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Comments and observations received from Governments

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:-

1993, vol. II(1)

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 3]

DOCUMENT A/CN.4/448 and Add.1

Comments and observations received from Governments

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[*1 March and 19 May 1993*]

CONTENTS

* The reply submitted jointly by Denmark, Finland, Iceland, Norway and Sweden is reproduced under Nordic countries.

NOTE

Multilateral intruments cited in the present report

Human rights

	Source
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	Ibid., vol. 213, p. 221.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	Ibid., vol. 189, p. 137.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
American Convention on Human Rights (San José, 22 November 1969)	United Nations, *Treaty Series*, vol. 1144, p. 123
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	Ibid., vol. 1015, p. 243.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	*Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 51*, resolution 39/46, annex.

Privileges and immunities, diplomatic relations

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 4 December 1973)	United Nations, *Treaty Series*, vol. 1035, p. 167.

Environment and natural resources

International Convention for the Regulation of Whaling (Washington, 2 December 1946)	Ibid., vol. 161, p. 72.
International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969)	Ibid., vol. 1125, p. 3.
Convention on International Trade in Endangered Species of Wild Flora and Fauna (Washington, 3 March 1973)	Ibid., vol. 993, p. 243.
Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976)	Ibid., vol. 1108, p. 151.
Convention on Long-range Transboundary Air Pollution (Geneva, 13 November 1979)	E/ECE/1010 UNEP, *Multilateral treaty series on environmental protection, Reference series 3*, Nairobi, 1982, p. 536.
Convention on the Physical Protection of Nuclear Materials (New York and Vienna, 3 March 1980)	Doc. NPT/Conf.II/6/Add.1.
Framework Convention on Climate Change (New York, 9 May 1992)	*International Legal Materials*, Washington, D.C., vol. 31, No. 4, July 1992, p. 851.

Law applicable to armed conflict

Convention respecting the Laws and Customs of War on Land, of 18 October 1907	J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press 1918), p. 100.
Convention concerning the Rights and Duties of Neutral Powers in Naval War (The Hague, 18 October 1907)	Ibid., p . 209.

Convention relative to the Laying of Automatic Submarine Contact Mines (The Hague, 18 October 1907)	Ibid., p. 151.
Convention concerning Bombardment by Naval Forces in Time of War (The Hague, 18 October 1907)	Ibid., p. 157.
Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases (Geneva, 17 June 1925)	League of Nations, *Treaty Series*, vol. XCIV (1929), No. 2138.
Geneva Conventions of 12 August 1949 for the Protection of War Victims	United Nations, *Treaty Series*, vol. 75,
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	Ibid., p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	Ibid., p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	Ibid., p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	Ibid., p. 287.
Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva, 8 June 1977	Ibid., vol. 1125, p. 3.
International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989)	*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49*, resolution 44/34, annex.
Disarmament	
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (London, Moscow and Washington, 10 April 1972)	United Nations, *Treaty Series*, vol. 1015, p. 163.
Civil aviation	
Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963)	Ibid., vol. 704, p. 219.
Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970)	Ibid., vol. 860, p. 105.
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)	Ibid., vol. 974, p. 177.
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 24 February 1988)	ICAO, document 9518.
Terrorism	
Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937)	League of Nations, document C.546.M.383.1937.V.
International Convention against the Taking of Hostages (New York, 17 December 1979)	United Nations, *Treaty Series*, vol. 1316, p. 205.
Narcotics and psychotropic substances	
Convention on Psychotropic Substances (Vienna, 21 February 1971)	Ibid., vol. 1019, p. 175.
Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs (New York, 8 August 1975)	Ibid., vol. 976, p. 105.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	Doc.E/CONF.82/15 and Corr.1.
Maritime navigation	
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988)	IMO, Convention No. 18, 1988.
and Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (Rome, 10 March 1988)	Ibid.

Introduction

1. At its forty-third session, in 1991, the Commission provisionally adopted on first reading the draft Code of Crimes against the Peace and Security of Mankind.[1] At the same session, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for their comments and observations, with a request that such comments and observations should be submitted to the Secretary-General by 1 January 1993.[2]

2. By paragraph 9 of resolution 46/54, and again by paragraph 12 of resolution 47/33, the General Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft Code and urged them to present in writing their comments and observations by 1 January 1993, as requested by the Commission.

3. Pursuant to the Commission's request, the Secretary-General addressed circular letters dated respectively 20 December 1991 and 1 December 1992 to Governments, inviting them to submit their comments and observations by 1 January 1993.

4. As of 29 March 1993, the Secretary-General had received 23 replies from Member States and one reply from a non-member State, the texts of which appear in the present document.

[1] For the text, see *Yearbook ... 1991*, vol. II (Part Two), para. 174.
[2] Ibid., p. 98, para. 174.

I. Comments and observations received from Member States

Australia

[*Original: English*]
[*14 January 1993*]

GENERAL COMMENTS

1. Australia congratulates the Commission on its adoption on first reading of the draft Code of Crimes against the Peace and Security of Mankind. It considers, however, that there are some difficulties with the Code as presently drafted. The comments below address both general issues of concern and specific areas which, in the opinion of Australia, require further attention by the Commission.

Limited list of crimes

2. Australia notes that the draft Code deals with a broad range of crimes against the peace and security of mankind. As currently drafted, however, it does not include a number of serious crimes such as piracy, hijacking, and crimes against internationally protected persons. The Commission has not explained the reasons for these omissions. There should be no gaps in the Code if it is intended to deal fully with crimes against the peace and security of mankind.

Relationship between the Code and existing multilateral conventions

3. The international community has developed an increasingly substantial body of international criminal law in recent decades through the conclusion of multilateral treaties. These treaties enjoy broad support. They have evolved enforcement mechanisms which rely on national legal systems and courts, reinforced by cooperation between States parties in the extradition of alleged offenders and mutual legal assistance in preparing prosecutions.

4. Australia believes the Commission should give attention to elaborating on the relationship between the draft Code and these multilateral conventions. States parties will need to be able to reconcile their obligations under the multilateral conventions to which they are already party and the Code.

5. Australia acknowledges that this will be a difficult task. The Code overlaps with and replicates definitions of offences already dealt with under the conventions. In a number of cases the Code either omits elements of an existing crime or reduces its scope. For example, article 25 of the Code repeats only one element of article 3, paragraph 1, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereafter called the "1988 Narcotic Drugs Convention").

6. Jurisdictional questions will also arise in settling the relationship between the Code and the multilateral conventions. The conventions all recognize the concept of universal jurisdiction in one form or another. Will the Code affect that by overlaying an international jurisdiction based on the principle of territoriality or some other principle? The Commission will need to take this into account in considering jurisdictional issues under the Code.

Setting penalties

7. Australia notes that penalty provisions have been included in the draft Code on the basis that the principle *nulla poena sine lege* so requires. States, however, have not believed it necessary to include specific penalty provisions in the multilateral conventions referred to above. Instead, States parties have been required to establish appropriately serious penalties in their domestic law for crimes dealt with under the conventions. Australia accepts, however, that there would be a need to establish specific penalties in any cases where the exclusive jurisdiction to try crimes under the Code lay with an international criminal tribunal.

Relationship to an international criminal tribunal

8. Australia notes that the proposed establishment of an international criminal tribunal is a separate issue from the draft Code, but it is nevertheless relevant. The Commission's commentary foreshadows a strong link, to the point of determining who should institute proceedings and, in respect of such offences, the possible exclusive jurisdiction of such a tribunal. Australia considers that it is only insofar as the Code deals with major war crimes that the questions of exclusive jurisdiction might arise, but even here it is not apparent that such jurisdiction should necessarily be exclusive. Australia welcomes the request by the Sixth Committee at the forty-seventh session of the General Assembly for the Commission to consider separately the issues of the draft Code of Crimes and a draft statute for an international criminal court.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 6

9. Australia notes that article 6 of the draft Code (Obligation to try or extradite) places an obligation on a State in whose territory an alleged offender is found either to try or to extradite him or her. The obligation to "try or extradite" is to be found in many multilateral conventions dealing with crimes in international law and is of fundamental importance to the enforcement of these conventions. The need to incorporate it in the Code is unquestionable.

10. Australia believes, however, that consideration should be given to the question of whether article 6 should contain more detailed provisions governing the extradition of alleged offenders. Such provisions might deal with the grounds on which other countries could seek extradition, the process of extradition under the Code, the possibility of extradition under existing treaties or arrangements between the countries concerned, and the creation of relationships between countries to allow extradition for the purposes of crimes under the Code where no such relationships already exist.

11. In addition to the obligation to "try or extradite", Australia believes that an obligation should be imposed on States to assist each other in investigating and prosecuting crimes under the Code. Evidence pertaining to the commission of a crime could well need to be obtained from several countries. Failure to secure such evidence from one or more countries because of their lack of cooperation could seriously or even fatally weaken the prosecution of an alleged offender. An example of a mutual assistance provision is to be found in article 7 of the 1988 Narcotic Drugs Convention. That article makes comprehensive provision for mutual legal assistance between parties to the Convention. The extent of any such provision in the Code would require detailed consideration.

Article 8

12. Australia believes this article (Judicial guarantees) provides the minimum guarantees necessary to ensure that an alleged offender would receive a fair trial.

Article 9

13. Australia considers there are difficulties with article 9 *(Non bis in idem)*.

14. Paragraph 1 provides for full protection against prosecution for crimes under the Code where persons have already been acquitted or convicted by an international criminal court.

15. Paragraph 2, however, provides for a more limited protection against "double jeopardy" in the case where a person has already been finally acquitted or convicted by a national court. The protection offered by paragraph 2 is made subject to exceptions contained in paragraphs 3 and 4.

16. Paragraph 3 envisages that a person can be tried both under the Code and the domestic criminal law of a State for the same course of conduct. Where a national court renders "judgement" (which could either be a conviction or acquittal) on a person under domestic criminal law, the same court pursuant to paragraph 3 would then have the jurisdiction to try that person for offences against the Code arising from the same conduct. Thus, a person acquitted under domestic criminal law could be convicted under the Code for the same course of conduct. Although such cases might not be common, they certainly would weaken the concept of "double jeopardy", which is a fundamental principle of the criminal law of many countries.

17. Paragraph 5 does seek to provide some protection for a person who has been convicted under domestic criminal law for an act and who is subsequently convicted

under the Code for the same act by requiring the court trying that person under the Code to deduct any penalty "imposed and implemented" for the previous conviction. Where, however, the penalty "imposed and implemented" under domestic criminal law is identical to the one to be imposed under the Code, a question does arise as to the utility of the second trial of that person. It may even be the case that the penalty under the Code could be less than the one imposed under domestic criminal law.

Article 14

18. Australia believes that an effort should be made to elucidate the reference to "defences under the general principles of law" in paragraph 1 of article 14. If the Code is to deal with some essential ingredients of a crime—penalties for example—then it should also deal with other necessary elements, such as defences. In systems with constitutional guarantees of due process, article 14 might well be held to be unconstitutionally vague.

19. Australia also believes consideration should be given to dividing article 14 into two articles, one dealing with defences and the other with extenuating circumstances. As noted by some members of the Commission, defences and extenuating circumstances are two different concepts best treated separately.

Article 15

20. In addition to wars of aggression, article 15 (Aggression) encompasses unjustified acts of aggression short of war. This goes beyond existing international law, which criminalizes wars of aggression only. While the international community would identify acts of aggression short of wars of aggression as illegal and hold the delictual State responsible for its illegality, it does not follow that the international community is willing to recognize that individuals in the delictual State are guilty of international crimes. Australia considers that the implications of criminalizing individual acts in these circumstances should be further considered.

21. A further difficulty arises from the reference in this article to the Security Council. According to paragraph 4 (*h*) of this article, the definition of aggression both includes "any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter" and according to paragraph 3 excludes acts which the Security Council determines not to be acts of aggression because of other relevant circumstances. The relationship between the Code and the Security Council is an exceptionally difficult problem, as the Commission notes. Under constitutional systems based on the separation of judicial power, a central element in an offence could not be left to be conclusively determined by an international executive agency such as the Security Council.

Article 16

22. Article 16 (Threat of aggression) extends criminal liability to those leaders who use threats of aggression to further their cause. Australia notes that the General Assembly resolutions which reiterate the prohibition of Article 2, paragraph 4, of the Charter of the United Nations have not referred to the threat of force as an international crime. Australia recognizes that a threat to use force is an illegal act for which an offending State may be held responsible. However, as is the case with article 15, it is doubtful that States are willing to accept the actual criminalization of all threats of intervention/aggression.

Article 17

23. Article 17 (Intervention) applies to leaders who intervene in the internal or external affairs of another State by organizing or financing subversive or terrorist activities. While intervention is a concern of an international system committed to maintaining peace and security and premised on the sovereignty of its constituent units, it is not at present a crime under international law. Australia considers that, given the doubt as to the normative force of the non-intervention rule, particularly in respect of the low-level intervention described as criminal in article 17, and the lack of jurisprudential support for its criminalization, the inclusion of intervention in the Code requires further consideration.

Article 18

24. Article 18 (Colonial domination and other forms of alien domination) refers to the rights of peoples to self-determination as enshrined in the Charter. There is considerable debate about what this right encompasses, and it does not appear satisfactory to define the elements of a criminal offence by reference to it.

25. Australia also has difficulties with the phrase "alien domination". According to the ILC commentary, alien domination refers to "foreign occupation or annexation".[3] This would appear to be a category of aggression rather than an offence against the right to self-determination. Further, this phrase broadens the scope of the article well beyond the colonial context to which the principle has classically been applied.

Article 19

26. While Australia has no difficulties with the substance of article 19 (Genocide), which is based entirely on the definition in article II of the Convention on the Prevention and Punishment of the Crime of Genocide, the issue of the applicable penalty requires further attention by the Commission.

27. The penalty to be specified in article 19, paragraph 1, may well be inconsistent with article V of the Genocide Convention, which requires States parties "to provide effective penalties for persons guilty of genocide".

Article 20

28. Australia would suggest that the wording of the draft article might be modified so as to reflect more closely the International Convention on the Suppression and Punishment of the Crime of Apartheid.

[3] Article 18 was previously adopted as article 15. For the commentary, see *Yearbook ... 1989*, vol. II (Part Two), p. 70, particularly para. (3).

29. Under paragraph 2 of this article, the policies or practices must be committed for the purpose of racial domination and oppression. This incorporates an element of intent which may be difficult to prove. The Convention states in article 1 that: "Inhumane acts resulting from the policies and practices of apartheid . . . are crimes violating the principles of international law". This disposes of the element of intent required in the draft Code and better states the position under international criminal law.

30. It is unclear whether leaders or organizers acting on their own initiative, rather than on the basis of government policies and practices, are intended to be covered by this article.

Article 21

31. Australia notes the stated intention of the Commission that only the most serious international delicts should be considered as crimes. This is consistent with the philosophical basis of international criminal law and the expressed attitude of States on the matter.

32. In particular, Australia has concerns about the lack of definition of the elements of the crimes set out in article 21 (Systematic or mass violations of human rights). It notes the view of the Commission that, as the definitions in this article are included in other international instruments, it is unnecessary to repeat them in the Code. However, not all the crimes in this article are so defined. There is, for example, no agreed definition of persecution in any international instrument.

33. Reliance on other instruments for definitions of the crimes in article 21 could also cause difficulties. For example, the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment limits the crimes to acts committed by public officials or persons acting in an official capacity. In contrast, the *chapeau* to article 21 indicates that responsibility for any of the crimes enumerated extends to any individual committing the offence.

34. Australia notes in this regard that articles 15, 19, 20, 22 and 23 include definitions of offences, despite the fact that definitions are to be found in other international instruments.

35. Article 21 is also limited in its scope in that it does not (unlike articles 15 and 16) allow for "other similar acts" (art. 15, para. 4(*h*)) and "any other measures" (art. 16, para. 2). Australia agrees with the observation set out in the Commission's commentary[4] that the practice of systematic disappearances of persons deserves special mention in the context of this draft article. It is not certain that persecution on social, political, racial, religious or cultural grounds would cover the practice of systematic disappearances.

Article 22

36. Article 22 (Exceptionally serious war crimes) enumerates the various acts which shall be deemed exceptionally serious war crimes. Most of these are included in the various treaties and conventions that make up international humanitarian law.

37. Article 22 differs, however, from customary international law in that it creates a new category of "exceptionally serious war crimes". As under international humanitarian law war crimes are themselves exceptionally serious transgressions of the laws of war, defined as grave breaches in the various conventions and protocols, it is unclear what the words "exceptionally serious" are intended to mean. If these words are intended to refer to the same conceptual category as grave breaches under the conventions and protocols, then there are a number of inconsistencies between the grave breaches under laws of war and the specific crimes listed in article 22.

38. For example, article 50 of the First Geneva Convention (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field) and article 51 of the Second Geneva Convention (Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea), both of 12 August 1949, define grave breaches to include " . . . extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly". Neither the element of wantonness nor the absence of military necessity is necessary to characterize the crime in article 22 of the draft Code. Similarly, the conditions relating to large-scale destruction of civilian property (para. 2 (*e*)) and wilful attacks on property of exceptional religious, historical or cultural value (para. 2 (*f*)) are not consistent with the offences set out in this article.

Article 23

39. Australia notes that the wording of paragraphs 2 and 3 of draft article 23 (Recruitment, use, financing and training of mercenaries) defining mercenary is the same as that adopted by the General Assembly in article 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which recognizes mercenary activity as an international offence.

40. There are, however, a number of significant differences between article 23 and existing international law for which no explanation is provided by the Commission. Article 23 is, for example, limited to acts of recruiting, using, financing or training mercenaries. It does not include acting as a mercenary, which is recognized as an offence in article 3 of the Convention against the Recruitment, Use, Financing and Training of Mercenaries.

41. A second problem raised by article 23 is the limitation of the crime to agents or representatives of a State. It should be considered whether agents or representatives of non-State entities should not also be included. If involvement in mercenary activity is to be an international crime it should be irrelevant to criminal liability whether the individual responsible is linked to a State entity or a non-State entity.

42. Another difficulty with article 23 is the restriction placed on the target of the mercenaries' activities. Under this article, unless the activities are directed against another State or are for the purpose of opposing the legiti-

[4] *Yearbook . . . 1991*, vol. II (Part Two), p. 104, para. (10) of the commentary on article 21.

mate exercise of the right of self-determination, an offence has not been committed. It is conceivable that mercenaries could be recruited, used, financed or trained for activities against an international organization—not a State and not a self-determination movement—and those activities not be punishable under article 23.

Article 24

43. Australia has difficulties with the drafting of article 24 (International terrorism). It notes in particular that the definition does not include any reference to violence. Does this mean therefore that the offence is intended to encompass non-physical acts of terror such as propaganda? Further, it is uncertain whether the agent or representative of the State needs to be acting in an official capacity for their acts to be considered acts of international terrorism. The absence from the definition of any reference to intent or motive (cf. the Convention for the Prevention and Punishment of Terrorism) also needs explanation.

Article 25

44. Australia strongly supports international action to deal with illicit trafficking in narcotic drugs and psychotropic substances. Accordingly, it has actively participated in the negotiation of multilateral conventions which promote both national and international action against drug trafficking.

45. Australia acknowledges the concerns underlying article 25 (Illicit traffic in narcotic drugs). It believes, however, that more detailed work needs to be done on a number of issues, including the relationship of article 25 with existing conventions, in particular, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

46. The acts enumerated as constituting crimes under article 25 are inconsistent with those listed in that Convention. Article 3 thereof describes a lengthy series of acts which are to be established as offences under domestic law. Although many of these appear to have been omitted from article 25 on the ground that they are not of a sufficiently serious nature to attract international criminal sanctions, others perhaps should be included.

47. The enforcement of any article dealing with drug trafficking would depend heavily on effective provisions on extradition of alleged offenders, mutual legal assistance between States in support of their prosecution, and money laundering.

48. Consideration also needs to be given to the relationship between the jurisdiction of national legal systems to deal with drug offences and any proposed international jurisdiction under the Code.

49. It is unclear why the phrase "psychotropic substances" is used only in paragraph 3, when the whole article is intended to cover these substances.

Article 26

50. The Commission's commentary refers to the possible inconsistency between the requirement in article 26 that the damage be caused or ordered to be caused wilfully and the possibility of a conviction under paragraph 2 (*d*) of article 22 for employing methods not only intended to but even "likely" to or "which may be expected to" cause the damage.[5] It was argued by some members of the Commission that the requisite *mens rea* in article 26 should be lowered so as to be consistent with article 22. This inconsistency could otherwise result in a deliberate violation, for economic gain, of some regulations on protection of the environment which caused widespread, long-term and severe damage, but did not cause that damage as the consequence of a will to do so, and did not therefore amount to criminal behaviour. Australia considers that this argument has merit and that if the violation may have been expected to cause the requisite degree of damage, then it should be treated as an international crime.

[5] Ibid., p. 107, para. (6) of the commentary on article 26.

Austria

[*Original: English*]
[*28 January 1993*]

GENERAL COMMENTS

1. First of all, Austria wishes to express its appreciation for the Commission's work in preparing the draft Code of Crimes against the Peace and Security of Mankind. Austria has noted with satisfaction the progress achieved by the Commission on this topic, which ranks high on the international agenda. Austria has consistently supported all endeavours to establish an international criminal court. It is fully committed to all efforts that will enhance and strengthen the international legal order by ensuring that individual perpetrators of serious crimes against the peace and security of mankind will be held fully accountable.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

2. The expression "under international law" in square brackets should be moved from its present position in the draft and inserted after the words "constitute crimes". In the Austrian view, the crimes enumerated in part two are liable to punishment *if committed with intent*, unless otherwise determined.

Article 2

3. The second sentence is not strictly necessary. The fact that the characterization of an act or omission as a crime against the peace and security of mankind is not affected by whether or not such act or omission is punishable under internal law is already to be understood from the first sentence, according to which the characterization is independent of internal law.

Article 3

4. Paragraph 1 regulates criminal responsibility without making any distinction to take account of circumstances which exclude criminal responsibility (cf. article 14). The

text of paragraph 1 should be completed as follows: " . . . if there are no circumstances excluding the criminal responsibility".

5. The wording of paragraph 3 does not make it sufficiently clear that under the present draft Code an attempt to commit a crime under circumstances which could objectively not lead to the actual commission of the crime would not entail criminal responsibility. Article 3 could therefore be made more specific by inserting a paragraph 4 with the following wording:

> "4. Any attempt to commit a crime or participation under circumstances which could objectively not lead to the actual commission of the crime does not entail criminal responsibility."

6. Austria shares the opinion of some members of the Commission who have urged further examination to clarify for which types of crimes covered by the present draft Code the attempt to commit a crime could be considered as liable to punishment. Therefore the expression in square brackets in paragraph 3 should be retained for the time being.

Article 4

7. The motive for the commission of a crime could be taken into account as an aggravating or as an extenuating circumstance (cf. article 14).

Article 8

8. Austria finds itself in general agreement with the substance of this provision, which essentially corresponds to article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. From a linguistic point of view, the introductory words "have the right to" could be dropped.

9. Austria shares the view of the Commission that the appointment of a counsel for the defence is necessary in all cases covered by the present draft Code (see para. (5) of the Commission's commentary to article 8).[1]

Article 9

10. Regarding this provision, attention is drawn to the problem of a *non bis in idem* effect caused by a sentence of acquittal by the State where the crime took place in the case where the perpetrator was acting on behalf of that State. This problem seems to be dealt with in paragraph 4 (*b*).

11. The word "punishment" in paragraph 2 should be replaced by "penalty".

12. The considerations set forth under paragraph 3 (*b*) of the Commission's commentary to article 9[2] should find expression in the wording of paragraph 4, which thus could be completed as follows: "... and these States consider that the decision did not correspond to a proper appraisal of the act or to its seriousness".

Article 11

13. Between the words "responsibility if" and "in the circumstances" the following words should be inserted: "he knew or should have known of the illegality of the order and if,".

Article 14

14. This article deals with two different principles: the need to take account of circumstances excluding criminal responsibility (para. 1) and extenuating circumstances (para. 2). The latter principle (as well as aggravating circumstances) comes into play by determining the extent of the penalty applicable to the perpetrator of a crime, but it has nothing to do with criminal responsibility.

15. Austria does not share the negative attitude of some members of the Commission towards taking into account grounds for exemption from punishment (e.g. plea of insanity) with regard to crimes against the peace and security of mankind.

16. Paragraph 2 should be completed by mentioning aggravating circumstances which are also to be taken into account in determining the extent of the penalty. Austria shares the view of some members of the Commission regarding the insertion of a descriptive enumeration of possible extenuating (and aggravating) circumstances.

PART TWO

17. In principle it must be pointed out that the incorporation of provisions on applicable penalties seems to be indispensable. Owing to the differing degrees of seriousness of the crimes, Austria does not share the view of some members of the Commission that it would be sufficient to limit the scope to providing one single penalty applicable to all crimes defined under the Code. Therefore the wording in square brackets which would later be expanded to include the extent of the penalty in the various articles of part two should be retained.

18. The words "on conviction thereof" in articles 15 to 26 are unnecessary and should be dropped.

Article 15

19. The binding effect of decisions of the Security Council provided for in paragraph 5 seems doubtful insofar as it may infringe upon the competence of a judicial organ to decide on the existence of a material element of a specific crime (an act of aggression).

Article 16

20. The word "would" in the expression "which would give" in paragraph 2 is unnecessary and should be dropped.

Article 17

21. The expressions in square brackets in paragraph 2 should be retained.

Article 18

22. The expression "colonial domination" should be defined specifically in an additional paragraph.

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[1] Article 8 was previously adopted as article 6. For the commentary, see *Yearbook . . . 1987*, vol. II (Part Two), p. 16.

[2] Article 9 was previously adopted as article 7. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), p. 69.

23. The words "contrary to the right of peoples to self-determination" should be replaced by the following: "thus infringing the right of peoples to self-determination".

Article 20

24. Austria finds itself in general agreement with the substance of the provision. However, there are certain doubts as to whether the notion of apartheid should really be retained in this instrument. A more general formulation of the title may be preferable, for instance "Institutionalized racial discrimination".

Articles 21 and 22

25. The relationship between the provisions of articles 21 and 22 (concurrent or cumulative crimes) calls for further clarification. If article 21 is only to be applicable in times of peace, this should be emphasized.

26. The expression in square brackets in article 22, paragraph 2 (*a*), should be retained. The fact that the enumeration is only descriptive is sufficiently emphasized by the words "in particular".

Article 23

27. In principle it may be asked if this crime is serious enough to be included in the present draft Code. The words "in any other situation" in paragraph 3 call for further clarification.

Article 24

28. Austria proposes to revise the wording of this provision to allow for the definition of "terrorist acts":

> "1. An individual who, as an agent or representative of a State, commits or orders the commission of any of the following acts:
>
> undertaking, organizing, assisting, financing, encouraging or tolerating terrorist activities against another State, shall be sentenced [to ...].
>
> 2. Terrorist activities are acts directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public."

Article 25

29. It remains to be seen if this crime should be included in the present draft Code. It is doubtful whether illicit traffic in narcotic drugs is a crime against the peace and security of mankind. Furthermore, the consequences linked with its inclusion in the Code (i.e. imprescriptibility) do not seem desirable from a political point of view.

Article 26

30. Since perpetrators of this crime are usually acting out of a profit motive, intent should not be a condition for liability to punishment.

Belarus

[*Original: Russian*]
[*28 December 1992*]

General comments

1. The draft Code of Crimes against the Peace and Security of Mankind was carefully studied in the Ministry of Justice and the Ministry of Foreign Affairs of the Republic of Belarus. In general, the document drawn up by the International Law Commission is commendable. However, Belarus feels that some individual provisions require clarification and redrafting.

Specific comments on individual articles

Article 1

2. The words "under international law" should be deleted in order to standardize the terms denoting serious violations of international law, normally referred to as crimes. At present, different concepts—"international crimes" committed by States, and "crimes under international law" committed by individuals—are used to denote actions which, objectively speaking, have an identical goal, although they are committed by different perpetrators. The deletion of the words in square brackets would serve to avoid semantic confusion.

3. It is to be hoped that in future the International Law Commission will try to make the provisions of the Code applicable to all perpetrators, including States; this will also make it possible to resolve, in principle, the question of the characterization of crimes. The objections that were raised in this connection (the fact that perpetrators are subject to different regimes from the standpoint of penalties and procedural rules) essentially relate to procedural law and need not be taken into account at the current stage of work on the substantive provisions of the Code. They should be resolved when the procedure for implementing the provisions, which will be different for different perpetrators, is considered. This procedure will obviously have to be worked out in stages, starting with the procedure in respect of the responsibility of individuals, taking into account the criterion of the participation of States, and ending with the procedure in respect of the legal responsibility of States for international crimes.

Article 3

4. This article should also provide for the responsibility of any individual who aids, abets or provides means and other services after the commission of a crime against the peace and security of mankind with a view to concealing both the crime itself, and the guilty parties. It would be advisable also to provide for the responsibility of any individual for an omission—for the failure to report such a crime to the legal authorities both at the preparation stage and once it has been committed. In all cases, it should be stipulated that the act or omission must have been deliberate.

5. Furthermore, article 3, paragraph 2, should include a special reference to the criminal nature of issuing an order to commit a crime against the peace and security of mankind.

6. In paragraph 3, the words "[as set out in arts. . . .]" should be deleted. It would be neither practicable, nor advisable, to consider every crime with a view to determining whether the characterization of attempt is applicable to it; the competent courts should have the right to decide for themselves whether this characterization is applicable to the specific content of cases before them.

Article 6

7. Bearing in mind the preliminary nature of article 6, Belarus is of the view that it should establish two possible types of jurisdiction for the implementation of the Code: universal and international.

8. A rigid comparison should be avoided in any attempt to change the existing situation as regards the machinery for universal jurisdiction. The basic component, extradition, has so many limitations—which, in any case, do not accord with the nature of crimes against the peace and security of mankind—that it is extremely difficult to implement, and at the same time allow the idea of establishing an international criminal court to demonstrate its advantages. A system of universal jurisdiction and an international criminal court are far from being mutually exclusive. Most of the drafts concerning the establishment of such a court do not afford it exclusive jurisdiction in relation to a certain group of criminal offences, but give States the option of choosing between the two mechanisms. This solution is appropriate in cases where a State did not participate in any way in the commission of a crime.

9. In the case of international crimes in which a State participated, in the great majority of cases the system of universal jurisdiction is not an alternative. If there is no external coercion, it will be totally ineffective. However, if it is applied under coercion, that will lead to a situation where national judges will deliver verdicts condemning the actions of other States.

10. Both these mechanisms therefore need to be further developed as alternative measures for the implementation of the Code. First, the provisions relating to extradition for crimes against the peace and security of mankind need to be made more specific. Unfortunately, article 6, paragraph 2, as currently formulated, does not resolve the problem of how to establish an order of priority for requests for extradition in the event that one individual has committed several such crimes, including crimes in the territory of various States. Secondly, further study should be made of the question of establishing an international criminal court which would be competent to judge crimes against the peace and security of mankind, and special consideration should be given to the criterion of the participation of States. Belarus is gratified that this point of view is shared by most States Members of the United Nations, as was demonstrated by the discussion in the Sixth Committee of the General Assembly at its forty-seventh session.

11. The formulation of article 6, paragraph 1, would be improved if it referred not to "an individual alleged to have committed a crime" but to "an individual in respect of whom there are grounds to believe that he committed a crime against the peace and security of mankind". This would exclude any possibility of applying article 6 against an individual in the absence of information about his guilt.

Article 11

12. In article 11, the words "if, in the circumstances at the time, it was possible for him not to comply with that order" should be replaced by the words "if, in that situation, he had a genuine possibility of not carrying out the order".

Article 14

13. In Belarus' view, the Russian version of article 14 should refer to circumstances attenuating responsibility rather than circumstances attenuating guilt. Moreover, this article should be divided into two separate articles, since paragraphs 1 and 2 refer to different legal concepts. In the article referring to the grounds which would allow for adjustment of the penalty, these grounds should be specified and should include self-defence, state of necessity, coercion and bona fide confusion (error). The possibility of applying them to each type of crime could be left to the court to consider.

14. The question of extenuating circumstances can be considered in conjunction with the question of penalties. It would be preferable to formulate a general article on penalties for all crimes, establishing the minimum and maximum penalties and listing the extenuating circumstances. An alternative to including a scale of penalties, in the event that the provisions of the Code are applied by national courts, could be to require that the crimes should be punished in a manner commensurate with their extreme danger and gravity.

15. The list of extenuating circumstances could be indicative in nature and could include, in particular, the commission of a crime under duress, on the order of a superior; and sincere remorse or acknowledgement of guilt.

16. It is commendable that the draft Code refrains from drawing a distinction between crimes against peace, war crimes and crimes against humanity. At the same time, care should be taken at the stage of formulating substantive legal provisions to avoid distinguishing between crimes on the basis of State participation. The criterion of State participation will be of crucial importance at a later stage, when the mechanism for implementing the Code is worked out.

PART TWO

17. In the light of the above-mentioned considerations on penalties and the inclusion of article 3 (Responsibility and punishment), which provides for the responsibility and punishment of an individual, the change that was made in 1991 to the initial provisions (these are now the new first paragraphs) of the articles of part two of the draft Code, concerning the perpetrators of crimes against the peace and security of mankind, is not really appropriate. The change relates in particular to articles 15, 16, 17, 18 and 20, where the perpetrator of such crimes as aggression, the threat of aggression, intervention, apartheid, and so on, is "an individual who as leader or organizer . . . ". In the view of Belarus, this formulation restricts the category of individuals and the extent of their responsibility.

Moreover, it runs counter to the general principles of responsibility and punishment laid down in article 3 of the draft Code, which refers to the responsibility of any individual, regardless of whether or not he was a leader or organizer.

18. While welcoming the inclusion in article 15 of responsibility for the planning of aggression, the competent bodies of the Republic of Belarus consider that the list of criminal acts should also include the preparation of aggression, particularly since planning is only one of the elements of preparation.

19. With regard to the distinction made in article 15 between the functions of the Security Council and those of the judicial authorities, it should be noted that the distinction can be viewed only as a temporary measure. If the Security Council's determination as to the existence of an act of aggression is to have binding force on national courts, what is needed is not only a legal formulation of this obligation in an international treaty, but also the existence and observance of some legal procedure (for example, a requirement for the preliminary establishment of a commission of inquiry), which would guarantee the objectivity of the Council's decision. Clearly, this decision can in no way prejudge the question of the guilt of a particular individual in committing aggression.

20. If an international criminal court is established within the United Nations, the question of the delimitation of competence between it and the Security Council will require further study.

21. In Belarus' view, the word "[armed]" in article 17, paragraph 2, should be omitted since economic measures can also be categorized as intervention. At the same time, article 17 should refer to the most serious forms of intervention, and the word "seriously" should therefore be retained in the text.

22. The category of perpetrators of crimes of international terrorism as set out in article 24 should be expanded. The Code cannot disregard the scale of acts of international terrorism committed by terrorist organizations and groups which are not necessarily linked to a State, and the threat posed by such acts to the peace and security of mankind. In any event, the participation of a State cannot be a criterion for defining terrorism as a crime against the peace and security of mankind.

23. Finally, Belarus is of the opinion that during the second reading of the draft Code the International Law Commission could revert to the question of the inclusion therein, as a crime against the peace and security of mankind, of the violation of a treaty designed to safeguard international peace and security.

Belgium

[Original: French]
[1 February 1993]

1. The draft articles on the draft Code of Crimes against the Peace and Security of Mankind, as prepared by the International Law Commission, are largely acceptable. The draft is the product of particularly thorough consideration of a set of juridical concepts applicable to various situations that are often difficult to define and for which it is hard to find a common denominator. Clearly, in theory, there are other possible options, particularly with regard to the list of crimes. However, a broad consensus can be reached on this exhaustive, balanced draft.

2. The observations set out below deal with the following points: the lacuna resulting from the fact that the draft contains no articles on an international tribunal; comments on a number of concepts relating to definition and characterization; and some remarks on a number of crimes, chiefly genocide.

I. International tribunal

3. The fact that there are no articles on the competence of an international criminal tribunal clearly constitutes a lacuna. It would have been advisable to include in the draft Code of Crimes against the Peace and Security of Mankind a chapter on the establishment of an international criminal tribunal, specifying the competence of the tribunal and procedural modalities.

4. It has been said repeatedly that crimes constituting breaches of the international order must fall within an international jurisdiction. In fact, it is essential that there should be an international jurisdiction; without one, there is no guarantee that the perpetrators of crimes against the peace and security of mankind will be punished.

5. Where national courts are called upon to pass judgement on the conduct of foreign Governments in connection with a particularly serious matter concerning the conduct of States, regardless of whether it is a Government itself or its agents that are responsible for the criminal act in question, it is likely that they will not be equal to the task. The principle of universal prosecution and punishment and extradition procedures have proved largely ineffective in this connection.

6. The competence of an international tribunal should not, a priori, preclude the competence of national courts. However, in order to ensure that the system of prosecution and punishment is as effective and well-defined as possible, the international tribunal should be given not only concurrent competence with national courts but also the competence to pass judgement on decisions of national tribunals under appeal.

7. Furthermore, recourse to the international tribunal should not be optional. A reservation with regard to competence in this respect, as provided for in article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, which stipulates that the international penal tribunal shall have jurisdiction with respect to those contracting parties which have accepted its jurisdiction, cannot be regarded as admissible. In that connection, Mr. Graven indicates as follows:

> However, that approach ignores the *mandatory nature* of the criminal jurisdiction. It is admissible, in some cases, to select the competent court (particularly the competent arbitral tribunal) to which to submit *disputes*; but it must not under any circumstances be possible, in the event of a criminal action or *criminal proceedings*, to avoid the criminal jurisdiction that has been established.[1]

[1] "Les crimes contre l'humanité", *Recueil des Cours . . . 1950-I*, Paris, Sirey, 1951, vol. 76, pp. 427 et seq., in particular p. 520, note 3.

II. Definition and characterization

8. The draft Code does not define what is meant by crimes against the peace and security of mankind, but establishes a list of the crimes concerned.

9. It is not really necessary to choose between a conceptual definition and an enumerative list of crimes, since the two approaches are complementary. It is regrettable that no conceptual definition is given, since, whatever the difficulties involved in establishing such a definition, it remains true that the list of crimes must inevitably be based on it.

10. Several criteria could be used to define what is meant by crimes against the peace and security of mankind. In its commentary, the Commission refers to crimes which affect the very foundations of human society, with the crimes being considered in the light of their seriousness and the extent of their effects. A more accurate definition could be obtained by drawing a distinction between crimes against the peace and security of mankind and ordinary crimes. That distinction would apply in the case of breaches of the international order and responsibility on the part of a State, where the latter was responsible either directly or indirectly because it tolerated the crime or failed to take the measures necessary to prevent situations constituting a breach of the international order from occurring.

11. If an article of the Code were to provide a definition of the crimes in question, the reference to international law contained in article 1 would be superfluous.

12. It is vital that a scale of penalties for each crime should be included in the draft Code.

13. The crimes in question are essentially breaches of the international order. It therefore seems unusual that the establishment of penalties should be left to the discretion of internal laws, which would result in different penalties being applied to the same offence of causing a breach of the international order.

14. The draft Code deals only with individual criminal responsibility and leaves undecided the question of the international criminal responsibility of States.

15. There ought to be an article in the Code dealing with the question of the international responsibility of States. The State as such is inevitably involved in any crime against the peace and security of mankind, either directly as the active and, in some cases, the sole agent, or indirectly because of its failure to act on its improvidence. It therefore seems unusual that State responsibility should not have been dealt with in the Code. It should also be noted that inclusion of State responsibility in the Code would make it possible to provide a sound juridical basis for the granting of compensation to the victims of crimes and other eligible parties.

16. Moreover, holding the State responsible for crimes, independently of the responsibility of the Government and agents of the State, would mean that the nation would feel some collective involvement in the act in question, thereby making it difficult for it to lay all the blame on the Government on which it has conferred political power.

17. It would appear difficult to apply the concept of defences, as provided for under draft article 14, to crimes against the peace and security of mankind.

18. The question thus arises whether it would be preferable to delete article 14. Hypothetically, a judge could invoke the general principles of criminal law, such as extenuating circumstances, when having to assess the situation in which the crime was perpetrated.

III. Crimes against the peace and security of mankind

(a) *Aggression and threat of aggression*

19. Article 15, paragraph 5, provides that any determination by the Security Council as to the existence of an act of aggression is binding on national courts. The Security Council is the United Nations organ competent to determine the existence of any act of aggression or threat to the peace (Art. 39 of the Charter of the United Nations). It therefore seems logical that a judge should be bound by those determinations, which are imposed on all States, and consequently on all State organs, including courts of law. This limitation of a judge's discretionary powers should be strictly interpreted in that the judge would be bound only to the extent that the Security Council, having had the case submitted to it, determines the existence or absence of aggression.

(b) *Intervention*

20. It is justifiable to retain armed activities as the sole form of intervention. The concept of a crime against the peace and security of mankind necessarily implies that a particularly serious act, threatening the foundations of society, is involved. In addition to the difficulty of assessing the scope of economic forms of intervention, such intervention does not appear to fit the concept of a particularly serious act. However, assuming that the Code must include forms of intervention other than armed activities, it should indicate what they are.

(c) *Genocide*

21. With regard to the groups targeted by acts of destruction, the draft Code reproduces the exhaustive list contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide: "National, ethnical, racial or religious groups". A non-exhaustive list of groups could quite easily have been produced. Reference has been made on several occasions to a non-exhaustive list, examples of which are:

(*a*) The statement by France at the Nürnberg trial referring to certain religious, national or racial groups;

(*b*) The definition of genocide in General Assembly resolution 96 (I) of 11 December 1946: "Genocide is a denial of the right of existence of entire human groups";

(*c*) The amendment proposed by France during the discussions in the Sixth Committee in connection with the drafting of the Genocide Convention "particularly by reason of his nationality, race, religion, or opinions".[2]

22. The non-exhaustive nature of the list of groups is totally justified: genocide is a concept intended to cover a variety of situations which do not necessarily fit the

[2] United Nations, *Historical Survey*... p. 145, appendix 15, art. I (text previously published under the symbol A/C.6/211).

mould of the few examples documented by history. Thus, in the case of the acts of genocide perpetrated in Cambodia, the target group did not have any of the characteristics included in the definition of genocide set out in article II of the Convention.

23. Those in favour of an exhaustive list of target groups have pointed out the need to avoid any vague legal definition. Such an approach could be adopted, but care must be taken to ensure that the list is in fact exhaustive. It should be noted, however, that both international and internal law rely on concepts that are not well defined; this is particularly true of the concepts of *jus cogens*, "public order" and "morals".

24. It has also been pointed out that acts of genocide which fall outside the scope of the concept of the crime of genocide as defined under the 1948 Convention, could be regarded as "systematic or mass violations of human rights". There are two objections to this approach. First, genocide differs from systematic violations in that in the case of genocide a particular group is the target. Secondly, the list of acts is not the same in the case of each of the two crimes under discussion.

25. Consequently, the definition of genocide should be reviewed. There are two possible solutions: either to adopt a non-exhaustive list of groups, or to supplement the exhaustive list with other notions such as those of political and socio-economic groups. It should be noted, in this connection, that reference was made to the concept of a political group during the discussions in the Sixth Committee with respect to the drafting of the Genocide Convention.[3]

26. Article 26 deals with wilful and severe damage to the environment. As noted in the relevant commentary, cases of damage by deliberate violation of regulations forbidding or restricting the use of certain substances or techniques if the express aim is not to cause damage to the environment are excluded from the scope of article 26.[4] The commentary also indicates that article 26 conflicts with article 22, on war crimes, because under article 22 it is a crime to employ means of warfare that might be expected to cause damage, even if the purpose of employing such means is not to cause damage to the environment.[5]

27. This difference between articles 22 and 26 does not seem to be justified. Article 26 should be amended to conform with the concept of damage to the environment used in article 22, since the concept of wilful damage is too restrictive.

[3] Ibid., p. 42; see also A/C.6/SR.129, p. 7.

[4] *Yearbook... 1991*, vol. II (Part Two), p. 107, para. (5) of the commentary on article 26.

[5] Ibid.

Brazil

[*Original: English*]
[*29 January 1993*]

General comments

1. At the outset, it is worth noting that the general part of the draft should be revised. Articles 11 to 13 are in fact related to some aspects of individual responsibility and should be placed immediately following articles 3 and 4. Article 5 should conclude this first series of principles. Furthermore, in comparing the English, French and Spanish texts of the articles of the draft Code, we noted differences between them. Brazil must emphasize the importance of the French and Spanish translations, particularly in view of the fact that Brazilian law is based on the system of civil law. In this context, it is worth recalling that the title of article 7 on the time-honoured "imprescriptibility of crimes" has been rendered in English as "Non-applicability of statutory limitations".

2. Brazil has no objection whatsoever to the structure of the draft. It is assumed, however, that besides the general principles and the part on characterization, additional sections are to be included relating not only to an international court but also to a system to execute the punishment, in which even an international correctional institution could be considered.

Specific comments on individual articles

Article 1

3. As far as the first article is concerned, on the definition of crimes covered by the Code, it would be preferable to delete the wording in square brackets, "under international law", since any crime which is defined in an international treaty is considered a crime under international law. At the most, Brazil could agree with the suggestion put forward at the end of the commentary on this article, namely that if this wording is retained it should be inserted in the second line of the draft article, after the words "constitute crimes".[1]

Articles 2 and 3

4. There appears to be a contradiction between articles 2 and 3 of the draft. In accordance with article 2, a crime against the peace and security of mankind is "an act or omission". However, article 3 refers only to an individual who commits or attempts to commit a crime (paras. 1 and 3) and to "commission of a crime" (para. 2). Article 3 does not make the distinction between act and omission, which is contemplated in article 5: "Prosecution ... does not relieve a State of any responsibility ... for an act or omission attributable to it".

5. Clearly, this contradiction, which also indicates the existence of a lacuna in the draft, was not overlooked by the Commission. In fact, in paragraph 2 of the commentary to article 10,[2] the Commission considers that the word "acts" should be interpreted as "acts or omissions", and that this interpretation "would form the subject, in due course, of a special provision explaining the meaning of the term whenever it is employed in the draft Code". Notwithstanding the formulation of this provision, the rule of article 3 should be reviewed in order to embody a provision similar, for instance, to article 13, paragraph 2, of the Brazilian Criminal Code and to other criminal codes, which states that the omission is criminally rel-

[1] *Yearbook... 1987*, vol. II (Part Two), p. 16 (art. 6) of the commentary on article 1.

[2] *Yearbook... 1988*, vol. II (Part Two), p. 70.

evant when a person who commits an "omission" should and could act to avoid the result.

6. It should be noted that the provision of article 3, paragraph 2, refers to at least three different acts relating to delicts which would require definition: (*a*) aiding, (*b*) abetting and (*c*) inciting. The fact that no fewer than two paragraphs of the commentary[3] deal with this provision emphasizes the importance of undertaking an in-depth and comprehensive analysis of its content.

7. It should be noted that the Spanish text of this provision seems to differ from the French text: the first refers to *asistencia o los medios*, and the other to *une aide, une assistance ou des moyens*.

Article 6

8. Paragraph 1 should be improved since, not only for the trial but also for the extradition, the mere allegation of the commission of a crime against the peace and security of mankind would not be sufficient; supporting information must be presented.

9. The future Code should distinguish between extradition (which only applies in the case of a trial before a national court) and the handing over of an individual alleged to have committed a crime for a trial in an international court. Assuming that an international court is to be established, paragraph 3 of article 6 will disappear and the other paragraphs will need to be reworded somewhat.

Article 8

10. Article 8, subparagraphs (*c*) and (*g*), should also be improved. In fact, the right of an individual charged with a crime to communicate with the counsel of his own choosing should be extended to the counsel assigned to him (see subparagraph (*e*)). Nevertheless, the right to have the free assistance of an interpreter should not be limited to the hearings but should apply at all stages of the proceedings.

Article 9

11. Some provisions, such as articles 6 and 9, are linked to the question of whether or not an international criminal court is established. Article 9 is particularly puzzling. It aims at ensuring the principle of *non bis in idem* among the national and international jurisdictions. However, the Commission drafted it before having decided on the jurisdictional system to be applied (international criminal court or national courts). A complex system of exceptions was therefore established which ultimately led to negative effects, as in the drafting of other articles, like article 6. As far as paragraph 1 is concerned, it should expressly state what is pointed out in paragraph (2) of the commentary, namely "that the word 'acquitted' meant an acquittal as a result of a judgement on the merits, not as a result of a discharge of proceedings".[4]

[3] *Yearbook ... 1987*, vol. II (Part Two), pp. 98-99, paras, (3) and (4).

[4] Article 9 was previously adopted as article 7. For the commentary, see *Yearbook ... 1988*, vol. II (Part Two), p. 69.

Article 14

12. As far as article 14 is concerned, what is stated about the "defence and extenuating circumstances under the general principles of law" seems to be insufficient. The provisions are somewhat vague since it is difficult, based only upon "the general principles of law", to indicate which circumstances should be taken into account. As a matter of fact, the large number of such broad-ranging provisions seems to be one of the most difficult problems hampering the Commission's effort to codify. As far as the draft is concerned, criminal law, by its very nature and the values involved, requires a greater level of definition and demands more detailed regulation.

PART TWO

Concerning the provisions of part two, in which the crimes are defined, the Commission should opt for a restrictive characterization. The inclusion of crimes such as the threat of aggression (art. 16) and the recruitment, use, financing and training of mercenaries (art. 23) could be embodied in an international criminal code but not necessarily in the Code under consideration. It also seems unjustifiable to include an article on intervention (art. 17), a concept too broad to be dealt with in the context of individual responsibility. The acts identified in the article could be considered crimes, but without reference to the general concept of intervention. It is understandable that the Commission may feel tempted to enlarge the mandate entrusted to it, seeking to prepare a draft Code which goes beyond the framework of crimes against the peace and security of mankind. This could lead, however, to negative results, including imprecision and lack of technical accuracy.

14. It should also be pointed out, however, that with the exceptions of the crimes of aggression, genocide and apartheid (arts. 15, 19-20), where the definitions do not stray from those in the existing international instruments, the characterization of crimes is not sufficient. In the case of article 21, although it is entitled "Systematic or mass violations of human rights", the text could be read as implying that individual cases of murder or torture would be crimes against the peace and security of mankind. It seems necessary, therefore, to clarify the scope of the expression "in a systematic manner or on a mass scale", in order to indicate that the Code will only cover acts with an international element, whether committed with or without the toleration of the State. Likewise, there is an international element in the crime of terrorism ("as an agent or representative of a State ... against another State") meaning that the crime described in article 24 may only be punished in accordance with the Code when it is committed or ordered by an agent or representative of a State against another State. The absence of an international element with regard to the crime described in article 25 (Illicit traffic in narcotic drugs) is not justifiable. Likewise, the crime of wilful and severe damage to the environment is also characterized without any reference to the international element.

Bulgaria

[*Original: English*]
[*4 February 1993*]

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

1. A conceptual definition is preferable in article 1 of the draft, whereby a general meaning will be rendered for the term "crime against the peace and security of mankind". This position is based on the understanding that in essence a conceptual definition defines the nature of a given type of crime, its basic characteristics and elements. It is necessary to outline precisely the method and principle which will be used to determine whether a given offence could be considered as a crime against the peace and security of mankind. Thus, on the one hand, a certain crime may formally have the characteristics of one of the criminal acts listed later in the draft, but in the concrete circumstances it may not be of sufficient gravity to qualify as a crime against the peace and security of mankind. In this way, the individual rights of the perpetrators will be better safeguarded. On the other hand, in order to observe the principle of criminal law according to which crimes and their respective punishments are determined only by law, it is necessary, as pointed out below (see paragraph 8), to set aside a special part of the Code where the particular characteristics of the crimes in question will be outlined. In this connection, a sentence should be added to the text of article 1 limiting the scope of the Code to the types of crime listed therein. Thus, the draft Code will draw on the positive aspects of the two possible approaches to the matter.

2. It is also proposed that circumstances affecting guilt should also be defined, such as participation in a group or organized type of criminal act. An argument in support of this view is that many national legal systems treat the organized or group commission of a crime as an aggravating circumstance. A criminal act committed by an individual and one committed by a group or organization, which usually has much graver consequences for the peace and security of mankind, cannot be placed on the same footing. In this connection, Bulgaria proposes that the fact that a given crime was committed by a group of people or by an organization should be considered as an aggravating circumstance in determining the type and degree of punishment for the crimes listed in this Code.

3. In line with the above, it is suggested that the definition contained in article 1 of the draft Code should be amended to read as follows:

"*Article 1. Definition*

"1. For the purposes of this Code a crime against the peace and security of mankind is any act or omission committed by an individual, which is in itself a serious and immediate threat to the peace and/or security of mankind or results in violation thereof.

"2. In particular the crimes defined in this Code constitute crimes against the peace and/or security of mankind."

Article 9

4. The wording of article 9, paragraphs 3 and 4, constitutes a substantial violation of the basic *non bis in idem* principle of criminal law and in this sense constitutes an abuse of human rights. In order to protect human rights, Bulgaria proposes the addition of the following wording at the end of paragraph 3: " . . . provided that the sanction enforced on him is apparently not corresponding to the seriousness of the crime committed". This wording should also be added at the end of paragraph 4, before subparagraphs (*a*) and (*b*).

5. Such an approach makes it possible to judge in each particular case whether the penalty imposed by a given State corresponds to the gravity of the crime committed, as well as to implement the clauses of paragraphs 3 and 4 of article 9 only in cases of blatant discrepancy.

Articles 15 et seq.

6. Articles 15 et seq. list the various types of crimes against the peace and security of mankind. In Bulgaria's view these should be grouped in a separate chapter entitled "Crimes against the peace and security of mankind", while articles 1 to 14 should be grouped in a chapter entitled "General provisions".

7. It is proposed that where the person who committed the crime has been defined as "leader or organizer" (under arts. 15, 16, 17, 18 and 20), this should be considered as an aggravating circumstance, as well as in cases where an individual has participated in the commission of a crime as part of a group or organization, in line with the arguments presented above. These qualifying circumstances should be considered when determining the type and degree of the penalty for a certain crime.

8. Article 16 should contain wording identical to that in article 17, paragraph 3, and should be reproduced as it is in article 16, too, since in both cases acts committed with the purpose of protecting the right of a nation to self-determination should not be included in the scope of the Code.

9. It is proposed in article 21 that the expression "persecution on social, political, racial, religious or cultural grounds" should be supplemented by the expression "including inhuman and degrading treatment based on such grounds".

10. During the consideration of the Draft Code of Crimes against the Peace and Security of Mankind, the members of the Bulgarian delegation should emphasize that, according to the Constitution of Bulgaria, international agreements become, from the day they take effect in our country, an integral part of our internal law. It is worth noting, however, that by the terms of decision 7 of the Constitutional Court of the Republic of Bulgaria in constitutional issue No. 6/1992, "in order for acts considered as criminal under international agreements to be included in internal law, constitutive elements of characterization and penalty for each crime must be specified in an internal law whose scope is determined by the requirements of internal law". In other words, in order for individuals who have committed crimes under the Code to be prosecuted, the various crimes defined in the Code have to be included in internal law and a penalty has to be specified for each.

Costa Rica

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General comments

1. The following analysis of the draft Code of Crimes against the Peace and Security of Mankind deals not only with the draft itself but also with the commentaries to each article provided by the Drafting Committee. Costa Rica considered it important to take the commentaries into account since they are meant to complement the articles and give an indication of the doctrinal trends upon which they are based. Any analysis of the draft would be incomplete if it did not take account of the authors' commentaries.

2. An attempt has been made to consider the text article by article, as far as possible, dealing with each major section or part separately. This approach has been taken in order to facilitate consideration of the report and aid comprehension of the original draft, thus clarifying objections and potential ways of overcoming problems relating to legality and constitutionality to which the original draft may give rise.

3. An attempt has also been made to provide information on major features of constitutional and criminal review practice so that the Commission may take note of and assess the precedents in question. This should help the Commission make headway on issues relating to the draft that are the subject of negotiations among various countries, including Costa Rica, which is embarking on a new constitutional interpretation of criminal law and is particularly concerned that the draft should be compatible with its Constitution.

I. General part of the draft

Definition and characterization of crimes (draft arts. 1 and 2)

4. In Costa Rica's view, draft article 1 opts for a definition that tends to be based on the specific characteristics of crimes against the peace and security of mankind. Such a characterization takes account of a number of specific features among which the seriousness of the acts described as crimes has unanimously been accepted as a criterion.

5. There is unanimity on the "cruelty", "monstrousness" and "barbarity" that may be involved in the perpetration of punishable acts such as those dealt with in the draft. These are acts that result in victims among peoples, populations and ethnic groups. As the commentary indicates:

> [. . .] it is this seriousness which constitutes the essential element of a crime against the peace and security of mankind—a crime characterized by its degree of horror and barbarity—and which undermines the foundations of human society.[1]

6. In general, it can be agreed that the acts in question are extraordinarily serious and that account must be taken of their effect on potential victims. Above and beyond the protection of the rights of the individual, what is at issue is the protection of juridical interests relating to a large number of individuals making up a people, ethnic group or race. The violation of these interests may involve a crime of a massive and systematic nature, as recognized by the draft, but that should not lead to the explicit conclusion that the Commission appears to be drawing, namely that "guilty intent" must always be presumed and "need not be proved", that such intent "follows objectively from the acts themselves and there is therefore no need to inquire whether the perpetrator was conscious of a criminal intent".[2] The Commission is accepting that there is strict liability for crimes against the peace and security of mankind, an issue thought to have been settled many years ago through criminal law based on guarantees.

7. Strict liability is no longer accepted in any liberal system of criminal law, since it requires that responsibility be established without any assessment of the individual perpetrator's intent when he committed the crime, it being sufficient for punishment of the act that he accepted the risk of a given outcome or the possibility that his act would result in the violation of a juridical interest. Most States subject to the rule of law, including Costa Rica, decided not to accept strict liability in their criminal law. They opted instead for individual responsibility based on whether the individual concerned showed wilfulness (*dolus*) or negligence (*culpa*) in committing the act in question. Under legal systems such as Costa Rica's, punishable acts are presumed to be wilful, unless otherwise stated, in which case the legislator usually describes the act as culpable. However, wilfulness is not presumed on the basis of the individual's act; it must be demonstrated in order to prove the existence of the individual element required for the decision on characterization that is one of the initial steps in the judicial examination of a criminal case.

8. The issue of wilfulness arises in the typical judicial examination. It is of enormous importance, not only because it concerns characterization itself (since wilfulness is regarded as a component of the description) but also because wilfulness must be demonstrated. It is thus necessary to establish whether in the specific case at issue an error of characterization has occurred. If there has indeed been such an error, wilfulness does not apply and (if there is a parallel description based on the concept of negligence) the act in question is punished as culpable negligence (art. 34 of the Costa Rican Penal Code). In Costa Rican criminal law, it has been established that the issue of wilfulness does not depend on the degree of culpability but on characterization and that the judge must therefore pay particular attention to the problems normally surrounding the phenomenon of intent (will and knowledge).

9. The Constitutional Court, the highest court with competence to interpret the Constitution, has established that the guarantees laid down in article 39 of the Costa Rican Constitution of 1949 prohibit strict liability in criminal matters. Any description aimed at attributing responsibility on the presumption that the perpetrator is guilty by reason of the consequences of his act, the risk it entailed, or the predictability of the outcome is therefore clearly unconstitutional in the absence of wilful intent.

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[1] *Yearbook . . . 1987*, vol. II (Part Two), p. 13, paragraph 2 of the commentary on article 1.

[2] Ibid., para. 3.

10. Costa Rica consequently believes that there could be not only legal but also constitutional incompatibility with a description of strict liability in the draft, and that, for that reason, individual responsibility should be adopted. Individual responsibility is much more coherent from the viewpoint of the Commission's goal, since it is entirely in keeping with the desire to apply the Code to individuals rather than to States.

11. Moreover, with regard to draft article 2, it is important to indicate that, although for the purposes of characterization there is no need to take account of whether or not the act in question is covered by internal law, it is necessary in drawing up legislation to pay special attention to constitutional prohibitions against criminal acts. As already indicated, in Costa Rica a particularly noteworthy prohibition of this type is the prohibition against characterizations of criminal acts that do not protect specific juridical interests and against characterizations of criminal acts for the purpose of imposing a punishment on the basis of the principle of strict liability. The Drafting Committee must pay due regard to such prohibitions. The inclusion in the draft Code of principles that constitute exceptions to guarantees laid down in national constitutions regarding criminal matters could give rise to serious problems of practical application should the Code eventually become international law.

12. Article 2 gives rise to another problem of great concern to Costa Rica, which therefore feels obliged to suggest that the second sentence, reading: "The fact that an act or omission is or is not punishable under internal law does not affect this characterization." should be redrafted. First, it should be pointed out that the words "this characterization" specifically refer to the articles on crimes against the peace and security of mankind. This gives rise to the following two possible interpretations: (*a*) that if there are parallel descriptions (one under internal law and another similar one under the Code of Crimes against the Peace and Security of Mankind), the description laid down under international law must be applied; or (*b*) that the two jurisdictions could coexist, both having full powers to investigate the case and to impose a penalty—this would necessarily mean accepting the possibility of prosecution twice for the same deed. Secondly, Costa Rica believes that the sentence should be deleted because it would necessitate clarification of potential jurisdictional problems arising as a consequence of the first problem, particularly as regards rules on statutory limitations and procedural and substantive guarantees that would lead to the application of international rules of law.

13. The problems in the first category are insoluble because the constitutions of most Latin American countries, including Costa Rica, prohibit punishment twice for the same act, which is what would happen if the appropriate penalty were applied first under internal law and then under international law. With regard to the second category of problems, there is much to be gained from not embarking on definitions of the jurisdictional principles requiring implementation of the draft; among other things, there is the difficulty that would arise in a situation where the State that arrests the alleged perpetrator is a party to the Code of Crimes but—in keeping with the principle of arrest—applies its own criminal laws and not the provisions of the Code, even though another principle (universality or territoriality) calls for application of the rules laid down in the draft. Clearly, the Commission's aim was to avoid the latter problem, but Costa Rica believes that the current drafting would present all the disadvantages mentioned above, which can easily be avoided through the deletion of the relevant sentence.[3] In Costa Rica's view their objection was justified.

II. General principles (arts. 3-14)

Article 3

14. In view of Costa Rica's conclusions on the issue of individual responsibility, it believes there is a need to include an article dealing with the principle of legality in connection with the acts under consideration, including, in particular, a definition of one of the most important related principles: the principle of culpability.

15. Paragraph 1 of article 3, which is poorly worded, should also cover responsibility on the grounds of wilfulness, negligence or preterintention. It should do so not only as a matter of general principle but also in order to dispel any idea that there might be such a thing as punishment in accordance with the principle of strict liability, which is a "sword of Damocles" hanging over the draft, threatening its potential success.

16. Paragraph 2 deals with complicity, conspiracy and incitement, all at once—a rather questionable approach. It is suggested that a separate section should be drafted on perpetration and participation, covering the most recent relevant principles. Conspiracy should be left out, since the corresponding penalty would be a punishment for ideas or decisions that took shape but did not materialize as an effective threat to a juridical interest protected under penal law. The concept of conspiracy often arises in Anglo-American law but is unknown in the law derived from continental Europe. Therefore there will be difficulties getting the Latin American countries to adopt it, owing to their highly justifiable reservations based on recent democratic achievements that are a reaction to certain de facto Governments and aim to counter any possible pretext for the punishment of individuals with different views. Latin America has had experience with dictatorial regimes which make a practice of using the terms "conspiracy" and "criminal association" in order to punish individuals with different views, thus punishing dissidents and acts directed against the regime, even though such acts constitute no more than the exercise of an individual freedom already directly curtailed through the exercise of authoritarian power.

17. With regard to the issue of the responsibility of the State and the commission of the punishable acts described under the draft Code, it must be stressed that if the principle of individual responsibility is taken as a basis it is necessary to punish State agents who have either personally or indirectly, or in complicity with other perpetrators, committed the acts described in the draft. In such a case the responsibility of States would be limited to joint and several liability for damages, in the event of offences

[3] Some members of the Drafting Committee appear to have been in favour of deleting the second sentence, which they did not consider strictly necessary.

committed by State organs. Costa Rica believes that the members of the Commission are right in indicating that the potential responsibility of States as perpetrators of the acts in question would lead to a transformation of the principles underlying the punishment of the acts on account of individual responsibility. It would oblige the drafters to move closer to the type of principles relating to penal matters that are being developed for the punishment of crimes perpetrated by transnationals, whose representatives are answerable, like those of States, in accordance with a set of laws and principles to be reviewed in the light of each particular country's constitution.

18. Such specific acts as helping perpetrators escape and eliminating the instruments or proceeds of the crime should be specifically characterized as crimes and not be left to be construed merely as a form of complicity; such an approach is in keeping with the principle of legality and facilitates evidentiary tasks. Clearly, those who commit such acts with a view to helping perpetrators of crimes against humanity escape are not participating in the principal act, but they are taking part in acts of "concealment" and it is for these crimes that they must be punished.

19. On paragraph 3—which deals with attempt and contains a definition that is quite in keeping with the internal legislation of most States—Costa Rica's only comment is that it is unnecessary to specify which articles define acts constituting attempt, because the acts in question must be defined on a case-by-case basis; leeway must be left for interpretation in this area, in view of the wide range of preparatory acts and forms of commission of the acts defined in the draft as crimes.

Article 4

20. It is understandable that the Drafting Committee should believe that nothing can justify a crime against the peace and security of mankind. However, as already indicated, the principle of strict liability cannot be used if there is no requirement regarding the perpetrator's intent and knowledge, and if there is no opportunity to take account of motives that might indicate that an error of characterization or prohibition has been made in the judicial study or analysis of the matter.

21. While it is true that the judge may not take into account trivial or inadmissible motives in order to justify or attempt to lessen the responsibility for a given act, it is also true that considering and promoting the rights of the defence is one of the most modern and advanced manifestations of respect for human dignity. These rights do not arise only in a formal context but also in a practical context, where use is made of all available regular and special judicial remedies and where the accused is presumed innocent and continues to be so presumed while arguments are put forward based on a series of facts and circumstances, it being for the investigating body to refute them in order to prove culpability beyond all reasonable doubt. It is true that the juridical interests that are to be protected by the laws under consideration are very extensive, but that is no reason to ignore the fact that respect for justice begins with respect for the accused. It is therefore essential not to hinder the defence, but instead to pave the way for solutions and ensure that the penalty ultimately imposed reflects not the degree of immorality of an act but an assessment of the crime of which an individual is guilty.

Article 5

22. Provided that the international responsibility of States is referred to in the terms used in the relevant literature under international law, Costa Rica endorses the current wording of the article. However, note should be taken of the earlier reference to the civil liability of the State, which is jointly and severally liable for damages in connection with the crimes under consideration.

Article 6

23. These extradition rules must undoubtedly be reconciled with the United Nations rules on the subject (Model Treaty on Extradition).[4] The theories which are currently being developed with regard to international courts composed of judges of varying backgrounds and jurisprudence are of grave concern, because such a composition could affect the rights of the defence in view of the uncertainty whether rules of interpretation would be utilized to define aspects of the crime of which the individual concerned would later be accused. In this connection, it is recommended that it should be national courts which try criminal acts or extradite in accordance with a multilateral treaty on extradition which takes into account the most up-to-date systems for protecting the rights of the accused, while also offering minimum guarantees for the prosecution of crimes.

24. Special care should be taken in the formulation of global policies with regard to interpolice cooperation and the joint support of all justice systems for the handing over of prisoners, an area in which the first steps have barely been taken.

25. The issue of an international criminal court is problematic in and of itself, not only because of the possible types of jurisdiction which may be conferred on it, but also because of the need felt by all States to ensure that their nationals are afforded all the judicial guarantees already established and provided by their internal law. Costa Rica is a special case in this regard since, while the extradition of aliens is permitted, the extradition of nationals is prohibited and, in the final analysis, Costa Rica is constitutionally barred from allowing one of its nationals to be compelled to leave the country in order to be tried by a body such as the one which it is proposed to establish. However, the main problems do not stem solely from these types of principles concerning extradition, since the discussion which will always be on the agenda will have to do with the guarantees afforded to the accused, the characterization of conduct constituting a crime and the penalties imposed for criminal acts, in addition to the measures by which the internal law of each State ensures the implementation of the principle of universal justice, an aspect which would directly affect the exercise of an international court's jurisdiction.

26. Without prejudging the issue, since the characteristics of this international court have not yet been defined,

[4] General Assembly resolution 45/116, annex.

it is possible that it could be declared unconstitutional under the Costa Rican Constitution.

Article 7

27. It is true that the issue of statutory limitations is one of policy regarding crime, and that States do not follow uniform rules in this respect. Nevertheless, it has recently been held that statutory limitation more properly refers to the State's real power to prosecute citizens, which ultimately cannot be an unlimited option. If the State fails or is unable to try an individual within a given period, this option should expire in the individual's favour. Costa Rica is, of course, aware that the monstrousness of these types of crimes would "morally" justify the non-applicability of statutory limitations; however, the contemporary legal trend is towards short statutory-limitation periods and a penal process which includes guarantees but is swift. Thus, there will probably be major negotiating problems in this area.

28. What would perhaps be most appropriate would be to establish a statutory-limitation period to be negotiated with countries on the basis of the longest such limitation periods for ordinary crimes in internal law, which currently range up to 20 years and more, a period which is more than sufficient for a timely response by the penal system. A longer period would imply that the punishment imposed, and the process which is established for its imposition, would not have any general or specific preventive effects.

Article 8

29. It is appropriate to think about the principles deriving from due process which should be applied to these types of criminal matters. The Constitutional Court of Costa Rica, in its judgement No. 1739-92, has broadly defined these principles and aspects and has incorporated all those which are mentioned in article 8. It would indeed be advisable to bear in mind that the rules for the conduct of trials remain to be defined; they could be set out in an annex to the Code, which would serve as an interpretative instrument. In the Latin American context, the American Convention on Human Rights establishes a number of judicial and penal guarantees which apply to any type of trial. In Costa Rica, even if article 8 did not exist, the Convention and the constitutional rules of due process would be applied (arts. 39 and 41 of the Costa Rican Constitution).

Article 9

30. Paragraph 1 of this article prejudges the question of the establishment of an international criminal court; however, it should be construed as referring to the national court which, in accordance with the principle of arrest or universal justice, imposes a punishment for the act committed by the individual, leaving aside not only the possible jurisdiction of the national court, but also the possible violation of the *non bis in idem* rule which could be involved, and thus the violation of the procedural rights of the accused.

31. Paragraph 2 should be eliminated, because to limit the possibility of the penalty being implemented in a manner more favourable to a person accused of this type of offence would necessarily violate the principle of equality. A well-drafted paragraph 1, giving national courts full jurisdiction to try persons accused of such acts, would be sufficient.

32. Paragraph 3 directly violates the *non bis in idem* principle and should be deleted in order to avoid the constitutional violations which it implies.

33. Paragraph 4 recognizes the principle of arrest and universal justice, which is the basis for the operation of the current jurisdiction of States with regard to this type of offence (art. 7 of the Costa Rican Penal Code).

34. Paragraph 5 should also be eliminated, since it allows for a second conviction for the same acts which resulted in a judgement being handed down for an ordinary crime.

Article 10

35. The principle of non-retroactivity is well defined and operates in full accordance with the constitutional definitions of the subject.

Articles 11 and 12

36. It would appear that what is at issue here is the set of rules which have been dealt with in the majority of Latin American penal codes as referring to "non-culpability", although it has been agreed in recent times that they do not all refer to issues of culpability, but that questions relating to characterization and justification might be involved.

37. According to article 11, the possibility of punishment arises only where an order which is blatantly illegal or in violation of human rights has been carried out by a subordinate agent of the State. In this connection, not only military regimes (which use the chain-of-command system), but also other ordinary-law penal systems are continuing to use the chain-of-command system; accordingly, its wide use in this draft is to be recommended. The chain-of-command scheme which is outlined in the draft penal code for Spain (1992) can be used as a model.

38. One additional argument in support of the notion that chain-of-command rules should be adopted in full is the existence of article 12 on the responsibility of the superior, which implies the possible existence of errors of characterization and prohibition applicable, through interpretation, to the cases mentioned in article 11.

Article 13

39. All systems of immunity appear to be excluded by this article. However, account should be taken, as a rule of criminal procedure, of the various cases in which these types of government officials can be prosecuted, rather than leaving it as a rule in principle which, as such, could be inapplicable.

Article 14

40. If a more technical formulation of the need for judges to evaluate such circumstances is desired, it is necessary to draft a generic rule concerning those aspects which should be taken into account in apportioning

blame, as is done in article 71 of the Costa Rican Penal Code. In any case, even though this article takes many defences and extenuating circumstances into account for this purpose, while penal characterizations can take into account the existence of qualifying aspects which influence the extent of the penalty on the basis of the same indictment, thereby reducing the extent of the judge's discretion, it is a decision relating to policy on crime which needs to be evaluated.

III. Special part of the draft

(a) *Aspects of legality of the descriptions*

Principle of legality and characterization

41. The principle of legality, as enunciated in the universal maxim *nullum crimen, nulla poena sine praevia lege* (which follows Feuerbach's Latin construction), and as represented in the Latin American countries (art. 1 of the Penal Code of Brazil, art. 39 of the Constitution of Costa Rica, and art. 2, para. 20 (*d*), of the Constitution of Peru), has been espoused as a principle by various peoples at various times, and has likewise been fiercely contested by individuals and groups that assume the exercise of power to be a form of unilateral supremacy maintained by force, rather than a way of guiding a nation towards a common goal by means of participatory democracy. All the struggles on behalf of that principle of legality have sprung from the common embryo of opposition to arbitrariness in penal and correctional justice. This opposition marked the birth of what today may be termed modern liberal and democratic penal and correctional law insofar as it impresses on the State authorities the need to identify for their citizens in advance those acts that are punishable and those that are to be prohibited, the prohibition having to be justified on grounds of necessity. The acts to be prohibited are those which would pose a serious threat to organized coexistence. Such acts, however, can be punishable only if the legislature has so determined prior to their commission. Thus, accepting the principle of legality of the crime means making a very clear-cut distinction between the authority adopting the legislation and establishing the prohibition, and the judicial authority. The latter's duty is to pronounce on the question of culpability and, on that basis, to impose the penalty.

42. With the principle of legality there emerges a penal and correctional law founded on the premise that only the law can determine the existence of crimes and offences and establish the respective penalties as a counter to arbitrariness in judicial proceedings.

43. In historical terms, the evidence of such arbitrariness is to be seen primarily in the lack of limits to the exercise of functions by judges, which gave the judicial authority the power to legislate by making it the judge's duty to determine, in the final analysis, what was prohibited. Each judge thus became a de facto legislative authority. Note should be taken of the major risk that such a situation creates: the role of judicial interpretation is expanded from an exercise involving the identification of the framework to one involving decisions as to whether the actions of an individual should or should not be punishable, thus providing a broader and easier outlet for the judge's shortcomings, prejudices, beliefs, opinions or fears.

44. As they gain currency in a juridical regime, the principle of legality of the crime and its natural derivative—the characterization of the act to be punished—create a particular category of penal and correctional jurisprudence based on respect for the human right of every inhabitant of a State to know beforehand what prohibitions circumscribe his acts as a member of society.

45. Through this system, the legislator, who is always the temporary holder of a power that is vested in the people, as may be seen from many constitutional texts, is obliged to place in the judge's hands clearly defined models of conduct, so that in seeking to determine whether an act has the specified characteristics, he would know for certain which prohibitions the legislative authority wanted to impose. Such a legislative attitude is of paramount importance in legal systems where the legislator must start with real situations in describing models of conduct (clear models, with precise limits, avoiding unnecessary detail as far as possible), and in establishing rational prohibitions that are always related to juridical interests requiring protection in penal and correctional matters.

(b) *Legality of the crime—problems of characterization in the draft*

46. In the light of the observations made in the preceding paragraphs, it must be made clear that within a republican framework, the principle of legality of the crime cannot be viewed in isolation from what might be called its natural derivative: the characterization of the act identified as a penal or correctional matter. Without characterization as an essential corollary, the principle of legality would remain a mere postulate—and an incomplete one. Imprecise or obscure penal or correctional texts would give the judge the power to become a legislator by obliging him to identify the characteristics of the act and interpret the limits or scope of the law. On the other hand, the existence of the principle of legality suggests the existence of republican penal law, for not only is characterization of the act necessary (a clear, precise and well-defined description) but, in addition, the existence of the principle makes it possible to predict the existence of a system of punishment based on juridical interests. Costa Rica would like to stress that each and every one of the prohibitions covered by penal provisions should be established on a rational and reasonable basis: that of protecting those elements of paramount importance for co-existence in society.

47. It is essential therefore to bear in mind that the reference to *nullum crimen, nulla poena sine lege* covers much more than a mere constitutional or legislative postulate: it is a reference to the adoption of a particular attitude towards the system of punishment, meaning that the State has a legislature that is distinct and separate from the judiciary and that the legislature not only has an obligation to describe in a clear, precise and well-defined manner the acts to be prohibited, but also to prohibit only acts affecting interests that are essential to coexistence.

(c) *Violations of legality and characterization*

48. Two methods by which the postulates discussed in these comments may be violated have been dealt with systematically in the literature; however, other forms of disregard for the existence of guarantees of legality and characterization can be found in legislative and judicial practice. Before going into them, it should be pointed out that in police and other extrajudicial practice, many examples can be found of methods of violating these principles.

Criminal laws with blanks

49. Also called legislative references, this is a common legislative practice in certain countries, which consists of referring in part of the description of the act to other laws, be they penal or extra-penal, of greater, equal, or lesser force than criminal laws. It is logical to assume that where reference is made to regulations, decrees, ordinances or other provisions of lesser force than law, that amounts to a total and absolutely clear violation of the principle of legality, since the text referred to would be amended by executive rather than legislative order. This means that a penal text could be totally remodelled by the decree, regulation, ordinance or other executive provision referred to. Where reference is made to laws of equal or greater force, the problem would appear to be less serious, although from a technical and descriptive point of view, it is equally improper, since an analysis of the description would require consultation of the law or laws referred to.

50. The foregoing shows that there are, so to speak, gradations in references, which range from those in absolute violation of the postulates of legality (references to texts which can be remodelled outside the purview of the legislative authority) to those where the text referred to belongs to the same corpus of law as the text in which the reference occurs, in which case both can be analysed easily. Lastly, mention should be made of those cases in which the text refers to another legislative provision, but in such general terms that consultation of that provision becomes difficult (for example: "Anyone who, in accordance with law, illegally exercises . . . ").

51. It should be noted that, in such cases, characterization requires consultation of all legislation for the purpose of identifying and incorporating the characteristic treatment and, ultimately, the prohibited act. Accordingly, texts with references or criminal laws with blanks form the boundaries beyond which correctional descriptions can be regarded as violating the dual requirements of legality and characterization (art. 15, on aggression, is undoubtedly an example of this).

Open characterizations

52. Open characterizations, which in Costa Rica's view go beyond a simple legislative device violating the requirement of characterization, to the point of becoming genuine denials of the principle of legality and clear aberrations from the standpoint of a democratic and republican law on suppression and punishment, can be termed, for a working definition, as those descriptions of an act identified as a penal or correctional matter which do not place precise or clear limits on the scope of the prohibition and, accordingly, prevent either the judge or the citizen from knowing positively and unequivocally what is prohibited.

53. Such descriptions are considered to be obscure, imprecise or without clear limits where the legislator, in drafting them, uses ambiguous or polysemous terms, poor syntax in the composition of the text or an excess of elements open to interpretation, so that there are no clear indicators by which the citizen and the judge may know the extent of the prohibition. Thus, the judge finds it necessary to interpret the scope of the prohibition, thereby assuming legislative functions if there is no limit: the judicial act of determining whether an act has the specified characteristics (incorporation) becomes a typical legislative act, with the further difficulty that there will be as many legislative acts establishing prohibitions as there are people with different points of view performing judicial functions and applying open characterizations (art. 20 concerning apartheid is a case in point).

Normative elements

54. Normative elements, which are one of the causes of openness in characterizations, deserve special mention, although the question of legality remains clear: if they require interpretation, the principle of legality of the crime has been violated.

55. Although the definitions of normative elements given by the various authors may not be very obvious, the works consulted were unanimous in stating that normative elements are subject to interpretation. Mayer is the first to have used such a term, according to Jiménez de Asúa. He used it to designate the components of a penal description " . . . which have only a given evaluative importance . . .". Normative elements are not in the same position as the subject or modal, temporal, or other auxiliaries, which have a place and a given function in the characterization. They can be any word, with any function (subject, root, etc.) and with a value: they are value-laden terms (or they confer value on the terms used). Better still, they are terms which the legislator leaves undefined, without giving them a clear meaning and which, accordingly, will need to be evaluated by the judge. Morality, acceptable conduct, authentic instruments and many more examples are to be found in the three legislations analysed.

56. When the term which is left undefined refers to the legal order (juridical normative elements) the problem does not generally arise, since it will have been defined by the legal order itself or by custom; the meaning is unambiguous.

57. Unlike juridical elements, the so-called cultural normative elements refer to relationships, cultural patterns, social beliefs, group preferences, and so forth. This is where problems arise from the standpoint of legality/characterization. In one of the legislations studied there is a characterization which concerns anyone who engages in witchcraft, sorcery or "... any other act that is contrary to civilization and acceptable conduct" (art. 291 of the Penal Code of Costa Rica). From the above text it appears that no further explanation is needed; that is also the problem with article 24 relating to terrorism.

(d) *Juridical interests and the draft articles*

58. The characterizations given in the draft articles like the penal characterizations given in internal law, are descriptions which set forth a normative model in the form of an affirmation. This means that beyond the characterization (whether it be correctional or penal) there is always an understanding of how things ought to be. This is purely a matter of style. However, when the correctional description refers to the normative model elliptically rather than expressly, there is a danger of forgetting that such a model exists. This is dangerous because it may lead to the belief that the law is the law, pure and simple, and overlook the fact that the norm, which is what all characterizations reflect, is a rational imperative whose purpose is to protect. In other words, there is a reason for the penal norm, a rationality and reasonableness which reaches beyond the mere exposition of the norm to its essence, namely juridical interest. The purpose of any prohibition covered by a penal or correctional provision is to protect.

59. Thus, just as it is said that there is no crime unless there has been a violation or endangerment of an interest protected by the penal law, so it must be pointed out that the same applies in respect of correctional norms.

60. According to the republican approach to punishment, there is a rational basis for the prohibition of acts which are punishable by law. This prevents the legislator from prohibiting an act without understanding the need and the rationale for the prohibition. Thus the existence of juridical interests is a direct derivative of the political system which the nations in question have chosen. Accordingly, the tenet that there is no crime unless there has been a violation of, or at least a real threat to, the juridical interest which is protected by the penal law has absolute validity in such constitutional systems and is the essential basis of these comments.

61. Thus the starting point is the assumption that any correctional characterization or description demonstrates and presupposes the existence of a juridical interest, and it therefore follows that, in addition to being clear, precise and well-defined, characterizations must refer to the protection of juridical interests which are reasonable in accordance with the group's social purpose.

62. The juridical interest arises from the need for coexistence. A characterization protecting any area of life the need for which is not felt by the entire group is an unreasonable social prohibition. Although mandatory, since it is law, its existence is not justified in a State having a republican, democratic system. Accordingly, there is a complementary relationship between juridical interests that are protected by the penal law and fundamental social needs (of all), since the only acts worthy of being raised to the category of interests protected by penal norms are those individual acts which truly disturb and threaten the life of the group as a collection of human beings (in all their diversity) in pursuit of a common goal.

(e) *Fragmentary character of the prohibition*

63. It is often stated that penal law is fragmentary in character or that penal law is a discontinuous system of illegalities. This is true. However, penal law (in the strict sense, namely that of crimes proper) does not constitute the whole of the legal system of punishment. Although there is no question as to the ontic equality between crimes and violations (it is the various police, procedural and penitentiary practices that are questionable), it is necessary to affirm that international penal law too is fragmentary in character.

64. To digress for a moment on this subject, it is not penal law or international penal law that is fragmentary but the common source from which these laws spring: penal law as a system of punishment subject to legality, norms with penalties (penal or international).

65. To speak of the fragmentary character of these laws is to refer to the idea that only those areas requiring real protection need to be covered by penal provisions, as opposed to the common practice by which Latin American penal norms regulate areas which, owing to their importance or their very substance, would fall within other branches of the law.

BRIEF SYNTHESIS OF THE PROBLEMS OF LEGALITY INVOLVED

66. Generally speaking, the Government of Costa Rica believes that the penal characterizations of the draft articles should be reformulated and the descriptions should be made clearer; the normative elements and blank penal laws should be reduced; and the characterizations should protect specific juridical interests.

67. This redrafting is extremely important to the successful negotiation of penal characterizations. The above scholarly considerations are put forward so that the Commission may take them into account in its final drafting of the Code. In Costa Rica these considerations are already part of constitutional doctrine. Thus, if the above-mentioned problems which are such a feature of the draft were to remain, Costa Rica would be compelled to reject the draft articles.

Denmark

[*See* ***Nordic countries***]

Ecuador

[*Original: Spanish*]
[*7 May 1992*]

1. The title of the draft Code might lead to the belief that it is simply a catalogue of crimes. It would be better to call it "Penal Code for Crimes against the Peace and Security of Mankind" or "Code of Penalties for Crimes against the Peace and Security of Mankind", as suggested by the writer Jiménez de Asúa.

Article 1

2. With a view to strengthening its content, it would be worthwhile adding a paragraph to read as follows:

> "The following, *inter alia*, shall be considered criminal acts under international law: genocide, terrorism, aggression and illicit traffic in narcotic drugs."

Article 17

3. It would be better to refer to "military intervention" or "armed intervention", since there are other types of intervention, economic, for example.

Article 19

4. Paragraph 2 (*d*) should be clarified. As currently drafted, it is vague and could create misunderstanding and confusion between purely social birth control programmes and crimes of genocide.

Finland

[*See* ***Nordic countries***]

Greece

[*Original: French*]
[*3 February 1993*]

1. The Government of Greece would like, first, to congratulate the Commission for having adopted the articles of the draft Code of Crimes against the Peace and Security of Mankind in first reading, and also to thank the Special Rapporteur, Mr. Doudou Thiam, for his important contribution to the preparation of the draft.

2. It views completion of the first reading of the draft articles by the Commission as a particularly positive development.

3. With regard to articles 15 to 26, the Commission has identified in these articles 12 crimes which are of a particularly serious nature and which constitute an affront to mankind. Greece supports the inclusion of all these crimes in the Code. However, it would be desirable to clarify some of the provisions, *inter alia*, those of article 22 (Exceptionally serious war crimes), paragraph 2.

4. Furthermore, it would be a good idea to include, after threat of aggression (art. 16) and aggression (art. 15) a characterization relating to unlawful occupation, annexation and succession of a State, by adopting a new provision which could read as follows:

> "Deliberate failure to respect the mandatory decisions of the Security Council, designed to put an end to an act of aggression and to wipe out its unlawful consequences, is a crime against the peace."

Iceland

[*See* ***Nordic countries***]

Netherlands

[*Original: English*]
[*18 February 1993*]

General comments

1. Part I of the present document sets out the views of the Netherlands Government concerning the legal status of the draft Code and ways of linking it to a mechanism, yet to be developed, which will enable the Code to be enforced under the provisions of international criminal law. They then deal with the main features of such a mechanism.

2. Part II sets out the views of the Netherlands Government on individual articles of the Commission's draft Code.

3. First, however, the Netherlands wishes to comment briefly on the background to and significance of the draft. The preparation of the Code and the question of the desirability of an international criminal court have a long history. The General Assembly, in its resolution 177 (II), requested the Commission to prepare a code of crimes against the peace and security of mankind in 1947. The project was delayed, however, partly by the prolonged debate that ensued concerning the definition of aggression. The Netherlands Government applauds the fact that, notwithstanding such obstacles, the Commission was able to complete the first reading of the draft Code in 1991.

4. Although the Commission has considered both the desirability and the feasibility of establishing an international criminal court, there are no provisions on this subject in the present draft Code. However, the Commission's report includes a list of factors relevant to the matter, for which provision would need to be made.

5. The Netherlands Government made its views known on the desirability of establishing an international criminal court during the review of the report by the Sixth Committee at the forty-sixth session of the General Assembly in 1991. The Government's views on the matter are therefore set out fairly briefly in part II below, insofar as they relate to the Code.

I. Draft Code of Crimes against the Peace and Security of Mankind

(a) *Legal status*

6. In the opinion of the Netherlands Government, the aim of this Code is to designate certain offences as crimes against the peace and security of mankind and to set up an enforcement system (whether national or international) applying only to those offences. This requires that the offences in question should be defined as clearly as possible and be laid down by treaty. This is in any event required in connection with the principle of *nullum delictum sine lege*. This basic premise is reinforced by the fact that an international enforcement system involving the establishment of an international criminal court is under consideration.

7. For practical reasons, however, the following comments are formulated in the terms used by the Commission.

(b) *Scope of the Code*

8. The Netherlands Government notes that there are substantial discrepancies in the nature of the offences referred to in the Code. Moreover, the choice is fairly arbitrary and includes a wide range of offences. On the one hand, it includes offences which run contrary to society's sense of right and wrong and constitute mass violations of basic humanitarian principles. These are offences which

in any event are punishable under prevailing international law and for which individuals can be held liable. They include genocide, for instance, or serious war crimes. On the other hand, certain offences included in the draft Code, which are based on obscure, or in any event unspecified, criteria are mainly a reflection of the types of international crime besetting various countries at the present time. Traffic in drugs is an example.

9. In the view of the Netherlands Government, there should be a close relationship between the offences to be considered for inclusion in the Code and the anticipated enforcement system. Since the Code envisages a universally applicable international enforcement system, certain criteria should apply to the offences to be covered by the Code. Considering that States are generally reluctant to relinquish any of their powers, especially in the fields of criminal law and its enforcement, it should be assumed, for the time being at least, that it will be possible only in exceptional cases to effect any form of international enforcement.

10. In the opinion of the Netherlands Government, a universal system for the enforcement of criminal law would be possible and desirable only in respect of offences that satisfy the following criteria:

(*a*) Crimes that violate fundamental humanitarian principles endorsed by the world community and outrage the conscience of mankind;

(*b*) Crimes which by their very nature are likely to preclude the effective administration of justice at the national level, and in respect of which justice can only be properly dispensed at international level;

(*c*) Crimes for which an individual can be held personally responsible, regardless of whether or not he or she was acting in a public capacity.

Having regard to these criteria, the Netherlands Government is of the opinion that the Code should cover only the crimes of aggression, genocide, systematic or mass violations of human rights, and serious war crimes.

11. These crimes are in any event punishable either under the provisions of international treaties or in accordance with international customary law. The Geneva Conventions of 12 August 1949 and Additional Protocol I thereto, as well as the Convention on the Prevention and Punishment of the Crime of Genocide, may be cited in this context.

12. Nevertheless, the Netherlands Government considers it feasible that at some point in the future, once a Code and criminal court are in place, other crimes (and possibly crimes of a different nature) may, if necessary, be included in the Code. However, this could only be achieved if the present structure of national sovereign States opens up to include an international mechanism for the enforcement of criminal law.

13. For the record, the Netherlands Government emphasizes that its view that relatively few crimes should actually be included in the Code does not imply that the additional crimes specified by the Commission should not be punishable. The list advocated by the Netherlands should not be taken to mean anything other than that the crimes omitted from the proposed list do not satisfy the criteria set out above, which have been formulated specifically with a view to producing a Code linked to an international enforcement mechanism. The crimes not included on the list, like the majority of those mentioned by the Commission, should perhaps be provided for by individual treaty and on the grounds of the *aut judicare, aut dedere* principle or the principle of universality. In cases of this nature, enforcement would ultimately take place at national level.

(c) *Linking the Code to an enforcement system*

14. The Netherlands Government considers it important that the Code should be closely linked to a system by which it can be enforced. In this connection, it observes that the development of international law based on the Code will primarily concern ways of enforcing the Code internationally, rather than making certain crimes punishable; all the offences to be included in the Code are in any event punishable under existing treaties or customary law. The main objective is therefore to develop a viable international enforcement mechanism. With this in mind, it would be advisable, for the time being at least, to limit the number of crimes included in the Code and thus minimize any breach of the national jurisdiction of States. In the light of the foregoing, the Netherlands Government is not in favour of a Code which makes provision for certain crimes but fails to create an enforcement mechanism. In this case, it would serve little purpose.

15. Finally, linking the crimes listed in the Code with a system of enforcement implies that no exemption clauses may be included. The crimes which the Netherlands Government would advocate for inclusion are already punishable under international law, while exemption clauses in respect of the enforcement mechanism would be undesirable, since they would undermine the essence of and the very reasons for adopting the draft Code.

II. Enforcement of the Code

16. In its contribution to the debate on the Commission's report in the Sixth Committee at the forty-seventh session of the General Assembly in 1992, the Netherlands Government set out in detail its views[1] on the feasibility and desirability of establishing an international criminal court. The following is therefore a summary of its views on the type of international enforcement mechanism it would like to see in place. In view of the nature of this contribution and the fact that talks concerning an international criminal court are still at an early stage, the following comments do not constitute an exhaustive analysis of the problems that could be encountered in establishing a criminal court of this nature.

17. The following issues are dealt with consecutively:

(*a*) The competence of an international supervisory mechanism (hereinafter the "criminal court");

(*b*) The procedure to be followed in the event of a criminal court of this nature being established;

(*c*) The penalties to be imposed;

[1] *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 21st meeting, paras. 57 to 76.

(*d*) The composition of the prosecuting agency and the criminal court.

(a) *Competence of the international criminal court*

(i) *Competence* ratione materiae

18. Since the object is to achieve an enforcement system in conjunction with the Code, the powers *ratione materiae* of the international criminal court should be confined to the crimes to be specified in the Code, as suggested above.

(ii) *Conferral of jurisdiction*

19. The Netherlands Government favours a system of preferential jurisdiction. This means that the international criminal court would have competence as soon as a person was suspected of committing any of the offences included in the Code. If proceedings were not instituted before the international criminal court, the national courts would acquire or regain competence to try the suspect. However, if the case were in fact to be tried before the international criminal court, the court would give judgement at first and sole instance.

20. An important question here is whether or not the court should be able to try cases in the absence of the accused. Although the Netherlands Government has not yet reached a final conclusion regarding the desirability of legal proceedings by default, it would draw attention to the disadvantages of such proceedings, since actions of this type are particularly difficult and time-consuming and may have adverse effects on public opinion.

21. The following points are relevant to the question of when, specifically, the international criminal court would be competent to take cognizance of a case. In the first place, having regard to the criteria set out in part I of the present commentary, the issue in question concerns the hearing of offences which are in any event universally punishable. Secondly, the criminal court should be competent in respect of any person guilty of any of the crimes specified in the Code, even if that person is in a country or is a national of a country which is not a party to this instrument. In addition, it is important that States subscribing to the Code should incorporate in their national legislation the principle of universality in respect of the crimes included in this instrument.

22. The Netherlands Government would be opposed to a procedure assigning to the criminal court the role of appeal court. However, this does not preclude a procedure for hearing disputes regarding the interpretation or application of the Code in cases which are brought before national courts following a decision not to institute proceedings before the international criminal court.

23. Regarding prosecution of the crime of aggression, the question arises of the relationship between the criminal court and the Security Council. The view of the Netherlands Government in this respect is that, regardless of whether or not the Security Council has debated the political question of whether a State has committed an act of aggression, the criminal court should in principle have full discretion with regard to the juridical question of whether or not an individual is guilty of that same offence. However, it is highly unusual for the Security Council to designate an act as aggression, and when it does, such a pronouncement invariably has extremely far-reaching consequences. It should be considered therefore as virtually impossible in practice for the international criminal court to reach a different conclusion in respect of the same situation.

24. In the light of these considerations, the Netherlands Government considers it unnecessary for the Security Council to be assigned a specific procedural role in prosecuting suspected acts of aggression.

(b) *Procedure*

25. In the opinion of the Netherlands Government, a procedure should be designed which is at the very least in accordance with the principles set out in article 8 of the draft Code.

26. The establishment of a special public prosecutions department would be essential in order for cases to be tried by the court. Such a department should be able to submit applications to the court:

(*a*) On its own initiative, for example, if it has received information from a State;

(*b*) On the grounds of a resolution adopted by the General Assembly. If the General Assembly were to adopt a resolution of this nature, it should be incumbent upon the public prosecutions department to prosecute the case. The Government considers the General Assembly to be the most appropriate body in view of its wide representation and powers;

(*c*) On the grounds of instructions to this effect from the international criminal court. Such instructions may be given at the request of a State, should the public prosecutions department decide against prosecution (expediency principle) after receiving information supplied by that State.

(c) *Penalties*

27. Having regard to the principle of *nulla poena sine lege*, the Code should incorporate provisions concerning the penalties to be imposed for these crimes. Since the Code is solely concerned with crimes of an extremely serious nature, the Netherlands feels they should all be subject to the same penalty, either in the form of custodial sentences, measures to restrict freedom or the confiscation of assets (such as those acquired through the commission of the crime). The Netherlands Government would be opposed to the inclusion of the death penalty, which would make it impossible for many other countries to endorse the Code on the grounds of national and/or international law.

(d) *Composition of the court and prosecuting agency*

(i) *Composition of the criminal court*

28. In the view of the Netherlands Government, the criminal court should be relatively small, comprising, for example, between five and seven independent judges elected by the same procedure as members of the International Court of Justice. The criminal court should be independent of ICJ, which is in fact an entirely different type of body from the court envisaged here. However, this

need not prevent ICJ judges from being appointed to the international criminal court, nor should it preclude other forms of organizational concentration which would underline the universal character of the criminal court.

(ii) *The public prosecutions department*

29. The public prosecutions department should comprise one procurator-general appointed by the General Assembly, assisted by one or more advocates-general and a small staff. In the Commission's opinion, the role of the Secretary-General, and especially the objectivity he is required to maintain in the exercise of duties assigned to him by the Charter, would be incompatible with the function of formal head of the public prosecutions department.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

30. The Netherlands Government would prefer the phrase in square brackets, "under international law", to be deleted. It shares the view of those members of the Commission who consider the insertion unnecessary and a potential source of confusion concerning the interpretation of the article.

Article 3

31. It is advocated that in principle not only the commission of a crime referred to in the Code, but also any attempt to commit such a crime, should be punishable. This could be achieved in a uniform manner either by amending the article to specify that an attempt to commit one of the crimes included in the Code is likewise punishable, or by reformulating each of the material provisions to include the words "attempts to commit" as well as "commits".

32. Secondly, the term "individual" in article 3 should be more closely defined. In particular, the article should specify whether it refers only to a natural person or whether it could also refer to a legal person. The advantage of the latter is that it would cover groups of people who cannot be deemed to be either individuals or government bodies. The drawback, however, is that this wider definition could make the enforcement system considerably more difficult to operate. In its second reading of the Code, the Commission might pay closer attention to this matter, either in the text of the article or in the commentary.

33. Thirdly, the Netherlands Government is unclear about the Commission's view of the connection between the concept of "the planning of" and the word "conspires" in paragraph 2.

34. It also suggests deleting the word "abets" in paragraph 2, which it considers too loosely defined and vague to merit inclusion.

Article 4

35. The Netherlands Government considers this article redundant, as the same points are covered in article 14. A reference to the purport of the present article and the commentary thereto could perhaps be made in the commentary to article 14.[2]

Article 6

36. The first part of the present commentary set out the views of the Netherlands Government regarding the importance of linking the Code to an enforcement mechanism. It agrees with the Commission that this article will need to be amended once a decision has been taken concerning the establishment of an international criminal court. At that stage, it will probably be possible to delete parts of the article. The Netherlands Government has two further points that need to be made in this context.

37. First, with regard to extradition, it is essential to provide sufficient guarantees that the suspect will be treated in accordance with the provisions of article 8 of the draft Code. This could be achieved either by adding a clause which explicitly prohibits extradition if the requesting State fails to provide the guarantees described in article 8, or by adding to article 6 the phrase "subject to the guarantees provided for in article 8".

38. Secondly, as article 6, paragraph 1, stands at present ("an individual alleged to have committed . . . is present"), the State concerned only has jurisdiction at such time as the person in question is present in that State. If one State requests another to extradite a person who is not—or not yet—in that State, the requested State does not—or not yet—have jurisdiction. It would only have such jurisdiction if universal jurisdiction in respect of the offences set out in the Code were enshrined in the national law of the State requesting extradition. The article should be reformulated with a view to making it more effective in practice, and/or parties to the Code should be required to establish universal jurisdiction in respect of the crimes included in the Code.

Article 7

39. The acceptability of this provision depends largely on the crimes to be included in the Code. Part 1 of the above comments points out that a limited number of crimes should be covered by the Code. The Netherlands Government feels that these are the only crimes serious enough to justify exemption from statutory limitations. It does not support the provisions of this article in respect of any other offences included in the present draft Code.

Article 8

40. The Netherlands Government attaches great importance to the guarantees provided for in this article, as it has already indicated above and in its comments on article 6.

Article 9

41. This article, like article 6, will need to be amended if an international criminal court is established. The Netherlands Government has three further comments to make regarding the formulation of article 9.

[2] *Yearbook . . . 1991*, vol. II (Part Two), pp. 100-101.

42. First, paragraph 3 of this article is incompatible with the principle of *non bis in idem*, since the decisive factor for the application of the rule is not the way in which a certain action is defined (in national or international law), but whether an action is punishable and whether the perpetrator has been prosecuted for it.

43. Secondly, the wording of paragraph 4 is unsatisfactory. The aim of the article is to ensure that a person who has committed a serious crime does not evade a punishment commensurate with the seriousness of the offence. At the same time, however, it has to ensure that the offender is not tried twice, in fair and proper proceedings, for the same crime, or sentenced twice to a punishment commensurate with the seriousness of the offence. The Netherlands Government feels that the present formulation fails to provide proper safeguards, especially against the latter contingency.

44. Thirdly, apart from paragraph 3 of this article, which has already been discussed, the problems relating to the rule of *non bis in idem* can only be prevented by granting exclusive competence to the envisaged international criminal court (as explained in the first part of our observations above). In any other circumstances, problems would arise in connection with this rule. The Commission will consequently need to consider this issue when working out an enforcement system.

Article 10

45. The Netherlands Government feels that the words "in accordance with international law", paragraph 2, *in fine*, should be deleted. Since the Second World War, certain offences have been codified under international law. As a result, it would prejudice the possibility of prosecuting and punishing the perpetrators of crimes which are not codified but might be considered offences according to international custom.

Article 15

46. There is an inconsistency in the wording of the first two paragraphs of this article. Paragraph 1 concerns the commission of a crime by an individual ("An individual who ... commits or orders ..."), whereas paragraph 2 refers to the actions of a State ("Aggression is the use of armed force by a State ..."). Either the article as such or the relevant commentary[3] should clarify the Commission's views on the relationship between individual responsibility and the responsibility of the State.

47. To avoid any ambiguity, the words "inconsistent with the Charter" in paragraph 2 should come after the words "use of armed force" at the beginning of paragraph 2. The paragraph would then finish after the words "of another State". These terms should be defined in the commentary.

48. The first part of paragraph 3 is inappropriate in this article, since it concerns the production of evidence, not the definition of the offence. The second part of the paragraph envisages empowering a political body to determine whether a particular act constituted an offence. This would violate the *nullum crimen sine lege* principle. This element should therefore also be deleted from the definition of the crime of aggression.

49. The *nullum crimen sine lege* principle also plays a role in the formulation of paragraph 4 (*h*). Empowering the Security Council to determine that certain acts in retrospect constituted aggression and could be prosecuted as such would violate this principle. The only alternative would be for the Security Council to stipulate in advance and in general terms what constitutes aggression.

50. Paragraph 5 could, by implication, provide that a determination by the Security Council is not binding on an (envisaged) international criminal court. This paragraph and the relevant commentary should be reviewed if an international court is indeed established.[4] For the sake of clarity, the words "or not" should be inserted after "existence".

51. The meaning of paragraph 6 is unclear. It is questionable whether it in fact adds anything to the provisions of Article 103 of the Charter of the United Nations. The Netherlands Government recommends the deletion of this paragraph.

52. Paragraph 7 could likewise be deleted.

Article 16

53. This crime should not be incorporated in the draft Code. In several cases it would be covered by the prohibition on aggression as such, and would accordingly fall under the provisions of article 15.

Article 17

54. This article should also be omitted from the Code. One reason is that certain types of intervention are in any event covered by the prohibition of aggression and are consequently punishable under the terms of article 15. In the view of the Netherlands Government, the types of intervention not covered by article 15 are not sufficiently grave to merit inclusion in the Code. On the other hand, the definition seems too loose and ambiguous to allow for the enforcement of those provisions.

Article 18

55. For the same reasons as those given in respect of article 17, the Netherlands Government considers it undesirable to include this article in the Code.

Article 19

56. The Netherlands Government is in favour of the inclusion of genocide in the Code. Indeed, it is a crime which, more than any other, outrages society's sense of right and wrong. It is to be hoped that the Code will help to enforce the prohibition against genocide, which has already been outlawed in a separate convention.

57. A discrepancy is noted between the crime of aggression, where planning to commit the crime is an offence, and genocide, where planning the offence is not. As suggested in respect of article 3, the problem could be solved

[3] Article 15 was previously adopted as article 12. For the commentary, see *Yearbook ... 1988*, vol. II (Part Two), pp. 71 and 72.

[4] Ibid., para. 6.

by amending each of the material provisions to conform to a uniform formulation, or by adding a further provision to article 3 specifying that planning to commit any of the crimes included in the Code is in itself a crime.

Article 20

58. This provision should not be included in the Code. On the one hand, the very nature of the offence is apt to raise virtually insoluble problems concerning responsibility, prosecution, and so forth. On the other hand, it is in any event the case that apartheid would generally constitute a systematic or mass violation of human rights.

Article 21

59. The Netherlands Government is of the opinion that this crime should be included in the Code and it merits attention in its own right, irrespective of the monitoring procedures relating to such violations laid down in various regional and global human rights conventions. The latter are designed primarily to evaluate—in retrospect—a State's fulfilment of its responsibility to observe human rights, rather than—as envisaged by the Code—the criminal responsibility of an individual who violates those rights. Furthermore, many of the existing monitoring procedures have proved inadequate in the cases of human rights violations which would fall under article 21 of this Code.

60. In addition, there is a close link between this article and the crime of genocide. For the sake of consistency, therefore, violations of human rights should be included in the Code together with genocide.

61. Concerning article 21, it would be desirable to interpret the term "persecution" in the same way as it is interpreted in the Convention relating to the Status of Refugees. This is in fact a narrower interpretation than the one in the commentary to article 21.[5] In the view of the Netherlands Government, the reference in the commentary to persecution "by government officials or by groups that exercise de facto power over a particular territory"[6] gives the concept a far wider interpretation than the Convention does.

62. The Netherlands Government would also prefer the word "and" instead of "or" in "systematic manner or on a mass scale". Only violations which occur both systematically and on a mass scale should be included in the Code, for only in such circumstances do they constitute acts which seriously conflict with society's sense of right and wrong.

63. It is further in favour of including "in a systematic manner or on a mass scale" in the *chapeau* of the article in order to clarify the fact that it applies to all five of the violations listed. Furthermore, this would serve to establish that certain aspects of apartheid fall within the scope of this article. Consequently, paragraphs 2 (*c*) and (*d*) of article 20, which in the opinion of the Netherlands Government should be omitted from the Code, could be covered in the commentary to article 21.

64. The Netherlands Government would also like to see a clearer statement than at present, perhaps in a general article (such as article 3), of the fact that the Code concerns individuals who have committed a crime in an official capacity. This should in fact be included in the Code itself. It is not sufficient to deal with this issue in the commentary.

65. Finally, the commentary should include more references to universal human rights conventions than those already mentioned. They should not, however, be incorporated in the actual definitions of crimes.

Article 22

66. The text of this article reflects the Commission's efforts to achieve a compromise between two different approaches to this category of offence: on the one hand, it has attempted to formulate a general definition of war crimes and, on the other, to enumerate acts which it feels constitute war crimes.

67. The Netherlands Government supports the view taken by those members of the Commission who are opposed to an enumeration of acts to be deemed "exceptionally serious war crimes". In the first place, an enumeration of this type occurs nowhere else in the text and, secondly, it would also prevent any new developments in the field of warfare from being included under the provisions of the Code.

68. At the same time, it appreciates that it is extremely difficult to find a general term which is sufficiently precise but yet does not limit the scope of the article more than necessary. In this connection, the phrase "grave breaches" would not be suitable, considering that certain acts described as "grave breaches" in the Geneva Conventions and Additional Protocol I thereto are not sufficiently serious to be included in the Code, while others which are not described as "grave breaches" are eligible for inclusion. On the other hand, the Netherlands Government feels that the phrase "acts of cruelty or barbarity" is too loosely defined and allows too much scope for subjective interpretation to be suitable here.

69. It consequently suggests that paragraph 2 should refer to "serious war crimes"—omitting the qualification "exceptionally"—defined as follows:

(*a*) Grave breaches as described in the Geneva Conventions and Additional Protocol I to the Geneva Conventions;

(*b*) Other serious violations of the rules of international law applicable in armed conflicts.

Strictly speaking, category (*a*) is not absolutely necessary, given that the same provision is covered by category (*b*). Nevertheless, it should be stated explicitly for the sake of clarity. The qualification "serious" implies that not all war crimes are covered by the Code. The question as to whether a violation may be deemed "serious" will arise primarily when the expediency of prosecuting a crime is at issue.

70. The Netherlands Government agrees with the Commission that this article should also be applicable to national armed conflicts, given that serious war crimes can likewise be committed in these circumstances. It would

[5] *Yearbook . . . 1991*, vol. II (Part Two), pp. 103-104.

[6] Ibid., p. 104, para. (9).

consequently be possible to invoke the article in response to human rights violations by insurgents. Furthermore, it would obviate the need to decide whether a conflict in a given case was national or international. The commentary to the article[7] should specify that this application widens the scope of existing law, since war crimes are not mentioned in Additional Protocol II to the Geneva Conventions. In addition, the commentary should examine this provision in relation to article 6, paragraph 5, of Additional Protocol II, which urges the parties to the conflict to cooperate in achieving the widest possible amnesty after the cessation of hostilities.

Articles 23 to 26

71. The Netherlands Government is opposed to the inclusion of articles 23 to 26 in the Code since none of them satisfies the criteria set out in part I of the present comments.

72. The concept of "international terrorism" (art. 24), moreover, could give rise to almost insurmountable problems of definition and interpretation.

73. Traffic in narcotic drugs (art. 25) is of an entirely different order from crimes such as genocide, aggression or systematic and mass violations of human rights. The Netherlands Government would again emphasize its view that the envisaged mechanism for enforcing the Code internationally would not be the most suitable means of punishing this offence. National enforcement instruments would be more appropriate in such cases, possibly based on the principle of universality or, alternatively, on the principle of *aut judicare aut dedere*, the application of which would be established by treaty.

Nordic countries

[*Original: English*]
[*22 December 1992*]

GENERAL OBSERVATIONS

A. *Considerations of principle*

1. The Nordic countries are basically in favour of a Code of Crimes against the Peace and Security of Mankind. However, the present draft must be supplemented extensively, both with respect to important questions of principle, such as under what circumstances a perpetrator is not to be held accountable, and to the specific wording of the various penal provisions. Furthermore, the wording of the draft deviates from general usage in legislative drafting and consequently the Code could not be used in its present form by the courts of many countries.

B. *Relationship to an international criminal court*

2. One of the basic difficulties with the present Code is that its status is unclear. On the one hand, it could be a traditional convention under which each individual country undertakes to incorporate the punishable acts mentioned in the convention into its internal legislation as crimes and stipulates an appropriate penalty or to initiate an extradition process. One argument against such a solution is, however, that most of the crimes included in the draft Code are already covered by existing conventions or are contrary to current international and domestic law.

3. On the other hand, the possibility could be envisaged of establishing an international penal code that is independent of national criminal law. Given such a point of departure, it is difficult to assess the current draft as it only touches briefly on the procedural requirements for trying a case before a court of law.

4. As the Nordic countries understand the draft, the intention is merely to criminalize various acts according to international law, but the question whether such crimes should be prosecuted by an international criminal court or a court in the country concerned, or both, remains undecided. They also interpret the draft to mean that the States that accede to the Code will not thereby undertake a legal obligation to ensure that their internal criminal legislation covers all the acts defined as crimes in the draft Code. Many judicial systems, such as those in the Nordic countries, will nonetheless require corresponding penal provisions in their internal law in order to institute a prosecution under the Code. Therefore, consideration should be given to whether States parties to the final instrument will be required to take the necessary measures, including legislation, in order to ensure its implementation.

5. There is a definite need for a court that can try certain particularly serious crimes, such as aggression, intervention and genocide, for which there is generally limited national jurisdiction because of their international character. However, the Nordic countries see less reason to establish an international criminal court to try crimes that unquestionably are of an international character, but which have been dealt with so far under the internal criminal law of the respective countries. It would be more expedient to use the Commission's draft as a basis for drawing up a code dealing with gross violations of the peace and security of mankind which could both serve as a foundation for and come under the jurisdiction of a prospective international criminal court.

C. *General comments on the draft Code*

6. To a certain extent, several of the articles are directly based on existing international conventions dealing with the respective crimes. In these cases, the relationship between the draft Code and the conventions in question must be clarified.

7. Another problem, particularly in the light of the high degree of precision required by criminal law, is that a number of the key articles are so vague and ambiguous that they would create more confusion than clarity. Moreover, many of the articles make use of general concepts with political overtones, which leaves them open to a variety of interpretations. This applies, for example, to the wording in article 16, "any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated". It may be difficult to determine precisely what is implied by that concept.

[7] Ibid., pp. 105-107.

8. It is evident from the above that the crimes to be included in such a code must fulfil two criteria. First of all, they should be acts that are in reality a crime against the peace and security of mankind, that is to say, they must fulfil the criterion of classification. Secondly, their nature must be such that they can be regulated by this kind of instrument, namely they must fulfil the criterion of suitability. As is pointed out in the specific comments on individual articles below, the draft Code includes a number of articles which, in the view of the Nordic countries, do not meet these two criteria. A code based on these criteria would be considerably less comprehensive than the present draft. The crimes that should be retained are primarily those outlined in articles 15 to 22, and which are committed on behalf of State authorities.

9. A further problem with the present draft is that it fails to specify the degree of accountability that must subsist. As the Nordic countries understand the draft, it is generally sufficient that an offence has actually been committed. However, in certain articles it is specified that the provision is only applicable to acts that are committed "wilfully". In other cases it is stated that special motives must be present. An example is the wording in article 20: "for the purpose of establishing". In the view of the Nordic countries, it should be set out in a separate article in part one that the Code basically only applies to acts committed wilfully. Any exceptions to this can be specified in the articles in which the intention is to strengthen or weaken the requirements as to subjective accountability.

10. Furthermore, the draft does not take account of the fact that there is a significant difference between cases in which the act has been carried out by individuals on their own initiative and those in which it is the consequence of a decision taken by the highest government bodies of the State. For example, cases in which decisions are made by a national assembly comprising several hundred members pose obvious problems. In this context reference is made to article 20, paragraph 2 (*c*), where "any legislative measures" may be regarded as apartheid. Is the intention here that all members of the national assembly who were instrumental in passing such a statute should be liable to a penalty? At any rate this would not be a particularly practical course of action. In such cases, the criminal responsibility would rest almost automatically with the State, in that it is the highest government bodies that act and have jurisdiction under international law to propose or pass legislation on behalf of the State. It is not indicated clearly enough whether it is individuals or the State as such that are liable. The criminal responsibility of a State raises problems of enforcement that differ fundamentally from those raised by the articles that are directed at individuals. It is the view of the Nordic countries that the Code should apply only to criminal acts committed by individuals.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

11. The following comments reflect the preliminary thinking of the Nordic countries on individual articles of the draft seen as a whole.

Article 1

12. The article appears to give a legal definition of the term "crimes against the peace and security of mankind" and, as currently worded, can be interpreted as being antithetical. This provision should be deleted as there is no need for such a definition. Moreover, it could be confusing because certain crimes included in the draft Code can hardly be said to be of the nature described.

Article 2

13. The principles set out in the article are acceptable as regards crimes that normally do not come under national jurisdiction because they would be contrary to international law. However, the draft Code includes crimes that are generally subject to conflicting national legislation. Where this is the case the provision needs to be made less categorical.

Article 3

14. The article is a good illustration of the difficulties associated with the technique employed in the draft Code. If the aim is to establish an international criminal code, the question of determining individual accountability, criminal participation, complicity, various kinds of attempt, and so forth, must be resolved satisfactorily from the point of view of interpretation.

Article 4

15. It is not difficult to imagine motives, for example in various kinds of emergency situations, which would affect the question of criminal responsibility. According to the wording of the article, however, no importance should be attached to such considerations. Thus, the article causes considerable problems and is not acceptable in its present form.

Article 5

16. This provision must be retained in the draft Code in order to maintain the criminal responsibility of individuals and at the same time ensure that States are not relieved of responsibility for war reparations, and the like.

Article 6

17. The Nordic countries presume that a decision not to incite a perpetrator is also covered by the term "try". This is in keeping with the corresponding interpretation of similar formulations employed in other international contexts. If an international criminal court were to be established, the substance of the principle "try or extradite" will have to be further elaborated.

Article 7

18. The absence of statutory limitations may be acceptable as regards the most serious crimes, but it is much more doubtful in those cases where conflicting national criminal law may prescribe statutory limitations after a certain period of time.

Article 8

19. The article demonstrates clearly that the procedural requirements for a trial in accordance with the draft Code must be determined in connection with the formulation of

the penal provisions. The minimum standards established for legal actions, which are taken from civil rights requirements, are reasonable as far as they go but far from sufficient as rules of judicial procedure for a court of law.

Article 9

20. A number of the substantive solutions that derive from this provision can be called into question. For instance, according to paragraph 4, an individual may be tried by a national court of one State even though he has been tried by the court of another State for the same offence, if the former State has been the main victim of the crime. The Nordic countries interpret this to mean that this applies, for example, even if the person in question has already served a long prison sentence. Thus, the provision clearly conflicts with traditional principles of force of law in criminal law and should thus be worded in less categorical terms. A reasonable solution might be to provide that consideration by a national court should not prevent a crime from being tried in accordance with the Code, but that account should be taken of the sentence the convicted person is serving or is to serve in accordance with the judgement handed down by the national court.

Article 11

21. The provision establishes that the fact that an individual acted pursuant to an order of a superior does not relieve him of criminal responsibility provided that "it was possible for him not to comply with that order". The word "possible" as used in this provision must be more clearly defined. The consequences for refusing to comply with orders may vary widely, ranging from reprimands and dismissal to the death penalty. The intention cannot be that all such circumstances shall relieve the perpetrator of criminal responsibility. This problem should be dealt with explicitly in the text of the Code itself.

Article 12

22. This provision, which concerns a superior's failure to attempt to prevent a criminal act, goes further in terms of criminalizing such failure than is acceptable in the Nordic countries. In order for such responsibility to exist, it is generally required that the substantive provisions give rise to an obligation to act on the part of the person who has omitted to act. Moreover, it may be difficult to reconcile the provision with the definition of individual responsibility set out in article 3.

Article 13

23. It must be presumed that even heads of State cannot be absolved of international responsibility for their acts if these acts constitute a crime against the peace and security of mankind. This must apply even if the constitution of a particular State provides otherwise.

Article 14

24. Paragraphs 1 and 2 should be placed in separate articles, because there is a fundamental difference between circumstances that absolve a perpetrator of responsibility for an act and circumstances that have a bearing on the sentence.

25. As the article is currently worded, it gives no indication of the circumstances to be taken into account when trying a crime. Thus, any court is free to interpret the provision, which is hardly in conformity with the rule of law. In the view of the Nordic countries, it would be appropriate to determine the significance of self-defence and state of necessity. The problem of consent may also arise in various contexts.

26. Furthermore, the draft Code includes two other articles (arts. 11 and 13) that deal with grounds on which a perpetrator may be relieved of responsibility. These should be combined with article 14. One way of doing this could be to enumerate the circumstances that relieve an individual of responsibility, and those that do not. The circumstances set out in articles 11 and 13 of the current draft would then be among those that do not in any case incur accountability.

27. Another problem with the draft is that it does not include any provisions to govern cases in which a perpetrator is insane or otherwise unaccountable for his actions at the time of committing the act.

28. Paragraph 2 should also govern aggravating circumstances. Moreover, it is necessary to define and exemplify what is meant by the terms extenuating and aggravating circumstances, as the provision in its present wording is practically without substance.

Article 15

29. The provision concerning aggression fulfils both the criteria set out in section C above. It is, however, questionable whether the definition is suitable in all respects. Paragraph 3 includes a reference to the Security Council's determination of aggression. From a political point of view, the Security Council's competence in this matter is well founded. However, in a legal context it is not an acceptable approach, as the judgement of a court would then be dependent upon a political assessment.

Article 16

30. The criteria set out in section C above have, in the view of the Nordic countries, been fulfilled in this article as well. However, the provision could perhaps be limited to the "threat of violent aggression" in order to avoid charges for misdemeanours that are less serious than or fall short of genuine threats.

Article 17

31. The provision fulfils the criteria mentioned in section C, but in some respects it seems to overlap with article 24 concerning terrorism. These two articles should be considered carefully, as it might be sufficient just to retain article 17, which is the more comprehensive of the two. There are, however, weighty political arguments for explicitly prohibiting terrorism in a separate article or, alternatively, in a separate paragraph in article 17.

Article 18

32. In the opinion of the Nordic countries, this provision does not fulfil the criterion of suitability set out in section C. The wording "alien domination contrary to the right of people to self-determination" is too imprecise and

probably too comprehensive. As currently worded, the provision could, for example, apply to various forms of trade boycott as well as to situations where a donor country stipulates certain conditions in connection with development assistance. Thus, the provision is open to various interpretations and could give rise to conflicts. It must therefore be made much more precise if it is to be retained.

Article 20

33. The Nordic countries hold the view that the provision on apartheid does not fulfil the criterion of suitability. What is more, the definition of the crime is clearly covered by article 21 concerning systematic or mass violations of human rights.

Article 22

34. Although the provision concerns "exceptionally serious war crimes", not all of the acts specified herein fall within this category, though they are definitely criminal acts. This applies, for example, to "unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities" (paragraph 2 (*a*)).

Article 23

35. In the view of the Nordic countries, the acts covered by the provision are in themselves not serious enough to be included in a code of crimes against the peace and security of mankind, particularly given the fact that the use of such forces in armed aggression or oppression of ethnic groups, and the like, is covered by previous articles. As currently worded, the provision also covers negligent complicity in financing the services of mercenaries, and it is questionable whether such an act ought to be an offence at all.

Article 24

36. The scope of the provision is too narrow from a substantive point of view. It is difficult to understand why only cases where the terrorist is "an agent or representative of a State" should be covered. The other crimes included in the draft Code are not subject to such a limitation, provided that it is possible for individuals to contravene these provisions without acting on behalf of a State. The majority of the crimes that could conceivably fall within the scope of this article are of such a nature that they are generally covered by national criminal legislation as well as specific conventions. There is, therefore, reason to presume that, in many cases, conflicting penal provisions are to be found in national criminal law.

Article 26

37. It is important to establish some form of international legal regime which deals with the question of liability in connection with transboundary environmental damage. From a substantive point of view, however, it is clear that the article does not have the degree of precision required for a penal provision. The matter should therefore be considered further.

PENALTIES

38. The Nordic countries presumed that imprisonment would be the most appropriate penalty, as the draft Code should only include crimes that are so serious that a custodial sentence is the only conceivable form of punishment. As far as the death penalty is concerned, they have on several occasions expressed the view that it is unacceptable, even for the most serious crimes.

39. As regards assessment of sentence, a scale of penalties should be established for each individual article. Minimum sentences should probably also be prescribed in connection with a number of the penal provisions.

40. There is also a definite need for provisions concerning confiscation in addition to imprisonment. This could, for example, be quite practical in cases where cultural objects have been stolen in wartime.

CONCLUSION

41. In the view of the Nordic countries, it would be most expedient to focus on the most serious crimes against the peace and security of mankind, and thus on a relatively limited code.

Norway

[*See* ***Nordic countries***]

Paraguay

[*Original: Spanish*]
[*30 November 1992*]

GENERAL COMMENTS

1. The draft Code of Crimes against the Peace and Security of Mankind does not define such crimes but simply enumerates them and characterizes them as crimes under international law. Unlike other international instruments, it does not draw a distinction between crimes against peace, war crimes and crimes against humanity.

2. The principal crimes it lists are aggression and the threat of aggression, intervention, colonial domination and apartheid. Another group consists of the recruitment, use, financing and training of mercenaries. A third group is made up of genocide, systematic or mass violations of human rights, exceptionally serious war crimes, illicit traffic in narcotic drugs and wilful and severe damage to the environment.

3. Many of these crimes, such as genocide, war crimes and torture, are already covered by instruments emanating from the United Nations and the Organization of American States.

4. The purpose of this draft is to supplement those norms by seeking to ensure effective protection for human rights and greater observance of the principles of non-intervention and self-determination of peoples, thereby helping to expand the legal protection of the international community.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 3

5. In paragraph 1 of the Spanish text, the words *podrá ser sancionado* should be replaced by the words *será sancionado*, since it involves an obligatory penalty. The same applies to paragraphs 2 and 3.

Article 7

6. Whatever views may be held regarding derogation from the principle of statutory limitations for criminal action and punishment, this article merely follows the system established with respect to such crimes in similar international instruments. Instead of declaring the non-applicability of statutory limitations, however, it should establish a longer time limit or limitation than that applicable to common-law crimes.

Article 9

7. Paragraphs 1 and 2 establish the rule of *non bis in idem*. However, paragraph 3 weakens it considerably by providing that if an individual has been punished for a crime under ordinary law, he may be tried and punished again for a crime covered by this Code. Such a provision works against the principle of *non bis in idem*, the right not to be tried more than once for the same act, which is a legal guarantee for the accused instituted for the preservation of legal safeguards.

8. The same applies to the provisions of paragraphs 4 (*a*) and (*b*). It should be acknowledged, however, that paragraph 5 would help mitigate the effects of the aforementioned paragraphs.

9. With regard to paragraph (2) *in fine* of the commentary,[1] it should be pointed out that, under Paraguayan law a discharge of proceedings has the same effect as an acquittal, although it is pronounced during pre-trial proceedings rather than during the trial.

Article 10

10. It is not advisable to limit the principle of non-retroactivity. *Nullum crimen, nulla poena sine lege* is a cardinal principle of the legal order and it is dangerous to permit exceptions to it. Paraguay believes, therefore, that paragraph 2 of this article should be deleted. Paragraph (3) of the commentary[2] is also unacceptable, for it seeks, without justification, to give the word *lex* a very broad meaning, encompassing not only written law but also custom and general principles of law. It would have the effect of virtually negating the principle of the legality of crimes and penalties as cited.

Article 14

11. Paragraph 1 of this article provides that

"the competent court shall determine the admissibility of defences under the general principles of law, in the light of the character of each crime".

Defences (justifications, grounds for inculpability and for non-imputability) are so important a matter in criminal law that to refer to "general principles of law", thereby leaving a great deal to the judge's discretion, seems inappropriate. It would be wiser, in order not to have to spell out the grounds for the defence, to refer to the laws of the State in which the crime was committed.

Article 15

12. This article states—as do the others in part two—that an individual who . . . commits one of the crimes specified in the draft Code "shall, on conviction thereof, be sentenced . . .". The phrase "on conviction thereof" is clearly redundant, for a person cannot be sentenced until he has been tried and found guilty.

13. The Commission saw fit to include the offence of total or partial annexation in the draft (paragraph 4 (*a*)); it is defined as the total or partial annexation of a sovereign State by another, through the use of violence or other illicit means.

Article 16

14. The rule set out in paragraph 1 is too broad and imprecise. Defining the threat of aggression in the Spanish text with the terms *proferir una amenaza* or *ordenar que sea proferida* is not precise enough with regard to the offence. There must be a reasonable probability, as evidenced through actions, that aggression will take place.

Article 17

15. Fomenting and financing armed activities is not the only form of intervention in the internal or external affairs of a State; intervention may take more subtle, covert and effective forms, such as attacks or measures of an economic nature that severely disrupt the life of a country, forcing it to accept the demands being placed upon it.

Article 19

16. The crime of genocide was already defined in the Convention on the Prevention and Punishment of the Crime of Genocide, and it remains unchanged in this instrument. If any change is to be made, paragraph 2 (*e*) could be expanded to cover adults as well as children.

Article 21

17. This is similar to the crime of genocide (art. 19), as can be seen by comparing the provisions of the two articles. However, this article does not mention the underlying motive for the crime of systematic or mass violations of human rights. The differences do not seem to be fundamental.

Article 22

18. There are already many international conventions on war crimes, which are referred to in the commentary to this article.[3] It is legitimate to ask whether there is any need to have yet another category of crime, namely ex-

[1] Article 9 was previously adopted as article 7. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), p. 69.

[2] Article 10 was previously adopted as article 8. For the commentary, ibid., p. 70.

[3] *Yearbook . . . 1991*, vol. II (Part Two), p. 105.

ceptionally serious war crimes, and whether the degree of seriousness is a sound criterion to use in defining an offence for which other characterizations already exist. Degree of seriousness is, however, a valid criterion to use in determining the severity of the punishment.

Article 24

19. This article covers terrorism, not as committed by individuals or private groups, but by agents or representatives of a State, cases of which exist in the international community today.

Article 26

20. Given the current gravity of ecological problems, it is appropriate that severe damage to the environment should be established as an offence under international criminal law.

Poland

[*Original: English*]
[*29 March 1993*]

GENERAL COMMENTS

Penalties

1. In the field of public international law it is very difficult to establish a uniform system of punishment which would be acceptable to all States. There are many concepts and philosophies regarding the punishment system provided in the domestic law of States. Certain penalties in force in some countries, based on a long legal and cultural tradition, are unknown in others, for example, death and physical mutilation penalties.

2. The first important question is whether a penalty should be specified for each crime against the peace and security of mankind severally or whether, since all such crimes are characterized by the same degree of extreme gravity, the same penalty should be laid down, under a general formula, for all cases, with a minimum and maximum according to whether or not there are extenuating or aggravating circumstances. Practically speaking, the second option would have a better chance of being adopted by all States. Determining a separate penalty for each crime would require very careful discussion on part one of the draft Code and probably would prevent the achievement of a satisfactory compromise in the near future.

3. Taking into account a diversity of legal systems, philosophies and traditions of criminal law of many countries, the Government of Poland supports the second option, with the term of imprisonment (life imprisonment and imprisonment for 10 to 35 years) being strictly determined by the court, according to the circumstances of the case, and, if deemed necessary by the court, supplemented by community work, total or partial confiscation of property and deprivation of some or all civil and political rights (as has been proposed by the Special Rapporteur in alternative B of the new, second version of draft article Z.[1])

4. The Polish Government is therefore in favour of a single penalty with a minimum and a maximum. On the other hand, it is obvious that some crimes might be considered more serious than others—for example genocide or aggression, which could not be treated in the same way as drug trafficking. Such differences should be taken into account by the court in deciding the penalty, ranging from life imprisonment (maximum) to imprisonment for a term of 10 years (minimum).

5. The second question, regarding penalties, raises the question of the type of penalties to be applied under the Code.

6. Poland shares the opinion in respect to life imprisonment, that those who have committed "the most serious of the most serious crimes" should be separated and removed from the international and domestic community for ever in order to protect mankind and prevent the recurrence of such crimes in the future.

7. As concerns temporary imprisonment (for the term of 10 to 35 years) the view is that the individual who has been convicted for temporary imprisonment should serve his full sentence without the right to apply for early release.

8. Poland draws attention to the fact that the draft Code does not determine who or what body would be responsible for carrying out the sentence of imprisonment and, consequently, in which State those condemned should serve their sentences. This determination would be important since the severity of penal institutions and prisons differs in various countries and it is necessary to take these differences into account.

9. In the opinion of the Government of Poland, the main problem regarding supplementary (additional) penalties seems to be their "territorialization" in one country or another. The question that arises is in which State the penalty of deprivation of some or all civil and political rights would be effective and applicable. Furthermore, this particular penalty should be decided only by the domestic court of the State of which the subject of the prosecution is a national.

10. The use of community service as a supplementary penalty also gives rise to some doubts. First, this penalty ought to be decided only in cases of petty offences or misdemeanours, not crimes. Secondly, it is a question of knowing for whom such work would be done and what society or State would be the beneficiary.

11. In principle, Poland is of the view that the restoration of stolen property is a matter for the domestic law and jurisdiction of each State concerned. Furthermore, there are many well-known problems and difficulties concerning claims to property, even in domestic cases.

12. The total or partial confiscation of property as one of the optional penalties would be useful in many cases. As to the question of to whom the confiscated property would be awarded on the international level, the Polish Government supports the view that, according to the widely recognized principle of law, such part of the property as has been stolen should be restored to its rightful owner or his heirs.

[1] For text, see *Yearbook . . . 1991*, vol. II (Part Two), p. 85, footnote 281.

13. Turning over the remaining part of the confiscated property (property which was not stolen) to humanitarian organizations or allocating it to a special United Nations fund might cause certain practical problems, particularly with regard to real estate.

Institution of criminal proceedings (submission of cases to the court)

14. Criminal proceedings in respect of crimes against the peace and security of mankind are to be instituted first and foremost, but not exclusively, by States. In the view of the Polish Government, in some cases it would be more convenient and appropriate for other entities concerned (such as international governmental and non-governmental organizations) to institute criminal proceedings rather than for States to do so, as for example in the case of environmental crimes, human rights violations or war crimes. Therefore such organizations should have the right to take action as regards the crimes described in the draft Code.

15. Poland does not share the opinion that the right to bring charges should be entrusted to a special prosecutor's office attached to the court, because it would be difficult to establish yet another international criminal body responsible for investigating and determining the grounds for prosecution.

16. The crimes of aggression and the threat of aggression as provided in the draft Code also constitute violations of international peace and security. Therefore, in these cases, the position and rights of the Security Council must be underlined and taken into account. The Security Council itself should not be competent to take any judicial measures and to institute criminal proceedings directly; to give it such competence would be neither logical nor appropriate. Furthermore, it would require amending the Charter of the United Nations. The court should be bound by a determination of the Security Council that there had been an act of aggression or threat of aggression, but if the Security Council did not act and make such a determination, the court would be fully capable of making its own decision as to the determination of a given act as one of aggression or threat of aggression. Later, the Security Council, in its activities, would not be bound by such a decision of the court.

17. This would make it possible to avoid the eventuality of blocking criminal proceedings were the Security Council unable to take a positive decision on the matter.

18. The conclusion is that either every positive decision of the Council would be binding on the court or the court, acting on the legal—not the political—level, would have to make its own decision and continue criminal proceedings regardless of the "no-decision" outcome of the Security Council's action. As mentioned by some members of the Commission during the consideration of the topic at its forty-third session, ICJ in its judgment of 27 June 1986 (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*)),[2] had not refused to consider the question whether one of the States parties to the dispute had been guilty of an act of aggression which had not been determined by the Security Council. In this case, the Court decided, quoting the Definition of Aggression[3] annexed to General Assembly resolution 3314 (XXIX) of 14 December 1974 as expressing customary law in this respect), by 12 votes to 3, that the United States, by certain attacks on Nicaraguan territory and other acts which involved the use of force, had acted against Nicaragua in breach of its obligations under international law not to use force against another State.

Acts likely to constitute an attempt to commit a crime

19. The Government of Poland is of the view that the automatic transfer of types of offences from domestic to international law is inappropriate. There are even doubts in respect of attempt. Those doubts are much more serious with regard to types of offences such as preparation of, aiding and abetting, and incitement to commit a crime. Nevertheless, the Government of Poland is open to consider attempt as a useful and applicable concept in the following types of crimes described by the draft Code in articles 15, 17, 19, 21, 22, and 24 to 26.

20. The Government of Poland considers that the crime of the threat of aggression, in essence seems to be something like "pre-attempt at aggression", and it would be going too far to recognize as a crime an "attempt to threaten", whatever the threat may be.

21. In the crimes described in articles 18, 20 and 23 of the draft Code, the essential element seems to be a wrongful result of the concrete act and therefore, in the cases of absence of such result (for example, in the case when there is only the attempt to commit a crime), such an act should be carefully considered and reviewed in a different manner, maybe outside the terms of criminal responsibility.

22. Regarding part two of the draft Code as a whole, the Government of Poland is of the opinion that the order in which particular crimes appear therein does not establish the scale or degree of seriousness of those crimes and the hierarchy of gravity among them. It supports the fact that the draft does not maintain the distinction between crimes against peace, war crimes and crimes against humanity.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

23. The square brackets around the words "under international law" seem unnecessary in this context. The Code will be a treaty and crimes may only constitute international crimes in terms of international law. However, many internal systems of law recognize crimes described in the Code as crimes under domestic law. Therefore, if the bracketed words were omitted it would leave open the question of "double recognition" of such crimes as crimes under both international and domestic law.

Article 2

24. It is suggested that the words "is not punishable" should be replaced by "is not a crime" or "is not unlawful".

[2] *Merits, I.C.J. Reports 1986*, pp. 14 et seq., paras. 187 to 201 and 201 to 227.

[3] General Assembly resolution 3314 (XXIX), annex.

Article 3

25. The Government of Poland supports the idea that the draft Code should limit criminal responsibility for the crimes described in it solely to individuals.

26. There are three categories of individuals who might be responsible and liable to punishment under the provisions of the Code:

(*a*) Leaders and organizers of crimes (arts. 15-18 and art. 20);

(*b*) Agents or representatives of States (arts. 23-24);

(*c*) Individuals per se (arts.19, 21, 22 and 25-26).

The last category is the most general.

27. The Government of Poland is of the view that the adoption for the purposes of articles 23 and 24 of such personal limitation of responsibility (para. 26 (*c*) above) goes too far. When the individual is not an agent or representative of the State, he does not fit the definitions of the crimes described in articles 23 and 24. The question therefore arises why only the categories of individuals described should be responsible for crimes against the peace and security of mankind while the wrongfulness of the outcome and the gravity of such acts when performed by individuals who are not agents (representatives) of States are the same.

Article 5

28. This article is a well-balanced barrier against the possible interpretation of the provisions of the draft Code as relieving States of their own responsibility under international law for all wrongful activities attributable to them. The prosecution, conviction and punishment of individuals under the provisions of the Code for the crimes described therein are in no way a substitute for the State's responsibility. The essence of the State's responsibility for acts is of a different nature and exists on a different level.

Article 6

29. This article establishes the right priority of jurisdiction, recognizing the special position of the State in whose territory the crime was committed. It is important that paragraphs 1 and 2 do not prejudge the jurisdiction of the future international criminal court.

Article 7

30. The provision that no statutory limitations shall apply to crimes against the peace and security of mankind is direct evidence that these crimes are primarily crimes of international law, determined and constituted by that law.

Article 8

31. Some doubts arise regarding the expression "minimum guarantees due to all human beings with regard to the law and the facts". The Government of Poland is of the view that the maximum or the widest guarantees should be recognized rather than the "minimum". Furthermore, it is not clear what the words "guarantees with regard to the facts" mean and how they should be interpreted.

32. As concerns the expression "by law or by treaty", the Government of Poland considers that making a distinction between law and treaty suggests that a treaty is not a law or that it is other than legal in nature. It is proposed to omit the words "or by treaty" and simply leave "by law".

Article 9

33. The *non bis in idem* principle, as mentioned in the title of this article, has been expressed in such a manner in the text that it has practically lost its fundamental sense and significance. That is why Poland considers that further intensive work is required on this article.

Article 10

34. The Government of Poland is in agreement with the manner in which the non-retroactivity principle is formulated in this article. Those crimes which existed before the entry into force of the Code might be prosecuted and punished accordingly.

Article 11

35. This article reflects experience deriving mainly from the Nürnberg trial.[4] Generally speaking, as a principle, any kind of order does not exclude responsibility except in a situation where, in the circumstances at the time, it was possible for a subordinate not to comply with the order. Practically speaking, it may be expected that at the international criminal court many perpetrators of crimes will refer to this exception as an excellent line of defence.

36. The Polish Government is of the view that in such cases it would be difficult for the court to make a proper and objective interpretation of the expression "in the circumstances at the time, it was possible for him not to comply with that order". It is not clear what this sentence really means. There are many possible interpretations: does it only mean a threat to the personal safety of the subordinate, or does it also concern the safety of the members of his or her family and other close relatives? Poland is of the view that it would require further specification. In many particular cases, article 11 is one of the key provisions for the determination of responsibility.

Article 13

37. The provisions of this article do not recognize any kind of immunity with respect to the position or office of an individual who commits a crime, including for heads of State or Government. It is a serious but logical and reasonable limitation of the full immunity of heads of State. Their immunity cannot be such as to put them beyond the reach of criminal responsibility for crimes against the peace and security of mankind.

Article 14

38. As concerns paragraph 1, the Government of Poland would like to underline that in its opinion this paragraph includes traditional criminal law defences such as self-defence, coercion, state of necessity, *vis maior* and error— all related to the existence or non-existence of responsibility. Extenuating and maybe other kinds of circumstances, which might be considered by the Commission in second reading, determine only the degree of harshness or leniency of the penalty.

[4] United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and Analysis (memorandum by the Secretary-General)* (Sales No. 1949.V.7).

39. Paragraph 2 should be supplemented by adding "aggravating circumstances" and also "other circumstances such as, for example, the personality of the offender, the gravity of the effects of the crime and others, as the case may be".

Article 15

40. Paragraph 4 (*h*) is an important supplementary clause which allows the Security Council to take into account the future progress of international law concerning the definition of aggression, and particularly new forms of aggression which may appear in the future.

Article 21

41. As is determined in the title of this article, only their systematic or mass character qualifies violations of human rights as a crime against the peace and security of mankind. Such a determination clearly excludes individual and occasional violations of human rights from the definition of that crime. But there is, in the opinion of the Polish Government, some kind of inconsistency in the construction of article 21. The title provides that a necessary attribute of the crime described therein is its "systematic or mass" character but as this attribute appears only once in the detailed enumeration of the five forms (examples) of the crime, it is not clear whether murder or torture also need to be of a "systematic or mass" character in order to be recognized as crimes under article 21. It is not clear whether the essential provisions of this article should be read in conjunction with its title or not. If an act only constitutes a crime under the provisions of this article when it involves systematic or mass violations and otherwise does not come under the draft Code, then this must be expressed clearly, not only in the title but particularly in the text of the article.

Article 25

42. The expression "on a large scale" has a subjective character and without any instructions, even general in nature, as to what it means it would be difficult for the court to answer the question of what is large scale and what is not.

Article 26

43. It would be reasonable to replace the expression "long-term" by "long-term effects" because, as has been mentioned by the Commission, the expression "long-term" does not mean the period of time in which the damage occurs, but the long-term nature of its effects.

44. The observations made above in relation to the term "on a large scale" in article 25 apply in the same manner to the expressions "widespread" and "severe", which determine the character of damage to the environment in article 26.

45. This article conflicts with article 22, which also deals with protection of the environment (para. 2 (*d*)). Under the provisions of the latter article it is also a crime when an individual employs methods or means of warfare that may be expected to cause damage, even if the purpose of using such methods has not been to cause damage to the environment, whereas article 26 is based on the concepts of intent and will ("who wilfully causes").

Senegal

[*Original: French*]
[*18 December 1992*]

1. During the debate on this item in the Sixth Committee, the Senegalese delegation welcomed the quality of the report submitted by the Special Rapporteur of the International Law Commission, and the efforts he has been making over the past 10 years to draw up a code of crimes and a statute for an international criminal jurisdiction.[1]

2. The Government of Senegal believes that the international community can no longer ignore the problems posed by the expansion of criminality to international dimensions.

3. Punishment of international crimes often involves a number of legal systems whose laws are very often incompatible. This situation creates spatial conflicts of law, making it difficult to punish crimes promptly and effectively, not to mention often creating tensions as a result of requests for extradition.

4. Accordingly, there is a pressing need for the international community to try to harmonize criminal law in order effectively to combat crime and offences of an international nature. This undertaking must be geared, as a matter of priority, to prevention, because punishment is but an imperfect means of fighting criminality.

5. For all these reasons, Senegal supports the principle of the drafting of a convention in respect of crimes against the peace and security of mankind and in respect of an international criminal jurisdiction, it being understood that such a convention would define the legal framework for international judicial cooperation, which is now more necessary than ever before in order to combat crime and delinquency in general, *inter alia*, by providing technical and financial assistance to the developing countries.

[1] See *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 22nd meeting, paras. 47-52.

Sudan

[*Original: Arabic*]
[*26 January 1993*]

1. An article should be inserted at the beginning of the draft Code of Crimes against the Peace and Security of Mankind to define those terms and expressions used in the text which require a strict legal definition in order to prevent any individual interpretations or disputes that might arise.

2. The provisions of the draft Code do not distinguish between crimes committed by a person in the territory of his own country and those committed in another country. A distinction must be drawn between these two types of crime, and it must be determined which court is competent to rule on crimes committed by nationals of a given country on foreign soil.

3. It is necessary to determine as well which court or courts are competent to rule on the crimes specified in the draft Code.

4. The failure to determine penalties for any of the crimes specified in the draft Code means the picture is not sufficiently complete to allow comment as to whether the penalties are appropriate and likely to lead to a curtailment of such crimes.

Sweden

[See *Nordic countries*]

Turkey

[*Original: English*]
[*15 January 1993*]

GENERAL COMMENTS

1. Approval of the draft Code initially as a declaration, to be converted later into a binding document, would be appropriate.

2. The fact that some of the issues entailed in the draft are covered in certain treaties and that national bodies are authorized to institute proceedings and hand down sentences on those issues may create difficulties for signatory States in harmonizing their obligations under such treaties with those under the Code.

3. The draft would be improved if penalties could be specified along with crimes. However, it would be appropriate to allow the judges to decide on penalties ranging between a minimum and a maximum, rather than stipulating specific sentences for each crime.

4. The draft should not include crimes on which complete agreement has not been reached.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 7

5. Even though the underlying idea of the article is tenable, in the case of the establishment of a future international criminal court, a statute of limitations—perhaps a relatively extensive one—should be envisaged for abuse-of-the-law cases brought against certain countries.

Article 10

6. According to this article, no one will be convicted for crimes committed prior to the entry into force of the Code. Paragraph 2 is among the basic principles of criminal law and should be made use of in the draft.

Article 15

7. After the enumeration of the acts of aggression, it is pointed out in paragraph 4 (*h*) of article 15 that the Security Council will also be able to determine, in accordance with the Charter of the United Nations, other acts that might also be considered as criminal. However, one of the basic tenets of criminal law and a safeguard for the offender is that the elements of and the penalty for the offence have to be predetermined. In the light of this principle, such a stipulation that might result in offences being devised that were not foreseen would not be appropriate.

Article 16

8. This article of the draft cites the threat of aggression as one of the crimes against the peace and security of mankind. Paragraph 1 stipulates that the leader or organizer of the crime of threat of aggression may be punished. Paragraph 2 provides that threat of aggression entails declarations and demonstrations of force appearing to Governments as threats of aggression against their countries. This concept is also referred to in the Charter of the United Nations. However, as the Charter constitutes a treaty that commits Member States not individuals, it would be essential to clarify how personal responsibilities would emanate from such a crime. Furthermore, in cases where a crime of threat of aggression is committed by individuals, any assessment as to the elements constituting the crime, whether the person acted on behalf of his Government or not, or who actually committed the crime, may be subjective.

Article 22

9. It should be reconsidered whether the acts mentioned in paragraph 2 (*a*) of this article (acts of cruelty or barbarity directed against the life, dignity or physical or mental integrity of individuals) really fall under the heading of "exceptionally serious war crimes".

10. Paragraph 2 (*f*) provides that wilful attacks against religious, historical and cultural values shall be considered as war crimes. It will be appropriate to expand this paragraph to include the theft, smuggling and destruction of items of religious, historical, cultural and scientific or technological value carried out in the chaotic atmosphere of times of war.

United Kingdom of Great Britain and Northern Ireland

[*Original: English*]
[*29 January 1993*]

GENERAL COMMENTS

1. The Government of the United Kingdom is concerned at the continuing lack of rigour in the preparation of the draft articles and the consequent lack of precision. Many of the proposed crimes set out in part two are vaguely defined, with the elements that are to constitute the crime far from clear. When defining any crime the need for legal precision is paramount.

2. In approaching this topic the United Kingdom has always been of the view, expressed often in the Sixth Committee, that the Commission must start with a working concept of what constitutes a crime against the peace and security of mankind. A member of the Commission has referred to the "scaffolding" of the tripartite classification of crimes against peace, war crimes and crimes against humanity, which has guided the Commission's work.[1]

[1] *Yearbook . . . 1986*, vol. I, 1961st meeting, para. 67.

Although this classification does not appear in the draft, it has served merely to subdivide a category of crimes, the outer parameters of which remain undefined. As a guide to the enumeration of specific offences the criterion of "extreme seriousness" is insufficient, being highly subjective and elastic. Strongly conflicting views within the Commission regarding the crimes to be included bear witness to the difficulties in following an enumerative approach without a working concept. If the work of the Commission is to have any success it is fundamental that there should be a rational distinction between international crimes and crimes against the peace and security of mankind. In identifying those crimes which are thought to constitute crimes against the peace and security of mankind, the Commission has quite properly drawn on the 1954 draft Code for guidance.[2] Less satisfactory is the reliance placed upon article 19 of the Commission's draft articles on State responsibility,[3] which are not concerned with individual criminal responsibility; many of the more objectionable elements of the present draft Code may be traced to the Special Rapporteur's reliance upon that article. This applies in particular to articles 18 (Colonial domination and other forms of alien domination), 20 (Apartheid) and 26 (Wilful and severe damage to the environment). Such reliance is misplaced since it fails to acknowledge the fundamental distinction between State responsibility and individual criminal responsibility. It is only the latter with which this draft Code is concerned.

3. Several of the draft articles would have to be recast in the event that an international criminal jurisdiction is realized. It is also clear that if the Code is to function effectively it will be necessary to obtain widespread support for it. As currently drafted, the Code is unlikely to achieve such support; certainly the United Kingdom is unable to support it. Indeed, with so many of the crimes which the Commission has included in part two having already been addressed in international conventions, it is increasingly difficult to see what lacuna is being filled by the Code.

4. At the request of the General Assembly, the Commission is currently heavily committed to the task of producing a draft statute for an international criminal court. The United Kingdom has already indicated in the Sixth Committee that it shares the widespread view that work on the court should not be coupled with that on the Code. The United Kingdom believes that it would make most sense, in the development of its work programme as a whole, for the Commission to suspend all work on the Code until it has completed the drafting of a statute for a court. That would be a suitable point at which the position could be reviewed by the General Assembly.

Specific comments on individual articles

Article 1

5. The draft adopts an enumerative approach to the definition of crimes against the peace and security of mankind. This approach, which was also that adopted in article 1 of the 1954 draft Code, is the only one which would allow the constituent elements of each offence to be properly defined. However, the deficiencies of the working methodology of the Commission have been noted above. The rationale for the inclusion or exclusion of particular offences appears arbitrary. It is difficult to discern the reason for excluding slavery, piracy, traffic in women and children, and hijacking, which are all well established in international law, while including hitherto unknown "international crimes" such as mercenary activities and wilful and serious damage to the environment. The inclusion of the words "under international law" is neither necessary nor useful.

Article 2

6. The United Kingdom recognizes that a clarification of the relationship between international and municipal law regarding the characterization of an act or omission as a crime against the peace and security of mankind may be both desirable and necessary. However, it is not readily apparent from the terms of this article what problem it is addressing. It is hardly conceivable that acts should be punishable pursuant to an international code which are not in general of a type punishable under national criminal law. It would appear that the drafters of the article had in mind that the perpetrator of an offence under such a code may not be exonerated by virtue of the act not being criminal at the time of its commission under the law of the place in which it was committed. The reference to Principle II of the Nürnberg Principles[4] in the commentary[5] supports this interpretation. If this is what the Commission does intend, the article should so state.

Article 3

7. This article rightly focuses upon the criminal responsibility of individuals. However, paragraph 1 includes no requirement of intent—or *mens rea*—which is a fundamental element for serious crimes. The Convention on the Prevention and Punishment of the Crime of Genocide, for example, refers in article II to "acts committed with intent", wording which is repeated in article 19, paragraph 2, of the Code. Paragraph 1 reflects the approach of those in the Commission who considered that intent can be deduced from the "mass scale and systematic nature of a crime". This approach confuses the elements of a crime with their proof. The enormity of acts committed may raise a presumption of intent at the highest levels of command, though even there it should be permissible to introduce evidence to rebut the presumption, if such evidence exists. But the great majority of potential defendants will be those who have played only a small part in large events and in their case the state of the individual's knowledge is crucial. The point emerges clearly from a study of paragraph 2. The Code should provide either in part one, or in part two in respect of each individual crime, that intent is an essential element.

8. Paragraph 3 attributes responsibility for an attempt to commit a crime against the peace and security of mankind. It will be essential to insert a reference to the relevant articles to which this provision is intended to apply.

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[2] Adopted by the ILC at its sixth session; the text is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8.

[3] *Yearbook . . . 1976*, vol. II (Part Two), p. 70.

[4] Principles of international law recognized in the Charter of the Nürnberg Tribunal, *Yearbook . . . 1950*, vol. II, p. 364, document A/1316, at p. 374.

[5] *Yearbook . . . 1987*, vol. II (Part Two), p. 14, para. (1).

It would be nonsensical to speak, for example, of an attempt to commit a threat of aggression (art. 16).

Article 4

9. This provision would be more appropriately located as part of article 14 (Defences and extenuating circumstances), where it might be stated simply that motive does not constitute a defence. To the extent that motive constitutes one of the requisite elements of a crime, this can and should be included within the definition of that crime. The mischief against which this article is addressed, namely a perpetrator claiming a motive different from the one required as an element of the crime, may be adequately addressed within the compass of the definition of the crime, and is ultimately an issue of proof as to whether the required motive was present. Any other motive is irrelevant.

Article 5

10. While the principle underlying this article is accepted, the article should be worded in such a way as to limit the possibility that at least one requirement in discharging the State of its responsibility may be to hand over specified individuals to stand trial.

Article 6

11. In the absence of an international criminal court with compulsory jurisdiction the Commission has perforce addressed this article from the vantage point of indirect, municipal enforcement of the Code. To be effective, this requires (*a*) broad participation, not just by "victim" States; (*b*) a wide basis for jurisdiction; and (*c*) curtailment of the political offence exception. Only the second of these requirements is met by the draft articles, and the treatment of universal jurisdiction is sketchy. Whether or not the Commission is successful in drawing up a statute for an international criminal court, it will be necessary, as the commentary recognizes,[6] to formulate more specific rules for the actual implementation of the Code. The United Kingdom assumes these will be on the lines of articles 2 to 11 of the International Convention against the Taking of Hostages, and similar conventions.

12. The obligation to prosecute or extradite contained in paragraph 1 is found in many international conventions. The commentary elaborates further upon the meaning of "try", which is intended to cover all the stages of prosecution proceedings, an elaboration which could usefully be incorporated in this article. But it would be preferable to employ the more usual formula "submit the case to its competent authorities for the purposes of prosecution". It also needs to be made clear that the States referred to in this article are only States which are parties to the convention containing the Code. The concept of universal jurisdiction is based on the notion that crimes against the peace and security of mankind affect all States wherever they are committed and irrespective of the nationality of the perpetrator or of the victims. However, paragraph 2 reflects the difficulty encountered by the Commission in allocating priorities when extradition is sought by a number of States with an interest in prosecution. For practical evidentiary purposes, the State in whose territory the crime was committed is usually given priority in existing conventions. However, effective enforcement of the Code could be undermined by according priority to the territorial State if government officials are involved or the crime results from the official policy of the State. Despite article 13, realistically, the likelihood of any provision proving workable where extradition is sought for senior government or military figures from the State in which they have carried out their official acts is remote. A further practical problem arises where extradition is sought with no real intention to prosecute. For paragraph 2, it would be preferable to have an order of priorities with the concomitant obligation on the extraditing State to ensure that the requesting State has a bona fide intention to prosecute.

Article 7

13. The suggested rule could hamper attempts at national reconciliation and the granting of amnesty for crimes. Whether and under what conditions the latter should be permitted, and the effect upon the draft articles, should be more carefully examined by the Commission. In this connection article 9 needs to be considered. If, for example, a State granted an amnesty to all government officials who had participated in the commission of a crime under the Code, article 9 would under certain conditions still permit their prosecution by another State or by an international criminal court. Whether the amnesty would be seen as a bona fide attempt at national reconciliation or a cynical measure designed to sidestep indirect enforcement of the Code would depend upon the circumstances. Clearly, the granting of amnesties could impair the efficacy of indirect enforcement under the Code, and is an issue which needs to be addressed by the Commission.

Article 8

14. This is an essential provision, one of the few to address the proper implementation of the Code. Judicial guarantees are of particular importance where the perpetrator is accused of heinous crimes of the kinds enumerated and which raise high emotion. Article 8 would be improved if the clarifications contained in paragraphs (6), (7) and (8) of the commentary[7] were incorporated in the text of the article.

Article 9

15. This article acknowledges the interface between municipal and international law: according to this provision individuals are not immune from double culpability where ordinary crimes also constitute crimes under the Code. The United Kingdom reserves its position on this proposal which, at first sight, conflicts with the corresponding provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, to both of which it is a party. For the moment, the United Kingdom wishes only to point out that paragraph 4 goes even further and permits an individual to be tried in more than one State for a crime under the Code, although para-

[6] Article 6 was previously adopted as article 4. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 67-68.

[7] Article 8 was previously adopted as article 6. For the commentary, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 16-17.

graph 5 would operate to reduce the penalty upon a subsequent conviction. As currently drafted, there would be nothing to prevent a State in whose territory the crime was committed, or which has been the main victim of a crime, from trying and punishing an individual who has already been tried and punished in the State of which he or she is a national, in both instances for the same crime under the Code. The only safeguard is that mentioned in paragraph 5. If the mischief against which this aspect of the rule is directed is to prevent too lenient a punishment in the State of which the individual is a national, then paragraph 4 would make more sense if it rendered the jurisdiction of the national courts specified therein dependent upon a failure adequately to punish in the first instance.

Article 11

16. While agreeing with the Commission that this provision might well have been included as part of article 14,[8] the United Kingdom accepts that the importance of the question, and its relationship to the issue raised in article 12, suggests its inclusion at this point. The wording, drawn from the 1954 draft Code, is not entirely felicitous: an individual would not be relieved of criminal responsibility if, "in the circumstances at the time, it was possible for him not to comply with an order of a superior". As presently drafted, it is far from clear when compliance with an order would operate as a defence to a crime under the Code because, in the circumstances at the time, it was not possible to disobey that order. Moreover, this wording would seem to make a large inroad into the principle in article 8 of the Charter of the Nürnberg Tribunal that superior orders are not a defence, but may be considered in mitigation of punishment.[9] Nor is it consistent with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that superior orders "may not be invoked as a justification of torture" (art. 2, para. 3). This article needs to be re-examined, taking into account the very serious nature of the crimes considered in the Code and the general trend internationally towards the expansion of individual responsibility.

Article 13

17. It is obviously important for the effective implementation of the Code that officials, including heads of State or Government, are not relieved of criminal responsibility by virtue of their official position. However, the Commission has failed to address here, and in article 9, the possible immunity of such officials from judicial process. The Commission should consider the immunity from jurisdiction to which officials may be entitled under international law, and the relationship of this draft to existing rules on the subject.

Article 14

18. It is clearly undesirable to leave vague a provision so vital both to the conceptualization of a crime against the peace and security of mankind and to the rights of the defendant. The more grave the crime, the less likely it is that a wide panoply of defences and extenuating circumstances will be permitted. If, as currently envisaged under article 6, it is national courts which will have jurisdiction under the Code, article 14 needs to be redrafted. National courts cannot be left to delineate defences and extenuating circumstances which will be admitted under the Code. Fairness and consistency would be entirely lost. It is symptomatic of the haste and lack of precision with which these articles have been drafted that paragraph 1 leaves open the possibility of defences to match specific crimes without any attempt at enumeration. Separate enumeration would be the better approach; although certain general defences will apply to all crimes, it is difficult to conceive of "blanket defences" which will adequately cover the circumstances of each and every crime set out in part two.

Part two

19. By far the most disappointing feature of the draft is part two and the crimes enumerated therein. As one of the members of the Commission noted, it is easy to express moral indignation but less easy to describe in abstract legal terms the primary rules and all the legal consequences of their violation.[10] There are three fundamental weaknesses in the Commission's approach. First, the Commission was not guided by a concept of crimes against the peace and security of mankind in selecting crimes for inclusion in this part of the draft Code. As a consequence, the crimes listed in part two cannot be regarded as a logically defensible or coherent catalogue of crimes against the peace and security of mankind. Secondly, the articles fail to maintain the distinction between international crimes in general and crimes against the peace and security of mankind, and between crimes committed by an individual and those which may be attributable to the State. Thirdly, many of the definitions of the crimes contained in this part are derived from General Assembly resolutions and international conventions which have not in every case garnered widespread support and which, in any event, need much closer examination to ensure that the language used is appropriate to a criminal code. The comments which follow should be regarded as sample criticisms only, identifying some of the worst defects of part two as it stands.

Article 15

20. The United Kingdom has grave doubts concerning this article. It is mostly a repetition of the Definition of Aggression contained in General Assembly resolution 3314 (XXIX). The terms of that resolution were intended to assist the General Assembly and the Security Council by clarifying a key concept in the Charter of the United Nations, which had been left undefined. The United Kingdom agrees entirely with those members of the Commission who consider that a resolution intended to serve as a guide for the political organs of the United Nations is inappropriate as the basis for criminal prosecution before a judicial body. It is patently insufficient for the commentary to suggest that this criticism is met by failing to men-

[8] See paragraph 4 of the commentary in *Yearbook ... 1991*, vol. II (Part Two), p.100.

[9] United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and Analysis (memorandum by the Secretary-General)* (Sales No. 1949.V.7).

[10] *Yearbook ... 1985*, vol. I, 1883rd meeting, para. 3.

tion the resolution by name.[11] The wording of the resolution needs careful adaptation in order to prescribe clearly and specifically those acts which attract individual criminal responsibility. Paragraph 4 (*h*) offends against the principle *nullum crimen sine lege*, as well as operating with potential retrospective effect in contravention of article 10.

Article 16

21. This article is unacceptable. If there is a crime of threat of aggression (which is open to doubt), it would be more appropriate for State responsibility than individual criminal responsibility. The definition in paragraph 2 is unsatisfactory, leaving as it does the exact nature of the crime unclear, notwithstanding the Commission's attempt at an enumerative definition. The actions listed in paragraph 2 have a collective flavour inappropriate to the establishment of individual criminal responsibility. The phrase "or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State" does not begin to meet the test of precision required of a criminal code.

Article 17

22. In his sixth report the Special Rapporteur posed the rhetorical question, "In view of the nuances and degrees involved, is the notion of intervention not too general and too varied in its manifestations to constitute a legal concept?"[12] "Intervention" is indeed a term of great conceptual generality, lacking the necessary precision required to define criminal conduct. The activities listed in paragraph 2 accomplish little by way of necessary clarification and narrowing of the concept. It is in any event doubtful whether intervention is a crime which should attract individual criminal responsibility. The sources relied upon by the Commission, in particular the judgment of ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*[13] are concerned with the lawfulness or otherwise of intervention by a State in the internal or external affairs of another State. They do not deal with criminal responsibility, still less with the penal responsibility of individuals under international law. "Intervention" as a crime attracting individual criminal responsibility is not recognized in international law nor, in the opinion of the United Kingdom, should it be.

Article 18

23. Terms such as "colonial domination" and "alien domination" do not possess the requisite legal content necessary for inclusion in a code of crimes and have no foundation in international criminal law. "Colonial domination" is, in any event, an outmoded concept redolent of the political attitudes of another era. Its presence in article 19 of part 1 of the draft articles on State responsibility is no justification whatsoever for its presence in the Code. The United Kingdom regrets the introduction of what are little more than political slogans into a code intended as a legal instrument. Rather than employing labels which encompass both permissible and impermissible behaviour, the Commission should identify and define the acts or practices proposed to be punished. Acts committed during "colonial or alien domination" may, when further defined, fit within other provisions of the Code concerning, for example, genocide (art. 19) or systematic or mass violations of human rights (art. 21).

Article 19

24. The Commission should consider the relationship between the Code and article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, which provides for the compulsory jurisdiction of ICJ in the case of disputes between contracting parties relating, *inter alia*, to the responsibility of a State for genocide.

Article 20

25. Just as the present draft is intended to update the provisions of the 1954 draft Code to take subsequent developments into account, so too should the Commission take fully into account political developments in the decade since it started work on the present draft. Discussion of apartheid in the Commission naturally focused on South Africa, though mention of that State was subsequently dropped and the draft article now applies without reference to time or place. The Commission needs fundamentally to reconsider this article in the light of changed international circumstances.

Article 21

26. Attention must plainly be paid to systematic or mass violations of human rights in any code of crimes under international law. Two requirements must be met before an act qualifies as "systematic or mass violations of human rights": the exceptional seriousness of the act and its systematic manner or mass scale. The express list of acts is welcome, but the article is incomplete and unsatisfactory. The commentary[14] makes clear that definitions of the terms used, such as torture or slavery, are to be found in existing international conventions. Even assuming that national courts would be able to identify the relevant source, the definitions contained therein are not free from controversy. Indeed, as the commentary indicates, there may be doubt whether the definition of torture contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should be limited to the acts of officials. As currently drafted, the article contains no precise definition of criminal conduct nor any clear unifying concept.

Article 22

27. In opting for a "compromise" reconciling competing trends, the Commission risks proliferating the categories of war crimes without any attendant benefit. If the Commission were to retain this article, the United Kingdom would prefer to see a provision which accords with

[11] Article 15 was previously adopted as article 12. For the commentary, see *Yearbook ... 1988*, vol. II (Part Two), pp. 72-73.

[12] *Yearbook ... 1988*, vol. II (Part One), p. 199, document A/CN.4/411, para. 22.

[13] *Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14.

[14] *Yearbook ... 1991*, vol. II (Part Two), pp. 103-104.

existing characterizations of war crimes, replacing "exceptionally serious war crimes" with "grave breaches of the Geneva Conventions", for example.

Article 23

28. While mercenary activities may in certain circumstances be reprehensible, it is the view of the United Kingdom that they have no place in a code of crimes against the peace and security of mankind. The activities are not sufficiently widespread and grave to merit inclusion in the Code. Nor have they yet achieved the status of generally recognized international crimes. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries has yet to achieve more than a handful of adherents.

Article 24

29. The United Kingdom regrets that the Commission has, as in the 1954 draft, limited the scope of the article to State-sponsored terrorism. International terrorism is no longer confined to the acts of agents or representatives of States. In attempting to distinguish between international and "internal" terrorism, the Commission has overlooked the important category of non-State-sponsored terrorism directed at States, which properly belongs in a definition of international terrorism. The United Kingdom would therefore urge the Commission to reconsider the definition of terrorism, including the present omission of "internal" terrorism. The latter is in practice more of a problem for many States than international terrorism. It should consider also the relationship of this article with international crimes omitted from the Code, such as hijacking and hostage-taking, which might fall within the present definition of international terrorism.

Article 25

30. The 1954 draft Code omitted drug-related crimes, along with piracy, traffic in women and children, counterfeiting and interference with submarine cables. The United Kingdom would have wished for a more detailed analysis of these crimes with a view to ascertaining whether they constitute crimes against the peace and security of mankind. It is the opinion of the United Kingdom that drug trafficking, though an international crime, is a borderline case for inclusion in a code as a crime against the peace and security of mankind. It may be asked what is to be gained by including in the Code an activity which is viewed as criminal by the great majority of States, and effectively prosecuted as such by most of them.

Article 26

31. The origin of this provision lies in article 19 of the Commission's draft articles on State responsibility, where its inclusion proved controversial. It is no less so here, since there is certainly no general recognition of "widespread, long-term and severe damage to the natural environment" as being an international crime, much less a crime against the peace and security of mankind. Environmental damage may give rise to civil and criminal liability under municipal law but it would be extending international law too far to characterize such damage as a crime against the peace and security of mankind.

CONCLUSION

32. The United Kingdom considers that the Commission could more usefully deploy its limited resources to other topics in its work programme. As indicated above, it believes that work on this topic should be suspended, at least until work has been completed on a draft statute for an international criminal court.

United States of America

[*Original: English*]
[*1 February 1993*]

GENERAL COMMENTS

1. The Government of the United States of America appreciates the opportunity to submit the following written comments and observations on the draft Code of Crimes against the Peace and Security of Mankind (draft Code), as requested under paragraph 9 of General Assembly resolution 46/54 of 9 December 1991.

2. The United States supports the development, in appropriate contexts, of individual international criminal responsibility, and is a party to most of the international conventions containing the prosecute-or-extradite requirements with respect to particular international offences. These conventions already go quite far in stipulating a number of internationally recognized offences which could be characterized as being against the peace and security of mankind, including war crimes, genocide, torture, drug offences, slavery, traffic in women and children, piracy, maritime terrorism, aircraft hijacking, aircraft sabotage, crimes involving nuclear material, crimes against officials and diplomats, and hostage-taking.

3. The United States, however, does not support the present draft Code because it is defective in many fundamental respects. Since many of the offences set forth in the draft Code are already covered by existing international conventions, much of it is either redundant or disruptive (especially where it deviates from existing statements of the law). Moreover, many of its suggestions for the development of new criminal offences are unacceptable to the United States. Throughout, the draft Code ignores basic concepts of criminal liability (for example, the state of mind necessary to be charged with a criminal violation). It also neglects concepts of due process basic to the jurisprudence of the United States and of many other countries, such as the concept that offences must be defined with precision sufficient to inform people of what acts will be considered criminal. Moreover, the Code, as drafted, does not contribute to resolving any of the technical difficulties or filling the lacunae that complicate the use of existing international conventions as a possible basis of subject-matter jurisdiction of an international criminal court. While a draft Code is by no means the only, or necessarily the best, way to solve these problems, it is noteworthy that the current effort does not do so.

4. The United States believes that the primary problem with many international crimes is not that they are undefined, but rather that they are not adequately prosecuted. This problem is particularly acute with respect to crimes committed either on behalf of, or with the tolerance of, Governments. The adoption of the Code would not solve this problem. In the view of the United States the most effective response to the problem of international crime is to strengthen cooperation among Governments in the investigation and prosecution of those committing criminal acts. The United States believes the Commission's time would be more productively spent on such measures than on continuing its efforts with respect to the draft Code.

The problem of vagueness

5. One major problem with the draft Code is its vagueness. The Code consistently fails adequately to define key terms, and frequently fails to specify precisely what actions are subject to criminal liability. It often adopts political terms that have no accepted legal definition and wraps them with a legal cloak. Because such political terms are often perhaps deliberately ambiguous, different domestic courts would inevitably disagree over the interpretation of the Code. Moreover, the ambiguously drawn offences fail to provide adequate notice concerning the type of acts that could form the basis for criminal liability. Consequently, the Code, in its present form, could run afoul of the due process protections basic to the jurisprudence of the United States and of other countries.

Failure to specify mental state necessary for the imposition of criminal liability

6. A second fundamental flaw that permeates the Code is its failure to specify the requisite knowledge or intent necessary to impose criminal liability on a potential defendant. In the United States system, criminal acts punishable by incarceration ordinarily must be committed knowingly or intentionally. The general failure of the Code to address a defendant's knowledge and intent is further compounded because the article on environmental crimes—in contrast with the other articles—specifies that the crime must be committed "wilfully". No other article has this provision, and the significance of this discrepancy is unclear.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 15

7. The Code's definition of aggression is taken from the General Assembly's 1974 Definition of Aggression.[1] The General Assembly, however, did not adopt this definition for the purpose of imposing criminal liability, and the history of its adoption shows that it was intended only as a political guide, not as a binding definition of a crime.

Article 16

8. The Code proposes the establishment of a new international criminal offence, based only on the threat of aggression. In addition to the defect in the definition that no nation has a right to threaten another nation with an act of aggression,[2] it is equally true that such threats—if not acted upon by a threatening nation—are more appropriately addressed among States rather than by a criminal action against individuals in a court of law. Far from reducing conflicts, this new offence would most likely serve to generate tensions among nations by encouraging criminal charges for statements or conduct that instead could better be addressed through constructive diplomatic dialogue.

Article 17

9. This article proposes the establishment of a new international crime called "intervention". This new crime not only is vague, but also apparently attempts to cover acts that would not otherwise fall within the already excessively broad and vague crime of "aggression". Moreover, although it provides an exception for acts undertaken pursuant to the "rights of peoples to self-determination", it fails to create an exception for acts of collective self-defence, which are explicitly provided for in Article 51 of the Charter of the United Nations. As with the crime of aggression, this crime of intervention is based on a General Assembly resolution that was never intended to be the legal basis for imposing criminal liability on individual defendants.

10. The article on intervention is based on the Declaration on Principles of Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[3] which elucidated the familiar principle that States should not intervene in matters exclusively within the domestic jurisdiction of any other State. The Code's wholesale criminalization of the non-intervention principle is not only divorced from the practical relationships among nations, but is also an open invitation to criminalize disputes that should more appropriately be resolved by the careful and prudent practice of diplomacy or, when necessary, by reference to the Security Council. It may also be noted that significant disputes still exist over the precise scope of this principle: some States, for example, still argue that international concern for human rights constitutes impermissible intervention in their internal affairs.

Article 18

11. The proposed crime of colonial domination suffers from the same defects that afflict the offences previously discussed. It is vague and too broad, in that it fails to define or even describe, "colonial domination" or "alien domination contrary to the right of peoples to self-determination". This failure is particularly grave in the present international climate, which is witnessing the emergence of smaller nations from the territory of larger ethnically diverse societies. Any attempt to criminalize conduct such as "alien domination" would most likely serve only to increase international tensions and conflicts.

Article 19

12. The crime of genocide is already defined by the Convention on the Prevention and Punishment of the

[1] Resolution 3314 (XXIX) of 14 December 1974.

[2] Charter of the United Nations, Article 2, paragraph 4.

[3] General Assembly resolution 2625 (XXV), annex.

Crime of Genocide, to which the United States and many other States are party. United States ratification of the treaty was based on several understandings. In particular, the United States indicated that it understands that the term "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such", as used in the Convention (art. II), means the specific intent to destroy, in whole or substantial part, a national, ethnic, racial or religious group as such by the acts prohibited in the Convention. The Code's definition, in contrast, fails to establish the mental state needed for the imposition of criminal liability.

Article 20

13. The draft Code's definition of the "crime of apartheid" contains many of the same defects that are present in the "crime of colonial domination". It is so vague and broadly worded that it could be contrary to the Constitution of the United States and those of other countries.

Article 21

14. This article is too vague to impose criminal liability. The crime of "persecution on social, political, racial, religious or cultural grounds" in particular is so vague that it could mean almost anything. For example, one definition of "to persecute" is "to annoy with persistent or urgent approaches, to pester".[4] It should not be an international crime for one political party to "annoy" or "pester" another political party, yet under the plain meaning of the draft Code that could be an international crime. This article also fails fully to consider the effect of the International Covenant on Civil and Political Rights, which spells out the specific human rights recognized by the vast majority of the international community. This article also appears to embrace common crimes, such as murder. The United States does not believe that it would be useful or even sensible to make every murder an international crime. It notes further that deportation may under many circumstances be lawful: this current formulation is thus too broad.

Article 22

15. This article seeks to punish "exceptionally serious war crimes", a term which is tautologically defined as "an exceptionally serious violation of principles and rules of international law applicable in armed conflict" consisting, *inter alia*, of "acts of inhumanity". The article is too vague and fails to consider and specifically incorporate the relevant provisions of the many international conventions dealing specifically with the law of armed conflict.[5] For example, the vague prohibition on the "unlawful use of weapons" does not reflect the complex realities of warfare or the international legal mechanisms established to regulate its conduct. Moreover, the United States believes it unwise to include only "exceptionally serious war crimes" and ignore other breaches of the laws of war that are also of great concern to the peace and security of mankind.

Article 23

16. This article is particularly troubling. The text does not criminalize the acts of mercenaries themselves, but criminalizes only the "recruitment, use, financing or training of mercenaries" by agents or representatives of a State. The United States questions this unduly limited approach. The mercenaries themselves must (by definition) be private individuals; those who recruit, use, finance and train them are often also private individuals or rebels who are not agents or representatives of a State. Moreover, the Code's use of the phrase "the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law" is not defined and is extremely liable to give rise to dispute, thus undermining and potentially politicizing the entire concept of this crime.

Article 24

17. Article 24 purports to punish international terrorism, even though there is no generally accepted definition of "terrorism" and no adequate definition of terrorism is given by the Code. The Code attempts to define terrorism through the use of tautology. The Code defines terrorism as the

> —undertaking, organizing, assisting, financing, encouraging or tolerating [by the agents or representatives of a State of] acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.

This definition is patently defective because "terror" is not defined.

18. Moreover, given the unsuccessful history of attempts to achieve a universally acceptable general definition of terrorism, the United States is sceptical about the possibility of reaching consensus on such a provision, no matter how it is drafted. In response to the difficulty in reaching consensus on a general definition of terrorism, the international community has instead concluded a series of individual conventions that identify specific categories of acts that the entire international community condemns, regardless of the motives of the perpetrators, and that require the parties to criminalize the specified conduct, prosecute or extradite the transgressors and cooperate with other States for the effective implementation of these duties. As listed in General Assembly resolu-tion 44/29,[6] these conventions cover aircraft sabo-

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[4] *Webster's Ninth New Collegiate Dictionary.*

[5] See the Convention respecting the Laws and Customs of War on Land, and annex thereto; Convention respecting the Rights and Duties of Neutral Powers in Case of Land War; Convention relative to the Laying of Automatic Submarine Contact Mines; Convention concerning Bombardment by Naval Forces in Time of War; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War.

[6] Convention on Offences and Certain Other Acts Committed on Board Aircraft, Convention for the Suppression of Unlawful Seizure of Aircraft, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Convention on the Prevention and Punish-

tage, aircraft hijacking, attacks against officials and diplomats, hostage-taking, theft or unlawful use of nuclear material, violence at airports and certain attacks on or against ships and fixed platforms. By focusing upon specific types of actions that are inherently unacceptable, rather than on questions of motivation or context as the draft Code does, the existing approach has enabled the international community to make substantial progress in the effort to use legal tools to combat terrorism.

19. Another fundamental problem with article 24 of the Code is that it limits the crime of terrorism to acts committed by "agents or representatives of a State". In fact, many terrorist acts are committed by individuals acting in their private capacity. The United States cannot accept a definition of terrorism that excludes acts committed by persons who are either not acting as agents of a State, or whose affiliation with a State cannot be definitively proved in a court of law.

Article 25

20. This article speaks of illicit traffic in narcotic drugs "on a large scale". Apart from the lack of precision of the term "large scale", it is not clear whether the phrase "large scale" is modifying "traffic in narcotic drugs" or "undertaking, organizing, facilitating, financing or encouraging". Therefore, it is not clear whether the individual's role must necessarily be a large one, or whether individuals who play a small role in a large operation are also included. This defect, it may be noted, is common to many of the other articles, insofar as the activities addressed (intervention, aggression, etc.) typically involve many different people, with sometimes incidental roles.

21. The term "narcotic drugs" is also used in a manner inconsistent with its standard usage in existing international conventions. The Code never defines the term "narcotic drugs", but does attempt to define trafficking in narcotic drugs to include trafficking in narcotic drugs and psychotropic substances. Moreover, the Code also fails to define the term "psychotropic substance". This imprecise use of key legal terms renders this article fatally flawed.

22. Under a series of United Nations conventions culminating in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the terms "narcotic drug" and "psychotropic substance" have specific and different meanings. Under this Convention, "narcotic drug" means any of the substances, natural or synthetic, in schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol (art. 1, (*q*)). In contrast, "psychotropic substance" means any substance, natural or synthetic, or any natural materials in schedules I, II, III and IV of the Convention on Psychotropic Substances, 1971 (art. 1 (*r*)). The Code's failure to define these terms, coupled with its attempt to define "narcotics trafficking" as trafficking in both narcotic drugs and psychotropic substances, is an open invitation to confusion and uncertainty.

23. Article 25 also provides that trafficking in "narcotic drugs" is "illicit" if it is "contrary to internal or international law". It is unclear whether the reference to internal law is meant to refer only to the law of the State in which the individual is located (in which case it has little point) or whether it is meant to include the internal law of any State that is a party to the Code (in which case it would be amazingly broad).

Article 26

24. This article is perhaps the vaguest of all the articles. The article fails to define its broad terms. There is no definition of "widespread, long-term and severe damage to the natural environment". Similarly, the term "wilfully" is not defined, thereby creating considerable confusion concerning the precise volitional state needed for the imposition of criminal liability. The term "wilfully" could simply mean that the defendant performed an act voluntarily, that is to say, without coercion, that had the unintended effect of causing harm to the environment. "Wilfully" could also be construed to impose criminal liability only when the defendant acted for bad purpose, knowing and intending to cause serious harm to the environment. As presently drafted, the meaning of "wilfully" is subject to a variety of interpretations. This confusion is magnified by the Code's failure throughout to specify the necessary mental and volitional states needed for the imposition of criminal liability.

25. Moreover, as with the other articles, this article fails to consider fully the existing and developing complex treaty framework concerning the protection of the environment.[7]

CONCLUSION

26. The United States cannot support the draft Code in its present form. Furthermore, the United States questions the efficacy of any future efforts to redraft the present Code, because of the numerous fundamental flaws that permeate its entire structure.

ment of Crimes against Internationally Protected Persons, including Diplomatic Agents, International Convention against the Taking of Hostages, Convention on the Physical Protection of Nuclear Material, Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf.

[7] See, for example, United Nations Framework Convention on Climate Change; Convention on Long-range Transboundary Air Pollution, (supplemented by various protocols); Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; Convention on International Trade in Endangered Species of Wild Flora and Fauna; International Convention for the Prevention of Pollution of the Sea by Oil; International Convention for the Regulation of Whaling.

Uruguay

[*Original: Spanish*]
[*17 November 1992*]

1. The Government of Uruguay expresses its firm support for the idea of drafting a code of crimes against the peace and security of mankind, and is convinced that the entry into force of such a set of norms would contribute in significant measure to the establishment of the universal rule of law through the codification and progressive development of international law.

2. The idea of establishing a permanent international criminal jurisdiction of a universal character, and establishing for that purpose an international criminal court to try those held responsible for crimes under international law likewise merits support.

3. Accordingly, and as a comment on article 6, the Government of Uruguay believes that it would be highly conducive to the achievement of the desired aims for the Commission to devote itself, as soon as possible, to the preparation of the statute of such a court.

4. The approach provisionally adopted by the Commission, which consists of proceeding to draw up a list of crimes against the peace and security of mankind and to define them individually in the draft articles, does not warrant any comments.

5. With regard to the offences listed and their characterization, the Government of Uruguay will reserve its views until the Commission's work has reached a more advanced stage.

6. Despite this reservation, the Uruguayan Government deems it relevant, in connection with article 26, to put forward at this stage some comments and observations in accordance with what has been stated by its representatives in various international forums, and especially by the President of the Republic, Mr. Luis Alberto Lacalle, in the address he delivered on 13 June 1992 at a plenary meeting of the United Nations Conference on Environment and Development.[1]

7. Uruguay believes that an effective defence of the environment is possible only within the framework of international cooperation, through joint action by all States and the conclusion of international instruments setting forth specific, legally binding obligations and conferring jurisdiction on national and international courts, as the case may be, making it possible to hold perpetrators of unlawful acts against the environment effectively accountable.

8. In this connection, the Uruguayan Government has summarized its views, at the national level, in a bill on the prevention of environmental impact, which has been submitted to the legislative authorities for consideration, and, at the international level, in the document entitled "Guidelines for a draft international environmental code", which contains a chapter specifically devoted to civil and criminal liability, which was submitted to the General Assembly at its forty-seventh session.

9. With specific reference to article 26 and the characterization of the offence envisaged in this provision, on the basis of the observations outlined above, the Uruguayan Government believes that, given the nature of the consequences of the conduct, namely "widespread, long-term and severe damage to the environment", the requirement of "wilfulness" should be deleted and replaced by the principle of liability which, in the exceptional case of the environment, should encompass not only instances of wilfully caused damage (wilful wrongs), but also damage caused through negligence or lack of precaution (culpable wrongs), since the interest which it is proposed to protect is, in the final analysis, the survival of mankind.

10. The Uruguayan Government also believes that it would be appropriate, from the standpoint of rule-making techniques, to follow the methodological approach taken in several draft articles and to prepare a descriptive enumeration of the principal acts which make up the envisaged offence against the environment for which those responsible are to be punished, be they individuals, corporate managers or representatives of a State.

11. The Government of Uruguay notes with satisfaction the work accomplished by the Commission with regard to the draft Code of Crimes against the Peace and Security of Mankind which has been submitted to the Governments of Member States for comments; it expresses the hope that the Commission will continue to give priority to the pursuit of its efforts.

[1] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1) (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. III: *Statements Made by Heads of State or Government at the Summit Segment of the Conference*, pp. 227 et seq.

II. Comments and observations received from a non-member State

Switzerland

[*Original: French*]
[*14 January 1993*]

1. As this is the first time that all the articles of the draft Code of Crimes against the Peace and Security of Mankind have been submitted to States, the Swiss Government wishes to start by making some general comments, before presenting observations concerning specific draft articles.

GENERAL COMMENTS

2. From the moment the Commission began its work, the preparation of a draft Code of Crimes against the Peace and Security of Mankind has proved to be an arduous task. The draft deals with a subject which is by no means free from political controversy. Nevertheless, the difficulty of the task does not make it any less urgent for States to adopt such an instrument, as is tragically being demonstrated right now by certain regional situations. There is no doubt whatsoever that the prime concern of States should be to establish rules which are sufficiently precise to serve as the basis for an accusation, in accordance with the sacrosanct principle *nullum crimen, nulla poena sine lege*, whereby no one may be charged with or punished for an offence unless he has violated, by commission or omission, an express provision of the law. Accordingly, the acts which are liable to give rise to conviction must be spelled out clearly. It is essential that criminal law should retain its qualities of clarity and predictability. Otherwise, the penalty would be tainted by

arbitrariness and would disregard the basic rights of defence. The Swiss Government therefore supports the Commission's decision to opt for an enumerative definition of crimes against the peace and security of mankind rather than a conceptual definition, which would leave too much to the judges' interpretation. The Swiss Government also approves of the inclusion in the draft of provisions recalling such basic rules as *non bis in idem* (art. 9) and non-retroactivity (art. 10).

3. Another general remark appears to be in order. The basic notion underlying the entire Code—at least, as the Swiss Government sees it—is that certain acts of an especially serious nature should be criminalized in order to strengthen the peace and security to which mankind is entitled. Thus, individuals who, by their conduct, are considered to have deliberately endangered the peace or threatened the security of mankind would be held personally accountable (art. 3, para. 1) for their acts before a national or an international jurisdiction.[1] The Swiss Government endorses this approach, to the extent that it helps to make those who by virtue of their function are able to undermine the very foundations of human society aware of their responsibilities. Reasons of State cannot be cited as a justification in all cases.

4. Nevertheless, a difficulty could arise. Violations of the peace are, in essence, the act of a State. Only State organs—in practice this often means the Government—can commit aggression, resort to intervention or practise colonial domination. It is not certain that violation of obligations incumbent on States in respect of the maintenance of peace can be the sole subject of an accusation. It may even be asked whether, despite article 5 (State responsibility), imputing some State acts to individuals is not liable to lead to a paradoxical result, namely the attenuation of the international responsibility of the State concerned, inasmuch as enforcement of such responsibility would no longer necessarily constitute the ultimate penalty in international relations. The problem posed by the shift in focus from State conduct to individual culpability might warrant further study by the Commission.

5. The Swiss Government starts from the assumption that the definitions of key terms will be set out in a special provision of the future instrument. Moreover, in view of the possible differences in interpretation, the draft Code should contain a clause relating to the settlement of disputes between States parties in a manner likely to lead to a legally binding decision.

6. Lastly, there can be little doubt that the future instrument should deal with the question of penalties. The pronouncement of sentence is an integral part of criminal proceedings and, more specifically, of trial proceedings. Moreover, it is hard to imagine that an international court would be able to rule on a defendant's culpability without also having the authority to impose a penalty. It would thus be appropriate to append to the definition of each crime a statement of the corresponding penalty, as is done in the majority of national penal codes. Moreover, the proposal regarding the inclusion of a scale of penalties applicable to all crimes does not appear to be fully consistent with the rule *nulla poena sine lege*. The latter requires that each incrimination be accompanied by a specific and individualized penalty. Unless that is done, the future Code would simply have a punitive function whereas, ideally, it should also have a preventive function.

[1] The question of the establishment of an international criminal jurisdiction will be the subject of separate observations in due course.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 3

7. In the Swiss Government's view, it would be preferable not to include in paragraph 3 the phrase "as set out in articles . . .". It is not certain that each of the crimes listed in the draft Code encompasses the notion of attempt. For example, the crime of colonial domination, as defined, appears to imply a minimum of implementation, which would rule out the very concept of attempt. In any case, the phrase is superfluous, since the attempt to commit a crime against the peace and security of mankind—which is punishable—obviously refers to a crime defined in the draft Code and not in some other instrument.

Article 6

8. The provisions relating to extradition are, of course, linked to those concerning the establishment of an international criminal court. Nevertheless, regardless of the choice to be made with respect to jurisdiction, conflicts of jurisdiction may occur where there are several extradition requests. The Commission noted its preference for special consideration to be given to the State where the crime was committed. In the Swiss Government's view, this solution deserves support. Indeed, there is no question but that the State where the crime was committed, which is, to some extent, the victim, is particularly qualified to try the case. Sometimes, however, the State in whose territory the alleged crime was perpetrated will be subject to pressures that are inconsistent with the proper administration of justice. Likewise, in some cases (apartheid, for instance, as explained by the Commission), the State in which the crime occurred might well bear direct responsibility for it and might seek to shield the accused. It is thus with good reason that article 6 confines itself to stating a preference for the principle of territoriality and does not establish a genuine rule of priority.

Article 14

9. The notion of combining in a single article two basic concepts of criminal law which are as alien to each other as defences and extenuating circumstances would appear to be questionable. The effect of a defence is to strip the act of its unlawful character on the ground that the perpetrator did not act knowingly and wilfully. In short, responsibility, which is the prerequisite for punishment, is lacking. Extenuating circumstances, by contrast, do not strip the act of its unlawful character; they simply moderate its penal consequences. It would therefore be advisable to envisage two separate provisions.

Article 15

10. The proposed definition of aggression rests mainly—and with perfect justification—on that contained in the annex to General Assembly resolution 3314 (XXIX). That, however, is a text intended for a political organ. Moreover, under the terms of Article 39 of the Charter

of the United Nations, it is the Security Council which is responsible for determining the existence of any threat to the peace, breach of the peace, or act of aggression. The question, therefore, is whether the national judge should be bound by the Council's determinations. In some respects, this would appear desirable. Indeed, it is hard to see how a national judge could characterize an act as aggression if the Security Council, which bears the primary responsibility for the maintenance of international peace, had not found it to be so. It is well known, however, that the Council can be paralysed by the exercise of the veto. Decisions of the courts would therefore be subordinate to those of the Council, though it is not certain that the security of law would benefit as a result. To suggest that decisions of the Security Council, a political organ if ever there was one, should serve as a direct basis for national courts when they are called upon to establish individual culpability and determine the severity of the penalty does not seem to be in keeping with a sound concept of justice. Accordingly, it would be just as well not to include the paragraph which appears in square brackets (para. 5).

Article 16

11. Article 16 characterizes the threat of aggression, like aggression, as a crime against peace. Switzerland has already raised the question in the Sixth Committee, during the annual discussion of the Commission's work,[2] whether aggression and threat of aggression should be put in the same category. In other words, should the threat of aggression appear in the draft Code as a separate crime against the peace and security of mankind? Doubts about this are justified. How can there be a conviction if the threat has not materialized, if it has not begun to be carried out? How can a threat, which is punishable, be distinguished from preliminary acts, which are not? It can even be argued that by criminalizing the threat of aggression it may encourage recourse to force in exercise of the right to self-defence, with all the unfortunate consequences that this may entail. What about intimidating manoeuvres consisting of "declarations, communications, demonstrations of force"—to quote article 16—which, by definition, are not translated into an act of aggression? Do they constitute an act sufficiently serious to be characterized as a crime against peace? This may well give rise to some hesitation. All in all, the Swiss Government has concluded that it is not advisable to extend the scope of the draft Code to the threat of aggression. In any event it would be difficult to apply such a provision.

Article 17

12. The major difficulty raised by this article probably lies in the definition of intervention. In this connection, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[3] makes a useful contribution. As the Commission notes in its commentary,[4] intervention must contain an element of coercion, that is to say, it must undermine the free exercise of its sovereign rights by the State which is a victim. Criminalization, however, should be limited to the most serious forms of intervention. In practice, only coercion involving the use of military force appears to reflect the degree of seriousness required in order to constitute a crime against the peace and security of mankind.

Article 18

13. This provision condemns colonial domination and other forms of alien domination established by force. Should alien domination also be understood in the sense of "neocolonialism", as some members of the Commission seem to think? This is doubtful. However reprehensible it may be politically, "neocolonialism" is not a legally established concept. Moreover, it should be noted that "neocolonialism", to the extent that it can be observed objectively, is not necessarily imposed by force as part of a plan or an understanding. It often results from economic disparities between countries and will be very difficult to prove in practice. Accordingly, the Swiss Government wonders if it would not be better to delete all references to "neocolonialism" from the commentary.[5]

Article 22

14. In international humanitarian law there are now two categories of violations. On the one hand, there are "grave breaches" which have already been enumerated (arts. 50, 51, 130 or 147, depending upon which of the four Geneva Conventions of 1949 is consulted, and article 85 of Additional Protocol I thereto, which also refers to article 11 of the same Protocol): these are also called war crimes. On the other hand, there are all the other violations of international humanitarian law.

15. The Commission, faithful to the principle that only extremely serious acts should be included in the Code, proposes to introduce a third category, that of "exceptionally serious war crimes", which would therefore encompass especially serious "grave breaches". Accordingly, it must be realized that, once the Code is in force, war crimes not enumerated in this provision may, as a result of article 22, be subject only to a relatively light penalty.

16. In addition, it is hard to understand why the Commission characterized "large-scale destruction of civilian property" (para. 2 (*e*)) as an "exceptionally serious war crime", but not attacks against the civilian population or demilitarized zones, or perfidious use of the protective emblems of the Red Cross and the Red Crescent.

17. It would therefore be advisable for the Commission to reconsider the impact this provision is liable to have on international humanitarian law, before adopting it on second reading.

Article 23

18. In paragraph (2) of the commentary[6] to this article, the Commission recalls that article 47 of the 1977 Addi-

[2] *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 22nd meeting, paras. 66 to 74.

[3] General Assembly resolution 2625 (XXV), annex.

[4] Article 17 was previously adopted as article 14. For the commentary, see *Yearbook . . . 1989*, vol. II (Part Two), p. 69.

[5] Article 18 was previously adopted as article 15. For the commentary, ibid., p. 70.

[6] Article 23 was previously adopted as article 18. For the commentary, see *Yearbook . . . 1990*, vol. II (Part Two), p. 29.

tional Protocol I to the Geneva Conventions of 1949, which deals with the status of mercenaries, specifies that a mercenary shall not have the right to be a combatant or a prisoner of war. Two clarifications are needed which could be taken into account in the commentary. The above-mentioned provision enables a State party to the Protocol to deny a mercenary this right; it does not compel it to do so. In addition, the mercenary deprived of the right to be a combatant or a prisoner of war will, like any civilian definitely suspected of engaging in activities hostile to the security of the State, benefit from the provisions of article 5, paragraph 3, of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, which guarantees him, in case of prosecution, the right to a fair and regular trial. He will also be afforded the basic guarantees contained in article 75 of Additional Protocol I.

Article 24

19. It would appear that the elements constituting the crime of international terrorism might not, depending on circumstances, be clearly distinguished from those constituting intervention, defined as the act of intervening in the internal or external affairs of a State by fomenting subversive or terrorist activities. Does the act of financing or training armed bands, when carried out by agents of a State for the purposes of sowing terror among the population and thus encouraging the fall of the Government of another State, come under either provision?

Article 25

20. Lastly, the question arises whether the inclusion in the Code of a provision on international drug trafficking is warranted. After all, such traffic may be regarded as a common crime, motivated mainly by greed. Such an approach, however, disregards an evolution which has revealed ever closer links between international drug trafficking and local or international terrorism. It is not without good reason that people commonly speak of "narco-terrorism". Apart from the harmful effects it has on health and well-being, international drug trafficking has a destabilizing effect on some countries and is therefore an impediment to harmonious international relations. In this connection, international drug trafficking indeed appears to be a crime against the peace and security of mankind. The Commission is therefore correct to include in the draft Code a provision criminalizing such traffic, whether it be carried out by agents of a State or simply by individuals.