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Summary record of the 2384th meeting

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

Extract from the Yearbook of the International Law Commission:-
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12 to 6 had no substantial effect on the seriousness or the nature of those crimes in international practice and doctrine. Perhaps the crime of colonial domination no longer had more than a historical importance. It had nevertheless been committed for more than two centuries and its victims had numbered in the millions. That was also true of apartheid, which for a very long time had affected the peace and security of mankind, and of crimes against humanity, which were not new phenomena. While he trusted the view of the Special Rapporteur that a shorter list of crimes would make the Code more easily acceptable for a larger number of States, he would truly back that view only if the Special Rapporteur made it the final conclusion of the second reading. Personally, he would have liked to see at least colonial domination and apartheid included in a Code conceived in fact as a symbolic instrument which could be used by individual States to identify certain acts or activities. If the Code could perform at least that function, the achievement would be a considerable one.

38. The Special Rapporteur had used two criteria to decide whether a given crime should be included in the draft Code: the seriousness of the crime and its acceptance by States for inclusion. The second criterion was debatable, since the Commission's role was precisely to submit its legal assessment of doctrine and State practice for subsequent review by States. It could therefore not prejudge their position and eliminate some crimes on the basis of the limited number of comments which had been submitted to it, especially since those comments were generally not final ones, as shown by the case of the statute for an international criminal court. Accordingly, the comments received from Governments, certainly few in number, were insufficient for establishing any *opinio juris* and could not justify the deletion of some crimes from the list adopted on first reading.

39. Another important subject of debate in the Commission had in fact two aspects. First, should aggression be defined in the Code or should the issue be left as it stood? Secondly, should the Security Council be the only organ competent to determine aggression and its legal consequences? The issue was a very important one which was and would remain interconnected with the question of the right of veto in the Council. Therefore, as the previous speaker had emphasized, the whole international system of criminal justice must meet the criteria of universality, objectivity, impartiality and equality of all before the law.

40. However, a decision by the Commission to leave it to the Security Council to define and determine aggression in a specific case would not bring all the other organs of the international community to a standstill or freeze any legal consequence. The general powers of the Council were not an obstacle to the exercise of their own powers by other organs, subject to certain provisions such as Article 12 of the Charter of the United Nations.

The meeting rose at 11.50 a.m.

2384th MEETING

Tuesday, 16 May 1995, at 10.05 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,[2] A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. IDRIS said that the proposals and comments contained in the Special Rapporteur's excellent thirteenth report (A/CN.4/466) provided a reasonable balance for the structure of the draft Code of Crimes against the Peace and Security of Mankind. He appreciated the Special Rapporteur's political wisdom and pragmatism in proposing that the list of crimes should be more restricted. However, there should not be any change in the aim of drafting an instrument of the widest possible acceptability and effectiveness.

2. The Special Rapporteur's intention to limit the list to crimes that were generally agreed to constitute crimes against the peace and security of mankind was a wise one, but it entailed rethinking the question of whether the title of the Code should refer only to those crimes. If the criterion was crimes whose characterization as such was hard to challenge, then it would certainly cover crimes not only against the peace and security of mankind but also crimes that threatened the survival of mankind. Mass killings of groups of people, prevention of births within a group, imposition of living conditions intended to bring about the physical destruction of a group, and the various forms of genocide were some examples of such crimes. Similarly, crimes against humanity such as international terrorism or illicit drug trafficking were not only crimes against the peace and security of man-

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[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

kind but crimes which endangered the survival of mankind.

3. The definition of aggression in the draft Code was based on the Definition of Aggression adopted by the General Assembly,[3] which was a political definition. It would not serve any purpose to try to produce a legal definition of aggression, not because, as argued by the previous Special Rapporteur, Mr. Spiropoulos, in 1951,[4] the notion of aggression was a notion *per se* and not susceptible of definition, but because, given modern political realities, concrete cases of aggression were viewed from different perspectives.

4. He preferred the Special Rapporteur's third option: a general definition of aggression accompanied by a non-limitative enumeration. That flexible approach had proved its applicability, notably in the Charter of the Nürnberg Tribunal, in which the list of violations included, but was not limited to, crimes such as murder and ill-treatment.[5] However, he was not in favour of the term "war of aggression". It was controversial and did not cover cases of aggression which had arisen since the Nürnberg Tribunal. The use of the term would constitute a major departure from the main content of the draft articles and reopen an endless debate. Furthermore, the distinction drawn between an act of aggression and a war of aggression on the ground that an act was less serious and did not have the same legal consequences as a war was misleading and unsustainable in practice. It also disregarded the end result of the criminal liability to be established. It was, in fact, important to focus on the wrongful act resulting in the international responsibility of a State and the criminal liability of the main perpetrators acting on behalf of a State. Due attention should also be given to article 15, paragraph 4, which listed specific acts as constituting acts of aggression regardless of a declaration of war.

5. With regard to the articles that the Special Rapporteur recommended should be abandoned for the time being, it should be noted that such a move would not detract from the seriousness of the crimes described in them. He had in mind more particularly article 17 (Intervention), and article 18 (Colonial domination and other forms of alien domination). The view that the articles lacked the precision required by international law missed the point that there had been hardly any other acts in the history of mankind which had caused so much misery to millions of underprivileged people and which were almost universally acknowledged to be crimes.

6. Article 20 (Apartheid) was central to the Code and must be retained. The argument that a separate article was not needed because apartheid was covered by article 21 (Systematic or mass violations of human rights) disregarded the lessons of history, the seriousness of apartheid, and the many decisions of United Nations organs. The issue had consistently received separate attention and must continue to do so. The disappearance of the symptoms of apartheid was no reason for apartheid to be excluded from the Code, which should include acts because they were criminal in nature and not exclude them because they were no longer likely to occur. One Government had proposed replacing apartheid with "institutionalized racial discrimination". That too missed the point; in any case, racial discrimination was already covered by the International Convention on the Elimination of All Forms of Racial Discrimination.

7. He endorsed the Special Rapporteur's approach in the new version of article 21 and his proposed new title. However, the definition should not be restricted to the narrow criterion of systematic violation of human rights but should include the "mass violations" mentioned originally. Those twin criteria would ensure wider support for the article and its universal applicability.

8. Mr. VARGAS CARREÑO said that, in his previous statement (2381st meeting), he had agreed with the Special Rapporteur that some of the crimes should be deleted from the list but had indicated that article 21 and article 24 (International terrorism) required further work. He was now submitting a new text for article 21 (A/CN.4/L.505) directly to the Commission rather than to the Drafting Committee, for two reasons. First, he hoped to receive comments which would enable him to produce a revised version, and secondly, he might not be able to attend the Drafting Committee when it discussed article 21.

9. The article was a particularly important one and must be compatible with international human rights law. He preferred to retain the original title of "Systematic or mass violations of human rights" because the proposed new title of "Crimes against humanity" was more generic and covered other crimes, such as genocide. However, he could accept the new title if the Special Rapporteur insisted on it.

10. A distinction must be drawn between two types of violation of human rights covered in the article. The first group consisted of murder, enforced disappearance and torture—very serious acts which, when committed by persons enjoying the protection or authorization of a State, warranted classification as crimes against the peace and security of mankind. The question of the person who committed the crime was important. For example, certain murders, no matter how horrible, were no more than common crimes when committed by individuals and were subject only to national jurisdictions or triggered an obligation to extradite. There was no reason for such crimes to be regarded as crimes against the peace and security of mankind. Furthermore, their inclusion in the draft Code might clash with the principles of the international protection of human rights, which had been introduced to find a body which could consider violations of human rights committed by organs and agents of a State. He was not arguing that the crime must necessarily be committed by an agent or representative of a State, but there must be at least some link with a State. The seriousness of a crime which justified inclusion in the Code lay precisely in the fact that it was committed by someone enjoying the protection or the consent of the State to kill, enforce disappearances or torture. His proposal made that point clear.

11. Another characteristic of such crimes was that they must constitute systematic or mass violations of human

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

[4] See 2379th meeting, para. 39.

[5] Ibid., footnote 12.

rights. If a policeman tortured an offender to extract a confession he was certainly committing a crime, but not a crime against humanity. In contrast, when a State's head of police set up a centre deliberately to torture political dissidents, as had happened in the not too distant past, he should be regarded as perpetrating such a crime.

12. The crimes of murder and torture included in the first group did not require any explanation, nor should the draft Code contain any definition of them. However, enforced disappearance should be included and defined. Of course, it was difficult to define because it was committed by persons who left no traces of their acts. Enforced disappearances usually ended with the murder of persons who had been arrested or kidnapped without eye witnesses. They usually came to light only years later as a result of the discovery of secret graves or confessions by the perpetrators. He had, nevertheless, tried to give a definition of enforced disappearance based on those given in the Inter-American Convention on Forced Disappearance of Persons and in General Assembly resolution 47/133, containing the Declaration on the Protection of All Persons from Enforced Disappearance. It should be noted that his definition did not apply when the enforced disappearance was perpetrated by common criminals kidnapping a person for ransom. The essential point was that the perpetrators enjoyed impunity because they had the support or acquiescence of government organs and were acting, for all legal purposes, as agents of a State. The other essential point was that, following the kidnapping or arrest, the government authorities refused to provide information on the fate or whereabouts of the victim.

13. The second group of crimes included, *inter alia*, two situations already covered in the thirteenth report. All the crimes in question were institutional violations of human rights committed by persons having the authority to adopt various types of measure which, *de jure* or de facto, reduced persons to a status of slavery, servitude, or forced labour, which institutionalized racial discrimination, or which ordered the deportation or forcible transfer of population. Some parts of the world still knew exploitation by individuals which amounted to de facto slavery and warranted the attention of the international community. Yet that was not sufficient justification for characterizing such situations as crimes against the peace and security of mankind when there was no institutional support by a State. The Special Rapporteur's deletion of the crime of apartheid from the list had left a gap which must be filled by including institutionalized racial discrimination. That proposal seemed to have the support of several members of the Commission.

14. The deportation or forcible transfer of population on social, political, racial, religious or cultural grounds were certainly violations of most of the provisions of the Universal Declaration of Human Rights[6] and the International Covenant on Civil and Political Rights and had been recognized as crimes against humanity by the Nürnberg Tribunal. More recently, the International Tribunal for the Former Yugoslavia[7] had also acknowledged such acts as crimes. They must therefore be included in the draft Code. However, there had been some transfers of population in the past three or four decades which were debatable and might even be legally acceptable if based, for example, on considerations of health—to control an epidemic—or of a country's economic development, or of protection of the people concerned. All such possibilities were envisaged in article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (the fourth Geneva Convention). Therefore, transfers of population should be regarded as crimes only when motivated by the grounds mentioned in his proposal.

15. Mr. PELLET said that he wished to make three comments and one proposal. His first comment was that, although aggression was a controversial topic, there was a general feeling that it was a crime against the peace and security of mankind. The problem, therefore, was not whether to include it in the list but how to define it. He might have shocked some members of the Commission in his previous statement (2379th meeting) by saying that in the absence of a satisfactory definition of aggression, and General Assembly resolution 3314 (XXIX) was not satisfactory—at best it was a guide for the Security Council—the Commission had to defer to the Council. It had been objected that, while his point might be correct, it should not be stated too openly and that it clashed with the principle of the separation of powers. He considered that as the international community was not a national community, what was good for the State—the separation of powers—was not necessarily good for international governance. All the same, that was a spurious problem. The Commission was drafting the Code to enable courts to try persons accused of particularly serious crimes. Those courts might be international ones but such jurisdictions had and would have to apply rules specified in their statutes, which defined the crimes in question. Therefore, such definitions would mainly be useful for national courts.

16. That purpose of the draft Code had a very specific implication for the crime of aggression. If it was allowed that national courts could try a person for the crime of aggression without a prior filtration process, the Court of Assize of Benghazi, say, could decide that Luxembourg had committed an act of aggression against Mali: an inconceivable and surrealistic situation. National courts could not decide that a State—for it amounted to a State even if, in fact, it was an individual that was being tried—had committed a crime of aggression, because as stated in article 15, paragraph 2, aggression was the use of armed force by a State against another State. A prior determination of aggression by the Security Council was not the ideal solution, but the Commission should resist the temptation of trying to decree a kind of world governance by judges, and above all national judges.

17. His second comment concerned crimes against humanity which related indirectly to several other crimes against the peace and security of mankind, including apartheid, illicit traffic in narcotic drugs and terrorism. While he had much sympathy for those members who argued in favour of including such crimes in the Code, it would, in his view, be both useless and dangerous to do so. Actually, it would be dangerous because it was use-

[6] General Assembly resolution 217 A (III).

[7] See 2379th meeting, footnote 5.

less. As he had already stated, he favoured the Special Rapporteur's proposals in regard to article 21, subject to a closer alignment with article 5 of the statute of the International Tribunal for the Former Yugoslavia. The main element of the definition in article 21, was, of course, the systematic commission of wilful killing, torture, reduction to slavery, persecution, deportation and all other inhumane acts, with the possible addition, as suggested by Mr. Vargas Carreño, of enforced disappearance of persons. It was a very broad definition, particularly because of the reference to persecution, on the one hand, and to all other inhumane acts, on the other. It thus encompassed systematic racial discrimination, particularly if it was combined with the definition of genocide as laid down in article 19 and also terrorism and illicit traffic in narcotic drugs when committed in a systematic manner and on a mass scale. If not committed in that manner, they were just crimes and nothing more, no matter how odious. They would not form part of the "crimes of crimes" that posed a serious and imminent threat to the peace and security of mankind. In other words, either the acts of terrorism and the illicit traffic in narcotic drugs lacked the massive and grave character which meant that they constituted crimes against the peace and security of mankind, or they fell within the definition of crimes against humanity, in which event it was unnecessary to devote special articles to them. He was not suggesting that terrorism and illicit traffic in narcotic drugs were not international crimes—they certainly were and had been defined as such—nor that they could never be crimes against the peace and security of mankind, which they could be. But the previous speakers' comments comfort him in his conviction that when those crimes were committed in a systematic manner and on a mass scale they constituted crimes against humanity within the meaning of article 21 and that it would be neither logical nor useful to devote separate articles to them. It might even open Pandora's Box and lead to a reconsideration of the list the Special Rapporteur had been wise enough to shorten.

18. His third comment was more general. All members, of course, had their own ideas of the crimes that should be covered by the Code, but he would appeal to them not to let themselves be carried away. As had been suggested, a criterion of the highest threshold of gravity could be adopted, but members must not seek to define that threshold in the light of their personal inclination. Rather, the Commission should take account of the views expressed by States. Admittedly, not all States had submitted written observations but the comments that had been received were fairly varied. What was more, a far greater number of States had expressed views in the Sixth Committee of the General Assembly that gave a sufficiently reliable picture of the general feeling in the matter.

19. The widely contrasting views expressed during the very valuable debates on the thirteenth report made it difficult to take a clear decision on what should be referred to the Drafting Committee, yet the Commission must face up to its responsibilities. The Drafting Committee's task was to review the articles referred to it by the Commission along with the Special Rapporteur's proposals made in the light of the general debate, but not to sort out the various provisions. In the light of those considerations, he wished to make a formal proposal, namely, that the Commission should take a vote—formal or informal—on referral to the Drafting Committee of each of the crimes against the peace and security of mankind proposed by the Special Rapporteur and also on whether they should be retained in the list of crimes to appear in the final draft. The object of the proposal was to preserve the prerogatives of the Commission, which the Drafting Committee must not seek to assume, and to ensure that matters were clear and transparent and to ascertain whether the Commission as a whole wished to refer any particular crime to the Drafting Committee.

20. Mr. FOMBA said that it was difficult not to go round in circles when examining the articles, as they embodied overlapping concepts and lacked clearly defined limits. Of the three key terms in article 21, for instance "violations", "systematic or mass" and "human rights", the term "mass" gave rise to problems of interpretation, while the term "human rights" prompted the question whether its scope was clear and whether it was not a global concept. There was also a question of the link between the crime of "systematic or mass violations of human rights" and other categories of crimes such as genocide, crimes against humanity, war crimes, international terrorism and illicit traffic in narcotic drugs. He wondered whether the generic concept of "systematic or mass violations of human rights" did not cover all those terms and whether there was in fact any basic difference between them.

21. The observations of Governments not only centred on the definition of terms and concepts but were also concerned with the list of crimes. In that connection, he agreed with the Special Rapporteur that it was not possible to provide a complete list of all acts that constituted crimes against the peace and security of mankind.

22. As to specific points, he noted that the title of the new version of article 21 had been changed, as indeed had its scope *ratione personae* and *ratione materiae*. The Special Rapporteur had explained that he preferred the new title—"Crimes against humanity"—as it was an established term in the lexicon of the law. Personally, however, he had some doubts on that score, as the precise meaning of two key words—"crimes" and "humanity"—was not clear. The word "crimes", for instance, could raise problems with regard to the legal definition and classification of acts: what was, or was not, criminal in terms of human conduct? The word "humanity" also raised problems of definition as well as of ideological and cultural perception and of the definition of its scope *ratione personae*. As he saw it, the expressions "Crimes against humanity" and "Systematic or mass violations of human rights"—the title of the earlier version of the article—reflected two generic concepts that could encompass other categories of crimes, such as genocide, and were to some extent interchangeable.

23. The content and legal status of the concept of crimes against humanity as a norm of international law were not so clear as in the case of genocide and violations of the Geneva Conventions and their Additional Protocols. The ambiguity in that concept stemmed from its formulation in the Charter of the Nürnberg Tribunal and the interpretation given to it. It was not immediately

apparent from article 6 (*c*) of the Charter of the Nürnberg Tribunal whether "crimes against humanity" and "war crimes" overlapped or whether they were separate legal concepts. That provision none the less greatly limited the concept of a crime against humanity, first *ratione personae* inasmuch as the acts must have been committed against civilians and not against soldiers and, secondly, *ratione temporis* inasmuch as the acts must have been committed before or during the war. No explanation of the expression "before the war" was, however, given. There was another instrument, a protocol signed in Berlin on 6 October 1945, which had modified the original version of article 6 (*c*).[8] In the original version of that subparagraph, a semicolon had been placed after the word "war", which could be interpreted to mean that certain acts could be regarded as crimes against humanity independent of the jurisdiction of the Nürnberg Tribunal. In the version contained in the Protocol, however, the semicolon had been replaced by a comma, which meant that crimes against humanity should be interpreted as entailing responsibility solely for acts connected with war.

24. The United Nations War Crimes Committee on Facts and Evidence in 1946 had sought to clear up any ambiguity by stating that crimes against humanity as referred to in the Four Power Agreement of 8 August 1945,[9] were war crimes within the jurisdiction of the [United Nations War Crimes] Commission. Consequently, "crimes against humanity" had been interpreted by the Nürnberg Tribunal as offences that were connected to the Second World War. Since 1945, however, the normative content of that concept had undergone substantial changes. First, the Nürnberg Tribunal had itself established that "crimes against humanity" covered certain acts perpetrated against civilians, including those with the same nationality as the perpetrator. Further, the origins of "crimes against humanity" as a concept lay in the "principles of humanity" first invoked at the beginning of the nineteenth century by a State to denounce another State's human rights violations of its own citizens. Thus, the concept had been conceived early on to apply to individuals regardless of whether or not the criminal act had been perpetrated during a state of armed conflict and regardless of the nationality of the perpetrator or the victim.

25. Furthermore, the content and legal status of the concept of "crimes against humanity" had been enlarged through the international human rights instruments adopted by the United Nations since 1945. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide affirmed the legal validity of part of the normative content of "crimes against humanity" as defined in article 6 (*c*) of the Charter of the Nürnberg Tribunal; it went no further, however. There was also the International Convention on the Suppression and Punishment of the Crime of Apartheid, article 1 of which referred to apartheid as a crime against humanity. Furthermore the Commission of Experts established pursuant to Security Council resolution 780 (1992) of 6 October 1992, concerning the Former Yugoslavia, defined a crime against humanity as:

> gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim.[10]

The Commission of Experts, established under Security Council resolution 935 (1994) of 1 July 1994, concerning Rwanda, had endorsed that definition and included in it murder, extermination, enslavement, deportation and population transfer, imprisonment, torture, rape, persecutions on political, racial and religious grounds, other inhumane acts and apartheid.

26. As to article 22 (Exceptionally serious war crimes), in its observations, the Swiss Government reproached the Commission for wanting to introduce a third category of "exceptionally serious war crimes", which would encompass especially "grave breaches" in the existing classification under international humanitarian law and questioned the scope *ratione materiae* and the impact on international humanitarian law. Strictly speaking, of course, the concept of "grave breaches" did not apply to internal armed conflicts, which might appear to be a legal aberration in view of the sociological reality of such breaches. In that connection, he noted that paragraph 1 of the new version of the article referred to "grave breaches" of the Geneva Conventions of 1949 but not to Additional Protocols I or II. He would therefore propose either that article 22 should contain an express reference both to the Geneva Conventions and to Additional Protocols I and II, in which case paragraph 1 should be amended to reflect all the relevant provisions of those instruments, or that the necessary clarification should be incorporated in the commentary. Of the two possibilities, he would prefer the first.

27. He fully agreed with the Special Rapporteur that a general definition of terrorism, though perhaps difficult, was not impossible. The definition which was now laid down in the new formulation of article 24 was on the whole a marked improvement on the earlier version, since it included individuals in the category of perpetrators, incorporated new terms such as "act of international terrorism" and "acts of violence", and specified the object of the terrorism. The wording of the article could none the less be improved.

28. The arguments advanced by the Swiss Government in favour of including illicit traffic in narcotic drugs in the Code were sound and commanded his support. Once again, however, the wording of article 25 (Illicit traffic in narcotic drugs) could be improved.

29. The Special Rapporteur had said that it would be difficult to lay down a specific penalty for each crime, and Governments had remained silent on the issue. The solution he favoured was to establish a scale of penalties, and leave it to the courts to decide in each case which penalty to apply. That was also the method followed in the statutes of international criminal courts since 1945. In that regard one might wonder what the legal basis was for the absence of the death penalty from more recent in-

[8] *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946* (Nürnberg, 1947), vol. I, p. 17.

[9] United Nations, *Treaty Series*, vol. 82, p. 279.

[10] Document S/25274, para. 49.

struments. Did that absence denote significant progress in the field of human rights? Again, what fate awaited such instruments as the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty?

30. Mr. AL-KHASAWNEH said that the Commission owed the Special Rapporteur a debt of gratitude for endeavouring to bring the codification exercise on a highly relevant topic begun in 1947 to a successful conclusion. The topic was highly relevant because crimes against the peace and security of mankind continued to be committed on a daily basis and for the most part went unpunished. His own gratitude to the Special Rapporteur was all the more deeply felt in that the topic fell—to use an expression taken from one of the Special Rapporteur's earlier reports—at the meeting place of politics and law, and touched everyone's sensibilities and deeply held convictions. Less diplomatically put, it could be said that the criminalization of the acts and activities described in the Code was seen as a possible curtailment of the freedom of States to act in areas of international relations where they would like to retain that freedom unhindered by considerations of clearly defined legal rules that might give rise to the individual criminal responsibility, not only of their nationals, but sometimes of their State officials.

31. In his thirteenth report the Special Rapporteur had signalled that the time had come to "beat a retreat" on the draft articles that had met with strong opposition from Governments. There was no doubt that the Special Rapporteur's assessment of the prospects of acceptability of the draft by States had been the principal consideration that had led him to make that decision. While sympathetic to that point of view, he found the decision regrettable for two reasons.

32. First, as previously stated, he believed that no firm inferences as to the ultimate acceptability of the draft, in the form of ratifications and accessions, could be drawn from the debates in the Sixth Committee. Nor would he view the replies of Governments—at least in the case under consideration—as constituting a representative statistical sample to warrant such a drastic decision.

33. Secondly, and more importantly, the Commission, as a body of independent jurists, was duty bound—if only as a matter of professional commitment—to pay as much regard to the requirements of elementary justice and logical consistency as it had paid to the political sensibilities of States. As St. Augustine had once remarked, "Without justice, what are kingdoms but great robberies?". In his view, the same was true of the international political order. Colonial domination and foreign occupation were not a thing of the past. One need only open the newspapers at random to be sure to find two or three cases of the use of force to deny a people the right to self-determination. Similarly, blatant acts of intervention with the express or thinly disguised aim of destabilizing States took place in complete disregard of the massive suffering of the populations of the targeted States. Again, wilful and severe damage to the environment, already identified in article 19 of part one of the draft articles on State responsibility[11] as an act that gave rise to the consequences associated with crimes, had been dropped from the list in the new draft, disregarding the requirement that there should be some unity of purpose in the work produced by the Commission, which might live to regret that decision.

34. It was generally agreed that what constituted a crime was ultimately a subjective matter, namely, the degree of reprobation elicited in the public conscience as a reaction to a heinous act, which of course was never uniform, even in a homogeneous national society. It was also generally agreed that the law aimed to reduce that subjectivity by linking the infringements to protected interests in preserving life, human dignity and property rights. All of the crimes dropped from the list infringed on those interests, and it should take something more than the unreasoned replies of Governments to convince the Commission to do away so readily with those crimes. That did not, of course, mean the list did not need narrowing, nor did it mean the views of Governments should not be taken into account. It did mean, however, that the decision to drop six of the crimes previously included in the draft was a disproportionate acceptance of the wishes of States in an area where ingenuity and perseverance were both still called for.

35. The Commission spoke of a "maximalist" or a "minimalist" approach, yet the current debate had made it plain that adopting the minimalist approach was no guarantee of acceptance of the draft by States, nor of consensus on its contents. The debate had already produced proposals to reduce the contents of the draft even further—for example, with regard to the crime of aggression, by drawing an artificial distinction between wars of aggression and acts of aggression: artificial, because the concept of war itself had long been treated by international law as a relative concept.

36. Similarly, the proposal that the words "or in any other manner inconsistent with the Charter of the United Nations" should be eliminated from article 15 would reduce the scope of the concept of aggression even further. He could not concur with that proposal, for three reasons. First, the international legal system could not be viewed as a static system. Rather, it was a developing system, aimed at establishing the rule of law at the international level. As Catherine the Great had once put it, "That which stops growing starts to rot". Establishment of the rule of law at the international level would not be helped if the Commission allowed for a wider margin for the use of force.

37. Secondly, prohibition of the use of force was the general rule, and circumstances when the use of force was permissible were the exception, and should therefore be narrowly construed. To reduce the area where individual criminal responsibility would arise from the use of force did not tally with the need to interpret the exceptions narrowly.

38. Thirdly, aggression, in the topic of State responsibility, had always carried the consequences of crimes, and in addition, still further consequences. That was probably a reflection of the centrality of the State in the system of international law, even though a particular act of aggression might not elicit—subjectively speaking—reprobation stronger than that elicited by, for example,

[11] See 2379th meeting, footnote 8.

an act of genocide. Mr. Mahiou was therefore right to say (2380th meeting) that aggression did not depend on the effects, but was prohibited *per se*.

39. The relationship between the existence of the crime of aggression and a prior determination by the Security Council had been debated for many years, in the context both of the present topic and of the topic of State responsibility. It was plain that predicating individual criminal responsibility on a prior determination by the Council would most probably lead to a situation where no national of the permanent members of the Council would ever be prosecuted for the crime of aggression. The impunity thus created would conflict with elementary considerations of justice. On the other hand, any solution the Commission might adopt should encourage an independent organic determination, and not leave that determination entirely to the unilateral decisions of State courts. On that question, he agreed with Mr. Pellet. One member of the Commission had also proposed that a solution drawing on General Assembly resolution 377 (V) entitled "Uniting for peace" might offer a viable solution. It was an avenue worth exploring.

40. With reference to genocide, he agreed that it was preferable to stay close to the text of the Convention on the Prevention and Punishment of the Crime of Genocide, in view of the broad agreement on the definition it contained. Again, the new, more tightly drafted version of article 21 was an improvement on the previous text. He was also persuaded that a review of precedents would reveal that the determining factor was not the scale of violations but the existence of systematic persecution of a community or a section of a community. He agreed with Mr. Jacovides (2382nd meeting) that forcible transfer of population should be maintained. At the same time, it was worth cautioning that not all cases of forcible population transfer gave rise to individual criminal responsibility. The building of a much-needed dam might require the flooding of large tracts of land, and the population living on them might have to be transferred. Provided certain conditions regarding survival and safety were met, it was doubtful whether any responsibility at all—save that contemplated under the topic of international liability for injurious consequences arising out of acts not prohibited by international law—was attached. Clearly, that situation was very different from the policy of ethnic cleansing. The degree of responsibility should be clearly categorized, perhaps in the commentary.

41. He agreed with the observations of the Swiss Government on article 22 set forth in the thirteenth report. Recognizing the validity of those comments, the Special Rapporteur had sought to improve the drafting of paragraph 2 of the article, through recourse to a non-exhaustive list. On the whole, that was perhaps the best possible solution.

42. On the question of international terrorism, he believed that the two approaches so far adopted by the international community were not mutually exclusive: the approach of identifying certain acts and prosecuting them regardless of motive on the basis of the principle of *aut dedere aut judicare*, and the approach of finding a general definition of terrorism for the purposes of criminal prosecution. Ultimately, the latter course had to be attempted. The problem was that terrorism had tended to be defined in terms of certain groups regarding which a measure of coercion or violence normally not allowed in ordinary situations was permitted. To that extent the concept of "terrorists" was akin to the concept of "counter-revolutionaries". Yet a crime could not be defined other than by its nature and effects. If it was intended to spread or had the effect of spreading terror, then an act was terroristic, regardless of whether the bomb was carried in a fruit basket or dropped from a military plane. He welcomed the reformulated version of article 24 in that it went a long way towards finding a definition that tallied with logic and consistency. However, pace the comments of the Special Rapporteur, terrorism was sometimes an end in itself: one need only think of the activities of nihilists and anarchists. The Commission should therefore look again at the phrase "in order to compel the aforesaid State".

43. His remarks had perhaps raised more problems than they had suggested answers. However, there was still room to review some of the articles that had been discarded, so as to find a more delicate balance between political realism and legal idealism than was currently to be found in the report.

The meeting was suspended at 11.35 a.m. and resumed at 12.05 p.m.

44. Mr. YAMADA pointed out that the Special Rapporteur had changed the title of article 22 from "Exceptionally serious war crimes" to "War crimes". Yet the opening sentence of the article contained a reference to "an exceptionally serious war crime". Perhaps that was an oversight. Paragraph 1 referred to the Geneva Conventions of 1949, but it should be made plain that Additional Protocol I was included in that reference. As to paragraph 2, it was indeed difficult to draw up an exhaustive list of violations of the laws or customs of war. Nevertheless, he had serious misgivings whether the formulation ", but are not limited to:" was consistent with the principle of *nullum crimen sine lege*, for it did not specify any limit. It must be made abundantly clear that those crimes which were not explicitly listed in the paragraph must be as serious as those which were listed therein. He would therefore prefer a different formulation of the leading sentence of paragraph 2, for example along the lines of "Such violations of the laws or customs of war as are:".

45. With reference to article 24, he agreed that perpetrators of international terrorism should not be limited to agents and representatives of States. On the other hand, it was not proper to expand the scope of the article so as to include a lone terrorist who was acting independently and had no affiliation with any terrorist organization or group. The element of an organized crime should be present in that article.

46. With regard to article 25, he still felt that the crime of illicit traffic in narcotic drugs was a borderline case for inclusion in the Code as a crime against the peace and security of mankind. The overwhelming majority of cases of drug trafficking had been effectively prosecuted by national Governments, and excellent international cooperation arrangements existed to suppress such crimes. At the same time, he recognized the difficulties

faced by some countries, particularly in Latin America. In those cases, the crime—sometimes known as "narco-terrorism"—was not simply drug trafficking but was linked with terrorism or the activities of insurgent groups. In view of that consideration, it might be possible to narrow down the concept of the crime to be included in the Code.

47. The Special Rapporteur had been right to abandon draft article 26 (Wilful and severe damage to the environment). Mr. Yankov (2383rd meeting) had pointed out that terrorists might resort to inflicting environmental damage as one of their tactics. He agreed that environmental modification such as was prohibited by the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques was a serious crime against mankind. However, the Commission could address that question either in the article on war crimes or in the article on international terrorism.

48. Mr. RAZAFINDRALAMBO said that the crime of aggression raised two questions, the first concerning its definition, the second regarding the role of the Security Council. On the first question, the observations of Governments merely confirmed that it was difficult to define the concept of aggression from the legal and criminal standpoints. Article 15 as adopted on first reading had been subjected to crossfire from Governments and from many of their representatives in the Sixth Committee. The view had been taken that article 15 was not innovative and merely reproduced the Definition of Aggression contained in the annex to General Assembly resolution 3314 (XXIX), a resolution that was essentially political in character and scope, even if its listing of cases of aggression did contain some more specific and factual elements. Those criticisms were not unwarranted. Indeed, the Commission had decided to adopt the definition only with considerable reluctance, and for lack of a more acceptable alternative. It was thus understandable, given the adverse reactions of certain Governments, that the Special Rapporteur was proposing to abandon the Definition of Aggression except for the first two paragraphs. However, reduced to its most basic expression, that definition did not escape the original reproach of having a political connotation, as was shown by the presence in paragraph 2 of expressions such as "sovereignty", "political independence" or "any other manner inconsistent with the Charter of the United Nations". Perhaps the Drafting Committee could find a formulation referring more directly to the victim State, for example, "use of armed force against another State".

49. The role assigned to the Security Council in article 15 had perhaps been exaggerated. Admittedly, paragraph 4 (*h*) stated that the Council could qualify as acts of aggression acts other than those listed in the preceding subparagraphs. Moreover, paragraph 5 stipulated that national courts were bound by any determination by the Council as to the existence of an act of aggression. Nevertheless, as the action by the Council did not adversely affect the independence of the judge in his assessment of the acts of aggression itemized in paragraph 4, the Commission seemed to have shown great prudence on the question of interference by the Council in the activities of the courts. Thus, unlike the text of article 15 adopted on first reading, the new text contained no provision likely to enable the Council to interfere dangerously in the determination or prosecution by the international judge of the crimes specifically characterized as crimes of aggression in paragraph 4.

50. He believed that criticisms on that score were, wittingly or otherwise, levelled at the system advocated in the draft statute for an international criminal court. Under paragraph 2 of article 23 (Action by the Security Council) of the draft statute,[12] relating to the role of the Security Council in the bringing of complaints of aggression, the Council had the power to, as it were, "screen" such complaints, thus enabling it to use the veto to prevent a complaint from being brought. But that provision related only to the modalities for prosecution in the event of an act of aggression. In other words, it set forth the conditions for exercise of the complaint. On the other hand, the Code, like all traditional criminal codes, consisted merely of a catalogue of crimes, described in terms of substance and intent. Accordingly, the Code should not be confused with a code of criminal procedure. The modalities for bringing the complaint were essentially a procedural question: they could if necessary be reconsidered in greater depth later on. Nevertheless, the provisions of article 15 adopted on first reading regarding the role of the Security Council were such as to accentuate the political character of the definition, and of the article as a whole. He thus endorsed the Special Rapporteur's proposal to drop paragraphs 3, 4 and 5, as well as paragraph 6, which added nothing to the definition. On the other hand, why had paragraph 7, concerning the right to self-determination, been sacrificed? He could find no satisfactory explanation for that decision anywhere in the thirteenth report. Paragraph 7 constituted a valuable saving clause that was worthy of consideration and was of an importance equal to article 18. The two texts represented the two sides of one and the same coin.

51. The definition of genocide in article 19, unlike the definition of aggression, posed no particular problems since it had been taken from a legal text, the Convention on the Prevention and Punishment of the Crime of Genocide. However, one Government had considered that the definition contained in paragraph 2 failed to establish the mental state needed for the imposition of criminal liability. It was the use of the term "intent" that was controversial. The definition of genocide included among the elements constituting the crime the "intent to destroy [...] a national, ethnic, racial or religious group as such". However, that formulation did not place sufficient emphasis on the fact that the intent in question was not the criminal intent as such, in other words, the deliberate will to commit the crime or the awareness of the criminal nature of the act (*mens rea*). Rather, it stressed the motive of the perpetrator of the crime, namely the destruction of a group of persons on account of their origin. Perhaps the Drafting Committee might review the definition with a view to avoiding any ambiguity, for example, by using a formulation such as "acts committed with the aim of" or "acts manifestly aimed at destroying".

52. The Special Rapporteur proposed retaining the list of acts of genocide adopted on first reading, while add-

[12] Ibid., footnote 10.

ing acts of direct and public incitement to commit genocide and attempts to commit genocide. In other words, the Special Rapporteur had returned to the definition contained in the Convention. Two questions arose, however. Why should incitement or attempt be specifically designated as crimes in the case of genocide, when those two concepts were already covered by paragraphs 2 and 3 of article 3 (Responsibility and punishment)? On first reading, the Commission had deliberately omitted those two acts, along with complicity, in view of the references to them in article 3. Should the Commission once again base itself on the approach adopted by the drafters of the Convention, as the Security Council had done when drafting the articles of the statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda,[13] concerning genocide? It could be argued that the specific reference to those two crimes in the statutes was justified by the fact that those texts contained no general provision on attempts to commit or incitement to commit that crime. Enumerating them as crimes, after the principal crime of genocide, could also be interpreted as reflecting the wish of the Commission to specify in the case of each individual crime whether attempt and incitement were to be criminalized. In order to remove any ambiguity, the Commission must now adopt a clear position. It had two alternatives: either it must pursue the approach adopted in the Convention, and draw up an exhaustive list of the acts considered as genocide, independently of article 3 of the draft Code, or else it must eliminate the crimes of incitement and attempt to commit genocide, leaving it to criminal jurisprudence to apply the appropriate provisions of article 3. In his view, the general provision in article 3 did not exonerate the Commission from making express mention of incitement and attempt as crimes in each article of part two of the Code. That approach had the merit of designating all acts constituting the crime in question, without requiring the court to decide in each case whether or not the concepts set forth in article 3 were applicable.

53. The crime of complicity was mentioned explicitly in article III (*e*) of the Convention and should be treated no differently from incitement and attempt: a reference to complicity should therefore be incorporated. On the other hand, he saw no need to expand paragraph 2 (*e*) to cover the transfer of adults as well as children, as suggested by one Government. With the transfer of children, as with attempts to restrict population growth, the purpose was to hinder the propagation of a particular race.

54. The Special Rapporteur had been right to change the title of article 21 to reflect the wording used in the Nürnberg Principles,[14] and in some penal codes. He did not agree, however, that a reference to systematic commission of a crime should be retained while mention of mass violations should be deleted. The two concepts were complementary and the Drafting Committee should try to reformulate article 21 so as to incorporate them. Efforts should also be made to improve the balance of the provisions on torture within the entire draft, perhaps by referring only to cruel, inhuman or degrading treatment or punishment, as in article 7 of the International Covenant on Civil and Political Rights. The proposal made by Mr. Vargas Carreño (2381st meeting) was sound and was worthy of consideration by the Drafting Committee.

55. He could accept the Special Rapporteur's proposal to revert to the classic phrasing, "War crimes", for the title of article 22, and likewise the new structure proposed for the article. The Drafting Committee should none the less consider making paragraph 1 refer to "international humanitarian law", rather than cite the Geneva Conventions of 1949. Again, it would be preferable to speak in paragraph 2 of "serious" violations of the laws or customs of war, a phrase the Commission had already incorporated in the draft statute for an international criminal court. The failure of the new text to mention the establishment of settlers in an occupied territory was a major drawback. Perhaps the Special Rapporteur could explain that omission.

56. As to article 24, he endorsed the Special Rapporteur's opinion that it was necessary to search for the common features of the various forms of terrorism and to derive common rules applicable to their suppression and punishment. Although a variety of treaties now set out penalties for specific terrorist acts, no real progress had been made in eradicating terrorism, and in particular, in doing away with urban terrorism. The reason might be that there was no single text on which international consensus had been reached and punishment of terrorist crimes fell exclusively within national jurisdiction. International prosecution might well be facilitated by designating such crimes as crimes against humanity.

57. As far as article 25 was concerned, the very helplessness of States in the face of illicit drug trafficking mentioned in the report militated in favour of retaining that crime in the draft Code. The new proposal represented an improvement over the earlier version if the Commission agreed to specify the penalty for the crime. Though in general he would prefer penalties to be dealt with in a separate article, the acts mentioned in article 25 formed minimum constituent elements of the larger crime of drug trafficking, like money laundering, for example, and therefore deserved to be treated in the article itself.

58. The CHAIRMAN announced that a former Special Rapporteur of the Commission, Mr. McCaffrey, was present at the meeting, and extended a warm welcome to him on behalf of all members.

59. Mr. AL-BAHARNA said he welcomed the thirteenth report, which raised a number of important issues.

60. In response to the criticisms and reservations of Governments on the draft articles as adopted on first reading, the Special Rapporteur had proposed to reduce the number of crimes from 12 to 6. That reduction seemed far too drastic, however. Even if a vast majority of States desired such a reduction, the choice of crimes for deletion remained a delicate decision, and it was questionable whether such a drastic change should be made on second reading.

[13] Ibid., footnote 11.

[14] See 2383rd meeting, footnote 5.

61. The fact that Governments, in their comments, had declined to specify penalties for each crime demonstrated the need for the Commission to be circumspect in prescribing them. He therefore welcomed the Special Rapporteur's reference, in the report, to the difficulty of the exercise, and the suggestion that a scale of penalties should be established, leaving it up to the courts to determine the applicable penalty in each case. Any provision on penalties should, of course, be made consistent with the corresponding provision in the draft statute for an international criminal court.

62. The new proposed definition of aggression in article 15 was too general. While the earlier version had been criticized by Governments as being too political, the Commission should take a second look at that version and try to find an appropriate wording. Deleting paragraphs 5 to 7, which were political in nature, might help to streamline the legal content. He would also be disinclined to remove paragraph 4 (*h*), although it related to the Security Council, because in matters relating to aggression the Council did have a necessary function that was acknowledged in article 20 of the statute for an international criminal court.

63. Article 19 called for no comment other than the minor point that no specific penalty should be stipulated for the crime of genocide: a general provision in the draft Code on penalties would suffice.

64. He had no objection to the proposal to change the title of article 21 to "Crimes against humanity".. If that was done, however, a reference to the "mass" nature of the crimes should be incorporated in the article itself. Otherwise, "wilful killing" and "persecution" as mentioned in the article, in other words, without the "mass" element, could hardly be justified as crimes against humanity. As one Government had pointed out, "persecution" was so vague it could mean anything. He preferred the earlier wording of "persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale". He would also suggest that "wilful killing" should be altered to read "wilful killing on a mass scale". Finally, the words "all other inhumane acts" should be supplemented by the phrase "perpetrated on a mass scale".

65. Article 22 had been sharply criticized by Governments. The Special Rapporteur was consequently proposing a new text consisting of an exhaustive list of war crimes under the Geneva Conventions of 1949 and a non-exhaustive list under the "laws or customs of war". Would it not be possible to adopt a uniform approach, making both lists either exhaustive or non-exhaustive?

66. Article 24 had likewise been the object of Government criticism, centred largely on the question of who could commit the crime, and what its substantive content should be. He was not fully convinced of the desirability of the proposal to extend the scope of the article to "individuals", without some qualification of the individual perpetrators. The general definition of terrorism in paragraph 2 of the proposed text would be acceptable if the word "terror" was replaced by "serious apprehension", a substitution that would neutralize the criticism by one Government that the earlier version defined terrorism in tautological terms.

67. Article 25 was one of the most controversial in the draft Code. Though he saw the merit of arguments both for and against inclusion, he was in favour of retaining the article, subject to deletion of the words "to internal or" from the new paragraph 2. The reference to internal law was such as to make the crime more national than international.

68. Mr. ROSENSTOCK suggested that the Drafting Committee should look into whether a reference to the issue of intent could be incorporated in article 3. Everyone agreed that *mens rea* was an element of a crime; the only divergence of views was on whether it was already implicit in the nature of the acts covered by the draft Code. He agreed that the Commission should not attempt to indicate penalties for each act.

69. Article 19 was broadly acceptable, subject to minor drafting changes and a possible review of the question of attempt in the context of the draft articles as a whole.

70. Again, subject to drafting changes to bring the text into line with the title and to improve its clarity, article 21 was acceptable, as was the new proposal put forward by Mr. Vargas Carreño, whose comments on the requirement of systematic or mass violations accurately reflected the very nature of the draft Code, and whose remarks on deportation were extremely germane. It would indeed be helpful to include the definition of torture, though cross-referencing or a detailed mention in the commentary was also an option. The inclusion of persecution on political, racial or religious grounds would be a step beyond the Charter of the Nürnberg Tribunal, which required that such acts be in execution of or in connection with any crime within the jurisdiction of the Tribunal. The statute of the International Tribunal for the Former Yugoslavia covered such acts only if they were committed in armed conflict. The Drafting Committee should also examine whether the notion of persecution was so vague that the crime should be made subject to penalties only when committed in connection with another crime listed in the Code.

71. The text proposed by the Special Rapporteur for article 22 eliminated some of the problems with the version that had emerged on first reading and had the additional merit of closely following the statute of the International Tribunal for the Former Yugoslavia. The Security Council had recently adopted the statute of the International Tribunal for Rwanda, article 4 of which gave the Tribunal jurisdiction with regard to violations of article 3 common to the Geneva Conventions of 1949 and Additional Protocol II. That was a significant step forward in combating intolerable conduct in any armed conflict, and it would be unfortunate if the draft Code failed to include a similar provision. The Drafting Committee should be asked to consider adding such new provisions as article 22 *bis*.

72. With reference to article 24, he continued to have serious doubts about the wisdom of including provisions on international terrorism. The fact that it would be difficult to reach a sufficiently precise definition of terrorism suggested that the article should in fact be eliminated. However, the text proposed by the Special Rapporteur was an enormous step in the right direction compared with the totally unacceptable version that had been

adopted on first reading. He also recognized the merits of Mr. Pellet's comments on terrorism. Article 25 should be deleted. Its subject did not fit in with the concept of a threat to international peace and security. The existing conventions on narcotic drugs and psychotropic substances focused on suppression of drug trafficking rather than establishing penalties for it at the international level. Increased international cooperation in law enforcement would be a more appropriate approach to the problem than to include the issue in a code of crimes against the peace and security of mankind.

73. Lastly, he endorsed the Special Rapporteur's recommendations on the material that should be deleted from the text adopted on first reading. Reopening those questions would confirm the validity of the concern that the Commission was engaged in a quixotic exercise.

The meeting rose at 1.05 p.m.

2385th MEETING

Wednesday, 17 May 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,[2] A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. LUKASHUK said that the construction proposed by the Special Rapporteur, although based almost entirely on existing law, had been given a mixed reception both in the Commission and in the Sixth Committee. The envisaged Code of Crimes against the Peace and Security of Mankind, in addition to the considerable impact which it might have on international law and on State policy, affected the interests and the status of persons occupying high positions of State. There was thus some purpose in shifting the location of the draft Code in the general process of the progressive development of international law.

2. The 50 years of the existence of the United Nations had been a period of restructuring of international law on the basis of the purposes and principles of the Charter of the United Nations. Mankind had finally woken up to the threat to its very survival posed by the lack of a reliable international legal order. If international law was to be able to offer solutions to current problems, it must move on to a new stage in its development and become the law of the international community as a whole. The Commission played an important role in that respect and it was at its initiative that the Vienna Convention on the Law of Treaties had embodied the fundamental idea that peremptory rules were adopted by the international community as a whole, in the sense not of adoption by all States in unanimity, but by a sufficiently representative majority. It was even being suggested, both in the statements of the representatives of some States in the Sixth Committee and in the work done by the Commission on the topic of State responsibility, that a kind of legal status should be conferred on this "international community", which was the victim, for example, when an international crime was committed and which was responsible for deciding what the reaction to such a crime should be. The move towards establishing the international community as a legal entity had implications for the formation of general international law and for the principal institutions responsible for applying such law, primarily the United Nations. But, while changes in the international system were clearly necessary in view of its imperfections, experience taught that it was always dangerous to destroy a system without knowing what could be put in its place.

3. The primacy of the interest of the international community was therefore what differentiated the law of the international community from "usual" international law. Thanks to the Commission's work, international criminal law was today a manifest fact and that was a sign of the maturity of the international community and its legal system. Such law was broken by individuals who were often officials enjoying immunity and it would be unrealistic to expect that leaders would cheerfully give up their privileges. Moreover, it was rarely easy to harmonize national legal systems effectively with international law. It was regrettable in that regard that national courts for most of the time had hardly any involvement in the formulation of international law, whose rules they would, however, be increasingly required to apply. There was thus a need to improve the access of national lawyers to the texts and commentaries produced by the Commission. All such constraints must be taken into consideration in the drafting of the Code and that might now perhaps entail a retreat to a restricted version. As the Special Rapporteur had stressed, the formulation of a whole new area of international law necessarily gave rise to many difficulties. The definition of aggression was a good example of such difficulties, for the existing definition was far from perfect, without there

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook ... 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook ... 1995*, vol. II (Part One).