responsibility of an individual in such a position for the crimes covered by the Code. The exclusion of official position as a mitigating factor is therefore expressly reaffirmed in the article. The official position of an individual has also been excluded as a mitigating factor in determining the commensurate punishment for crimes under international law in almost all of the relevant legal instruments, including the Charter of the Nürnberg Tribunal, Control Council Law No. 10, the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda. The Charter of the Tokyo Tribunal was the only legal instrument which indicated the possibility of considering official position as a mitigating factor when justice so required.

Article 8. Establishment of jurisdiction

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

Commentary

(1) Article 8 is the first in a series of articles contained in part one which address procedural and jurisdictional

⁶⁹ Judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any substantive or procedural immunity based on his official position to avoid prosecution and punishment.

issues relating to the implementation of the Code. In this regard, article 8 addresses as a preliminary matter the establishment of the jurisdiction of a court to determine the question of the responsibility and, where appropriate, the punishment of an individual for a crime covered by the Code by applying the principles of individual criminal responsibility and punishment contained in articles 2 to 7 of part one in relation to the definitions of the crimes set out in articles 16 to 20 of part two.

(2) Article 8 establishes two separate jurisdictional regimes: one for the crimes set out in articles 17 to 20 and another for the crime set out in article 16. The first regime provides for the concurrent jurisdiction of national courts and an international criminal court for the crimes set out in articles 17 to 20, namely, the crime of genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes. The second regime provides for the exclusive jurisdiction of an international criminal court with respect to the crime of aggression set out in article 16 subject to a limited exception. The Commission decided to adopt a combined approach to the implementation of the Code based on the concurrent jurisdiction of national courts and an international criminal court for the crimes covered by the Code with the exception of the crime of aggression, as discussed below.

(3) As the twentieth century draws to a close, the world remains plagued by the all too frequent occurrence of the most serious crimes that are of concern to the international community as a whole, including the crime of genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes. Since the Second World War, States have adopted a number of multilateral conventions in an effort to respond to these particularly serious crimes. The relevant conventions rely at least in part on national jurisdiction for the prosecution and punishment of offenders (for example, the Convention on the Prevention and Punishment of the Crime of Genocide, article VI; the Geneva Conventions of 12 August 1949, in particular, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter "first Geneva Convention"), article 49; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter "second Geneva Convention"), article 50; the Geneva Convention relative to the Treatment of Prisoners of War (hereinafter "third Geneva Convention"), article 129; and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter "fourth Geneva Convention"), article 146; the International Convention on the Suppression and Punishment of the Crime of Apartheid, article V; and the Convention on the Safety of United Nations and Associated Personnel, article 14).

(4) There are only two conventions which expressly provide for the possibility of the prosecution and punishment of offenders by an international criminal court, namely, the Convention on the Prevention and Punishment of the Crime of Genocide (art. VI) and the Convention on the Suppression and Punishment of the Crime of Apartheid (art. V). However, these Conventions also envisage a role for national courts in the prosecution and punishment of offenders by providing for the concurrent,

rather than the exclusive, jurisdiction of an international court. In the draft statute for an international criminal court which it recently elaborated,⁷⁰ the Commission also opted for an international criminal court with concurrent jurisdiction that would complement rather than replace the jurisdiction of national courts.⁷¹ Similarly, the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda provide for the concurrent jurisdiction of the international tribunals and national courts. Thus, the international community has recognized the important role to be played by an international criminal court in the implementation of international criminal law while at the same time recognizing the continuing importance of the role to be played by national courts in this respect. As a practical matter it would be virtually impossible for an international criminal court to single-handedly prosecute and punish the countless individuals who are responsible for crimes under international law not only because of the frequency with which such crimes have been committed in recent years, but also because these crimes are often committed as part of a general plan or policy which involves the participation of a substantial number of individuals in systematic or massive criminal conduct in relation to a multiplicity of victims.

(5) The Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court. The article therefore establishes the principle of the concurrent jurisdiction of the national courts of all States parties to the Code based on the principle of universal jurisdiction and the jurisdiction of an international criminal court for the crimes set out in articles 17 to 20 of part two. This approach recognizes, on the one hand, that no permanent international criminal court is in existence at the present stage of development of international society and, on the other hand, that the General Assembly has recently decided to establish a preparatory committee to continue work on the draft statute for an international criminal court elaborated by the Commission.⁷²

(6) The first provision of article 8 establishes the principle of the concurrent jurisdiction of the national courts of the States parties to the Code and an international criminal court for the crimes set out in articles 17 to 20 of part two. As regards national court jurisdiction, the first provision of the article is a corollary of article 9 which establishes the obligation of a State party to extradite or prosecute an individual who is allegedly responsible for such a crime. In this regard, the provision is intended to secure the possibility for the custodial State to fulfil its obligation to extradite or prosecute by opting for the second alternative with respect to such an individual. This alternative for the custodial State consists of the prosecution of that individual by its competent national authorities in a national court. It is meaningful only to the extent that the courts of the custodial State have the necessary jurisdiction over the crimes set out in articles 17 to 20 to enable that State to opt for the prosecution alterna-

⁷⁰ *Yearbook* . . . 1994, vol. II (Part Two), p. 26, para. 91.

⁷¹ See the preamble to the draft statute (*ibid.*).

⁷² General Assembly resolution 50/46.

native. Failing such jurisdiction, the custodial State would be forced to accept any request received for extradition which would be contrary to the alternative nature of the obligation to extradite or prosecute under which the custodial State does not have an absolute obligation to grant a request for extradition. Moreover, the alleged offender would elude prosecution in such a situation if the custodial State did not receive any request for extradition which would seriously undermine the fundamental purpose of the *aut dedere aut judicare* principle, namely, to ensure the effective prosecution and punishment of offenders by providing for the residual jurisdiction of the custodial State.

(7) Jurisdiction over the crimes covered by the Code is determined in the first case by international law and in the second case by national law. As regards international law, any State party is entitled to exercise jurisdiction over an individual allegedly responsible for a crime under international law set out in articles 17 to 20 who is present in its territory under the principle of "universal jurisdiction" set forth in article 9. The phrase "irrespective of where or by whom those crimes were committed" is used in the first provision of the article to avoid any doubt as to the existence of universal jurisdiction for those crimes.

(8) As regards the crime of genocide, the Commission noted that the Convention on the Prevention and Punishment of the Crime of Genocide (art. VI) restricted national court jurisdiction for this crime to the State in whose territory the crime occurred. The provision extends national court jurisdiction over the crime of genocide set out in article 17 to every State party to the Code. The Commission considered that such an extension was fully justified in view of the character of the crime of genocide as a crime under international law for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention and therefore not subject to the restriction contained therein. Unfortunately, the international community had repeatedly witnessed the ineffectiveness of the limited jurisdictional regime provided by the Convention for the prosecution and punishment of individuals responsible for the crime of genocide during the last half century since its adoption. The impunity of such individuals remained virtually the rule rather than the exception notwithstanding the fundamental aims of the Convention. Moreover, this impunity deprived the prohibition of the crime of genocide of the deterrent effect that was an essential element of criminal law due to the absence of any real prospect of enforcing the principles of individual responsibility and punishment for this crime in most instances. This regrettable state of affairs was only partly due to the non-existence of the international penal tribunal envisaged in article VI of the Convention which, as a practical matter, could not possibly have prosecuted and punished all of the individuals who were responsible for crimes of genocide committed at various times and in various places in the course of recent history. The Commission considered that a more effective jurisdictional regime was necessary to give meaning to the prohibition of genocide as one of the most serious crimes under international law which had such tragic consequences for humanity and endangered international peace and security.

(9) The provision is intended to give effect to the entitlement of States parties to exercise jurisdiction over the

crimes set out in articles 17 to 20 under the principle of universal jurisdiction by ensuring that such jurisdiction is appropriately reflected in the national law of each State party. The phrase "shall take such measures as may be necessary" defines the relevant obligation of a State party in flexible terms to take account of the fact that constitutional and other national law requirements for the exercise of criminal jurisdiction vary from State to State. Thus, a State party is required to take those measures, if any, that are necessary to enable it to exercise jurisdiction over the crimes set out in articles 17 to 20 in accordance with the relevant provisions of its national law.

(10) In addition, the provision is intended to require a State party to enact any procedural or substantive measures that may be necessary to enable it to effectively exercise jurisdiction in a particular case with respect to an individual who is allegedly responsible for a crime set out in articles 17 to 20.⁷³ Article 8 substantially reproduces paragraph 3 of article 2 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons provisionally adopted by the Commission at its twenty-fourth session.⁷⁴ As indicated in paragraph (11) of the commentary to the said provision, the intention is

to provide for the exercise of jurisdiction in a broad sense, that is as regards both substantive and procedural criminal law. In order to eliminate any possible doubts on the point, the Commission decided to include . . . a specific requirement, such as is found in The Hague and the Montreal Conventions and in the Rome draft, concerning the establishment of jurisdiction.⁷⁵

(11) The recognition of the principle of the universal jurisdiction of the national courts of States parties to the Code for the crimes set out in articles 17 to 20 does not preclude the possibility of the jurisdiction of an international criminal court for those crimes, as indicated by the opening clause of the first provision which states that it is "without prejudice to the jurisdiction of an international criminal court". The possible jurisdiction of an international criminal court for the crimes set out in articles 17 to 20 was formulated as a without prejudice clause in view of the fact that the international legal system does not yet include such a court with jurisdiction over the crimes set out in the Code, as such, in contrast to the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda which have jurisdiction over the crimes set out in their respective statutes. The jurisdiction of these tribunals extends to many of the crimes under international law set out in part two of the Code, but not as crimes against the peace and security of mankind under the Code. Thus, the provision and indeed the Code do not

⁷³ In this regard, article V of the Convention on the Prevention and Punishment of the Crime of Genocide states as follows:

"The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or of any of the acts enumerated in article III."

The Geneva Conventions of 12 August 1949 also contain a common provision under which States parties "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" (first Geneva Convention, art. 49; second Geneva Convention, art. 50; third Geneva Convention, art. 129; fourth Geneva Convention, art. 146).

⁷⁴ *Yearbook . . . 1972*, vol. II, pp. 312 et seq., document A/8710/Rev.1.

⁷⁵ *Ibid.*, p. 316.

apply to those tribunals which are governed by their respective statutes.

(12) The provision envisages the concurrent jurisdiction of an international criminal court in relation to the crimes set out in articles 17 to 20 to complement the national court jurisdiction envisaged for those crimes and thereby enhance the effective implementation of the Code in that respect. The priority to be given to national court jurisdiction or international court jurisdiction is not addressed in the article since this question would no doubt be addressed in the statute of the international criminal court. The term "international criminal court" is used to refer to a competent, impartial and independent court or tribunal established by law in accordance with the right of an accused to be tried by such a judicial body which is recognized in the International Covenant on Civil and Political Rights (art. 14, para. 1). In addition, this term should be understood as referring to a court established with the support of the international community. An international criminal court could effectively exercise jurisdiction over the crimes covered by the Code and thereby alleviate rather than exacerbate the threat to international peace and security resulting from those crimes only if it had the broad support of the international community. The provision envisaged the jurisdiction of an international criminal court established with the broad support of the international community without indicating the method of establishment for such a court. In this regard, the Commission noted that this question was presently under consideration within the framework of the United Nations in connection with the draft statute for an international criminal court adopted by the Commission at its forty-sixth session.

(13) The second and third provisions of the article comprise a separate jurisdictional regime for the crime of aggression set out in article 16. This jurisdictional regime provides for the exclusive jurisdiction of an international criminal court for the crime of aggression with the singular exception of the national jurisdiction of the State which has committed aggression over its own nationals. The term "international criminal court" has the same meaning in the first and second provision of the article in relation to the two separate jurisdictional regimes envisaged for the crimes set out in articles 17 to 20 in the first instance and the crime set out in article 16 in the second instance. Thus, the criteria for an international criminal court discussed in the context of the first jurisdictional regime are equally applicable in the present context.

(14) The second provision of the article establishes the principle of the exclusive jurisdiction of an international criminal court in determining the responsibility and, where appropriate, the punishment of individuals who are responsible for the crime of aggression set out in article 16 subject to the singular exception recognized in the third provision of the article which is discussed below. This principle of exclusive jurisdiction is the result of the unique character of the crime of aggression in the sense that the responsibility of an individual for participation in this crime is established by his participation in a sufficiently serious violation of the prohibition of certain conduct by States contained in Article 2, paragraph 4, of the Charter of the United Nations. The aggression attributed to a State is a *sine qua non* for the responsibility of an

individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.

(15) The third provision of the article recognizes a singular national court jurisdiction exception to the otherwise exclusive jurisdiction of an international criminal court under the second jurisdictional regime for the crime of aggression. The only State that could try an individual for the crime of aggression in its national courts under this provision is the State referred to in article 16, namely the State whose leaders participated in the act of aggression. This is the only State which could determine the responsibility of such a leader for the crime of aggression without being required to also consider the question of aggression by another State. Thus, the national courts of such a State could determine the responsibility of an individual for the crime of aggression under the Code or under such relevant provisions of national criminal law as may be applicable. The determination of the responsibility of the leaders for their participation in the crime of aggression by the national courts of the State concerned may be essential to a process of national reconciliation. In addition, the exercise of national jurisdiction by a State with respect to the responsibility of its nationals for aggression would not have the same negative consequences for international relations or international peace and security as the exercise of national jurisdiction in the same respect. In the event that the proceedings fail to meet the necessary standard of independence and impartiality, the national court proceedings would not preclude a subsequent trial by an international criminal court in accordance with the exception to the principle *non bis in idem* set out in article 12, paragraph 2 (a) (ii). Since the national court jurisdiction for the crime of aggression, as a limited exception to the otherwise exclusive jurisdiction of an international criminal court, is formulated in permissive rather than obligatory terms, there is no corresponding obligation for a State party to establish the jurisdiction of its national courts with respect to this crime under the article.

Article 9. Obligation to extradite or prosecute

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual.

Commentary

(1) Article 8 of the Code envisages the establishment of two separate jurisdictional regimes for the crimes set out in articles 17 to 20 in the first instance and for the crime set out in article 16 in the second instance. In the first instance, the national courts of States parties would be entitled to exercise the broadest possible jurisdiction over genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes under the principle of universal jurisdiction. In addition, an international criminal court would be entitled to exercise concurrent jurisdiction over those crimes in accordance with its statute. In the second instance, an international criminal court would have exclusive jurisdiction over the crime of aggression with the singular exception of the national court jurisdiction of the State which committed aggression. Article 9 addresses the obligation of a State party to extradite or prosecute an individual alleged to have committed a crime covered by part two other than aggression in the context of the jurisdictional regime envisaged for those crimes, as indicated by the reference to articles 17 to 20. Article 9 does not address the transfer of an individual with respect to any crime covered by the Code to an international criminal court under either jurisdictional regime or the extradition of an individual with respect to the crime of aggression to the State which committed aggression under the exception to the second jurisdictional regime, as discussed below.

(2) Article 9 establishes the general principle that any State in whose territory an individual alleged to have committed a crime set out in articles 17 to 20 of part two is bound to extradite or prosecute the alleged offender. The *aut dedere aut judicare* principle is reflected in several of the relevant conventions referred to in the commentary to the previous article. The fundamental purpose of this principle is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction.

(3) The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present.⁷⁶ The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction. The obligation to extradite or prosecute applies to a State which has custody of "an individual alleged to have committed a crime". This phrase is used to refer to a person who is singled out, not on the basis of unsubstan-

tiated allegations, but on the basis of pertinent factual information.

(4) The national laws of various States differ concerning the sufficiency of evidence required to initiate a criminal prosecution or to grant a request for extradition. The custodial State would have an obligation to prosecute an alleged offender in its territory when there was sufficient evidence for doing so as a matter of national law unless it decided to grant a request received for extradition. The element of prosecutorial discretion under which an alleged offender may be granted immunity from prosecution in exchange for giving evidence or assisting with the prosecution of another individual whose criminal conduct is considered to be more serious, which is recognized in some legal systems, is precluded with respect to the crimes covered by the Code. Crimes under international law constitute the most serious crimes that are of concern to the international community as a whole. This is particularly true with respect to the crimes against the peace and security of mankind covered by the Code. It would be contrary to the interests of the international community as a whole to permit a State to confer immunity on an individual who was responsible for a crime under international law such as genocide. The question of considering cooperation with the prosecution as a relevant mitigating factor to be taken into account in determining an appropriate punishment is discussed in the commentary to article 15.

(5) Whereas the sufficiency of evidence required to institute national criminal proceedings is governed by national law, the sufficiency of evidence required to grant an extradition request is addressed in the various bilateral and multilateral treaties. In terms of the sufficiency of evidence required for extradition, the Model Treaty on Extradition (art. 5, para. 2 (b)) requires as a minimum "a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time and place of its commission".⁷⁷ In this regard, the relevant provision that is common to the Geneva Conventions of 12 August 1949 refers to the notion of a *prima facie* case.⁷⁸

(6) The custodial State has a choice between two alternative courses of action either of which is intended to result in the prosecution of the alleged offender. The custodial State may fulfil its obligation by granting a request for the extradition of an alleged offender made by any other State or by prosecuting that individual in its national courts. Article 9 does not give priority to either alternative course of action. The custodial State has discretion to decide whether to transfer the individual to another jurisdiction for trial in response to a request received for extradition or to try the alleged offender in its national courts. The custodial State may fulfil its obligation under the first alternative by granting a request received for extradition and thereby transferring to the requesting State the responsibility for the prosecution of the case. However, the custodial State is not required to grant such a request

⁷⁶ The Geneva Conventions of 12 August 1949 expressly provide for "the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches" (first Geneva Convention, art. 49; second Geneva Convention, art. 50; third Geneva Convention, art. 129; fourth Geneva Convention, art. 146).

⁷⁷ General Assembly resolution 45/116, annex.

⁷⁸ First Geneva Convention, art. 49; second Geneva Convention, art. 50; third Geneva Convention, art. 129; and fourth Geneva Convention, art. 146.

if it prefers to entrust its own authorities with the prosecution of the case. Moreover, the custodial State is not required to give priority to a request for extradition made by a particular State if the custodial State receives a plurality of requests from more than one State. The draft article adopted on first reading⁷⁹ recommended that particular consideration should be given to a request from the State in whose territory the crime was committed. The Special Rapporteur proposed on second reading that consideration should be given to including in a specific provision the priority of the request of the territorial State. However, the Drafting Committee considered that this question was not ripe for codification. Thus, the State which has custody of the alleged offender is given the discretion to determine where the case will be prosecuted. The discretion of the custodial State in this respect is consistent with the Model Treaty on Extradition (art. 16).

(7) The custodial State may fulfil its obligation under the second alternative by prosecuting the alleged offender in its national courts. Any State party in whose territory an alleged offender is present is competent to try the case regardless of where the crime occurred or the nationality of the offender or the victim. The physical presence of the alleged offender provides a sufficient basis for the exercise of jurisdiction by the custodial State. This exceptional basis for the exercise of jurisdiction is often referred to as "the principle of universality" or "universal jurisdiction". In the absence of a request for extradition, the custodial State would have no choice but to submit the case to its national authorities for prosecution. This residual obligation is intended to ensure that alleged offenders will be prosecuted by a competent jurisdiction, *that is to say*, the custodial State, in the absence of an alternative national or international jurisdiction.

(8) The introductory clause of article 9 recognizes a possible third alternative course of action by the custodial State which would fulfil its obligation to ensure the prosecution of an alleged offender who is found in its territory. The custodial State could transfer the alleged offender to an international criminal court for prosecution. Article 9 does not address the cases in which a custodial State would be permitted or required to take this course of action since this would be determined by the statute of the future court. The article merely provides that the obligation of a State to prosecute or extradite an individual alleged to have committed a crime set out in articles 17 to 20 of the Code is without prejudice to any right or obligation that such a State may have to transfer such an individual to an international criminal court. For similar reasons, article 9 does not address the transfer of an individual alleged to have committed a crime of aggression to an international criminal court under the separate jurisdictional regime envisaged for this crime in article 8. Moreover, it does not address the extradition of an individual for the same crime to the State that committed aggression based on the limited exception to the exclusive jurisdiction of an international criminal court for this crime. The exceptional national court jurisdiction for the crime of aggression is formulated in permissive rather than obligatory terms in article 8. It would be for each State party to decide whether to provide for the jurisdiction of its national courts with respect to this crime and whether to

include this crime in its bilateral or multilateral extradition agreements with other States.

(9) The obligation to extradite or prosecute an alleged offender under article 9 is further addressed in article 10 and article 8, respectively, with a view to facilitating and ensuring the effective implementation of either option.

Article 10. Extradition of alleged offenders

1. To the extent that the crimes set out in articles 17, 18, 19 and 20 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party.

Commentary

(1) The provisions of articles 8 and 10 are corollaries of those of article 9. The obligation of a State party to "extradite or prosecute" is formulated in the alternative in article 9 to provide the custodial State with two possible courses of action when it finds an alleged offender in its territory, namely, either to grant a request received from another State to extradite the alleged offender to its territory for trial or to prosecute the alleged offender in its national courts. The custodial State will only have a genuine choice between these two alternatives, assuming that it receives a request for extradition, if it is capable of implementing either course of action. The implementation by the custodial State of the two possible courses of action is therefore addressed in articles 8 and 10.

(2) The provisions of article 10 are intended to enable the custodial State to select and effectively implement the first alternative. They do not, however, indicate a preference for either course of action. The custodial State may fulfil its obligation under the first alternative by granting an extradition request received from another State that is seeking to try the alleged offender for a crime set out in articles 17 to 20 of part two. The aim of article 10 is to ensure that the custodial State will have the necessary

⁷⁹ Initially adopted as article 6 (see footnote 16 above).

legal basis to grant a request for extradition and thereby fulfil its obligation under article 9 in a variety of situations. Paragraph 1 addresses the situation in which there is an extradition treaty in effect between the States concerned which does not cover the crime for which extradition is sought. Paragraph 2 deals with the situation in which, under the law of the requested State, extradition is conditional on the existence of an extradition treaty and there is no such treaty when the extradition request is made. Paragraph 3 addresses the situation where under the law of the concerned States extradition is not conditional on the existence of a treaty. In all of these situations, article 9 provides the custodial State with the necessary legal basis to grant a request for extradition.

(3) Under some treaties and national laws, the custodial State may only grant requests for extradition coming from the State in which the crime occurred. However, several anti-terrorism conventions contain provisions which are designed to secure the possibility for the custodial State, notwithstanding any such restriction, to grant requests for extradition received from certain States which have an obligation to establish their primary jurisdiction over the relevant offences.⁸⁰ The more recent Convention on the Safety of United Nations and Associated Personnel also secures the possibility for the custodial State to grant such a request received from a State that intends to exercise jurisdiction on a permissive basis, for example, the passive personality principle. Paragraph 4 secures the possibility for the custodial State to grant a request for extradition received from any State party to the Code with respect to the crimes covered in part two. This broader approach is consistent with the general obligation of every State party to establish its jurisdiction over the crimes set out in articles 17 to 20 in accordance with article 8 and finds further justification in the fact that the Code does not confer primary jurisdiction on any particular States nor establish an order of priority among extradition requests.

(4) Article 10 substantially reproduces the text of article 15 of the Convention on the Safety of United Nations and Associated Personnel. Similar provisions are also found in a number of other conventions, including the Convention for the Suppression of Unlawful Seizure of Aircraft (art. 8), the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (art. 8), and the International Convention against the Taking of Hostages (art. 10).

⁸⁰ The question whether these provisions also extend to States seeking to exercise jurisdiction on a permissive basis has been raised in relation to article 10, paragraph 4, of the International Convention against the Taking of Hostages in the following terms:

"This provision was added to the Hague Convention and each of the subsequent anti-terrorism conventions to cover the case of any requirement which may exist in treaties or domestic laws wherein extradition may only be had when the offence was committed in the territory of the requesting State. It may be noted that this fiction relates only to those States which are required to establish primary jurisdiction pursuant to Article 5(1). It would not appear to relate to those States which have established their jurisdiction pursuant to that provision on a permissive basis, that is to say, the passive personality principle, and over stateless persons resident in their territory." (J. J. Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979*, p. 243.)

Article 11. Judicial guarantees

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

(a) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

(b) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) To be tried without undue delay;

(e) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

(f) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) Not to be compelled to testify against himself or to confess guilt.

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law.

Commentary

(1) The 1954 draft Code did not address the procedures to be followed in the investigation and prosecution of alleged perpetrators of the crimes referred to therein. The draft Code was envisaged as an instrument of substantive criminal law to be applied by a national court or possibly an international criminal court in accordance with the rules of procedure and evidence of the competent national or international jurisdiction.

(2) Rules of criminal procedure and evidence are characterized by their complexity and their diversity in various legal systems. The lack of uniformity of the procedural and evidentiary rules of various domestic jurisdictions is a consequence of the rules having been adopted primarily at the national level to facilitate and regulate the administration of justice by national courts in the context of the legal system of a particular State. In addition, the ad hoc international criminal tribunals have operated under specific rules of procedure and evidence adopted for each of the tribunals. Thus, in the absence of a uniform code of criminal procedure and evidence, the

procedural and evidentiary rules that are required to conduct judicial proceedings are tailor-made for the courts of each jurisdiction and vary accordingly. The difficulty of reconciling the different rules for conducting criminal proceedings in the civil law and the common law systems has been encountered by the Commission in elaborating the draft statute for an international criminal court.

(3) The Commission maintains the position that persons charged with a crime contained in the Code should be tried in accordance with the rules of procedure and evidence of the competent national or international jurisdiction. Notwithstanding the diversity of procedural and evidentiary rules that govern judicial proceedings in various jurisdictions, every court or tribunal must comply with a minimum standard of due process to ensure the proper administration of justice and respect for the fundamental rights of the accused. There are various national, regional and international standards concerning the administration of justice and the right to a fair trial that must be applied by a particular court or tribunal. The Commission considered it appropriate to ensure that the trial of an individual for a crime covered by the Code would be conducted in accordance with the minimum international standard of due process.

(4) The principle that a person charged with a crime under international law has the right to a fair trial was recognized by the Nürnberg Tribunal after the Second World War. Article 14 of the Charter of the Nürnberg Tribunal sets forth certain uniform procedural rules with a view to ensuring a fair trial for every defendant.⁸¹ The Nürnberg Tribunal confirmed the right of a defendant to receive a fair trial in its Judgment which stated as follows: "With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law."⁸² The Commission recognized the general principle of fair trial in relation to persons charged with crimes under international law in its formulation of the Nürnberg Principles. Principle V states that "Any person charged with a crime under international law has the right to a fair trial on the facts and law."⁸³

(5) The principles relating to the treatment to which any person accused of a crime is entitled, and to the procedural conditions under which his guilt or innocence can be objectively established have been recognized and further developed in a number of international and regional instruments adopted after the Second World War, including: the International Covenant on Civil and Political Rights (art. 14); the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (arts. 6 and 7); the American Convention on Human Rights (arts. 5, 7 and 8); the African Charter on Human and Peoples' Rights (art. 7); the Geneva Conventions of 12 August 1949 (art. 3, common to the four Conventions); and Protocols I (art. 75) and II (art. 6) to the Geneva Conventions of 12 August 1949.

(6) The Commission considered that an instrument of a universal character, such as the Code, should require

respect for the international standard of due process and fair trial set forth in article 14 of the International Covenant on Civil and Political Rights. The essential provisions of article 14 of the Covenant are therefore reproduced in article 11 to provide for the application of these fundamental judicial guarantees to persons who are tried by a national court or an international court for a crime against the peace and security of mankind contained in the Code. However, some provisions of the Covenant have been omitted or slightly modified for purposes of the Code, as explained below.

(7) *Paragraph 1* indicates the scope of application of the judicial guarantees provided for in article 11. These guarantees are to apply to "An individual charged with a crime against the peace and security of mankind". The provision is framed in non-restrictive terms so as to indicate that it applies irrespective of which competent court or tribunal may be called upon to try an individual for such a crime.

(8) The opening clause of paragraph 1 also provides that an individual who is accused of a crime covered by the Code is presumed innocent with respect to that accusation. The prosecution has the burden of proving the responsibility of the individual for the crime concerned as a matter of fact and law. If the court is not satisfied that the prosecution has met its burden of proof, then the court must find that the person is not guilty as charged. This presumption of innocence is consistent with article 14, paragraph 2 of the International Covenant on Civil and Political Rights.

(9) This clause is also intended to ensure that the minimum judicial guarantees listed in article 11 will apply equally to any person who is accused of a crime covered by the Code. Every person charged with a criminal offence is entitled as a human being to the right to a fair trial. The phrase "shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts" confirms the equal protection of the law with respect to the fundamental judicial guarantees that are essential to ensure a fair trial. This phrase is formulated as a non-discrimination clause to emphasize the prohibition of any discrimination. The reference to "the law and the facts" is to be understood as relating to "the applicable law" and "the establishment of the facts". The principle of the equal protection of the law with respect to the right to a fair trial is consistent with article 14, paragraph 3, of the International Covenant on Civil and Political Rights.

(10) The expression "minimum guarantees" is used in the opening clause of paragraph 1 to indicate the non-exhaustive character of the list of judicial guarantees set forth in paragraph 1, subparagraphs (a) to (h). Thus, a person charged with a crime under the Code may be provided additional guarantees other than those expressly identified. Furthermore, each of the guarantees listed represents the minimum international standard for a fair trial and does not preclude the provision of more extensive protection with respect to the guarantees that are included in the list.

(11) *Paragraph 1 (a)* sets forth the fundamental right of the accused to a fair and public trial conducted by a court

⁸¹ See footnote 33 above.

⁸² *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), at p. 48.

⁸³ See footnotes 10 and 12 above.

which is competent, independent, impartial and duly established by law. The right to a public trial subjects the proceedings to public scrutiny as a safeguard against any procedural irregularities. The Commission notes, however, that article 14, paragraph 1, of the International Covenant on Civil and Political Rights permits a court to exclude the public or the press from the proceedings in a limited number of exceptional circumstances. The competence of the court is a prerequisite for its authority to conduct the proceedings and to render a valid judgement in the case. The independence and impartiality of the court is essential to ensure that the merits of the charges against the accused are determined, as a matter of fact and law, in a fair and objective manner. The court must be duly established by law to ensure its legal authority and the proper administration of justice. This provision is drawn from article 14, paragraph 1, of the Covenant.

(12) The text of paragraph 1 (a) adopted on first reading⁸⁴ contained a specific reference to a court established "by law or by treaty" to take into account the possibility of a permanent international criminal court being established in the future by means of a treaty. The Commission has deleted the phrase "by treaty" in view of the establishment of two ad hoc international criminal tribunals by means of resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations. The Commission recognized that there were various methods by which an international criminal jurisdiction could be established. The essential requirement for purposes of the judicial guarantees required for a fair trial is that the court be "duly established by law".

(13) *Paragraph 1 (b)* guarantees the right of the accused to be informed promptly, meaningfully and in sufficient detail of the charges against him. This is the first of a series of rights that are intended to enable the accused to defend against the charges. The accused must be informed promptly of the charges against him to be able to respond thereto at any preliminary proceeding and to have adequate time to prepare his defence. The accused must be informed of the nature and cause of the charges in a meaningful way so as to be able to fully comprehend the alleged wrongdoing and to respond to the allegations. This requires that the accused be informed of the charges in sufficient detail and in a language that he understands. The provision is drawn from article 14, paragraph 3 (a), of the International Covenant on Civil and Political Rights.

(14) *Paragraph 1 (c)* is intended to ensure that the accused will have a sufficient opportunity and the necessary means to effectively exercise the right to defend against the charges. This right will only be meaningful if the accused is guaranteed the time, the facilities, and the legal advice that may be required to prepare and present a defence during the trial. It was emphasized in the Commission that the freedom of the accused to communicate with his counsel would apply equally to defence counsel chosen by the accused or assigned by the court under paragraph 1 (e). The provision is drawn from article 14, paragraph 3 (b), of the International Covenant on Civil and Political Rights.

(15) *Paragraph 1 (d)* guarantees the right of the accused to be tried without undue delay. A person who has been charged but not convicted of a crime should not be deprived of liberty or bear the burden of alleged wrongdoing for an extended period of time as a consequence of any unreasonable delay in the judicial process. The international community as well as the victims of the serious crimes covered by the Code also have a strong interest in ensuring that justice is done without undue delay. This provision is drawn from article 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights.

(16) *Paragraph 1 (e)* provides for the right of the accused to be present during the trial and to defend himself against the charges. There is a close relationship between the right of the accused to attend the proceedings and to offer a defence to the charges. The presence of the accused during the proceedings makes it possible for him to view the documentary or other physical evidence, to know the identity of the witnesses for the prosecution and to hear their testimony against him. The accused must be informed of the evidence presented in support of the charges against him in order to be able to defend against those charges. The accused may present his own defence to the court or engage the counsel of his choice to represent him before the court in defending against the charges.

(17) There may be situations in which an accused prefers to be represented by counsel and to receive legal assistance in defending against the charges, but lacks the necessary means to pay for such assistance. In such a situation, the accused would be entitled to receive the legal assistance of a defence counsel assigned by the court without being required to pay for this assistance. An accused who is not represented by counsel must be informed of the right to assigned counsel and to free legal assistance if he does not have sufficient means to pay for it. This provision is based on article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights. Article 11 does not reproduce the qualifying phrase "in any case where the interests of justice so require" or the related phrase "in any such case" which appear in the Covenant. The Commission considered that the appointment of counsel for the defence, either by the accused or ex officio by the court, was necessary in all cases, by reason of the extreme seriousness of the crimes covered by the Code and the probable severity of the commensurate punishment.

(18) *Paragraph 1 (f)* seeks to ensure the right of the accused to defend against the charges in relation to the presentation of witness testimony during the trial. It guarantees that the defence will have an opportunity to question the witnesses who testify against the accused. It also guarantees the right of the defence to obtain the attendance of witnesses on behalf of the accused and to question these witnesses under the same conditions as the prosecution with respect to its witnesses. This provision is drawn from article 14, paragraph 3 (e), of the International Covenant on Civil and Political Rights.

(19) *Paragraph 1 (g)* seeks to ensure the ability of the accused to understand what takes place during the proceedings by providing for the right to free interpretation

⁸⁴ Initially adopted as article 8 (see footnote 16 above).

if the proceedings are conducted in a language that the accused does not understand or speak. The accused must be able to comprehend the testimony or other evidence presented in support of the charges against him during the trial in order to be able to effectively exercise the right to defend against those charges. Furthermore, the accused has the right to be heard and to free interpretation to enable him to do so if he is unable to speak or understand the language in which the proceedings are being conducted. The right of the accused to the assistance of an interpreter applies not only to the hearing before the trial court, but to all phases of the proceedings. This provision is drawn from article 14, paragraph 3 (f), of the International Covenant on Civil and Political Rights.

(20) *Paragraph 1 (h)* prohibits the use of a threat, torture or other means of coercion to force the accused to testify against himself during the proceedings or to obtain a confession. The use of coercive measures to compel an individual to make incriminating statements constitutes a denial of due process and is contrary to the proper administration of justice. Furthermore, the reliability of any information obtained by such means is highly suspect. This provision is drawn from article 14, paragraph 3 (g), of the International Covenant on Civil and Political Rights.

(21) *Paragraph 2* provides that any individual who is convicted of a crime covered by the Code is entitled to have the conviction and the resulting sentence reviewed according to law. The right of appeal was not envisaged in the article as adopted on first reading.⁸⁵ The Charter of the Nürnberg Tribunal did not provide for the right of a defendant to appeal a conviction or sentence to a higher tribunal. The Nürnberg Tribunal was established as the highest court of international criminal jurisdiction to try the major war criminals of the European Axis.⁸⁶ There was no "higher tribunal" competent to review its judgments. The Commission noted the legal developments that had taken place since Nürnberg concerning the recognition of the right of appeal in criminal cases in the International Covenant on Civil and Political Rights and in the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda established by the Security Council. It was also recalled that the draft statute for an international criminal court elaborated by the Commission provided for the right of appeal. The Commission considered it appropriate to provide for a right of appeal for persons convicted of a crime covered by the Code, given the serious nature of these crimes and the commensurate severity of the corresponding punishment. The right of appeal extends to both the conviction and the sentence imposed by the court of first instance. This provision is drawn from article 14, paragraph 5, of the Covenant. The reference to a "higher tribunal" contained in the Covenant is not reproduced in the provision to avoid possible confusion since the appeal may be conducted by a higher court which is part of the same judicial structure comprising a single "tribunal" as in the case of the two ad hoc tribunals established by the Security Council. The essence of the right of appeal is the right of a convicted person to have the adverse judgement

and the resulting punishment reviewed by a "higher" judicial body which has the authority as a matter of law to conduct such a review and, where appropriate, to reverse the decision or revise the punishment with binding legal effect. The provision does not address the hierarchical structure of a particular national or international criminal justice system since a national criminal justice system is governed by the national law of the State concerned and an international criminal justice system is governed by the constituent instrument which provided for the establishment of the international tribunal or court.

Article 12. Non bis in idem

1. No one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court.

2. An individual may not be tried again for a crime of which he has been finally convicted or acquitted by a national court except in the following cases:

(a) By an international criminal court, if:

- (i) The act which was the subject of the judgement in the national court was characterized by that court as an ordinary crime and not as a crime against the peace and security of mankind; or
- (ii) The national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted;

(b) By a national court of another State, if:

- (i) The act which was the subject of the previous judgement took place in the territory of that State; or
- (ii) That State was the main victim of the crime.

3. In the case of a subsequent conviction under the present Code, the court, in passing sentence, shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Commentary

(1) Criminal law provides a standard of conduct which the individual must respect bearing in mind the threat of prosecution and punishment for violations of this standard. Just as every State has an interest in effectively enforcing its criminal law by prosecuting and punishing the individuals who are responsible for violations of this law, the international community has an interest in ensuring that the individuals who are responsible for the international crimes covered by the Code are brought to justice and punished.

(2) The concurrent jurisdiction envisaged in article 8 for an international court and the national courts of States parties to the Code with respect to the crimes set out in articles 17 to 20 of part two gives rise to the possibility

⁸⁵ Ibid.

⁸⁶ Charter of the Nürnberg Tribunal (see footnote 33 above), art. 1.

that a person could be tried and punished more than once for the same crime. In addition, this possibility is not completely ruled out with respect to the crime of aggression set out in article 16 since the exclusive jurisdiction of an international criminal court envisaged for this crime does not preclude a limited exception for the national courts of the State which committed aggression according to article 8. The possibility of multiple trials conducted in the national courts of different States as well as an international criminal court raises the question of whether the *non bis in idem* principle should be applicable under international law. The Commission recognized that this question involved theoretical and practical issues. In theoretical terms, it was noted that this principle was applicable in internal law and that its implementation in relations between States gave rise to the problem of respect by one State for final judgements pronounced in another State, since international law did not make it an obligation for States to recognize a criminal judgement handed down in a foreign State. In practical terms, it was pointed out that a State could provide a shield for an individual who had committed a crime against the peace and security of mankind and who was present in its territory by acquitting him in a sham trial or by convicting and sentencing him to a penalty which was not at all commensurate with the seriousness of the crime, but which would enable him to avoid a conviction or a harsher penalty in another State and, in particular, in the State where the crime was committed or in the State which was the main victim of the crime.

(3) The application of the *non bis in idem* principle under international law is necessary to prevent a person who has been accused of a crime from being prosecuted or punished more than once for the same crime. This fundamental guarantee protects an individual against multiple prosecutions or punishments by a given State for the same crime and is reflected in the International Covenant on Civil and Political Rights (art. 14, para. 7). A person who has been duly tried and acquitted of criminal charges should not lightly be required to go through the ordeal of a criminal prosecution a second time. In addition, a person who has been duly tried and convicted of a crime should be subject to a punishment that is commensurate to the crime only once. To impose such a punishment on an individual on more than one occasion for the same crime would exceed the requirements of justice.

(4) The Commission decided to include the *non bis in idem* principle in the article subject to certain exceptions which were intended to address the various concerns regarding the principle. The Commission has struck an appropriate balance between, on the one hand, the need to preserve to the maximum extent possible the integrity of the *non bis in idem* principle and, on the other hand, the requirements of the proper administration of justice. The Commission noted that the application of this principle at the international level is provided for in the statute of the International Tribunal for the Former Yugoslavia (art. 10) and the statute of the International Tribunal for Rwanda (art. 9). The Commission also recalled that this principle has been included in the draft statute for an international criminal court (art. 42).

(5) Article 12 provides for the application of the *non bis in idem* principle in relation to the crimes covered by the

Code in two different situations depending on whether an individual is first prosecuted by an international criminal court or a national court.

(6) Paragraph 1 addresses the situation in which an individual has already been tried for a crime covered by the Code as such by an international criminal court and has been either convicted or acquitted of the crime. In such a case, the *non bis in idem* principle applies fully and without any exception to the decisions of the international criminal court. Thus, an individual who has already been tried by an international court for a crime under the Code could not be tried again for the same crime by any other court, whether national or international. This paragraph is intended to take into account the possible establishment of an international criminal court that would be entrusted with the implementation of the Code. In this context the term "international criminal court" is used to refer to an international court that is competent to prosecute individuals for crimes under the Code and has been established by or with the support of the States parties to the Code or the international community at large, as discussed in the commentary to article 8.

(7) The phrase "finally convicted or acquitted" is used in paragraphs 1 and 2 to indicate that the *non bis in idem* principle would apply only to a final decision on the merits of the charges against an accused which was not subject to further appeal or review. In particular, the word "acquitted" is used to refer to an acquittal as a result of a judgement on the merits, not as a result of a discharge of proceedings.

(8) Paragraph 2 addresses the situation in which an individual has already been tried for a crime by a national court and has been either convicted or acquitted of the crime by that court. It provides that an individual may not be tried for a crime under the Code arising out of the same act (or omission) that was the subject of the previous criminal proceedings before the national court. While paragraph 1 does not recognize any exceptions to the *non bis in idem* principle with respect to the judgement of an international criminal court, paragraph 2 of the same article does not require as strict an application of this principle with respect to the judgements of national courts. Paragraph 2 affirms this principle with respect to national court judgements while at the same time envisaging certain limited exceptions set forth in subparagraphs (a) and (b).

(9) Paragraph 2 provides for the application of the *non bis in idem* principle to a final decision of a national court on the merits of the case which is not subject to further appeal or review. The application of this principle with respect to a final conviction does not require the imposition of a commensurate punishment or the complete or partial enforcement of such a punishment. The failure to impose a punishment that is proportional to the crime or to take steps to enforce a punishment may indicate an element of fraud in the administration of justice. The Commission decided to preserve the *non bis in idem* principle in paragraph 2 to the maximum extent possible and to address the possibility of the fraudulent administration of justice under the exception to the principle provided for in subparagraph 2 (a) (ii).

(10) *Subparagraph 2 (a)* recognizes two exceptional cases in which an individual could be tried by an international criminal court for a crime under the Code notwithstanding the prior decision of a national court. First, an individual may be tried by an international criminal court for a crime against the peace and security of mankind arising out of the same act that was the subject of the previous national court proceedings if the individual was tried by a national court for an "ordinary" crime rather than one of the more serious crimes under the Code. In such a case, the individual has not been tried or punished for the same crime but for a "lesser crime" that does not encompass the full extent of his criminal conduct. Thus, an individual could be tried by a national court for murder and tried a second time by an international criminal court for the crime of genocide based on the same act under subparagraph 2 (a) (i).

(11) Secondly, an individual could be tried by an international criminal court for a crime set out in the Code arising out of the same act or even for the same crime that was the subject of the previous national court decision if "the national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted". In such a case, the individual has not been duly tried or punished for the same act or the same crime because of the abuse of power or improper administration of justice by the national authorities in prosecuting the case or conducting the proceedings. The international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process. It is important to note that these exceptions only permit subsequent proceedings by an international criminal court. Subparagraph 2 (a) (ii) is similar to the corresponding provisions contained in the statute of the International Tribunal for the Former Yugoslavia (art. 10, para. 2) and the statute of the International Tribunal for Rwanda (art. 9, para. 2).

(12) *Subparagraph 2 (b)* recognizes two exceptional cases in which an individual could be tried by a national court for a crime under the Code notwithstanding the prior decision of a national court of another State. These two exceptions recognize that although any State party to the Code would be competent to prosecute an alleged offender, there are two categories of States which have a particular interest in ensuring the effective prosecution and punishment of the offenders. First, the State in the territory of which the crime was committed has a strong interest in the effective prosecution and punishment of the responsible individuals because the crime occurred within its territorial jurisdiction. The territorial State is more directly affected by the crime in this respect than other States. Secondly, the State which was the primary target of the crime, the nationals of which were the primary victims of the crime or the interests of which were directly and significantly affected also has a strong interest in the effective prosecution and punishment of the responsible individuals. The State which is the "main victim" of the crime has incurred a greater and more direct injury as a result of the crime as compared to other States. Subparagraphs 2 (b) (i) and 2 (b) (ii) provide that the territorial State or the State which was the victim or whose nationals were the victims may institute criminal proceedings against an individual for a crime set out in the Code even

though that individual has already been tried by the national court of another State for the same crime. Either State has the option of instituting subsequent proceedings if, for example, it considers that the previous decision did not correspond to a proper appraisal of the acts or their seriousness. Neither State is under an obligation to do so if it is satisfied that justice has already been done.

(13) *Paragraph 3* requires a court that convicts an individual of a crime under the Code in a subsequent proceeding to take into account in imposing an appropriate penalty the extent to which any penalty has already been imposed and enforced against the individual for the same crime or the same act as a result of a previous trial. There are two ways in which the court could take into account the extent of enforcement of the previous penalty. First, the court could impose a penalty that is fully commensurate to the crime set out in the Code for which the individual has been convicted in the subsequent proceeding and further indicate the extent to which this penalty is to be implemented in the light of the punishment that has already been enforced. Secondly, the court could determine the penalty that would be commensurate to the crime and impose a lesser penalty to reflect the previous punishment. Under the second approach the court could still indicate the fully commensurate penalty to demonstrate that justice had been done and to seek a degree of uniformity in punishing persons convicted of crimes covered by the Code. This paragraph is equally applicable in the event of a subsequent conviction by a national court or an international criminal court. It is similar to the corresponding provisions contained in the statute of the International Tribunal for the Former Yugoslavia (art. 10, para. 3) and the statute of the International Tribunal for Rwanda (art. 9, para. 3).

Article 13. Non-retroactivity

1. No one shall be convicted under the present Code for acts committed before its entry into force.

2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

Commentary

(1) The fundamental purpose of criminal law is to prohibit, to punish and to deter conduct which is considered to be of a sufficiently serious nature to justify the characterization of an act or omission as a crime. This law provides a standard of conduct to guide the subsequent behaviour of individuals. It would clearly be unreasonable to determine the lawfulness of the conduct of an individual based on a standard that was not in existence at the time the individual decided to pursue a particular course of action or to refrain from taking any action. The prosecution and punishment of an individual for an act or omission that was not prohibited when the individual decided to act or to refrain from acting would be manifestly unjust. The prohibition of the retroactive application of criminal law is reflected in the principle *nullum crimen sine lege*. This principle has been embodied in a

number of international instruments, such as the Universal Declaration of Human Rights (art. 11, para. 2), the International Covenant on Civil and Political Rights (art. 15, para. 1), the European Convention on Human Rights (art. 7, para. 1), the American Convention on Human Rights (art. 9) and the African Charter on Human and Peoples' Rights (art. 7, para. 2).

(2) The principle of the non-retroactivity of criminal law is recognized with respect to the Code in article 13. This principle would be violated if the Code were to be applied to crimes committed before its entry into force. *Paragraph 1* is intended to avoid any violation of the principle by limiting the application of the Code to acts committed after its entry into force. It would therefore not be permissible to try and possibly convict an individual for a crime "under the present Code" as a consequence of an act committed "before its entry into force".

(3) Paragraph 1 applies only to criminal proceedings instituted against an individual for an act as a crime "under the present Code". It does not preclude the institution of such proceedings against an individual for an act committed before the entry into force of the Code on a different legal basis. For example, a person who committed an act of genocide before the Code entered into force could not be prosecuted for a crime against the peace and security of mankind under that instrument. This individual could, however, be subject to criminal proceedings for the same act on a separate and distinct legal basis. Such an individual could be tried and punished for the crime of genocide under international law (Convention on the Prevention and Punishment of the Crime of Genocide, customary law or national law) or the crime of murder under national law. The possibility of instituting criminal proceedings for an act committed before the entry into force of the Code on independent legal grounds provided by international law or national law is addressed in paragraph 2.

(4) The principle of non-retroactivity, as outlined in article 13, applies also to the imposition of a penalty which is heavier than the one that was applicable at the time when the criminal offence was committed.

(5) In formulating *paragraph 2* of article 13, the Commission was guided by two considerations. On the one hand, it did not want the principle of non-retroactivity set out in the Code to prejudice the possibility of prosecution, in the case of acts committed before the entry into force of the Code, on different legal grounds, for example a pre-existing convention to which a State was a party, or again, under customary international law. Hence the provision contained in paragraph 2. On the other hand, the Commission did not want this wider possibility to be used with such flexibility that it might give rise to prosecution on legal grounds that are too vague. For this reason, it preferred to use in paragraph 2 the expression "in accordance with international law" rather than less concrete expressions such as "in accordance with the general principles of international law".

(6) Paragraph 2 also envisages the possibility of the prosecution of an individual for a crime under pre-existing national law. However, the term "national law" should

be understood as referring to the application of national law in conformity with international law.

Article 14. Defences

The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.

Commentary

(1) Article 14 entrusts the competent court with the determination of the question of the admissibility of any defence which may be raised by an accused in a particular case with respect to a crime against the peace and security of mankind. It provides for the competent court to perform this task in accordance with "general principles of law" and having regard to the character of each crime.

(2) The title of the article is "defences". Different legal systems classify in different ways the range of possible responses that an accused can make to an accusation of crime. In some national legal systems a distinction is drawn between justifications (*faits justificatifs*) and excuses (*faits excusatoires*). Thus self-defence is a justification, eliminating in all respects the criminal character of the act in question. By comparison duress, if admitted in relation to a particular crime, is merely an excuse which may exculpate a particular accused. Other legal systems do not make such a systematic distinction, using the general description "defence" to cover both justifications and excuses. Article 14 is intended to cover all such pleas.

(3) The competent court is required to consider two criteria in making the determination required by article 14. First, the court must consider the validity of the defence raised by the accused under general principles of law. This first criterion limits the possible defences to crimes covered by the Code to those defences that are well-established and widely recognized as admissible with respect to similarly serious crimes under national or international law. Secondly, the court must consider the applicability of the defence to the crime covered by the Code with which an accused is charged in a particular case in the light of the character of that crime.

(4) The Charter of the Nürnberg Tribunal did not recognize any defences to crimes against peace, war crimes or crimes against humanity. The Nürnberg Tribunal acquitted some defendants based on its conclusion that there was insufficient evidence to establish with the necessary degree of certitude that these individuals were guilty of the crimes with which they were charged.⁸⁷ This relates to onus of proof, not to defences in the sense explained in paragraph (2) above.

(5) Since Nürnberg, the international community has adopted a number of relevant conventions which also do

⁸⁷ For example, the Nürnberg Tribunal found the defendant Schacht not guilty as charged because the evidence provided by the prosecution with respect to the elements of the definition of the crime concerned was not sufficient to establish his guilt beyond a reasonable doubt. *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), p. 137.

not recognize any defences to crimes. The Convention on the Prevention and Punishment of the Crime of Genocide reaffirmed the principle of individual criminal responsibility for the crime of genocide without recognizing any possible defences to this crime. The Geneva Conventions of 12 August 1949 and the more recent Protocol I thereto recognized the principle of individual criminal responsibility for grave breaches of the Conventions and the Protocol without recognizing any defences to those grave breaches. The International Convention on the Suppression and Punishment of the Crime of Apartheid recognized the principle of individual criminal responsibility for the crime of apartheid without recognizing any defences to this crime.

(6) The United Nations War Crimes Commission compiled the judicial decisions of almost 2,000 war crime trials conducted by nine countries at the end of the Second World War as well as the relevant legislation adopted by a number of countries, and drew certain conclusions with respect to the admissibility of defences or extenuating circumstances with respect to crimes under international law.⁸⁸ It would be for the competent court to decide whether the facts involved in a particular case constituted a defence under the article or extenuating circumstances under article 15 in the light of the jurisprudence of the Second World War as well as subsequent legal developments.

(7) A classic defence to a crime is self-defence. It is important to distinguish between the notion of self-defence in the context of criminal law and the notion of self-defence in the context of Article 51 of the Charter of the United Nations. The notion of self-defence in the criminal law context relieves an individual of responsibility for a violent act committed against another human being that would otherwise constitute a crime such as murder. In contrast, the notion of self-defence in the context of the Charter refers to the lawful use of force by a State in the exercise of the inherent right of individual or collective self-defence, and which would therefore not constitute aggression by that State. Since aggression by a State is a *sine qua non* for individual responsibility for a crime of aggression under article 16, an individual could not be held responsible for such a crime in the absence of the necessary corresponding action by a State, as discussed in the commentary to article 16.

(8) Self-defence was recognized as a possible defence in some of the war crime trials conducted after the Second World War. The United Nations War Crimes Commission concluded that "A plea of self-defence may be successfully put forward, in suitable circumstances, in war crime trials as in trials held under municipal law."⁸⁹ The plea of

self-defence may be raised by an accused who is charged with a crime of violence committed against another human being resulting in death or serious bodily injury. The notion of self-defence could relieve an accused of criminal responsibility for the use of force against another human being resulting in death or serious injury if this use of force was necessary to avoid an immediate threat of his own death or serious injury caused by that other human being. The right of an individual to act in self-defence is implicitly recognized in the saving clause contained in the Convention on the Safety of United Nations and Associated Personnel (art. 21).⁹⁰

(9) An issue often discussed in the context of defences to crimes under international law is that of "superior orders". Article 5 of these articles makes it clear that superior orders do not constitute a defence; article 7, similarly, precludes an accused from relying on his or her official position by way of defence. Superior orders may, however, sometimes be relevant in relation to the separate issue of duress or coercion.

(10) Duress or coercion was recognized as a possible defence or extenuating circumstance in some of the war crime trials conducted after the Second World War.⁹¹ The United Nations War Crimes Commission concluded that duress generally required three essential elements, namely:

(a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; (c) the remedy was not disproportionate to the evil.⁹²

Although superior orders *per se* was excluded as a defence by the Charter and the Judgment of the Nürnberg Tribunal, the existence of such orders could be a relevant factor in determining the existence of the necessary conditions for a valid plea of duress. In this regard, the Nürnberg Tribunal stated:

That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.⁹³

Clearly an individual who was responsible in some measure for the existence or the execution of an order or whose participation exceeded the requirements thereof could not claim to have been deprived of a moral choice as to his course of conduct.⁹⁴ The plea of duress may be raised by

⁸⁸ See M.-C. Bourloyannis-Vrailas, "The Convention on the Safety of United Nations and Associated Personnel", *International and Comparative Law Quarterly*, vol. 44, part 3 (July 1995), pp. 560 et seq., in particular, pp. 586-587.

⁸⁹ The United States Military Tribunal which conducted the *Einsatzgruppen Trial* stated as follows:

"Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever." (*Law Reports* . . . (see footnote 61 above), vol. XV, p. 174.)

⁹² *Ibid.*

⁹³ *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), pp. 53-54.

⁹⁴ The United States Military Tribunal which conducted the trial in the *I.G. Farben Case* discussed the relevance of superior orders in determining the validity of a "defence of necessity" as follows:

⁸⁸ *Law Reports* . . . (see footnote 61 above), vol. XV, p. 155.

⁸⁹ *Ibid.*, p. 177. The Judge Advocate acting in the trial of Willi Tessman and others before the British Military Court in Germany in 1947 described the general requirements for a valid claim of self-defence:

"The law permits a man to save his own life by despatching that of another, but it must be in the last resort. He is expected to retreat to the uttermost before turning and killing his assailant; and, of course, such considerations as the nature of the weapon in the hands of the accused, the question whether the assailant had any weapon and so forth, have to be considered. In other words, was it a last resort? Had he retreated to the uttermost before ending the life of another human being?" (*Ibid.*)

an accused who is charged with various types of criminal conduct. There are different views as to whether even the most extreme duress can ever constitute a valid defence or extenuating circumstance with respect to a particularly heinous crime, such as killing an innocent human being. This question requires consideration of whether an individual can ever be justified in taking the life of one human being in order to save another human being or, in other words, whether the remedy of saving a human being is inherently disproportionate to the evil of killing another human being under the third element.⁹⁵ Duress which does not constitute a valid defence that relieves an individual of all responsibility for criminal conduct may none the less constitute an extenuating circumstance resulting in the imposition of a lesser punishment.

(11) Military necessity, was recognized as a possible defence or extenuating circumstance in very limited situations in some of the war crime trials conducted after the Second World War. The United States Military Tribunal which conducted the *German High Command Trial* rejected the doctrine of military necessity as a general defence to war crimes⁹⁶ and as a defence to certain types of war crimes, such as "the compulsory recruitment of labour from an occupied territory . . . for use in military operations".⁹⁷ However, the Tribunal recognized a plea of military necessity as a defence in relation to charges of spoliation because the prohibition of this type of devastation was formulated in terms of conduct that was not justified by military necessity.⁹⁸ Similarly, the United States

"From a consideration of the IMT, Flick, and Roehling judgments, we deduce that an order of a superior officer or a law or governmental decree will not justify the defence of necessity unless, in its operation, it is of a character to deprive the one to whom it is directed of a moral choice as to his course of action. It follows that the defence of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative." (*Trials of War Criminals* . . . (see footnote 63 above), vol. VIII (1952), p. 1179.)

The United Nations War Crimes Commission characterized the plea considered in that case as one of coercion or duress, rather than necessity, based on the alleged facts considered by the court (*Law Reports* . . . (see footnote 61 above), vol. XV, pp. 155-157 and 170-171).

⁹⁵ For example, the Judge Advocate acting in the trial of Robert Holzer and others before a Canadian Military Court in Germany, in 1946, stated that:

"There is no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person can never be justified." (*Law Reports* . . . (ibid.), vol. XV, p. 173.)

The Judge Advocate acting in the trial of Valentin Fuerstein and others before a British Military Court in Germany, in 1948, also expressed the view that coercion or duress could not justify killing another human being (ibid.).

⁹⁶ *Law Reports* . . . (ibid.), vol. XII.

"We content ourselves on this subject [the doctrine of military necessity] with stating that such a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations." (Ibid., p. 93.)

⁹⁷ Ibid.

⁹⁸ The United States Military Tribunal discussed the plea of military necessity in relation to the charge of spoliation as follows:

"The devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in

Military Tribunal which conducted the *Hostages Trial* rejected military necessity as a defence in relation to rules of international law which did not explicitly recognize any such exception.⁹⁹ In contrast, the Tribunal acquitted the defendant Rendulic of charges of wanton destruction of private and public property under the military necessity exception which was expressly provided for in the relevant Regulation.^{100, 101} The United Nations War Crimes Commission concluded that the plea of military necessity was more often rejected than accepted as a defence or an extenuating circumstance with the notable exceptions of the *High Command Trial* and the *Hostages Trial*.¹⁰²

(12) A mistake of fact was also recognized as a possible defence or extenuating circumstance in some of the war crime trials conducted after the Second World War. The United Nations War Crimes Commission concluded that "A mistake of fact, however, may constitute a defence in war crime trials just as it may in trials before municipal courts."¹⁰³ A plea of mistake of fact requires a material fact which relates to an element of the crime. In addition, a mistake of fact must be the result of a reasonable and honest error of judgement rather than ignoring obvious facts.¹⁰⁴

(13) There is no indication that there is a minimum age requirement for individual criminal responsibility under

serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature. We do not feel that in this case the proof is ample to establish the guilt of any defendant herein on this charge." (Ibid., vol. XII, pp. 93-94.)

⁹⁹ "Military necessity or expediency do not justify a violation of positive rules. International Law is prohibitive law. Articles 46, 47 and 50 of the Hague Regulations of 1907 make no such exceptions to its enforcement. The rights of the innocent population therein set forth must be respected even if military necessity or expediency decree otherwise." (Ibid., vol. VIII, p. 66-67.)

¹⁰⁰ Annexed to The Hague Convention IV of 1907.

¹⁰¹ "The Hague Regulations prohibited 'The destruction or seizure of enemy property except in cases where this destruction or seizure is urgently required by the necessities of war.' Article 23 (g). The Hague Regulations are mandatory provisions of International Law. The prohibitions therein contained control and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destructions of public and private property by retreating military forces which would give aid and comfort to the enemy, may constitute a situation coming within the exceptions contained in Article 23 (g)." (*Law Reports* . . . (see footnote 61 above), vol. VIII, p. 69.)

¹⁰² Ibid., vol. XV, pp. 176-177.

¹⁰³ Ibid., p. 184.

¹⁰⁴ The United States Military Tribunal which conducted the *Hostages Trial* recognized mistake of fact as a possible exculpatory factor in the following circumstances:

"In determining the guilt or innocence of any army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgement, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence." (Ibid.)

international law. None the less the competent court may have to decide whether the youth of the accused at the time the alleged crime occurred should be considered to constitute a defence or extenuating circumstance in a particular case.¹⁰⁵ The United Nations War Crimes Commission did not conduct an exhaustive analysis of the ages of the persons convicted in the war crime trials conducted after the Second World War, but noted that persons as young as 15 years of age were convicted and punished in some of these trials.¹⁰⁶

Article 15. Extenuating circumstances

In passing sentence, the court shall, where appropriate, take into account extenuating circumstances in accordance with the general principles of law.

Commentary

(1) The general principle of the liability of an individual to punishment for a crime covered by the Code is set forth in article 3. The competent court which convicts an individual of such a crime is entrusted with the task of determining an appropriate punishment for that crime in accordance with the relevant provisions of its applicable substantive and procedural law. In this regard, the court is required to take into account the character and gravity of the crime in considering the punishment to be imposed in accordance with article 3.

(2) Whereas article 3 is intended to ensure that the punishment contemplated by the court is commensurate with the crime, article 15 is intended to ensure that the court considers any relevant extenuating circumstances or mitigating factors before taking a decision on the question of punishment. The interests of justice are not served by imposing an excessive punishment which is disproportionate to the character of the crime or the degree of culpability of the convicted person or which fails to take into account any extenuating circumstances that lessen the degree of culpability or otherwise justify a less severe punishment.

(3) The competent court must engage in a two-step process in considering whether it is appropriate to impose a less severe punishment on a convicted person as a consequence of extenuating circumstances. First, the court must determine the admissibility of the extenuating circumstance raised by the accused under general principles

of law. This criterion limits the possible extenuating circumstances for crimes covered by the Code to those circumstances that are well-established and widely recognized as admissible with respect to similarly serious crimes under national or international law. Secondly, the court must determine whether there is sufficient evidence of the extenuating circumstance in a particular case.

(4) The extenuating circumstances to be taken into account by the court vary depending on the facts of a particular case. The court is to be guided by general principles of law in determining the extenuating circumstances which may merit consideration in a particular case. These circumstances pertain to general categories of factors which are well-established and widely recognized as lessening the degree of culpability of an individual or otherwise justifying a reduction in punishment. For example, the court may take into account any effort made by the convicted person to alleviate the suffering of the victim or to limit the number of victims, any less significant form of criminal participation of the convicted person in relation to other responsible individuals or any refusal to abuse a position of governmental or military authority to pursue the criminal policies. The Nürnberg Tribunal considered such mitigating factors in deciding to impose prison sentences rather than the death penalty on some convicted persons.¹⁰⁷ The extensive jurisprudence of the military tribunals and the national courts which conducted the subsequent war crime trials after the trial of the major war criminals by the Nürnberg Tribunal at the end of the Second World War could provide some guidance to the competent court in determining the general principles which govern the question of the admissibility of defences or extenuating circumstances with respect to the crimes covered by the Code under articles 14 and 15 respectively, as discussed in the commentary to article 14. In this regard, the United Nations War Crimes Commission noted that in the subsequent war crime trials conducted after the Second World War some convicted persons entered pleas for mitigation of sentence based on their age, experience and family responsibilities.¹⁰⁸ Moreover, the fact that the accused provided substantial cooperation in the prosecution of other individuals for similar crimes could also constitute a mitigating factor, as provided for in the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia (Rule 101)¹⁰⁹ and of the International Tribunal for Rwanda (Rule 101).¹¹⁰

PART TWO

CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 16. Crime of aggression

An individual who, as leader or organizer, actively participates in or orders the planning, preparation,

¹⁰⁵ The general principle of a minimum age requirement for criminal responsibility was recognized in Rule 4.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). The Beijing Rules did not, however, establish an international standard for the age of criminal responsibility. Moreover, the definition of a juvenile for purposes of excluding the application of criminal law varies greatly in different legal systems, ranging from 7 years to 18 years or above. The commentary to Rule 4.1 suggests that the current trend is to consider

"whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour". (General Assembly resolution 40/33, annex.)

¹⁰⁶ *Law Reports* ... (see footnote 61 above), vol. XV, p. 185.

¹⁰⁷ *Nazi Conspiracy and Aggression* ... (see footnote 35 above), pp. 134, 158-159 and 161.

¹⁰⁸ *Law Reports* ... (see footnote 61 above), vol. XV, p. 187.

¹⁰⁹ Document IT/32/Rev.8, p. 62.

¹¹⁰ Document ITR/3/Rev.1, p. 91.

initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.

Commentary

(1) The characterization of aggression as a crime against the peace and security of mankind contained in article 16 of the Code is drawn from the relevant provision of the Charter of the Nürnberg Tribunal as interpreted and applied by the Nürnberg Tribunal. Article 16 addresses several important aspects of the crime of aggression for the purpose of individual criminal responsibility. The phrase "An individual . . . shall be responsible for a crime of aggression" is used to indicate that the scope of the article is limited to the crime of aggression for the purpose of individual criminal responsibility. Thus, the article does not address the question of the definition of aggression by a State which is beyond the scope of the Code.

(2) The perpetrators of an act of aggression are to be found only in the categories of individuals who have the necessary authority or power to be in a position potentially to play a decisive role in committing aggression. These are the individuals whom article 16 designates as "leaders" or "organizers", an expression that was taken from the Charter of the Nürnberg Tribunal. These terms must be understood in the broad sense, that is to say, as referring, in addition to the members of a Government, to persons occupying high-level posts in the military, the diplomatic corps, political parties and industry, as recognized by the Nürnberg Tribunal, which stated that: "Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and businessmen".¹¹¹

(3) The mere material fact of participating in an act of aggression is, however, not enough to establish the guilt of a leader or organizer. Such participation must have been intentional and have taken place knowingly as part of a plan or policy of aggression. In this connection, the Nürnberg Tribunal stated, in analysing the conduct of some of the accused, that:

When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.¹¹²

¹¹¹ *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), p. 55.

¹¹² *Ibid.* However, the Tribunal found Schacht, Doenitz and Bormann innocent of certain charges of crimes against peace, stating that:

"It is clear that Schacht was a central figure in Germany's rearmament program, and the steps which he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power. But rearmament of itself is not criminal under the Charter. To be a crime against peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars." (*Ibid.*, pp. 135-136.)

With regard to the second defendant, the Tribunal stated:

"Although Doenitz built and trained the German U-boat arm, the evidence does not show he was privy to the conspiracy to wage aggressive wars or that he prepared and initiated such wars. He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced and there is no evidence that he was informed about the decisions reached there." (*Ibid.*, p. 137.)

(4) Article 16 refers to "aggression committed by a State". An individual, as leader or organizer, participates in that aggression. It is this participation that the article defines as a crime against the peace and security of mankind. In other words, it reaffirms the criminal responsibility of the participants in a crime of aggression. Individual responsibility for such a crime is intrinsically and inextricably linked to the commission of aggression by a State. The rule of international law which prohibits aggression applies to the conduct of a State in relation to another State. Therefore, only a State is capable of committing aggression by violating this rule of international law which prohibits such conduct. At the same time, a State is an abstract entity which is incapable of acting on its own. A State can commit aggression only with the active participation of the individuals who have the necessary authority or power to plan, prepare, initiate or wage aggression. The Nürnberg Tribunal clearly recognized the reality of the role of States and individuals in stating that:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.¹¹³

Thus, the violation by a State of the rule of international law prohibiting aggression gives rise to the criminal responsibility of the individuals who played a decisive role in planning, preparing, initiating or waging aggression. The words "aggression committed by a State" clearly indicate that such a violation of the law by a State is a *sine qua non* condition for the possible attribution to an individual of responsibility for a crime of aggression. Nonetheless, the scope of the article is limited to participation in a crime of aggression for the purpose of individual criminal responsibility. It therefore does not relate to the rule of international law which prohibits aggression by a State.

(5) The action of a State entails individual responsibility for a crime of aggression only if the conduct of the State is a sufficiently serious violation of the prohibition contained in Article 2, paragraph 4, of the Charter of the United Nations. In this regard, the competent court may have to consider two closely related issues, namely, whether the conduct of the State constitutes a violation of Article 2, paragraph 4, of the Charter and whether such conduct constitutes a sufficiently serious violation of an international obligation to qualify as aggression entailing individual criminal responsibility. The Charter and the Judgment of the Nürnberg Tribunal are the main sources of authority with regard to individual criminal responsibility for acts of aggression.

(6) Several phases of aggression are listed in article 16. These are: the order to commit aggression, and, subsequently, the planning, preparation, initiation and waging of the resulting operations. These different phases are not watertight. Participation in a single phase of aggression is enough to give rise to criminal responsibility.

As to the third defendant, the Tribunal suggested the possibility of inferring knowledge by virtue of a person's position:

"The evidence does not show that Bormann knew of Hitler's plans to prepare, initiate or wage aggressive wars. He attended none of the important conferences when Hitler revealed piece by piece those plans for aggression. Nor can knowledge be conclusively inferred from the positions he held." (*Ibid.*, p. 164.)

¹¹³ See footnote 51 above.

Article 17. *Crime of genocide*

A crime of genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Commentary

(1) The Charter of the Nürnberg Tribunal recognized in article 6, subparagraph (c), two distinct categories of crimes against humanity. The first category of crimes against humanity relating to inhumane acts is addressed in article 18. The second category of crimes against humanity relating to persecution is addressed in article 17 in the light of the further development of the law concerning such crimes since Nürnberg.

(2) The Charter and the Judgment of the Nürnberg Tribunal defined the second category of crimes against humanity as "persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal". The Nürnberg Tribunal convicted some of the defendants of crimes against humanity based on this type of conduct and, thus, confirmed the principle of individual responsibility and punishment for such conduct as a crime under international law.¹¹⁴ Shortly after the Judgment of the Nürnberg Tribunal, the General Assembly affirmed that the persecution type of crimes against humanity or "genocide"¹¹⁵ constituted a crime under international law for which individuals were subject to punishment.¹¹⁶ The General Assembly subsequently recognized that genocide had inflicted great losses on humanity throughout history in adopting the Convention on the Prevention and Punishment of the Crime of Genocide to provide a basis for the international cooperation required to liberate mankind from this odious scourge.

(3) The fact that the General Assembly had recognized the extreme gravity of the crime of genocide as early as 1946 and had drafted an international convention on its prevention and punishment as early as 1948 made it essential to include this crime in the Code and also facilitated the Commission's task. The Convention on the Prevention and Punishment of the Crime of Genocide has been widely accepted by the international community and ratified by the overwhelming majority of States. More-

over, the principles underlying the Convention have been recognized by ICJ as binding on States even without any conventional obligation.¹¹⁷ Article II of the Convention contains a definition of the crime of genocide which represents an important further development in the law relating to the persecution category of crimes against humanity recognized in the Charter of the Nürnberg Tribunal. It provides a precise definition of the crime of genocide in terms of the necessary intent and the prohibited acts. The Convention also confirms in article I that genocide is a crime under international law which may be committed in time of peace or in time of war. Thus, the Convention does not include the requirement of a nexus to crimes against peace or war crimes contained in the Charter of the Nürnberg Tribunal which referred to "persecutions . . . in execution of or in connection with any crime within the jurisdiction of the Tribunal". The definition of genocide contained in article II of the Convention, which is widely accepted and generally recognized as the authoritative definition of this crime, is reproduced in article 17 of the Code. The same provision of the Convention is also reproduced in the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Tribunal for Rwanda. Indeed the tragic events in Rwanda clearly demonstrated that the crime of genocide, even when committed primarily in the territory of a single State, could have serious consequences for international peace and security and, thus, confirmed the appropriateness of including this crime in the Code.

(4) The definition of the crime of genocide set forth in article 17 consists of two important elements, namely the requisite intent (*mens rea*) and the prohibited act (*actus reus*). These two elements are specifically referred to in the initial phrase of article 17 which states that "A crime of genocide means any of the following acts committed with intent to . . .". Whereas the first element of the definition is addressed in the opening clause of article 17, the second element is addressed in subparagraphs (a) to (e).

(5) As regards the first element, the definition of the crime of genocide requires a specific intent which is the distinguishing characteristic of this particular crime under international law. The prohibited acts enumerated in subparagraphs (a) to (e) are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence. However, a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act. As indicated in the opening clause of article 17, an individual incurs responsibility for the crime of genocide only when one of the prohibited acts is "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such".

¹¹⁴ *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), pp. 84, 129-131 and 144-146.

¹¹⁵ The term "genocide" was first coined by Raphael Lemkin. See R. Lemkin, *Axis Rule in Occupied Europe* (Washington, Carnegie Endowment for International Peace, 1944), pp. 79-95.

¹¹⁶ General Assembly resolution 96 (I).

¹¹⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15.

(6) There are several important aspects of the intent required for the crime of genocide. First, the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group. It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target or intended victim of this type of massive criminal conduct.¹¹⁸ The action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group.

(7) Secondly, the intention must be to destroy the group "as such", meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group. In this regard, the General Assembly distinguished between the crimes of genocide and homicide in describing genocide as the "denial of the right of existence of entire human groups" and homicide as the "denial of the right to live of individual human beings" in its resolution 96 (I).

(8) Thirdly, the intention must be to destroy a group "in whole or in part". It is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.

(9) Fourthly, the intention must be to destroy one of the types of groups covered by the Convention on the Prevention and Punishment of the Crime of Genocide, namely, a national, ethnic, racial or religious group. Political groups were included in the definition of persecution contained in the Charter of the Nürnberg Tribunal, but not in the definition of genocide contained in the Convention because this type of group was not considered to be sufficiently stable for purposes of the latter crime. None the less persecution directed against members of a political group could still constitute a crime against humanity as set forth in article 18, subparagraph (e) of the Code. Racial and religious groups are covered by the Charter of the Nürnberg Tribunal and the Convention. In addition, the Convention also covers national or ethnical groups. Article 17 recognizes the same categories of protected groups as the Convention. The word "ethnical" used in the Convention has been replaced by the word "ethnic" in article 17 to reflect modern English usage without in any way affecting the substance of the provision. Furthermore, the Commission was of the view that the article covered the prohibited acts when committed with the necessary intent against members of a tribal group.

¹¹⁸ "The main characteristic of genocide is its object: the act must be directed toward the destruction of a group. Groups consist of individuals, and therefore destructive action must, in the last analysis, be taken against individuals. However, these individuals are important not per se but only as members of the group to which they belong." (N. Robinson, *The Genocide Convention: A Commentary* (New York, Institute of Jewish Affairs, World Jewish Congress, 1960), p. 58.)

(10) As recognized in the commentary to article 5, the crimes covered by the Code are of such magnitude that they often require some type of involvement on the part of high level government officials or military commanders as well as their subordinates. Indeed the Convention on the Prevention and Punishment of the Crime of Genocide explicitly recognizes in article IV that the crime of genocide may be committed by constitutionally responsible rulers, public officials or private individuals. The definition of the crime of genocide would be equally applicable to any individual who committed one of the prohibited acts with the necessary intent. The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide. A subordinate is presumed to know the intentions of his superiors when he receives orders to commit the prohibited acts against individuals who belong to a particular group. He cannot escape responsibility if he carries out the orders to commit the destructive acts against victims who are selected because of their membership in a particular group by claiming that he was not privy to all aspects of the comprehensive genocidal plan or policy. The law does not permit an individual to shield himself from criminal responsibility by ignoring the obvious. For example, a soldier who is ordered to go from house to house and kill only persons who are members of a particular group cannot be unaware of the irrelevance of the identity of the victims and the significance of their membership in a particular group. He cannot be unaware of the destructive effect of this criminal conduct on the group itself. Thus, the necessary degree of knowledge and intent may be inferred from the nature of the order to commit the prohibited acts of destruction against individuals who belong to a particular group and are therefore singled out as the immediate victims of the massive criminal conduct.

(11) With regard to the second element of the definition of genocide, the article sets forth in subparagraphs (a) to (e) the prohibited acts which are contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide. Whereas the 1954 draft Code used the word "including" in article 2, paragraph 10, to indicate an illustrative rather than an exhaustive list of acts constituting genocide, the Commission decided to use the wording of article II of the Convention to indicate that the list of prohibited acts contained in article 17 is exhaustive in nature. The Commission decided in favour of that solution having regard to the need to conform with a text widely accepted by the international community.

(12) As clearly shown by the preparatory work for the Convention on the Prevention and Punishment of the Crime of Genocide,¹¹⁹ the destruction in question is the

¹¹⁹ See Report of the Ad Hoc Committee on Genocide, 5 April-10 May 1948 (*Official Records of the Economic and Social Council, Third year, Seventh Session, Supplement No. 6 (E/794)*).

material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word "destruction", which must be taken only in its material sense, its physical or biological sense. It is true that the draft Convention prepared by the Secretary-General at the second session of the General Assembly in 1947¹²⁰ and the draft convention of the prevention and punishment of the crime of genocide, prepared by the Ad Hoc Committee on Genocide, contained provisions on "cultural genocide"¹²¹ covering any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group. However, the text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of "cultural genocide" contained in the two drafts and simply listed acts which come within the category of "physical" or "biological" genocide.¹²² Subparagraphs (a) to (c) of the article list acts of "physical genocide", while subparagraphs (d) and (e) list acts of "biological genocide".

(13) As regards *subparagraph (a)*, the phrase "killing members of the group" was drawn from article II, subparagraph (a) of the Convention on the Prevention and Punishment of the Crime of Genocide.¹²³

(14) With regard to *subparagraph (b)*, the phrase "causing serious bodily or mental harm to members of the group" was drawn from article II, subparagraph (b) of the Convention on the Prevention and Punishment of the Crime of Genocide. This subparagraph covers two types of harm that may be inflicted on an individual, namely, bodily harm which involves some type of physical injury and mental harm which involves some type of impairment of mental faculties. The bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.

(15) Regarding *subparagraph (c)*, the phrase "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" was drawn from article II, subparagraph (c), of the Convention on the Prevention and Punishment of the Crime of Genocide.¹²⁴ It was suggested that deportation should be included in subparagraph (c). The Commission, however,

considered that this subparagraph covered deportation when carried out with the intent to destroy the group in whole or in part.

(16) As regards subparagraph (d), the phrase "imposing measures intended to prevent births within the group" was drawn from article II, subparagraph (d), of the Convention on the Prevention and Punishment of the Crime of Genocide.¹²⁵ The phrase "imposing measures" is used in this subparagraph to indicate the necessity of an element of coercion.¹²⁶ Therefore this provision would not apply to voluntary birth control programmes sponsored by a State as a matter of social policy.

(17) With regard to *subparagraph (e)*, the phrase "forcibly transferring children of the group to another group", was drawn from article II, subparagraph (e) of the Convention on the Prevention and Punishment of the Crime of Genocide. The forcible transfer of children would have particularly serious consequences for the future viability of a group as such. Although the article does not extend to the transfer of adults, this type of conduct in certain circumstances could constitute a crime against humanity under article 18, subparagraph (g) or a war crime under article 20, subparagraph (a) (vii). Moreover, the forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c).

(18) The article clearly indicates that it is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed. It is enough to have committed any one of the acts listed in the article with the clear intention of bringing about the total or partial destruction of a protected group as such.

(19) The Commission noted that a court that was called upon to apply the definition of the crime of genocide contained in the article in a particular case might find it necessary to have recourse to other relevant provisions contained in the Convention on the Prevention and Punishment of the Crime of Genocide either as conventional or as customary international law. For example, if a question should arise as to whether the crime of genocide set forth in the article could be committed in time of peace, the court could find the authoritative answer to this question in article I of the Convention which confirmed this possibility.

advance the 'conditions of life' that would come within the prohibition of article II; the intent and probability of the final aim alone can determine in each separate case whether an act of genocide has been committed (or attempted) or not. Instances of genocide that could come under subparagraph (c) are such as placing a group of people on a subsistence diet, reducing required medical services below a minimum, withholding sufficient living accommodations, etc., provided that these restrictions are imposed with intent to destroy the group in whole or in part." (Ibid., pp. 60 and 63-64.)

¹²⁵ "The measure imposed need not be the classic action of sterilization; separation of the sexes, prohibition of marriages and the like are measures equally restrictive and produce the same results." (Ibid., p. 64.)

¹²⁶ The Committee on the Elimination of Discrimination against Women has recognized compulsory sterilization or abortion as a violation of the Convention on the Elimination of all Forms of Discrimination against Women (*Report of the Committee on the Elimination of Discrimination against Women (Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38 (A/47/38))*, chap. I, para. 22).

¹²⁰ Document E/447.

¹²¹ Article III (footnote 119 above).

¹²² Nonetheless some of the acts referred to in this paragraph could constitute a crime against the peace and security of mankind in certain circumstances, for example, a crime against humanity under article 18, subparagraph (e) or (f) or a war crime under article 20, subparagraph (e) (iv).

¹²³ "The act of 'killing' (subparagraph (a)) is broader than 'murder'; and it was selected to correspond to the French word 'meurtre', which implies more than 'assassinat'; otherwise it is hardly open to various interpretations." (Robinson, op. cit. (see footnote 118 above), p. 63.)

¹²⁴ "The word 'deliberately' was included there to denote a precise intention of the destruction, i.e., the premeditation related to the creation of certain conditions of life . . . It is impossible to enumerate in

(20) The Commission also noted that the fact that the article was drawn from the Convention on the Prevention and Punishment of the Crime of Genocide did not in any way affect the autonomous nature of that legal instrument. Furthermore, the Commission drew attention to article 4 of the Code which expressly provided that it was "without prejudice to any question of the responsibility of States under international law". This would include any question relating to the responsibility of a State for genocide referred to in article IX of the Convention.

Article 18. Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

- (a) Murder;**
- (b) Extermination;**
- (c) Torture;**
- (d) Enslavement;**
- (e) Persecution on political, racial, religious or ethnic grounds;**
- (f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;**
- (g) Arbitrary deportation or forcible transfer of population;**
- (h) Arbitrary imprisonment;**
- (i) Forced disappearance of persons;**
- (j) Rape, enforced prostitution and other forms of sexual abuse;**
- (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.**

Commentary

(1) Article 18 recognizes certain inhumane acts as constituting crimes against humanity.

(2) The definition of crimes against humanity contained in article 18 is drawn from the Charter of the Nürnberg Tribunal, as interpreted and applied by the Nürnberg Tribunal, taking into account subsequent developments in international law since Nürnberg.

(3) The opening clause of this definition establishes the two general conditions which must be met for one of the prohibited acts to qualify as a crime against humanity covered by the Code. The first condition requires that the act was "committed in a systematic manner or on a large scale". This first condition consists of two alternative requirements. The first alternative requires that the inhumane acts be "committed in a systematic manner" meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act

which was not committed as part of a broader plan or policy. The Charter of the Nürnberg Tribunal did not include such a requirement. Nonetheless the Nürnberg Tribunal emphasized that the inhumane acts were committed as part of the policy of terror and were "in many cases . . . organized and systematic"¹²⁷ in considering whether such acts constituted crimes against humanity.

(4) The second alternative requires that the inhumane acts be committed "on a large scale" meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim. The Charter of the Nürnberg Tribunal did not include this second requirement either. Nonetheless the Nürnberg Tribunal further emphasized that the policy of terror was "certainly carried out on a vast scale"¹²⁸ in its consideration of inhumane acts as possible crimes against humanity. The term "mass scale" was used in the text of the draft Code as adopted on first reading¹²⁹ to indicate the requirement of a multiplicity of victims. This term was replaced by the term "large scale" which is sufficiently broad to cover various situations involving a multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude. The first condition is formulated in terms of the two alternative requirements. Consequently, an act could constitute a crime against humanity if either of these conditions is met.

(5) The second condition requires that the act was "instigated or directed by a Government or by any organization or group". The necessary instigation or direction may come from a Government or from an organization or a group.¹³⁰ This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity. It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18. The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State.¹³¹

¹²⁷ *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), p. 84.

¹²⁸ *Ibid.*

¹²⁹ See footnote 16 above.

¹³⁰ The Nürnberg Tribunal declared the criminal character of several organizations which were established for the purpose of and used in connection with the commission of crimes against peace, war crimes or crimes against humanity. The Charter and the Judgment of the Nürnberg Tribunal recognized the possibility of criminal responsibility based on the membership of an individual in such a criminal organization. (Charter of the Nürnberg Tribunal, articles 9 and 10; and *Nazi Conspiracy and Aggression* . . . (see footnote 35 above), p. 84.) The Code does not provide for any such collective criminal responsibility as indicated by article 2.

¹³¹ Regarding the defendants Streicher and von Schirach, see *Nazi Conspiracy and Aggression* . . . (*ibid.*), pp. 129 and 144.

(6) The definition of crimes against humanity contained in article 18 does not include the requirement that an act was committed in time of war or in connection with crimes against peace or war crimes as in the Charter of the Nürnberg Tribunal. The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement. The Convention on the Prevention and Punishment of the Crime of Genocide did not include any such requirement with respect to the second category of crimes against humanity, as discussed in the commentary to article 17. Similarly, the definitions of the first category of crimes against humanity contained in the legal instruments adopted since Nürnberg do not include any requirement of a substantive connection to other crimes relating to a state of war, namely, Control Council Law No. 10 adopted shortly after the Berlin Protocol as well as the more recent statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3).¹³² The absence of any requirement of an international armed conflict as a prerequisite for crimes against humanity was also confirmed by the International Tribunal for the Former Yugoslavia: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict."¹³³

(7) As regards the prohibited acts listed in article 18, the first such act consists of murder which is addressed in *subparagraph* (a). Murder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation. Murder was included as a crime against humanity in the Charter of the Nürnberg Tribunal (art. 6, subpara. (c)), Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (art. 2, para. 11).

(8) The second prohibited act addressed in *subparagraph* (b) is extermination. The first two categories of prohibited acts consist of distinct and yet closely related criminal conduct which involves taking the lives of innocent human beings. Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed. It also applies to situations in which

some members of a group are killed while others are spared. Extermination was included as a crime against humanity in the Charter of the Nürnberg Tribunal (art. 6, subpara. (c)), Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (art. 2, para. 11).

(9) Another third prohibited act addressed in *subparagraph* (c) is torture. This prohibited act is defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 1, para. 1).¹³⁴ It is true that the definition in the Convention limits the scope of that Convention to acts committed in an official capacity or with official connivance. But article 1, paragraph 2, contemplates that the term "torture" may have a broader application under other international instruments. In the context of crimes against humanity committed not only by Governments but by organizations or groups this is appropriate here. For the present purposes, acts of torture are covered if committed in a systematic manner or on a mass scale by any Government, organization or group. Torture was included as a crime against humanity in Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3).

(10) The fourth prohibited act consists of enslavement under *subparagraph* (d). Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29, concerning Forced or Compulsory Labour (forced labour). Enslavement was included as a crime against humanity in the Charter of the Nürnberg Tribunal (art. 6, subpara. (c)), Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (art. 2, para. 11).

(11) The fifth prohibited act consists of persecution on political, racial, religious or ethnic grounds under

¹³² See Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994) (document S/1995/134), note 5. See also V. Morris and M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (Irvington-on-Hudson (New York), Transnational Publishers, 1995), vol. 1, p. 81.

¹³³ *Prosecutor v. Duško Tadić aka "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, International Tribunal for the Former Yugoslavia, case No. IT-94-1-AR72, Appeals Chamber, decision of 2 October 1995, p. 73, para. 141.

¹³⁴ Article 1 of the Convention contains the following definition:

"1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

"2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

subparagraph (e). The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the Charter of the United Nations (Arts. 1 and 55) and the International Covenant on Civil and Political Rights (art. 2). The provision would apply to acts of persecution which lacked the specific intent required for the crime of genocide under article 17. Persecution on political, racial or religious grounds was included as a crime against humanity in the Charter of the Nürnberg Tribunal (art. 6, subpara. (c)), Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (art. 2, para. 11).

(12) The sixth prohibited act is institutionalized discrimination on racial, ethnic or religious grounds involving the violation of human rights and fundamental freedoms and resulting in seriously disadvantaging a part of the population under *subparagraph (f)*. The fifth and sixth categories of prohibited acts consist of distinct and yet closely related criminal conduct which involves the denial of the human rights and fundamental freedoms of individuals based on an unjustifiable discriminatory criterion. Whereas both categories of prohibited acts must be committed in a systematic manner or on a large scale to constitute a crime against humanity under article 18, the sixth category of prohibited acts further requires that the discriminatory plan or policy has been institutionalized, for example, by the adoption of a series of legislative measures denying individuals who are members of a particular racial, ethnic or religious group of their human rights or freedoms. The prohibited act covered by *subparagraph (f)* consists of three elements: a discriminatory act committed against individuals because of their membership in a racial, ethnic or religious group, which requires a degree of active participation; the denial of their human rights and fundamental freedoms, which requires sufficiently serious discrimination; and a consequential serious disadvantage to members of the group comprising a segment of the population. It is in fact the crime of apartheid under a more general denomination.¹³⁵ Institutionalized discrimination was not included as a crime against humanity in the previous instruments. For

this reason, the Commission decided to limit this crime to racial, ethnic or religious discrimination. The Commission noted that such racial discrimination was characterized as a crime against humanity in the International Convention on the Suppression and Punishment of the Crime of Apartheid (art. 1).

(13) The seventh prohibited act is arbitrary deportation or forcible transfer of population under *subparagraph (g)*. Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State. The term "arbitrary" is used to exclude the acts when committed for legitimate reasons, such as public health or well being, in a manner consistent with international law. Deportation was included as a crime against humanity in the Charter and the Judgment of the Nürnberg Tribunal (art. 6, subpara. (c)), Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3) as well as the Nürnberg Principles (Principle VI) and the 1954 draft Code (art. 2, para. 11).

(14) The eighth prohibited act is "arbitrary imprisonment" under *subparagraph (h)*. The term "imprisonment" encompasses deprivation of liberty of the individual and the term "arbitrary" establishes the requirement that the deprivation be without due process of law. This conduct is contrary to the human rights of individuals recognized in the Universal Declaration of Human Rights (art. 9) and in the International Covenant on Civil and Political Rights (art. 9). The latter instrument specifically provides that "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." *Subparagraph (h)* would cover systematic or large-scale instances of arbitrary imprisonment such as concentration camps or detention camps or other forms of long-term detention. "Imprisonment" is included as a crime against humanity in Control Council Law No. 10 (art. II, subpara. (c)) as well as the statute of the International Tribunal for the Former Yugoslavia

"(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

"(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

"(d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

"(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

"(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid."

¹³⁵ Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid defines this crime as follows:

"For the purpose of the present Convention, the term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

"(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

"(i) By murder of members of a racial group or groups;

"(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

"(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(art. 5) and the statute of the International Tribunal for Rwanda (art. 3).

(15) The ninth prohibited act is forced disappearance of persons under *subparagraph* (i). In 1992, the General Assembly expressed its deep concern regarding the enforced disappearance of persons which occurred "in many countries" in adopting the Declaration on the Protection of All Persons from Enforced Disappearance.¹³⁶ The problem of the disappearance of persons was also addressed in the Inter-American Convention on the Forced Disappearance of Persons.¹³⁷ The term "forced disappearance of persons" is used as a term of art to refer to the type of criminal conduct which is addressed in the Declaration and the Convention. Forced disappearance was not included as a crime against humanity in the previous instruments. Although this type of criminal conduct is a relatively recent phenomenon, the Code proposes its inclusion as a crime against humanity because of its extreme cruelty and gravity.

(16) The tenth prohibited act consists of rape, enforced prostitution and other forms of sexual abuse under *subparagraph* (j). There have been numerous reports of rape committed in a systematic manner or on a large scale in the former Yugoslavia. In this regard, the General Assembly unanimously reaffirmed that rape constitutes a crime against humanity under certain circumstances.¹³⁸ Furthermore, the National Commission for Truth and Justice concluded, in 1994, that sexual violence committed against women in a systematic manner for political reasons in Haiti constituted a crime against humanity.¹³⁹ Rape, enforced prostitution and other forms of sexual abuse are forms of violence that may be specifically directed against women and therefore constitute a violation of the Convention on the Elimination of All Forms of Discrimination against Women.¹⁴⁰ Rape was included as

a crime against humanity in Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3). While noting that persecution on gender grounds could also constitute a crime against humanity under *subparagraph* (e) if the two general criteria were met, the Commission decided to limit the possible grounds for persecution to those contained in existing legal instruments. Similarly, the Commission noted that gender-based discrimination might also constitute a crime against humanity under *subparagraph* (f), although not necessarily a crime against the peace and security of mankind.¹⁴¹

(17) The eleventh and last prohibited act consists of "other inhumane acts" which severely damage the physical or mental integrity, the health or the human dignity of the victim, such as mutilation and severe bodily harm, under *subparagraph* (k). The Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity. It should be noted that the notion of other inhumane acts is circumscribed by two requirements. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Secondly, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity. The subparagraph provides two examples of the types of acts that would meet these two requirements, namely, mutilation and other types of severe bodily harm. The Charter of the Nürnberg Tribunal (art. 6, subpara. (c)), Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3) as well as the Nürnberg Principles (Principle VI) also included "other inhumane acts".

¹³⁶ The General Assembly referred to situations in which

"persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of law." (General Assembly resolution 47/133.)

¹³⁷ Article II of the Convention contains the following definition:

"For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

¹³⁸ General Assembly resolution 50/192.

¹³⁹ Haiti, Commission Nationale de Vérité et de Justice, *SI M PA RELE*, 29 septembre 1991-14 octobre 1994 (1995).

¹⁴⁰ The Committee on the Elimination of Discrimination against Women stated:

"The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty . . . Gender-based violence, which impairs or nullifies the enjoyment by women of human

Article 19. Crimes against United Nations and associated personnel

1. The following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate:

(a) Murder, kidnapping or other attack upon the person or liberty of any such personnel;

(b) Violent attack upon the official premises, the private accommodation or the means of transporta-

rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention." (*Report of the Committee on the Elimination of Discrimination against Women* (see footnote 126 above), chap. I, paras. 6 and 7.)

¹⁴¹ Gender-based persecution or discrimination entailing the denial of human rights and fundamental freedoms is contrary to the Charter of the United Nations; the International Covenant on Civil and Political Rights; the Convention on the Political Rights of Women; the Declaration on the Elimination of Discrimination against Women (General Assembly resolution 2263 (XXII)); and the Convention on the Elimination of All Forms of Discrimination against Women.

tion of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

Commentary

(1) The United Nations was established for the purpose of, *inter alia*, maintaining the international peace and security of mankind and to that end taking effective collective measures to prevent and remove threats to the peace and to suppress acts of aggression or other breaches of the peace under Article 1 of the Charter of the United Nations. The Secretary-General stated that

whereas, in the past, working under the banner of the United Nations has provided its personnel with safe passage and an unwritten guarantee of protection, this is no longer the case, and such personnel are often at risk simply by virtue of their affiliation with organizations of the United Nations system.¹⁴²

The seriousness and the magnitude of the dramatic increase in attacks on United Nations and associated personnel has been underscored not only by the Secretary-General, but also by the Security Council and the General Assembly. In the landmark report entitled "An Agenda for Peace" the Secretary-General called attention to the problem of ensuring the safety of United Nations personnel deployed in conditions of strife for preventive diplomacy, peacemaking, peace-keeping, peace-building or humanitarian purposes due to the unconscionable increase in the number of fatalities resulting from attacks on such personnel.¹⁴³ The Security Council commended the Secretary-General for calling attention to this problem, recognized that it was increasingly necessary to deploy United Nations forces and personnel in situations of real danger in discharging its responsibility for the maintenance of international peace and security and further demanded that States take prompt and effective action to deter and, where necessary, to prosecute and to punish all those responsible for attacks and other acts of violence against such forces and personnel.¹⁴⁴ The General Assembly also expressed grave concern on a number of occasions about the growing number of fatalities and injuries among United Nations peacekeeping and other personnel resulting from deliberate hostile actions in dangerous areas of deployment.¹⁴⁵ In addition, the General Assembly acknowledged the vital importance of the involvement of United Nations personnel in preventive diplomacy, peacemaking, peacekeeping, peace-building and humanitarian operations and resolutely condemned any hostile actions against such personnel, including the deliberate attacks against United Nations peacekeeping operations which have resulted in a disturbing number of casualties.¹⁴⁶

Consequently the General Assembly unanimously adopted the Convention on the Safety of United Nations and Associated Personnel in 1994 with a view to deterring and, when necessary, ensuring the effective prosecution and punishment of the individuals who are responsible for such attacks.

(2) Attacks against United Nations and associated personnel constitute violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community. These crimes are of concern to the international community as a whole because they are committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind. These personnel are taking part in, present in an official capacity in the area of or otherwise associated with a United Nations operation which is "conducted in the common interest of the international community and in accordance with the principles and purposes of the Charter of the United Nations", as recognized in the preamble to the Convention on the Safety of United Nations and Associated Personnel. Attacks against such personnel are in effect directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace and security by means of collective security measures taken to prevent and remove threats to the peace. The international community has a special responsibility to ensure the effective prosecution and punishment of the individuals who are responsible for criminal attacks against United Nations and associated personnel which often occur in situations in which the national law-enforcement or criminal justice system is not fully functional or capable of responding to the crimes. Moreover, these crimes by their very nature often entail a threat to international peace and security because of the situations in which such personnel are involved, the negative consequences for the effective performance of the mandate entrusted to them and the broader negative consequences on the ability of the United Nations to perform effectively its central role in the maintenance of international peace and security. In terms of the broader negative implications of such attacks, there may be an increasing hesitancy or unwillingness on the part of individuals to participate in United Nations operations and on the part of Member States to make qualified personnel available to the Organization for such operations. For these reasons, the Commission decided to include this category of crimes in the Code.

(3) Crimes against United Nations and associated personnel are addressed in article 19 which consists of two paragraphs. The first paragraph contains the definition of these crimes for purposes of the Code. The second paragraph limits the scope of application of this definition by excluding attacks committed in certain situations.

(4) The opening clause of *paragraph 1* of the article establishes the general criterion which must be met for crimes against United Nations and associated personnel to constitute a crime against the peace and security of mankind under the Code, namely, the criminal attacks must be committed either in a systematic manner or on a large scale. The first alternative criterion requires that the crimes be committed "in a systematic manner", meaning

¹⁴² Document A/AC.242/1, para. 4.

¹⁴³ Document A/47/277-S/24111; see *Official Records of the Security Council, Forty-seventh Year, Supplement for April, May and June 1992*, document S/24111, para. 66.

¹⁴⁴ Document S/25493.

¹⁴⁵ General Assembly resolutions 47/120, 47/72 and 48/37.

¹⁴⁶ General Assembly resolution 47/72.

pursuant to a preconceived plan or policy. This alternative may be met by a series of attacks which are actually carried out, by a single attack which is carried out as the first in a series of planned attacks, or by a single attack of extraordinary magnitude carried out pursuant to a preconceived policy or plan, such as the murder of the mediator entrusted with resolving the conflict situation as in the case of the assassination of Count Bernadotte. The second alternative criterion requires that the crimes be committed "on a large scale", meaning that the criminal acts are directed against a multiplicity of victims either as a result of a series of attacks or a single massive attack resulting in extensive casualties. This dual criterion also appears in article 18 and is discussed in greater detail in the commentary thereto which is equally applicable to article 19 in this respect. While any attack against United Nations and associated personnel is reprehensible, this criterion ensures that such an attack also entails the necessary threat to international peace and security required to constitute a crime covered by the Code. However, conduct which does not meet the general criterion required for purposes of the Code would still constitute a crime under the Convention on the Safety of United Nations and Associated Personnel which does not require any such criterion and is not affected by this provision. This is recognized in the opening phrase of paragraph 1 which states that "The following crimes* constitute crimes against the peace and security of mankind". As in the case of the other crimes covered by part two, the fact that the Code does not extend to certain conduct is without prejudice to the characterization of that conduct as a crime under national or international law, including the Convention.

(5) For the purposes of article 19, a crime is committed only when the accused is shown to have done one of the acts referred to in paragraph 1, subparagraphs (a) and (b), with the necessary intent. As to this intent, two elements are required. The first is that the attack on United Nations personnel must have been carried out "intentionally". The term "intentionally" is used to convey the requirement that the perpetrator of the crime must in fact have been aware that the personnel under attack were members of or associated with a United Nations operation. It is in this sense that the word "intentionally" is used, for example, in article 2 of the Convention on the Protection and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.¹⁴⁷ It is used in the same sense in article 9 of the Convention on the Safety of United Nations and Associated Personnel. There is thus a requirement of an attack on United Nations or associated personnel as such. In addition, however, article 19 requires that the attack should have been committed "with a view to preventing or impeding that operation from fulfilling its mandate". No such requirement is contained in the Convention on the Safety of United Nations and Asso-

ciated Personnel, which seeks to protect United Nations and associated personnel against all intentional attacks. But in the context of a code of crimes against the peace and security of mankind, the Commission took the view that the only attacks against such personnel which should be covered were those calculated or intended to prevent or impede the operation itself. Whether this was so in any particular case would be a question of fact. The broader scope of Article 9 of the Convention is of course not affected.

(6) The two categories of prohibited acts are set out in paragraph 1, subparagraphs (a) and (b). The first category of acts consists of serious acts of violence perpetrated against a protected person, namely, "murder, kidnapping or other attack upon the person or liberty of any such personnel". The second category of acts consists of serious acts of violence upon particular places or modes of transportation which endanger a protected person, namely, a "violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty". These two categories of prohibited acts consisting of serious violent attacks are drawn from the definition of crimes contained in the Convention on the Safety of United Nations and Associated Personnel (art. 9, paras. 1 (a) and 1 (b)). The ancillary crimes contained in the Convention are not reproduced in article 19 since such crimes are addressed in article 2 in relation to all of the crimes covered by the Code.

(7) The potential victims of the crimes covered by article 19 are limited to United Nations¹⁴⁸ and associated personnel, as indicated by the reference to crimes committed against such personnel.¹⁴⁹ These terms are defined in the Convention on the Safety of United Nations and Associated Personnel and should be understood as having the same meaning in article 19. In addition, the crimes must be committed against protected persons who are "involved in a United Nations operation". The term

¹⁴⁸ Article 1, subparagraph (a) of the Convention on the Safety of United Nations and Associated Personnel contains the following definition:

"(a) 'United Nations personnel' means:

"(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;

"(ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;"

¹⁴⁹ Article 1, subparagraph (b) of the Convention contains the following definition:

"(b) 'Associated personnel' means:

"(i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;

"(ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;

"(iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency,

"to carry out activities in support of the fulfilment of the mandate of a United Nations operation;"

¹⁴⁷ As the Commission indicated in the commentary to article 2,

"[t]he word 'intentional' . . . both to make clear that the offender must be aware of the status as an internationally protected person enjoyed by the victim as well as to eliminate any doubt regarding exclusion from the application of the article of certain criminal acts which might otherwise be asserted to fall within the scope of subparagraphs (a) or (b), such as the serious injury of an internationally protected person in an automobile accident as a consequence of the negligence of the other party". (*Yearbook . . . 1972*, vol. II, document A/8710/Rev.1, p. 316, para. (8).)

“involved” is used to cover the various categories of protected persons who are taking part in, present in an official capacity in an area of or otherwise associated with a United Nations operation as indicated in the definitions of the protected persons contained in the Convention. The term “United Nations operation” is defined in the Convention and should be understood as having the same meaning in article 19.¹⁵⁰

(8) *Paragraph 2* is intended to avoid characterizing as criminal any conduct that is directed against personnel involved in a United Nations operation which is mandated under Chapter VII of the Charter of the United Nations to take part in an enforcement action and is in fact taking part in a combat situation against organized armed forces to which the law of international armed conflict applies.¹⁵¹ This paragraph is designed to ensure that United Nations personnel are covered by the article unless they are covered by the law of international armed conflict which is addressed in article 20.

Article 20. War crimes

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale:

(a) Any of the following acts committed in violation of international humanitarian law:

- (i) Wilful killing;**
- (ii) Torture or inhuman treatment, including biological experiments;**
- (iii) Wilfully causing great suffering or serious injury to body or health;**
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;**
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;**
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;**
- (vii) Unlawful deportation or transfer of unlawful confinement of protected persons;**

¹⁵⁰ Article 1, subparagraph (c) of the Convention contains the following definition:

“(c) ‘United Nations operation’ means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under the United Nations authority and control:

“(i) Where the operation is for the purpose of maintaining or restoring international peace and security; or

“(ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation;”.

¹⁵¹ For the discussion of international humanitarian law, see the advisory opinion rendered by ICJ in response to the request by the General Assembly in its resolution 49/75 K (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, in particular p. 256, para. 75).

(viii) Taking of hostages;

(b) Any of the following acts committed wilfully in violation of international humanitarian law and causing death or serious injury to body or health:

- (i) Making the civilian population or individual civilians the object of attack;**
- (ii) Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;**
- (iii) Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;**
- (iv) Making a person the object of attack in the knowledge that he is hors de combat;**
- (v) The perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs;**

(c) Any of the following acts committed wilfully in violation of international humanitarian law:

- (i) The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;**
- (ii) Unjustifiable delay in the repatriation of prisoners of war or civilians;**

(d) Outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(e) Any of the following acts committed in violation of the laws or customs of war:

- (i) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;**
- (ii) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;**
- (iii) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings or of demilitarized zones;**
- (iv) Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;**
- (v) Plunder of public or private property;**

(f) Any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character:

- (i) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;**

- (ii) Collective punishments;
- (iii) Taking of hostages;
- (iv) Acts of terrorism;
- (v) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (vi) Pillage;
- (vii) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as indispensable;

(g) In the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

Commentary

(1) For the title of this article, the Commission preferred to retain the expression "war crimes" rather than the expression "violations of humanitarian law applicable in armed conflict". Although the second expression is legally more correct, the Commission preferred the first, which is shorter. When consulted, as of the submission of the first reports, the Commission preferred the expression "war crimes". The expressions "violations of the laws and customs of war" and "violations of the rules of humanitarian law applicable in armed conflict" are, however, also used in the body of the report.

(2) The war crimes referred to in the Charter of the Nürnberg Tribunal under the general heading of "violations of the laws and customs of war" did not involve any general definition.

(3) The authors of the Charter of the Nürnberg Tribunal worked on the basis of a list, stating, however, that the list was not restrictive.¹⁵² The Nürnberg Tribunal also stated that the violations listed were already covered by The Hague Convention IV of 1907, as well as by the Geneva Convention for the Amelioration of the Wounded and Sick in Armies in the Field of 1929.

(4) Article 20 reproduces, *inter alia*, the categories of war crimes provided for by The Hague Convention IV of 1907 and the Geneva Convention for the Amelioration of the Wounded and Sick in Armies in the Field of 1929 as well as the Geneva Conventions of 12 August 1949 and the Protocols Additional thereto. However, the Commission considered that the above-mentioned acts must also meet the general criteria indicated in the *chapeau* of article 20 or, in other words, that they must have been committed in a systematic manner or on a large scale in order

to constitute crimes under the Code, that is to say, crimes against the peace and security of mankind.

(5) These general criteria for war crimes under the Code are based on the view that crimes against the peace and security of mankind are the most serious on the scale of international offences and that, in order for an offence to be regarded as a crime against the peace and security of mankind, it must meet certain additional criteria which raise its level of seriousness. These general criteria are provided for in the *chapeau* of the article: the crimes in question must have been committed in a systematic manner or on a large scale.

(6) This additional requirement is the result of the fact that, until the Judgment of the Nürnberg Tribunal, the word "crime" in the expression "war crimes" was not taken in its technical sense, that is to say, as meaning the most serious on the scale of criminal offences, but, rather, in the general sense of an offence, that is to say, the non-fulfilment of an obligation under criminal law, regardless of the seriousness of such non-fulfilment. The Commission thus deemed it necessary to raise the level of seriousness that a war crime must have in order to qualify as a crime against the peace and security of mankind. Hence its criteria of an act committed in a systematic manner or on a large scale.

(7) A crime is systematic when it is committed accordingly to a preconceived plan or policy. A crime is committed on a large scale when it is directed against a multiplicity of victims, either as a result of a series of attacks or of a single massive attack against a large number of victims.

(8) Not every war crime is thus a crime against the peace and security of mankind. An offence must have the general characteristics described above in order to constitute a crime against the peace and security of mankind.

(9) The list of crimes referred to in article 20 has not been made up *ex nihilo*. Most of the acts are recognized by international humanitarian law and are listed in different instruments.

(10) The first category of war crimes addressed in *subparagraph* (a) consists of grave breaches of international humanitarian law as embodied in the Geneva Conventions of 12 August 1949. Subparagraphs (a) (i) to (a) (iii) cover grave breaches of the four Geneva Conventions, namely, the first Geneva Convention (art. 50); the second Geneva Convention (art. 51); the third Geneva Convention (art. 130); and the fourth Geneva Convention (art. 147). Subparagraph (a) (iv) covers grave breaches that are common to the first, second and fourth Geneva Conventions. Subparagraphs (a) (v) and (a) (vi) cover grave breaches that are common to the third and fourth Geneva Conventions. Subparagraphs (a) (vii) and (a) (viii) cover grave breaches of the fourth Geneva Convention. The provisions of subparagraph (a) should be understood as having the same meaning and scope of application as the corresponding provisions contained in the Geneva Conventions.¹⁵³ This provision closely resembles the corresponding provision contained in the statute of the International Tribunal for the Former Yugoslavia (art. 3).

¹⁵² The list of war crimes included, but was not limited, to:

"murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity".

¹⁵³ In this regard, the authoritative commentaries to the Geneva Conventions would be equally applicable to these provisions (*The*

(11) The second and third categories of war crimes addressed in *subparagraphs* (b) and (c) cover the grave breaches listed in Protocol I. As to the second category, *subparagraph* (b) covers the grave breaches contained in article 85, paragraph 3, of Protocol I. The opening clause of this paragraph reproduces two general criteria contained in article 85, paragraph 3, namely, the acts must be committed wilfully and must cause death or serious injury to body or health. *Subparagraphs* (b) (i) to (b) (v) cover the grave breaches listed in article 85, paragraph 3, *subparagraphs* (a) to (c), (e) and (f), respectively.¹⁵⁴ As regards the third category, *subparagraph* (c) covers the grave breaches listed in article 85, paragraph 4, of Protocol I. The opening clause of this *subparagraph* reproduces the general criterion contained in article 85, paragraph 4, namely, the acts must be committed wilfully. *Subparagraphs* (c) (i) and (c) (ii) cover the grave breaches contained in article 85, paragraph 4, *subparagraphs* (a) and (b) of Protocol I.¹⁵⁵ *Subparagraphs* (b) and (c) should be understood as having the same meaning and scope of application as the corresponding provisions contained in the Protocol.¹⁵⁶ These *subparagraphs* are formulated in general terms and do not reproduce the references to the specific articles of Protocol I which provide the underlying standard of conduct for purposes of the grave breaches provisions contained in article 85. Nonetheless the relevant standard of conduct is equally applicable to these *subparagraphs*.

(12) The fourth category of war crimes addressed in *subparagraph* (d) consists of "outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault". This type of conduct clearly constitutes a grave breach of the four Geneva Conventions of 12 August 1949 under *subparagraphs* (a) (ii) and (a) (iii). None the less the Commission considered that it was important to reaffirm explicitly the criminal nature of such conduct as a war crime when committed in armed conflict of an international character in view of the unprecedented reports of this type of criminal conduct having been committed in a systematic manner or on a large scale in the former Yugoslavia. This provision is drawn from article 4, para-

Geneva Conventions of 12 August 1949: Commentary (Geneva, ICRC); vol. I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1952); vol. II, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1960); vol. III, Geneva Convention relative to the Treatment of Prisoners of War (1960); vol. IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War (1958)).

¹⁵⁴ *Subparagraph* (e) (iii) covers the remaining grave breach listed in article 85, paragraph 3 (d).

¹⁵⁵ Other provisions of article 20 cover the remaining grave breaches listed in article 85, paragraph 4 of Protocol I: *subparagraph* (a) (vi) covers the grave breach listed in article 85, paragraph 4 (e); *subparagraph* (a) (vii) covers the grave breach relating to deportation or transfer listed in article 85, paragraph 4 (a); *subparagraph* (d) covers the grave breach listed in article 85, paragraph 4 (c); and *subparagraph* (e) (iv) covers the grave breach listed in article 85, paragraph 4 (d). The grave breach listed in article 85, paragraph 4 (c), is covered not only as a war crime under the more general language contained in *subparagraph* (d) of article 20, but also as a crime against humanity under article 18, *subparagraph* (f) of which does not require the existence of an armed conflict.

¹⁵⁶ In this regard, the authoritative commentary to Protocol I would be equally applicable to these provisions (*Commentary on the Additional Protocols* ... op. cit. (see footnote 65 above)).

graph 2 (e), of Protocol II, which characterizes this conduct as a violation of the *fundamental guarantees* to which all protected persons are entitled during an armed conflict of a non-international character. The Commission noted that the fundamental guarantees provided for by the law applicable to armed conflict of a non-international character constitutes a minimum standard of humanitarian treatment of protected persons which is applicable to any type of armed conflict, whether international or non-international in character. This is clearly recognized in article 3 common to the Geneva Conventions of 12 August 1949 and article 4, paragraph 2, of Protocol II.

(13) The fifth category of war crimes addressed in *subparagraph* (e) consists primarily of serious violations of the laws and customs of war on land as embodied in The Hague Convention IV of 1907 and the Regulations annexed thereto. The Commission noted that *subparagraph* (e) (iv) would cover, *inter alia*, the cultural property protected by the Convention for the Protection of Cultural Property in the Event of Armed Conflict, as well as the literary and artistic works protected by the Berne Convention for the Protection of Literary and Artistic Works. This provision is based on the Charter of the Nürnberg Tribunal (art. 6, subpara. (c)) and the statute of the International Tribunal for the Former Yugoslavia (art. 3). In contrast to those instruments, this provision provides an exhaustive list of violations of the laws or customs of war to provide a greater degree of certainty in terms of the conduct covered by the Code. In addition, *subparagraph* (e) (iii) covers the grave breach listed in article 85, paragraph 3 (d) of Protocol I, concerning demilitarized zones. The term "demilitarized zone" has the same meaning in the provision as in article 60 of Protocol I.¹⁵⁷

(14) The sixth category of war crimes addressed in *subparagraph* (f) consists of serious violations of international humanitarian law applicable in non-international armed conflict contained in article 3 common to the Geneva Conventions of 12 August 1949 and article 4 of Protocol II. The provisions of this *subparagraph* should be understood as having the same meaning and scope of application as the corresponding provisions contained in the Geneva Conventions and Protocol II.¹⁵⁸ *Subparagraph* (f) (i) covers violations of article 3, paragraph 1 (a), common to the Geneva Conventions and of article 4, paragraph 2 (a), of Protocol II. *Subparagraph* (f) (ii)

¹⁵⁷ "It is quite clear that the drafters of Article 60 did not have such zones in mind, even though they provided that demilitarized zones could be created already in time of peace. In fact, such different types of demilitarized zones, created by treaty ... are not created for wartime but for peacetime, or at least for an armistice."

"In fact, this is the essential character of the zones created in Article 60: they have a humanitarian and not a political aim; they are specially intended to protect the population living there against attacks. Admittedly, there is nothing to prevent a demilitarized zone created by a peace treaty, armistice or any other international agreement, from becoming a demilitarized zone in accordance with Article 60 in the case of armed conflict, provided this is done by means of a new agreement." (*Commentary on the Additional Protocols* ... (see footnote 65 above), (Protocol I), p. 709.)

¹⁵⁸ In this regard, the authoritative commentaries to the Geneva Conventions and Protocol II would be equally applicable to these provisions (see footnotes 153 and 65 above, respectively).

covers violations of article 4, paragraph 2 (b), of Protocol II. Subparagraph (f) (iii) covers violations of article 3, paragraph 1 (b), common to the Geneva Conventions and of article 4, paragraph 2 (c), of Protocol II.¹⁵⁹ Subparagraph (f) (iv) covers violations of article 4, paragraph 2 (d), of Protocol II. Subparagraph (f) (v) covers violations of article 3, paragraph 1 (c), common to the Geneva Conventions and of the more detailed article 4, paragraph 2 (e), of Protocol II. Subparagraph (f) (vi) covers violations of article 4, paragraph 2 (g), of Protocol II. Subparagraph (f) (vii) covers violations of article 3, paragraph 1 (d), common to the Geneva Conventions. The subparagraph is drawn from the statute of the International Tribunal for Rwanda (art. 4), which is the most recent statement of the relevant law. The Commission considered this subparagraph to be of particular importance in view of the frequency of non-international armed conflicts in recent years. The Commission noted that the principle of individual criminal responsibility for violations of the law applicable in internal armed conflict had been reaffirmed by the International Tribunal for the Former Yugoslavia.¹⁶⁰

(15) The seventh category of war crimes addressed in subparagraph (g) covers war crimes which have their basis in articles 35 and 55 of Protocol I. Violations of these provisions are not characterized as a grave breach entailing individual criminal responsibility under the Protocol. The subparagraph contains three additional elements which are required for violations of the Protocol to constitute a war crime covered by the Code. First, the use of the prohibited methods or means of warfare was not justified by military necessity. The term "military necessity" is used in the provision to convey the same meaning as in the relevant provisions of existing legal instruments, for example, article 23 (g) of the Regulations annexed to The Hague Convention IV of 1907,¹⁶¹ the

grave breaches provisions contained in articles 50, 51 and 147 of the first, second and fourth Geneva Conventions, respectively, article 33 of the first Geneva Convention¹⁶² and article 53 of the fourth Geneva Convention.¹⁶³ Secondly, the conduct was committed with the specific "intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population". In this regard, the provision requires that the conduct should result in more serious consequences for the population in order to constitute a war crime covered by the Code, namely, gravely prejudicial consequences as compared to prejudicial consequences required for a violation of Protocol I. Thirdly, the subparagraph requires that such damage actually occurred as a result of the prohibited conduct. The Commission considered that this type of conduct could constitute a war crime covered by the Code when committed during an international or a non-international armed conflict. Thus, the subparagraph applies "in the case of armed conflict", whether of an international or a non-international character, in contrast to the more limited scope of application of Protocol I to international armed conflict. The opening clause of the subparagraph does not include the phrase "in violation of international humanitarian law" to avoid giving the impression that this type of conduct necessarily constitutes a war crime under existing international law in contrast to the preceding subparagraphs.¹⁶⁴

¹⁵⁹ These violations when committed in an armed conflict of an international character would be covered by the identical provision contained in subparagraph (d) of article 20.

¹⁶⁰ *Prosecutor v. Duško Tadić aka "Dule"*, ... (see footnote 133 above), p. 68.

¹⁶¹ Article 23 states that "it is expressly forbidden:

"[...]

"(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".

¹⁶² Article 33 of the first Geneva Convention prohibits the diversion of buildings or materials belonging to enemy medical units subject to a limited exception "in case of urgent military necessity". The commentary to this article refers to "the exception of urgent military necessity" as "an accepted principle of international law". (*The Geneva Conventions of 12 August 1949: Commentary* ... (see footnote 153 above), vol. I p. 275).

¹⁶³ Article 53 recognizes an exception to the prohibited destruction of certain property "where such destruction is rendered absolutely necessary by military operations".

¹⁶⁴ The Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict prepared by ICRC state that

"Destruction of the environment not justified by military necessity violates international humanitarian law. Under certain circumstances, such destruction is punishable as a grave breach of international humanitarian law" (document A/49/323, annex, para. 8).