

The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind

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I. Introduction

When, on 5 July, 1996, after many years, the Draft Code of Crimes against the Peace and Security of Mankind was finally adopted on second reading by the ILC, a polite but half-hearted applause was heard. The Commission had rid itself of a heavy burden, but the final moments had been somewhat polemic, and the weariness and urgency typical of the end of five years' work were visible in the members. There was, however, reason to celebrate. The topic was the oldest one on the agenda of the Commission, dating back to 1947.¹ After having reached a first draft Code in 1954 consisting of four articles, the work had to be interrupted owing to lack of agreement on the concept of aggression. In 1981 the General Assembly invited the Commission to resume its task with a view to elaborating a renewed version of the draft Code. From 1983 onwards, the Commission prepared a project with 26 articles which was adopted on first reading in 1991. However, the discussion on these articles during 1995 and 1996 led to drastic decisions. The 1991 Draft Code contained 12 crimes, and the Commission in 1995 decided to reduce the number to 6. Nevertheless, a deep rift was observed among the members regarding the need to reduce the number of crimes. In 1996 another two crimes were excluded, illicit traffic in narcotic drugs, and wilful and severe damage to the environment (although the latter was retained, subject to certain conditions, as a war

¹ A/RES/177 (II) of 21 November 1947 directed the Commission to prepare a draft Code of offences against the peace and security of mankind. For the history of the Code, see United Nations, *The Work of the International Law Commission*, 5th edition, 1996, 38–41, and 142–149; and ILCYB 1983, Vol. II (part 2), paras. 26–41.

crime). The exclusion of severe harm to the environment as a crime in peace time proved nonetheless highly controversial. Finally, when the list appeared to be limited to four categories (aggression, genocide, crimes against humanity, and war crimes), a fifth type (crime against United Nations personnel) was included in the last few days, with some protest concerning the inconsistency of the late inclusion compared to the drastic reduction made in the list of crimes. Consistency is not a concept one can absolutely respect in an exercise carried out over decades and involving a Commission with a changing composition, so at that stage the Commission wisely decided not to get involved in pointless discussions, and to adopt the Draft Code as it was, thereby allowing some time to complete its busy agenda before the end of the session. Nonetheless, the shadow of inconsistency somewhat dimmed the final adoption of the Draft Code.

The purpose of the present study is to analyse the process leading to the 1996 ILC's Draft Code, and to assess its meaning for contemporary international law. After pondering various options (such as whether to endorse the Code as a declaration, or to adopt it as a treaty open to ratification by states), the 51st General Assembly decided to draw the attention of the states participating in the Preparatory Committee for the Establishment of an International Criminal Court to the relevance of the Draft Code to their work. At the same time, the General Assembly requested member states to present their written comments on action which might be taken in relation to the Draft Code.² It will be interesting to observe the evolution of the Draft Code and of the proposed conference on an international criminal court over the next few years since this is one of the crucial matters which will put the progress of international law to the test in the near future. Throughout its history, the great majority of projects prepared by the ILC dealt with questions that did not involve profound political differences among states; they were mainly technical matters of international law.³ The new period inaugurated since the end of the cold war has also affected the codification of international law, and at present two consequences seem to have arisen. On the one hand, there is a slight acceleration of the process, and on the other hand more difficult topics are being dealt with. The Commission adopted the Draft Statute for an International Criminal Court in 1994, and in 1996, apart from the Draft Code, the Commission has provisionally adopted on first reading the Draft Articles on State Responsibility. Among the topics foreseen for the Commission's work programme are other questions of relevant political

² A/RES/51/160 of 16 December 1996; see text of the Draft Code — Annex.

³ See O. Schachter, *International Law in Theory and Practice*, 1991, 73.

content, for instance, diplomatic protection, and unilateral acts of states.⁴ It is very important to understand the adoption of the Draft Code within this context, in which the distinction between codification and progressive development must be seen from a new perspective.

II. The Crucial Choices of the International Law Commission

During its work on the Draft Code, the Commission had to make a number of crucial decisions which shape the Code as finally adopted.

(a) *General provisions and the list of crimes.* Following a suggestion made by the Commission, A/RES/38/132 of 19 December 1983 invited the Commission to divide the Draft Code into these two parts. The Commission understood that this mandate did not imply that they should work on one part before the other, and worked almost simultaneously on both parts.⁵

(b) *Only individual responsibility.* In spite of some doubts at the very beginning, it was soon decided that the Code should confine itself only to individual responsibility. State responsibility was the object of another topic under consideration by the Commission. In 1985, the Commission studied whether the draft should refer only to state authorities or rather to any individual who committed a crime of the kind envisaged, and the Commission tended towards this last option.⁶

(c) *Only the most serious crimes and not an international criminal code.* The Commission unanimously agreed that the Code would cover the category of the most serious international crimes, and would exclude the less grave international crimes.⁷ In this regard, the Special Rapporteur and the Commission emphasized that they were not elaborating an international penal code aiming at the criminalization of the wide variety of international crimes as a whole. They thus meant to establish a clear difference from the doctrinal efforts in the field of criminal law.⁸ In the

⁴ GAOR 51st Sess., Suppl. No. 10 (ILCYB 1996, Vol. II, part 2), paras. 245–249, and Annex II. See also GAOR 50th Sess., Suppl. No. 10 (ILCYB 1995, Vol. II, part 2), paras. 500–507, and Doc. A/51/358/Add.1.

⁵ ILCYB 1983, Vol. 2 (part II), para. 67; ILCYB 1984, Vol. 2 (part II), paras. 33, 39–40 & 65 (b).

⁶ ILCYB 1984, Vol. 2 (part II), paras. 32 & 65 (a); ILCYB 1985, Vol. 2 (part II), paras. 40–45 & 99.

⁷ ILCYB 1983, Vol. 2 (part II), paras. 46–48 & 69 (a).

⁸ See among others V. Pella, “La codificación del Derecho penal internacional”, *RGDIP* 56 (1952), 378 et seq.; A. Quintano Ripollés, *Tratado de Derecho*

1954 Draft Code, certain crimes were omitted because they were not considered to be sufficiently grievous: piracy, currency counterfeiting and damage to submarine cables. In 1985 the Commission considered that the taking of hostages, violence against persons enjoying diplomatic privileges and immunities, and the hijacking of aircraft should not be treated as crimes against the peace and security of mankind, but rather should be regarded as associated with the phenomenon of international terrorism, on which a general characterization was to be drafted. With regard to piracy, the Commission recognized that it was a crime under customary international law, but it doubted whether in the present international community the offence could be such as to constitute a threat to the peace and security of mankind. Finally the Commission decided not to consider other crimes such as forgery of passports, dissemination of false or distorted news, or insulting behaviour towards a foreign state,⁹ as well as the breach of treaties designed to ensure international peace and security.¹⁰ On first reading, the Commission found 12 crimes serious enough to be included in the Draft Code until 1991: aggression, threat of aggression, intervention, colonial domination and other forms of alien domination, genocide, apartheid, systematic or mass violations of human rights, exceptionally serious war crimes, recruitment, financing and training of mercenaries, international terrorism, illicit traffic in narcotic drugs, and wilful and severe damage to the environment. The work on the Draft Code was resumed in 1994, and in its 1995 and 1996 sessions the Commission totally changed its mind, as will be shown below. Instead of the seriousness of the criminal conduct or of its effects, the Commission preferred tradition as the criterion of the definition of the crimes, and on second reading decided to include only the four crimes recognized by the Nuremberg trial (aggression, genocide, crimes against humanity, and war crimes), although in fact some changes had to be accepted.

(d) *The Principle of nullum crimen sine lege.* In his first report, the Special Rapporteur Mr. Thiam,¹¹ affirmed the general validity of this

Penal Internacional y Internacional Penal, 1957; C. Lombois, *Droit pénal international*, 1979; D. Oehler, *Internationales Strafrecht*, 1983; M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, 1987.

⁹ ILCYB 1985, Vol. 2 (part II), paras. 60, 63 & 65 (c).

¹⁰ ILCYB 1988, Vol. 2 (part II), paras. 256–261; ILCYB 1990, Vol. 2 (part II), paras. 89–92.

¹¹ From 1983 until 1995, Mr. Thiam presented 13 reports on the topic. In this study, the recent practice of the ILC is followed, according to which the title of the members is 'Mr.' (no woman has been yet elected to the Commission), be they Ambassadors, Professors, etc.

principle, which required that any criminal conduct should be expressly defined in order to be punishable. However, the Commission felt that it was not advisable to conclude from the principle that the list of crimes in the Draft Code was to be exhaustive.¹² In fact, Article 1 para.2 of the final draft does not declare that the crimes against the peace and security of mankind are only those found in the Code itself but rather provides that this kind of crime is defined by general international law. In consequence, the *nullum crimen sine lege* principle is asserted in the Draft Code by way of declaring its non-retroactivity, yet at the same time, it is affirmed that the non-retroactivity of the Code does not preclude the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law. This crucial exception to the principle is justified in international law. The commentary to the 1991 Draft Code declared that the word 'lege' in the phrase *nullum crimen sine lege* might be interpreted in international law as encompassing not only treaties but also custom and general principles of law.¹³ The exception is also justified by the most relevant cases of the Nuremberg trial and its recent constructions. According to one school of thought, a certain degree of retroactivity was in a way acceptable on the ground of 'a common sense of justice'.¹⁴ Otherwise expressed:

"l'esprit des règles de Nürnberg relatives au problème de la rétroactivité des règles pénales revient à dire que certains faits sont trop monstrueux pour ne pas être déjà incriminés coutumièrement ou en vertu des principes généraux du droit à défaut de l'être *expressis verbis* par le droit international conventionnel".¹⁵

¹² ILCYB 1983, Vol. 2 (part I), First report by Mr. Thiam, Doc. A/CN.4/364, para. 55; ILCYB 1983 Vol. 2 (part II), para. 66.

¹³ See commentary to Article 8 of the 1991 Draft Code, in ILCYB 1988, Vol. II (part 2). The commentary to the corresponding Article 13 of the 1996 Draft Code has suppressed that observation.

¹⁴ See W. Simons, "The jurisdictional bases of the International Military Tribunal at Nuremberg", in: G. Ginsburgs and V.N. Kudriavtsev (eds.), *The Nuremberg trial and international law*, 1990, 39–60 at 58, note 63. See also pages 111–117. Another position stressed the consensual character of the Nuremberg experiment, for many states adhered to the London Agreement and Charter, and the trial was proclaimed in the interests of the United Nations. See *op. cit.*, pages 52–54, and 58.

¹⁵ E. David, "L'actualité juridique de Nuremberg", in: Colloque international de l'ULB sous le patronage de W.G. van der Meersch, *Le procès de Nuremberg. Conséquences et actualisation*, 1988, 89–176, at 147.

Articles 1 para.2 and 13 para.2 of the Draft Code allow the possibility that the crimes against the peace and security of mankind are regulated not only by the Code (even if the Code were declaratory of customary law) but also by the variety of sources accepted in contemporary international law. The principle of non-retroactivity as expressed in Article 13 para.2 of the Draft Code implies that general international law may always consider certain criminal acts as crimes against the peace and security of mankind although they are not expressly characterized in the Code.

(e) *The characterization of the criminal conduct.* The 1991 Draft Code used several approaches to the characterization of each crime. Aggression was defined by nearly reproducing A/RES/3314 (XXIX) of 14 December 1974. Threat of aggression, intervention and colonial domination were paraphrased as a short synthesis of relevant General Assembly resolutions. Genocide, apartheid and the recruitment of mercenaries were quasi-reiterations of well known multilateral conventions. Systematic or mass violations of human rights replicated the concept of crime against humanity set out in Principle VI (c) of the Principles of International Law recognized in Nuremberg and adopted by the ILC in 1950. When drafting international terrorism and drug trafficking, the Commission endeavoured to phrase new general descriptions. Finally, the crime of wilful and severe damage to the environment was directly inspired by Articles 35 para.3 and 55 of the 1977 Protocol I Additional to the Geneva Conventions. Criticisms from governments and from specialists in criminal law alike were directed towards the vagueness and lack of precision of some of the characterizations, and it should be noted that the Commission was indeed not very inspired when drafting some articles, especially those on threat of aggression, intervention and terrorism.

On second reading, four forms of characterization may be identified, which broadly speaking could be described as follows. Firstly, the Commission simply desisted from characterizing the crime of aggression. Secondly, the restatement approach was used in the crime of genocide, and the major part of the crimes against humanity and of war crimes. Thirdly, what may be called the synthesis technique is observed in the characterization of the crimes of institutionalized discrimination and forced disappearance of persons (Article 18 lit.(f) and (i) of the Draft Code). In both cases, the language condenses in a few words a number of more specific criminal acts defined elsewhere (notably Article II of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, and the third preambular paragraph of A/RES/47/133 of 18 December 1992 adopting the Declaration on the Protection of All Persons from Enforced Disappearance, as well as Article II of the 1994 Inter-American Convention on the Forced Disappearance of Persons, all quoted in the commentary to Article 18). Fourthly, the Commis-

sion also elaborated *ad hoc* characterizations from treaty clauses in order to raise the threshold of the gravity of the criminal conduct concerned. This applies to the characterization of the crime against United Nations personnel in Article 19 (a reinforced version of Article 9 para.1 lit.(a) and (b) of the 1994 Convention on the Safety of United Nations and Associated Personnel) and to the crime of wilful and severe damage to the environment in the case of armed conflict in Article 20 lit.(g) of the Draft Code (whose characterization was taken from Articles 35 para.3 and 55 of 1977 Protocol I, strengthened in a bizarre way, as will be shown).

(f) *Excluding sanctions.* The General Assembly repeatedly asked the states to give their opinions on whether the Code should include concrete punishment or sanction for the convicted criminals, and whether any reference should be made to the establishment of an international criminal jurisdiction.¹⁶ The Special Rapporteur stressed on various occasions the *nullum poena sine lege* principle, and eventually proposed a very broad draft Article Z on sanctions, according to which the person convicted for any crime described in the Draft Code could be imprisoned for a period of 10 years to life imprisonment.¹⁷ Finally, the Commission decided to defer the question of applicable penalties to the second reading of the draft, so as to examine it bearing in mind the comments of the governments on the 1991 Draft Code.¹⁸ As a matter of fact, the governments preferred to remain silent on this particular issue, but at the time the second reading was being carried out, a new development was to prevent the Commission from taking any further steps on this matter. In its 1994 session, the Commission had adopted the Draft Statute for an International Criminal Court, Article 47 of which dealt with the penalties that the Court might impose on a convicted criminal. Following the pattern of the Nuremberg Charter (Article 27), the Charter of the Tribunal for the Far East (Article 16), and the Statute of the International Criminal Tribunal for the former Yugoslavia (Article 24), the Draft Statute allowed the Court a great degree of discretion to impose particular penalties, although these would be only

¹⁶ A/RES/38/132 of 19 December 1983, A/RES/39/80 of 13 December 1984, A/RES/41/75 of 3 December 1986, A/RES/ 43/164 of 9 December 1988, and A/RES/44/32 of 4 December 1989. The comments by governments are contained in documents Doc. A/CN.4/392 (ILCYB 1985, Vol. II, part 1), Doc. A/40/451, Doc. A/CN.4/407 (ILCYB 1987, Vol. II, part 1), Doc. A/42/484, Doc. A/CN.4/429 (ILYB 1990, Vol. II, part 1), and Doc. A/44/465.

¹⁷ See ILCYB 1983, Vol. II (part 1), First report by Mr. Thiam, Doc. A/CN.4/364, para. 50; and ILCYB 1990, Vol. II (part 1), Eighth report by Mr. Thiam, Doc. A/CN.4/430, paras. 101–105.

¹⁸ ILCYB 1991, Vol. II (part 2), paras. 70–105, and 171.

imprisonment and fines. The Special Rapporteur observed: "It is regrettable that the draft Statute ..., as recently prepared by the Commission, determined the applicable penalties when this should normally have been done in the draft Code".¹⁹

(g) *The separation of the work of the ILC on the International Criminal Court and the Draft Code.* The study of the various issues concerning the possibility of establishing an international criminal court was started by the Commission at the last stages of the first reading of the Draft Code.²⁰ In its 1992 session, the Commission discussed the Tenth report by Mr. Thiam on the topic, but then decided to create a working group on the question of establishing an international criminal jurisdiction. The working group's report was received favourably by the Commission at the end of the session, and while this report was presented to the General Assembly the Commission asked for a renewed mandate to prepare a detailed draft statute for a tribunal.²¹ During its 1993 and 1994 sessions, the Commission, with strong support from the General Assembly, managed to complete the Draft Statute, a huge task facilitated by the more dynamic method of the working group.²² At the same time, the second reading of the Draft Code began in 1994, when the general provisions were considered, and was continued in 1995 and 1996.²³ Therefore, the work of the Commission on the Draft Statute and the Draft Code was differentiated from 1992 onwards, and both drafts were considered separately by the Commission. Although both instruments coincide in certain aspects, as could be expected, there are also some inconsistencies between the two, as shall be pointed out hereinunder.

Excursus: Criminal international law and international criminal law, a difficult marriage. Some of the big choices made by the ILC clearly troubled specialists in criminal law. In a collective work containing commentaries on the 1991 Draft Code, edited by Mr. Cherif Bassiouni,²⁴ a

¹⁹ Thirteenth report by Mr. Thiam, Doc. A/CN.4/466 (ILCYB 1995, Vol. II, part 1), para. 31. See also ILCYB 1994, Vol. II (part 2), para. 103. Article 3 of the 1996 Draft Code provides the general principle for punishment.

²⁰ ILCYB 1990, Vol. II, (part 2), paras. 93–157; ILCYB 1991, Vol. II (part 2), paras. 106–165 & 175.

²¹ ILCYB 1992, Vol. II (part 2), paras. 23–104, and Annex.

²² GAOR 48th Sess., Suppl. No. 10 (ILCYB 1993, Vol. II, part 2), paras. 33–100, and 471–483; GAOR 49th Sess., Suppl. No. 10 (ILCYB 1994, Vol. II, part 2), paras. 42–91.

²³ GAOR 49th Sess., Suppl. No. 10 (ILCYB 1994, Vol. II, part 2), paras. 92–209; GAOR 50th Sess., Suppl. No. 10 (ILCYB 1995, Vol. II, part 2), paras. 37–143; GAOR 51st Sess., Suppl. No. 10 (ILCYB 1996, Vol. II, part 2), paras. 42–50.

number of criminal lawyers criticised basically three aspects of the work of the Commission: the acceptance of sources other than the *lex scripta* (which negatively affects the *nullum crimen sine lege* principle), the vague and imprecise characterizations, and the lack of definition of sanctions. This sacred triangle of criminal law was put in danger. However, the characteristics criticised are inevitable in international law, because there is no global legislative power. International law has its own system of sources and it must inevitably be taken into account that custom governs even in criminal international law. The characterizations cannot be made more exact because situations are quite unpredictable in international relations. Likewise, sanctions cannot be rigorously established when each state has a different penal system. One must not forget that an international criminal code is destined to operate within a society of states and not in the more homogeneous environment of a single state.

Just as criminal lawyers should understand these extremes, internationalists should make more assiduous use of the contributions of criminal lawyers and not consider them somewhat disdainfully. In fact, the ILC has recognized that it would need the assistance of specialists for a series of points.²⁵ In the same way, the Statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda as well as the Draft Statute for an International Criminal Court provide that these tribunals are to be served by both specialists in criminal law and in international law. Therefore, these two subjects must, in practice, come to an understanding. It is absolutely necessary to achieve a frank dialogue and an ultimate comprehension between these two disciplines because the tribunals mentioned above must use equity often, for example to determine sanctions.

III. The General Provisions

1. Individual Responsibility and Participation

Individual criminal responsibility is determined in the Draft Code along the same general lines established in the Nuremberg principles. The rules which express whether an individual can be held accountable for a crime against the peace and security of mankind are set out in Articles 2, 5, 6,

²⁴ M. Cherif Bassiouni (ed.), "Commentaries on the ILC's 1991 Draft Code", *Nowvelles Etudes Pénales* 11 (1993), monographic issue.

²⁵ See for example the Meeting on defences and extenuating circumstances (Articles 14 and 15 of the Draft Code) held on 12 June 1996, Doc. A/CN.4/SR.2440, 11–12.

and 7. Generally speaking, an individual incurs international criminal responsibility by the commission of such a crime (Article 2 para.3 lit. (a)), by complicity or conspiracy (lit. (b) to (f)), or by attempt (lit. (g)). The well known principles regarding government or superior orders, the responsibility of the superior, and the irrelevance of the official position are set out in Articles 5, 6, and 7.

The main problems concerning participation were the regulation of attempt, which was left expressly unresolved in the 1991 Draft,²⁶ and responsibility for the crime of aggression. Both issues are addressed in the 1996 Draft Code in a restrictive way. Commission of and participation in the crime of aggression are described in Article 16, in a way that could be construed as even narrower than Principle VI (a) of the 1950 Nuremberg Principles. On the other hand, participation does not always entail responsibility if the crime was only attempted but not actually committed. When describing the different forms of complicity and conspiracy, Article 2 para.3 ensures that participation in an attempt to commit a crime would only be relevant in the case of an individual who orders the criminal act (lit. (b)). Attempt is expressly excluded altogether in Article 20 lit.(g) of the Draft Code, as it is analysed below. The restrictive approach to participation is inconsistent with the Convention on the Prevention and Punishment of the Crime of Genocide, for which reason the commentary asserts that the limitation does not affect the wider scope of related provisions contained in other instruments.²⁷

2. Jurisdiction

Jurisdiction over the crimes covered by the Draft Code is regulated in a very clear way. There are three general rules directly dealing with jurisdiction in Articles 8, 9 and 10, and two dealing indirectly, Articles 12 and 13. Jurisdiction over the crime of aggression is regulated separately in the last two sentences of Article 8. The first rule is the principle of universal jurisdiction. According to Article 8, "each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed". The commentary makes it clear that states are obliged to enact any procedural or substantive measures that may be necessary to enable them to effectively exercise jurisdiction. The only basis

²⁶ ILCYB 1991, Vol. II (part 2), para. 172.

²⁷ GAOR 51st Sess., Suppl. No. 10 (ILCYB 1996, Vol. II, part 2), footnote 29.

for this jurisdiction would be the physical presence of the alleged offender in the territory of the state. The second general rule is the principle *aut dedere aut judicare*, an obligation to extradite or prosecute. This obligation is imposed on the state in whose territory an alleged offender is present; this state has an obligation to take the necessary steps to apprehend the individual for whom a request for extradition has been received, and to ensure the prosecution or extradition of that individual. Article 10 endeavours to facilitate the extradition process. Finally, the jurisdictional provisions also recognize the possibility of an international jurisdiction. The custodial state might prefer neither to extradite nor to prosecute but to transfer the alleged offender to an international criminal court for prosecution. The statute for an international criminal court will have to address this question. On the other hand, the provisions of Articles 12 and 13, *non bis in idem* and non-retroactivity, may be regarded as judicial guarantees for the accused, but their respective exceptions may also be interpreted as jurisdictional clauses. National and international courts alike are entrusted jurisdiction over crimes previously tried by other courts if the conditions foreseen in Article 12 para.2 are met. Jurisdiction of national and international courts might also expand to acts committed before the entry into force of the Draft Code if, at the time when those acts were committed, those acts were criminal in accordance with international law or national law.

The general provisions of the Draft Code contain an advanced jurisdictional system whose aim is to widely expand jurisdiction over the crimes against the peace and security of mankind. The relevant provisions are innovative as to their ample scope, since they tend to encompass every crime of the Draft Code. Several treaties dealing with international crimes had provided for expanded jurisdiction, notably through the principle *aut dedere aut judicare*, but the general application of the principle of universal jurisdiction, which was restricted in practice mainly to some war crimes,²⁸ was hereto unknown. The 1991 Draft Code only included the principle *aut dedere aut judicare*. The commentary to the 1996 Draft Code implies that the principle of universal jurisdiction is a corollary to the other principle and in fact universal jurisdiction was introduced in 1996 almost inadvertently.²⁹ However, universal jurisdiction is not as evident a corollary of the obligation to extradite or prosecute as it is suggested. In spite of the obligation to extradite or prosecute, an alleged criminal might elude prosecution if the state in whose territory he is staying does not receive

²⁸ G. Gilbert, *Aspects of Extradition Law*, 1991, 220–225.

²⁹ Compare GAOR 49th Sess., Suppl. No. 10 (ILCYB 1994, Vol. II (part 2)), paras. 140–146, and 2439th Mtg. (Doc. A/CN.4/SR.2439, 6–9).

any request for extradition. Similarly an alleged criminal could escape trial if the custodial state decided to prosecute instead of extradite, and the criminal courts of this state find that they have no jurisdiction whatsoever over a crime committed abroad. The principle *aut dedere aut judicare*, as formulated in Article 9 of the Draft Code, obliges to prosecute, not to try or, obviously, to punish. It is here submitted that the ILC introduced an expanded jurisdictional system for the crimes against the peace and security of mankind without much careful consideration. Consequently, there are a number of complex problems which remain unsolved in the Draft Code, and which would deserve further thought and regulation. Basically, the common ground of these problems is that the principle of universal jurisdiction seeks to assure the prosecution of any individual who has committed crimes against the peace and security of mankind, but paradoxically enough the same principle could be used to shield offenders.

The following questions are among the issues left open by the jurisdictional system of the Draft Code.

(a) The obligation to extradite or prosecute refers to an individual who is *alleged* to have committed a crime. The commentary affirms that the concerned person should not be singled out on the basis of unsubstantiated allegations, but on the basis of pertinent factual information. Nonetheless, Article 10 para. 2 underlines that extradition shall be "subject to the conditions provided in the law of the requested State". Several doubts remain as to the evidence that ought to be produced for requesting an extradition, and whether the threshold of the factual information should be higher or lower with regard to crimes against the peace and security of mankind.

(b) The custodial state has absolute *discretion* to decide between prosecuting or extraditing. It could be doubted whether certain limits to such discretion should be established. If the purpose is to avoid the existence of safe havens for offenders, some measures ought to be introduced; for instance, the principle *primo dedere sequondo prosequi* in certain cases, or the definition of minimum penalties. Measures of political pressure have also been discussed in related contexts.³⁰

(c) The 1991 Draft indicated a *preference* for the extradition requested from the state in whose territory the crime was committed. On the contrary, the 1996 Draft Code concedes discretion to the custodial state when it receives more than one request for extradition. This is a complex issue which would require further elaboration, for sometimes the state where the crime was committed is in the best position to examine evidence, but sometimes this state has no real purpose of trying the alleged criminal,

³⁰ Gilbert, see note 28, 164.

especially if the offender had been a government or a military official. As is stated in the United Kingdom comment to the 1991 Draft Code, perhaps the best solution would be “to have an order of priorities with the concomitant obligation on the extraditing State to ensure that one requesting State has a bona fide intention to prosecute”.³¹

(d) The jurisdictional system of the Draft Code does not provide for *mutual legal assistance* among concerned states. Judicial cooperation is a must if the principle of universal jurisdiction is to be effectively applied. Lack of cooperation over evidence for example, could end up in a defective prosecution and a mistrial.

(e) Finally, the exception to the *non bis in idem* rule would be meaningless if the records and proceedings of the trials for crimes against the peace and security of mankind are not communicated to the international criminal court and to the states mentioned in Article 12 para.2 lit.(b). Otherwise the description of the particular crimes that were considered by the court and the assessment of the impartiality of the previous trial would have to be made only from media information.

It is to be hoped that future work leading to a Draft Statute for an International Criminal Court will make advances toward the solving of these problems, but some of them should have been addressed in the Draft Code itself. In any case, it seems that the workable enforcement of the jurisdictional system envisaged in the Draft Code will require further elaboration and regulation in the years to come.

3. Judicial Guarantees

An adequate list of the most important judicial guarantees is set out in Article 11. These guarantees tend to assure the respect for the alleged offender who is being prosecuted in national or international courts, and to assure an impartial and fair trial. Judicial guarantees described in the Draft Code are to be considered a minimum standard for any national criminal judicial system, and are replicated and developed in the statutes of the international criminal courts established by the Security Council and the Commission's 1994 Draft Statute.

³¹ Doc. A/CN.4/448 of 1 March 1993, 88.

IV. The List of Crimes

1. The Search for Seriousness

Since beginning work on the Draft Code in 1983, the Commission had to consider what heinous acts could be declared offences or crimes against the peace and security of mankind. In A/RES/36/106 of 10 December 1981, the General Assembly had invited the Commission "to review [the 1954 Code], taking duly into account the results achieved by the process of the progressive development of international law", which seemed to imply that there might be changes in the list of crimes. In a first stage, from 1983 to 1985, the Commission discussed how it ought to seek the crimes. In a second stage different crimes were gradually included in the Draft Code from 1986 to 1991. At the outset the Special Rapporteur submitted a deductive method to the Commission, which consisted in the elaboration of a prior definition of crimes against the peace and security of mankind, and an inductive method, consisting in searching out one by one the different facts which may be regarded as such crimes. In 1983, the Commission decided that the deductive method should be closely combined with the inductive one.³² This combination took the form of the joint use of two criteria: firstly, what could be called the 'seriousness' of the heinous acts which is nearer to the deductive approach, and secondly, the inductive task of compiling the most serious offences through available international practice, or as the Commission put it "to sift the acts constituting serious breaches of international law, making an inventory of the international instruments (conventions, declarations, resolutions, etc.) which regard these acts as international crimes, and selecting the most serious of them".³³

There are certain indications of what the Commission thought should be understood as a "serious" international offence. Only acts "distinguished by their especially horrible, cruel, savage and barbarous nature", were eligible as crimes against the peace and security of mankind. These are conducts "which threaten the very foundations of modern civilization and the values it embodies".³⁴ The seriousness of an offence could be measured according to a number of elements that seemed difficult to separate: the motive of an act, the end pursued, the horror and reprobation it aroused, or the physical extent of the disaster caused.³⁵ A more sophis-

³² ILCYB 1983, Vol. II (part 2), paras. 62–66.

³³ ILCYB 1984, Vol. II (part 2), para. 40.

³⁴ The last two quotations are from ILCYB 1984, Vol. II (part 2), para. 63.

³⁵ ILCYB 1984, Vol. II (part 2), para. 34. See also ILCYB 1983, Vol. II (part 2), para. 48.

ticated explanation of seriousness was elaborated on in 1985, when the Special Rapporteur tried to define the crimes against peace and security of mankind following the pattern of Article 19 of the Commission's draft on state responsibility. It was stated that the crimes involved constituted "the breach of obligations intended to protect the most fundamental interests of mankind, namely those which reflected mankind's basic needs and concerns and on which the preservation of the human race depended".³⁶ On this basis of extreme seriousness, the Commission sought the international instruments that would express those acts considered more serious by the states. Evidently, no practice could be found which would determine whether certain acts were offences or crimes against the peace and security of mankind, because this term of art has only been used by the Commission since World War II, but what they were able to find were treaties and declarations describing certain conduct as international crimes or other expressions of strong condemnation. This double criterion led the Commission to incorporate new crimes not envisaged in the 1954 Draft Code.

2. Legal Archaeology

The Commission returned to the list of crimes in 1995 with the aim of completing the second reading of the Draft Code in 1996. However, in 1995 the Special Rapporteur was to adopt a radically new approach to the definition of the crimes. The twelve-crime list had been the target of written comments by 24 Governments.³⁷ On the basis of these comments above all, Mr. Thiam proposed to reduce drastically the list of crimes against the peace and security of mankind in his Thirteenth report. Mr. Thiam confesses in the report that if he maintains the twelve crimes, "he runs the risk of reducing the draft Code to a mere exercise in style, with no chance of becoming an applicable instrument. Conversely, if he follows the restrictive tendency, he could end up with a mutilated draft".³⁸ This dilemma was solved in favour of the second option, and the Special Rapporteur presented a new list of six crimes: aggression, genocide, crimes against humanity, war crimes, international terrorism, and illicit traffic in narcotic drugs. The Commission discussed this proposal in 1995 and at its 2387th Mtg. it decided to retain the first four, whereas consultations would

³⁶ ILCYB 1985, Vol. II (part 2), para. 69.

³⁷ Doc. A/CN.4/448 of 1 March 1993, and Add. 1.

³⁸ Thirteenth report by Mr. Thiam, Doc. A/CN.4/466 of 24 March 1995, para. 3.

continue as regards drug trafficking and wilful and severe damage to the environment. The Commission also decided that in formulating the first four crimes, the Drafting Committee "would bear in mind and at its discretion deal with all or part of the elements" of the six crimes adopted on first reading that were being abandoned now.³⁹

There is no way of knowing the Commission's reasons for making these decisions. The provisional summary records of the 2379th Mtg. to the 2386th Mtg. in 1995 show that Mr. Thiam's proposal was received favourably by the majority of the Commission, but there was also a head-on opposition from a strong minority.⁴⁰ It is not possible to understand whether there is any criterion for the different treatment of the crimes not included. Apart from aggression, genocide, crimes against humanity and war crimes, on which there was consensus, the members of the Commission expressed their preferences regarding the other crimes. Many of those in favour of reducing the list wanted, at the same time, to maintain some particular crimes.⁴¹ When the Special Rapporteur summed up the discussion held during the 1995 session at the 2386th Mtg. he considered that there seemed to be ample grounds for deleting from the Draft Code the articles on intervention, threat of aggression and recruitment of mercenaries, but a further round of consultations should be instituted on another four crimes (racial discrimination, colonial domination, international terrorism, and illicit traffic in narcotic drugs), since those remained controversial.⁴² The Commission neither voted nor continued the consultations but at the next meeting the decision mentioned above was made.

One of the arguments most often repeated by those in favour of reducing the list was that of respecting the will of the states in order not to push forward too vigorously in the advancement of international law.

³⁹ GAOR 50th Sess., Suppl. 10 (ILCYB 1995, Vol. II, part 2), para. 140.

⁴⁰ See Messrs. Mahiou (2380th Mtg.), Kabatsi and Szekely (2381st Mtg.), Pambou-Tchivounda and Villagran Kramer (2382nd Mtg.), Rao (2383rd and 2385th Mtg.), Idris and Al-Khasawneh (2384th Mtg.), and Lukashuk (2385th Mtg.).

⁴¹ For instance, Messrs. Eiriksson (crime against environment) and Pellet (colonial domination) in 2379th Mtg.; Bennouna (apartheid and drug trafficking) in 2380th Mtg.; Razafindralambo (colonial domination and environment), and Vargas Carreño (institutionalised discrimination, intervention and drug trafficking) in 2381st Mtg.; Jacovides (international terrorism and drug trafficking) in 2382nd Mtg.; Güney (international terrorism and drug trafficking) in 2383rd Mtg.; De Saram and Tomuschat (both international terrorism) in 2385th Mtg.

⁴² Compare Doc. A/CN.4/SR.2386, and GAOR 50th Sess., Suppl. No. 10 (ILCYB 1995, Vol. II, part 2), paras. 134–139.

A list containing only the less controversial crimes would be of maximum acceptability. A more extreme version of this would be fear of failure: "Excessive zeal could only lead to yet another draft being consigned to the archives in New York",⁴³ warned one member of the Commission. To counter this argument it was said that the number of states that had submitted comments to the Draft Code was very small, and that those states did not represent the international community as a whole.⁴⁴ Neither would the reduction of the list of crimes be a guarantee of its eventually being accepted by the states. In this respect, it was overtly stated that the fact that states were not very keen on assuming the list of crimes was not surprising.

"[T]he 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".⁴⁵

In spite of the opposition of a number of states to some crimes, it was said, the Commission was duty-bound to codify and progressively develop international law.

Another argument was that the Commission should only concentrate on the more serious crimes. Admittedly, all the crimes contained in the 1991 list were heinous, but it was necessary to find the most serious among them. However, this argument was not sufficiently developed. The Commission's discussions do not allow to identify the criterion for distinguishing the most serious crimes or the "crimes of crimes" from the other crimes.⁴⁶ The idea of "seriousness" elaborated in the sessions from 1983

⁴³ Mr. Tomuschat, in 2380th Mtg. (Doc. A/CN.4/SR.2380, 6).

⁴⁴ See, for example, Mr. Szekely, in 2381st Mtg. (Doc. A/CN.4/SR.2381, 12-13).

⁴⁵ Mr. Al-Khasawneh in Doc. A/CN.4/SR.2384, 13. See also Mr. Lukashuk: "it was unrealistic to expect that leaders would cheerfully give up their privileges" (Doc. A/CN.4/SR.2385, 4).

⁴⁶ For example, it is very difficult to know what Mr. Pellet means when he says: "The Commission must in fact stick to the most serious crimes located at the extremity of a continuum beginning with the offences covered in part one of the draft articles on State responsibility, then embracing crimes regarded by the international community as a whole as violations of an obligation essential to the protection of fundamental interests, and ending with crimes which posed a serious and imminent

to 1985 is similar to that used in 1995. It cannot be maintained that there is a substantial difference of gravity or seriousness between large scale arbitrary imprisonment as a crime against humanity and large scale drug trafficking, to cite but one example.

An attempt was also made to establish the lack of precision in their characterization as a restriction to the inclusion of some crimes.⁴⁷ But this criticism of the drafting of several crimes in 1991 does not bear comparison with other crimes retained in the 1996 Draft Code whose characterization is also rather (but inevitably) vague.⁴⁸ Furthermore, the less than precise characterizations could have been improved by amending the wording, if the conduct merited criminalization. To this effect, Mr. Idris said that

“the view that the articles [on intervention and on colonial domination] 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”.⁴⁹

The profound difference in opinions as to the maintaining or not of the crimes defined on first reading is clearly reflected in the 1995 ILC's report to the General Assembly.⁵⁰ The Sixth Committee of the General Assembly in its 50th Session considered the reduction of the list of crimes made by the Commission, and the representatives of the states manifested the same contrasting opinions as the members of the Commission. In 1996, the Commission had before it the topical summary of the discussion held in the Sixth Committee prepared by the Secretary General,⁵¹ yet no mention was made of this document. Curiously, the opinions of the states were taken into account for the shortening of the list, but afterwards, the opinions of the states were not even mentioned when they referred precisely to this decision of the Commission. The reduction of the list of crimes was tacitly considered irrevocable in the 1996 session. The Commission devoted two tense meetings to discussing wilful and severe damage to the environment, as we shall see, and thought it necessary to include institutionalized discrimination among the crimes against humanity, but there is no consideration of any of the other crimes deleted in 1995, not

threat to the peace and security of mankind.” (Doc. A/CN.4/SR.2379, 7).

47 For instance, Mr. Yamada in 2381st Mtg. (Doc. A/CN.4/SR.2381, 7).

48 See Section II (e) and Excursus, *supra*.

49 Mr. Idris, in Doc. A/CN.4/SR.2384, 4.

50 GAOR 50th Sess., Suppl. No. 10 (ILCYB 1995 Vol. II, part 2), paras. 44–45 and 55–59.

51 Doc. A/CN.4/472 of 16 February 1996.

even drug trafficking, of which it was also said that consultations would continue. When the President of the Drafting Committee submitted the second part of the project, no reference was made to the possibility of further study on the incorporation of other crimes,⁵² but rather he expressly said that the drafting of the list of crimes “had primarily involved legal archaeology”.⁵³

Indeed, the characterization of most of the crimes listed in the present Draft Code has well established archaeological roots. However, paradoxically enough the Commission deemed it necessary to incorporate a number of innovations, notably the crime against United Nations personnel.

3. The Semantic Power of the Commission

The fact that certain innovations were accepted in the 1996 session did not affect the 1995 decision to reduce the list of crimes to the least controversial four. The incorporation of institutionalized discrimination and forced disappearance of persons as crimes against humanity, of damage to the environment as a war crime, and the inclusion of the crime against United Nations personnel are three anomalies which lie in sharp contrast to the previous decision of drastically reducing the list. In the face of this inconsistency, one may suspect either that there had never been a reliable definition of crimes against the peace and security of mankind, or that such a definition is not feasible. However none of these ideas is correct. There was certainly a definition, as elaborated from 1983 to 1991. Admittedly, it was not a definition by inclusion but by extension, although not conclusive but rather open-ended. In order to explain this, the analogy of the definition of “European state” can be used. If this is considered a concept that is very difficult to define in geographical or historical terms, a definition can be made by naming 20 or 22 states which can be considered undoubtedly European, and it can also be affirmed that others could also be so. The problem is that the definition by extension of crime against the peace and security of mankind changed abruptly in 1995. Instead of continuing to use the concept developed from 1983 to 1991, there is a return to the concept created by the Nuremberg Charter and Tribunal, thus producing two different meanings of the term. It is as if someone changed his mind and maintained that the concept of “European state” only includes those states in the European Union.

⁵² There is only a marginal reference in 2437th Mtg. (Doc. A/CN.4/SR.2437, 4).

⁵³ Mr. Calero Rodrigues in Doc. A/CN.4/SR.2440, 14.

What seems to be most curious is that the concept elaborated in 1983–1985 and subsequently developed year after year, was abandoned in less than ten meetings without convincing justification. With this change of attitude the Commission attributed itself with a semantic power which was excessive. The General Assembly to some extent had granted the Commission a certain semantic power, because the concept of crime against the peace and security of mankind is not defined in any international instrument, excluding perhaps the 1954 Draft Code of Offences.⁵⁴ But this semantic power cannot be exercised outside the limits of both logic and law. It is long established in jurisprudence that legal concepts cannot be regarded as perfectly defined entities. This idea was stressed, for instance, by H.L.A. Hart, when he submitted that legal language has an open texture, by R. Dworkin, through a new comprehension of the functioning of the principles of law, or by R. Alexy, who underlined how legal reasoning is based in ordinary language.⁵⁵ Nonetheless, the semantic power exercised by the ILC in the elaboration of the Draft Code went far beyond any type of otherwise desired flexibility required by legal concepts.

The Commission cannot use its semantic power arbitrarily, but rather it should, above all, take into account the progress of contemporary international law, as manifested in the huge web of multilateral treaties which deal with abhorrent acts rejected by the international community. Recent developments in international law are also represented in the vast field of written law, “soft law” and practices inspired by the United Nations organs. At the same time, the Commission should have carefully borne in mind its previous work, including the Draft Articles on State Responsibility. By the same token, the Commission should have acted coherently with the work done in the first reading of the Draft Code, and if there were any reasons for changing its mind, it should have explained those reasons in length. The work of the Commission from 1983 to 1991 was the product of a consensus, hence it seemed to reflect significantly the evolution of international law. Likewise, the Commission should also have been consistent with the Draft Statute for an International Criminal Court which it drew up in 1994 itself.

⁵⁴ In fact, the Commission recommended to the General Assembly that it amend the title of the topic, so that it would read ‘crimes’ instead of ‘offences’, a recommendation that the General Assembly endorsed (A/RES/42/151 of 7 December 1987).

⁵⁵ H.L.A. Hart, *The concept of law*, 1961, Chapter VII; R. Dworkin, *Taking rights seriously*, 1977, Chapters 2–4; R. Alexy, *Theorie der juristischen Argumentation*, 1978, Chapter C, III.

V. The List of Crimes and the Jurisdiction of the International Criminal Court

The drastic reduction of the list of crimes might be seen as not wholly consistent with the work previously done by the Commission on the Draft Statute. Surprisingly enough, one cannot find many references to the Draft Statute during the 1995 and 1996 sessions. The preamble of the Draft Statute emphasizes that the Court “is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole”. Article 20 lit.(e) states that the Court has jurisdiction in respect of crimes established under the treaties specified in an Annex which, “having regard to the conduct alleged, constitute exceptionally serious crimes of international concern”. Moreover, there is another provision which should be understood as a “jurisdictional limitation”⁵⁶ referred to both general international law crimes and treaty law crimes. The International Criminal Court may decide at any time to decline to exercise its jurisdiction if it is not satisfied that the crime in question “is not of such gravity to justify further action by the Court” (Article 35 lit.(c)). Finally, Article 42 para.2 recognizes that there is a distinction between “ordinary” crimes (of international concern), and the crimes which are within the jurisdiction of the Court, also called generally crimes “of the kind referred to in Article 20”.

These unnamed crimes could very well have a familiar name. Seriousness, the characteristic common to the crimes regulated in the Draft Statute according to its preamble, is the nuclear aspect of the definition elaborated by the Commission during 1983–1985 at the outset of its work on the Draft Code. The specific crimes contained in Article 20 and in the Annex of the Draft Statute were covered in the list of the 1991 Draft Code, which at that time was more comprehensive than the Draft Statute.⁵⁷ The palpable difference between the two approaches was that the general international law crimes were merely mentioned in Article 20 lit.(a) to (d) and the treaty law crimes were precisely characterized by reference to particular treaties in Article 20 lit.(e) of the Draft Statute, whereas the 1991 Draft Code sought to characterize every crime in a general more or less homogeneous fashion. Yet there was no clear distinction as regards the nature and concept

⁵⁶ J. Crawford, “The ILC adopts a Statute for an International Criminal Court”, *AJIL* 89 (1995), 404 et seq., (412).

⁵⁷ The Draft Statute did not include threat of aggression, intervention, and colonial domination as general international law crimes, and did not mention any treaty dealing with recruitment of mercenaries, and wilful and severe damage to the environment.

of the crimes in the 1991 Draft Code and in the Draft Statute. In fact, the list of crimes in the Draft Statute included only crimes that were accepted beyond any doubt within the Draft Code. That is to say, Article 20 assured jurisdiction for the Court over crimes against the peace and security of mankind under another name, or, at least, over the central types of crimes against the peace and security of mankind. The chosen legal technique was rather different but the aim of both instruments as regards criminalization was clearly identical.

The reduction of the list of crimes in the Draft Code substantially altered this parallelism. The work of the ILC has given birth to three not totally coincident, yet undifferentiated, concepts. In a sense, it could be said that there will be a first meaning of crimes against the peace and security of mankind according to the Draft Statute, a second more restrictive meaning according to the 1996 Code, and a third sense emanating from general international law. The model international criminal court, which has jurisdiction "only over the most serious crimes of concern to the international community as a whole", will be able to prosecute and try individuals on wider grounds than those laid down in the list of crimes of a Code dedicated to characterizing the same crimes.

Foreseeing the future of the Draft Statute is not an easy task. The April and August 1996 sessions of the Preparatory Committee for the Establishment of an International Criminal Court show that there were opposing opinions on jurisdiction, for which reason the present wording of Article 20 of the Draft Statute cannot be seen as definitive. Two main currents of opinion may be identified. Some delegations were in favour of a much more detailed definition of the crimes, some others would like new crimes to be included, and several representatives even proposed a review mechanism to enable states parties to add additional crimes to the Court's jurisdiction. In this sense, it was suggested that general descriptions of the crimes of drug trafficking and terrorism should be included in the Draft Statute, as well as the crime against United Nations personnel. On the other hand, some delegations affirmed that the Draft Statute was not the right place to characterize the particular crimes, which could simply be named in this instrument of a procedural nature. In an initial stage, only the most indisputable crimes should be under the jurisdiction of the Court. Moreover, crimes such as drug trafficking and terrorism were not of the same kind as the traditional crimes mentioned in Article 20 lit.(a) to (d), and could be dealt with much better at a national level.⁵⁸ In view of this

⁵⁸ Report of the Preparatory Committee for the Establishment of an International Criminal Court, GAOR 51st Sess., Suppl. No. 22, Vol. I, paras. 51–115.

divergence, it may not be ruled out that the jurisdiction of the Court could eventually be defined along the restrictive line of the Draft Code. Nonetheless, this author finds it more probable that the jurisdiction of the Court would follow eventually the pattern of the present Article 20 of the Draft Statute. The participation of a great number of states in the discussions on the establishment of the Court, and the necessary presence of specialists in criminal law are two factors that support the occurrence of the second possibility.

VI. The Confusing Episode of the Crime that Was a Crime and the Crime that Was not

Since 1984 the Commission had agreed that there was ground enough for including serious damage to the environment as a new crime. The fact that Article 19 para.3 lit.(d) of the draft on state responsibility had recognized such a possibility was taken into account by the Commission, as well as the existence of a number of conventions dealing with the protection of the environment. The Commission adopted on first reading the following provision:

“Article 26.— Wilful and Severe Damage to the Environment
An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced ..”⁵⁹

At the same time, Article 22 para.2 lit.(d) of the 1991 Draft Code embodied a provision which was inspired by Articles 35 para.3 and 55 of Protocol I to the Geneva Conventions:

“For the purposes of this Code, a serious war crime is [...] one of the following acts: [...]

(d) employing methods or means of warfare which are intended or may be reasonably expected to cause unnecessary or disproportionate and widespread, long-term and severe damage to the natural environment.”⁶⁰

⁵⁹ See ILCYB 1991, Vol. II (part 2), 107, for commentary.

⁶⁰ Ibid., 104. The observation made at the end of paragraph 9 of the commentary on this Article (Ibid., 106) was introduced into the writing of the Report of the ILC to the General Assembly: see ILCYB 1991, Vol. I, 2251st Mtg., para. 75. The reservations of one of the members actually

One cannot find any objection to Article 22 para.2 lit.(d) in the comments of the Governments to the Draft Code adopted on first reading. Only a few Governments expressed major opposition to Article 26,⁶¹ while others would have liked to see the volitional requisite expanded so as to include negligence, and thereby to conform to Article 22 para.2 lit.(d) of the 1991 Draft Code.⁶² Surprisingly enough, basing his decision mainly on the comments of the Governments, the Special Rapporteur proposed in 1995 a new Article on war crimes with no reference to the prejudice of the environment whatsoever, and to delete Article 26.⁶³ This proposal was intended to be consistent with the general aim of reducing the number of crimes, but it was not totally justified. Perhaps for this reason, the Commission did not want to make a definitive decision in 1995, and it created a working group to examine the possibility of covering in the Draft Code the issue of wilful and severe damage to the environment.⁶⁴ During the General Assembly's 50th session in 1995, "a great majority of States argued in favour of keeping a provision dealing with crimes against the environment."⁶⁵ At the beginning of its 1996 session, the Commission had before it a balanced paper prepared by Mr. Tomuschat with a view to facilitating the endeavours of the working group,⁶⁶ suggesting that there were certain sound reasons for supporting the idea that a crime against the environment should be an autonomous crime. The working group presented two draft proposals to the plenary. On the one hand:

"employing methods or means of warfare which are intended or may be expected to cause such widespread, long-term and severe damage to the natural environment that the health or survival of a population will be gravely prejudiced",

would be a war crime.

On the other hand, a new paragraph amongst the crimes against humanity would read:

referred to the entire article: see ILCYB 1991, Vol. I, 2240th Mtg., paras. 46–52, 73–74 and 82, and 2241st Mtg.

61 See Doc. A/CN.4/448, comments by the Netherlands, the United Kingdom and the United States.

62 *Ibid.*, Australia, Austria, Belgium, and Uruguay.

63 Thirteenth report by Mr. Thiam, Doc. A/CN.4/466 of 24 March 1995, paras. 10 and 110.

64 Decision taken at the 2404th Mtg. See GAOR 50th Sess., Suppl. No. 10 (ILCYB 1995, Vol. II, part 2), para. 141.

65 Document quoted in note 66, para. 8.

66 Doc. ILC(XLVIII)/DC/CRD.3 of 27 March 1996.

“wilfully causing such widespread, long-term and severe damage to the natural environment that the health or survival of a population will be gravely prejudiced”.⁶⁷

The ordinary life of the Commission underwent a sudden commotion at Mtgs. 2430 and 2431 (17 and 21 May 1996).⁶⁸ After a sometimes harsh exchange of opinions, the members of the Commission decided to send to the Drafting Committee the first draft proposal by 12 votes to 1, with 4 abstentions, but the second draft proposal was not accepted, there being 9 votes in favour, 9 against and 2 abstentions. Is it acceptable that the lack of one vote in that meeting should be sufficient to mean that a huge and intentional damage to the environment in peace time is not a crime against the peace and security of mankind?

The Drafting Committee produced a new text which in the end was adopted by the Commission as the definitive Article 20 lit.(g):

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

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

The wording of the different projects quoted so far shows that the provision became increasingly restrictive. The Commission felt the need to declare the massive destruction of the environment as a war crime, something which had been demanded from several angles,⁶⁹ but it tried to limit the description of the criminal act excessively. The Commission was probably influenced by the idea expressed by Mr. Rosenstock: “extreme caution was required when characterizing crimes against the environment: [...] It was important not to try to make the paragraph under consideration

⁶⁷ Both drafts are taken from Doc. A/CN.4/SR.2430, 3. Another draft proposal, in the same terms as the second one, tried to revive the crime against environment as an autonomous crime.

⁶⁸ See Mr. Lukashuk with his comment on the situation in Doc. A/CN.4/SR.2431, 3.

⁶⁹ See for example A/RES/47/37 of 25 November 1992; G. Plant (ed.), *Environmental Protection and the Law of War*, 1992, especially contributions by R. Falk, A. Roberts, and H. Türk.

say too much.”⁷⁰ The final result is that the paragraph says too little, with a wording so full of conditions as to make its reading somewhat hazardous.

Firstly, the characterization of the conduct in Article 20 lit.(g) is qualified by military necessity, which seems to indicate an essential difference between this paragraph and the rest in Article 20. According to a general principle of the contemporary law of armed conflict, military necessity cannot override the provisions regulating conduct in armed hostilities, “[o]therwise, the concept of military necessity would reduce ‘the entire body of the laws of war to a code of military convenience’”.⁷¹ That is how it is accepted by the internal law of the states; for example, in the United States, military necessity “consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war”.⁷² Necessity is only mentioned in very specific cases (e.g. Article 20 lit. (a)(iv), and lit.(e)(ii), of the Draft Code) if it is a matter of conduct that may be excusable. Genocide, enslavement, or systematic attacks on the civilian population can never be justified by military necessity. The damage foreseen in Article 20 lit.(g) is so enormous that it is impossible to conceive of any kind of military need that could justify a grave prejudice to the health or survival of a population. Mr. Crawford drew the attention of his colleagues to that contradiction, and the Commission decided to point out in the commentary “that the degree of military necessity must be very high indeed”.⁷³ Unfortunately, the commentary to Article 20 lit.(g) did not fulfil this promise.

Secondly, the damage is described with an accumulative sentence which emphasizes the repercussions on persons in contrast with what occurred in Articles 35 para.3 and 55 of Protocol I, in the 1977 Convention on the Prohibition of Military or other Hostile Use of Environmental Modification Techniques, and in Article 22 para.2 lit.(d) of the 1991 Draft Code. The solution of the draft articles on state responsibility was to introduce the idea of a “human environment”. The final wording of Article 20 lit.(g) may be criticised on technical grounds, for it clearly overlaps with other

⁷⁰ Doc. A/CN.4/SR.2448, 9.

⁷¹ L. C. Green, *The contemporary law of armed conflict*, 1993, 118, quoting W.J. Fenrick, *International law*, 1965, 655. See also Green, 293, 328 and 333.

⁷² US Army General Orders No. 100 (1863), or Lieber Code, quoted in Department of Defense, *Report to Congress on the conduct of the Persian Gulf War*, App. O, “The role of the law of war”, of 10 April 1992, in: *ILM* 31 (1992), 642.

⁷³ Mr. Rosenstock’s intervention, among many others, in Doc. A/CN.4/SR. 2448, 19.

provisions of Article 20. The population mentioned in Article 20 lit.(g) is already protected at least by lit. (a) (i), (ii), (iii), (iv), (b) (i), (ii), (iii), (e) (i), (ii), (iii), and (f) (i), of the same article. Apart from that, the anthropocentric approach is also mistaken because it overlooks the fact that the value defended by the Draft Code is not just the physical integrity of mankind, its health and survival, but also an immaterial asset as is its peace and security. In aggression, a crime par excellence, the population, which may not be affected at all, is not protected. In fact, the Commission should have directed its efforts (perhaps in the commentary) to defining "widespread, long-term and severe damage to the natural environment" or to the human environment in a way that affected decisively the peace and security of mankind. In its present wording, Article 20 lit.(g) ignores the fact that man, although highly evolved, is dependent on the environment, and has the technical means to change it and destroy the ecosystem, a value at least as primordial as an internationally recognized border.

Thirdly, the efforts of the Commission to limit the characterization of the criminal activity went to the extreme of preferring "the" population instead of "a" population. The chairman of the Drafting Committee explained that that choice was intended to include only the population of the place where the damage to the environment had occurred, but not the population outside the immediately affected zone.⁷⁴ It is evident that certain environmental modification techniques may be designed to harm precisely the people who live far away. I think that the short-sighted interpretation outlined above, which is not confirmed in the commentary, merits no further comment.

Fourth and finally, the apothegm embodied in the last four words of Article 20 lit.(g) is intended to reduce even further the characterization of the crime, excluding the possibility of attempt, although it could be construed also as a plain contradiction between Articles 20 lit.(g), and 2 para.3 lit.(b) and (g). There is no plausible reason for including this limitation to the characterization which cannot be found in any other crime in the Draft Code (except aggression).

On the other hand, the Commission chose not to include serious damage to the environment in time of peace as a crime against mankind, or as an autonomous crime, a decision which is also open to criticism on account of the lack of consistency shown by the Commission. In 1976, the Commission defined "the safeguarding and preservation of the human

⁷⁴ Mr. Calero Rodrigues in Doc. A/CN.4/SR.2448, 7. The chairman of the Drafting Committee implied that the idea was borrowed from Article 55 of Protocol I. However, it is evident that the subject-matter of protection in this Article is the natural environment, and the mentioning of the population (under the guise of explanation) has no restrictive meaning.

environment” as one of the fundamental interests of the international community, and a breach of an obligation of essential importance for the safeguarding and preservation of the human environment was defined as an international crime of state. In its commentary to draft Article 19 para.3 lit.(d) on state responsibility, the Commission asserted that *opinio iuris* developing in the seventies indicated the emergence of rules of general international law.⁷⁵ In 1991, the Commission “also took the view that the protection of the environment was of such importance that some particularly serious attacks against this fundamental interest of mankind should come under the Code and the perpetrators should incur international criminal responsibility”.⁷⁶ What was of crucial importance for international society, and was considered an international crime in 1976 and in 1991, was not considered such in 1996. It is true that the composition of the International Law Commission changes every five years, but it is respectfully submitted here that the members ought to be careful and bear in mind what their predecessors considered to be the evolution of contemporary international law.

During its 1996 session, the Commission had to decide on serious attacks against the environment, and also on another proposal of a new crime: the crime against United Nations and associated personnel. After having adopted on second reading (from 6 June until 26 June)⁷⁷ every draft Article presented by the Drafting Committee, and when only the adoption of the Draft Code as a whole remained, the plenary considered a three-page Memorandum submitted by Mr. Rosenstock in which a crime never previously discussed by the Commission was proposed.⁷⁸ The members of the Commission were again divided as to the convenience of introducing this crime, hence, after a first exchange of opinions on the 27 June, it was decided to create a small working group.⁷⁹ The draft proposal of this working group was considered and modified again at the long and intense 2453rd Mtg. on the 4 July. The Commission decided to take a vote to get an indication as to whether an article along the lines of the proposal should be included, and the result was 12 in favour, 5 against and 4 abstentions. This obliged the working group to meet and hastily change the wording. Towards the end of the meeting, when a new text had been produced, and

⁷⁵ ILCYB 1976, Vol. II (part 2), commentary to draft Article 19 on state responsibility, paras. 32, 66–67, and 71. See also ILCYB 1980, Vol. II (part 2), 32.

⁷⁶ ILCYB 1991, Vol. II (part 2), 107.

⁷⁷ 2437th–2448th Mtgs., at which the draft Articles contained in Doc. A/CN.4/L.522 of 31 May 1996 were discussed.

⁷⁸ Doc. ILC(XLVIII)/CRD.2 of 3 June 1996.

⁷⁹ See Doc. A/CN.4/SR.2449, 23.

it seemed that it could finally be adopted, Mr. Villagran Kramer explained that he did not understand why this new crime should be introduced while international crimes of great importance to Latin America such as intervention or drug trafficking should be left aside. He requested therefore that these and other crimes be reconsidered. If this were not the case, this member said, he would have to vote against the adoption of the code as a whole. At the next meeting, the acting chairman, Mr. Rosenstock, read a declaration which stated that "the inclusion of certain crimes in the Code does not affect the status of other crimes under international law". In view of this declaration, the opposing member withdrew his proposal to vote the Draft Code as a whole. In all, three meetings were sufficient to include the new crime and to adopt the Draft Code.

The arguments given in the Commission for supporting the inclusion of crimes against United Nations personnel are already put forward in Mr. Rosenstock's Memorandum: the magnitude and seriousness of the problem of attacks on such personnel, and "its centrality to the maintenance of international peace and security".⁸⁰ Also stated is the rapid reaction in the face of the problem on the part of the Secretary-General, the Security Council and the General Assembly. Among those opposing the inclusion, a first argument referred to the lack of consistency regarding the line followed since 1991, which had produced the withdrawal of other more important crimes. The new crime proposed did not fulfil the requirements demanded for the "crimes of crimes", for the "four great crimes" retained in the Draft Code. Another argument was that the condemning of attacks on United Nations personnel was quite recent and therefore a general awareness had not been developed in international society that would allow us to speak of them in terms of crimes against the peace and security of mankind. In fact, the convention approved in A/RES/49/59 of 9 December 1994 without a vote had been ratified only by a few states at that time. Consequently, the incorporation of a new crime would mean adopting a heterogeneous Code, would undermine the whole exercise intended by the Commission, and would weaken the possibility of its being accepted by states.⁸¹

In view of the Commission's decisions in 1996 on the crimes against the environment and against United Nations personnel, one lesson may be learned. The inclusion or exclusion of crimes in the Draft Code did not depend exclusively on juridical arguments, but was also depended on the

⁸⁰ Document quoted in note 77, 3 (conclusion).

⁸¹ See especially the interventions by Messrs. Fomba, Güney, He, Mikulka, Pellet, Rao and Villagran Kramer in Doc. A/CN.4/SR.2449, and A/CN.4/SR.2453. See also memorandum submitted by Mr. Pellet, Doc. ILC(XLVIII)/CRD.5 of 17 June 1996.

Commission members' feelings of convenience or necessity. Reference to sources of international law and other legal arguments were sometimes a way of justifying political convenience. In consequence, it seems quite difficult to describe the nature of the Commission's work. Reflecting the perplexity of other colleagues, one member warned that the adoption of the proposal on the crimes against United Nations personnel "would constitute neither codification of existing law nor progressive development of international law".⁸²

VII. Codification, Progressive Development, and the Final Decision of States

To what extent was the ILC codifying or making progressive development of international law when it prepared the Draft Code? The short answer might be obtained by comparing the 1950 Principles, the 1991 and the 1996 Draft Codes, and indeed it seems that this would be a good exercise for students of international law. Apparently, the 1996 Draft Code introduces progressive development in quite a few instances: the jurisdictional system, some cases of crimes against humanity, the crime against United Nations personnel, and the crime against environment in the case of armed conflict, being the most relevant.

Yet the long answer cannot be so simple. To start with, a first question arises: was it clear to the Commission itself what it was trying to do? Personally, I do not think so. There is a lack of general pronouncement, in spite of the fact that the mandate of the General Assembly expressly referred to progressive development. The commentary to the 1996 Draft Code does help to identify the points which are innovative, but the commentary emerges as a monument to rationality and systematization while the study of the records of the relevant meetings does not show a unity of intention. In the face of this lack of collective pronouncement, it is astonishing to find the insistence, especially on the part of some members during the 1995 and 1996 sessions, that what should be done was mainly codification, thereby leaving only very little room for progressive development. A member accused the Commission of entrusting itself the role of "universal legislator" by incorporating new crimes in the Draft Code.⁸³

Progressive development of international law should be considered in the new light of the ILC practice since the end of the cold war. Three types of development in the law could be distinguished within the codification

⁸² Mr. Güney in Doc. A/CN.4/SR.2453, 15.

⁸³ Mr. Pellet in Doc. A/CN.4/SR. 2449, 18.

process. First of all, there is what could be called “codificative” or inevitable development. It is well established that the technical operation of settling in written form customary international law cannot be carried out without some amount of generalizing and systematizing, without choosing the concrete wording in which the new norm should be expressed. This first meaning has been recognised since the first studies on the work of the ILC, and indeed it was perhaps the dominant sense for decades. Secondly, “selective” progressive development has occurred when particular and identifiable changes in the existing law were proposed by the drafting body and then accepted by states. That is the case, for instance, of the creation of the continental shelf as a new legal concept in the 1958 Geneva Convention on the Continental Shelf (UNTS Vol.499 No.7302), and of Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties and the settlement of disputes related to those Articles. States knew which parts of each concrete proposal constituted selective progressive development of the law, and consequently weighed the opportunity of giving their consent more carefully. Thirdly, another meaning of progressive development would embrace any draft in which development of the law overrides the elements of codification that also exist. So far this has occurred only with respect to the Draft Statute for an International Criminal Court.

It is interesting to note that this last progressive development in the strict sense was only possible when the General Assembly ordered an ambitious and unprecedented project, but this meaning was already foreseen in the ILC Statute. Progressive development in this third sense should not be confused with political initiative, which corresponds to the General Assembly according to Article 16 of the Statute of the ILC.⁸⁴ Neither should “selective” nor progressive development in the strict sense be confused with international legislation. In the last instance, the “*imprimatur* that attests the jural quality” of innovative as well as of codification conventions “is a collective judgement of the States (generally by very large majorities) that implicitly recognizes the contemporary social value of the rules in the text”.⁸⁵ The drafts prepared by the ILC do not constitute international legislation because the states subsequently analyse the proposals and may eliminate what they do not consider convenient and incorporate new provisions. The task of the Commission is a task of preparation that is clearly defined in its statute. But the Commission is not

⁸⁴ The Commission pointed out once more the impossibility of separating the concepts of codification and progressive development in its 1996 Report to the General Assembly (GAOR 51st Sess., Suppl. No. 10, paras. 157–158). But this is not wholly true with respect to the Draft Statute, which is a clear example of progressive development in the strict sense.

⁸⁵ Schachter, see note 3, 70.

totally free when facing the assignments it receives. The ILC's proposals for progressive development must not be planned *ad libitum*, and this is how the term progressive must be interpreted. On the one hand, the proposals must take into account the whole field of existing international law, and that is the reason why those proposals have to be drafted by international jurists. Obviously, the international law that the Commission should contemplate is contemporary international law; it may not present a project based on international law prior to 1945, ignoring subsequent advances. On the other hand, 'progressive' also means that the development of international law should be a purposeful activity in which the ends of contemporary international law, especially those embodied in the Charter of the United Nations, are pursued.⁸⁶

During the preparation of the 1991 Draft Code, the Commission carried out "selective" progressive development with regard to the general provisions and the crimes not contemplated in the Principles of 1950. In fact, in this particular case, it was hardly a matter of codifying customary law, since the relevant precedents (the criminal tribunals established after World War II) had been already codified by the Commission itself. Although the Commission mentioned declarations, resolutions, and treaty law when it introduced each crime, the Commission could not likewise refer to customary rules in this particular field, since there was no relevant practice up to the creation of the International Tribunal for the former Yugoslavia. Undoubtedly, during the last decades, there was certain conduct which was either criminalized as international crimes (such as drug trafficking or aircraft hijacking) or widely rejected as contrary to the values of the international community (such as colonialism, apartheid or intervention). In this respect, it could be said that a sort of *opinio iuris* had developed as to which were the most abhorrent acts for the international community as a whole. However, there was not a state or international practice that regarded those individual acts as crimes against the peace and security of mankind. The lack of use of this term of art and the absence of an international criminal tribunal pre-empted the formation of customary law. Therefore, it should not be surprising that the 1991 Code had to be built upon "selective" progressive development.

The drastic reduction of the list of crimes in 1995 and 1996 changed the previous approach to progressive development. The written comments of 24 governments on the Draft Code, contained in Doc. A/CN.4/448, were

⁸⁶ The preambles of the General Assembly resolutions dealing with the work of the ILC repeatedly refer to codification and progressive development "as a means of implementing the purposes and principles set forth in the Charter of the United Nations". See for example A/RES/49/51 of 9 December 1994, and A/RES/50/45 of 11 December 1995.

deemed to be crucial by the Special Rapporteur in order to propose the reduction of the list of crimes. Some members of the Commission also believed that these opinions justified the reduction, and it seems that this opinion eventually spread to the majority of the Commission. However, this assessment was quite exaggerated. The reading of the comments of the governments shows that, in reality, the states were not so opposed to many of the crimes. Several states merely expressed doubts or else were not completely in agreement with the wording used by the Commission, but very few states were totally against any specific crime. Furthermore, the document only reflects the opinion of a small number of states, and the positions of others are missing; for example, there are only two countries from Africa and none from Asia. The Commission gave an exaggerated value to Doc. A/CN.4/448 without taking into account the fact that years before, in other opinions expressed, many states had been in favour of lengthening the 1950 list of crimes.⁸⁷ The proof that the Commission over-interpreted the states' will is that certain opposition to the reduction of the list of crimes could be found in the Sixth Committee of the 50th General Assembly,⁸⁸ and there was also some opposition in the 51st General Assembly. In 1996, a number of states expressly demanded the inclusion in the Draft Code of certain crimes which were in the 1991 Draft Code.⁸⁹ The insistence on certain crimes (such as terrorism and drug trafficking) shows that the Commission went too far in the reduction of the list.

The excessive zeal of the ILC has reduced the freedom of choice of the states, which might wish to incorporate crimes other than those proposed by the Commission in the near future. As explained in Section V. *supra*, it is possible that the jurisdiction of the international criminal court will encompass a wider variety of crimes than the Draft Code. Instead of anticipating states' point of view, the Commission should have described the crimes that could be considered the most serious in present interna-

⁸⁷ During the eighties, a number of states expressed the opinion that it was convenient for the Draft Code to include crimes other than those set out in the 1950 Principles. See, for example, documents in note 16, especially comments by Finland, Hungary, United Kingdom (Doc. A/35/210, and Add. 1), Philippines, Poland, Tunisia (Doc. A/36/416), Australia, Egypt, and Venezuela (Doc. A/40/451).

⁸⁸ See Doc. A/CN.4/472, quoted in Section IV.2, note 51.

⁸⁹ Some states demanded the inclusion of other crimes at the Sixth Committee in 1996; for instance: terrorism (Algeria, 28th Mtg.; China, 32nd Mtg.; Pakistan, 33rd Mtg.); colonialism (India, 33rd Mtg.); threat of aggression (Greece, 32nd Mtg.; Republic of Korea, 33rd Mtg.); or drug trafficking (China, 32nd Mtg.; Slovak Republic, 33rd Mtg.).

tional law. Taking into account the General Assembly's mandate which expressly referred to progressive development, the task of the Commission was to list all of those crimes in order to leave the final decision to the states. This mission of proposal was accomplished paradigmatically in the 1991 Draft Code. On the first reading of the Code, progressive development consisted in suggesting to the General Assembly and also to states that a number of heinous crimes belonged to the gravest category of international crimes. Year after year the members of the Commission accepted that there were sufficient reasons in contemporary international law to support that certain criminal acts were equivalent to those stigmatized at Nuremberg. But the last word remained with the states. In the 1996 Draft Code, the Commission's mission of proposal was reduced to the crime against United Nations personnel and a few other instances. By doing so, the ILC inexplicably almost renounced the mandate for progressive development entrusted to it by the General Assembly.

VIII. The Draft Code and General International Law

The 51st General Assembly considered three courses of action concerning the Draft Code: to adopt it as a treaty open to ratification by states, to adopt it as a Declaration, or to send the Code to the Preparatory Committee for the Establishment of an International Criminal Court. The second option would have meant that the General Assembly endorsed the Code, so that a sort of *opinio iuris* would have been attached to its provisions. Subsequent state practice would have created customary rules. The first option would have made the formation process of general international law norms more complex, for it would imply waiting and seeing how many and which states ratified the treaty. Following the third possibility, A/RES/51/160 of 16 December 1996 deferred the whole question of the value of the Draft Code in general international law, especially of those provisions containing progressive development.

In any case, the definition of the crimes against the peace and security of mankind is one aspect of the Draft Code which will not be affected by its subsequent evolution, since the Draft Code itself assumes that the definition of this category is contained in general international law. Articles 1 para.2, 13 para.2, and the declaration read at the moment of the adoption of the Draft Code are expressive enough in this respect. Consequently, the Draft Code does not oppose the possibility that a national or international court may consider that an act of drug trafficking or terrorism, for example, may be a crime against the peace and security of mankind if it concludes that such a crime existed in general international law at that time, notwithstanding the fact that the Draft Code does not mention these

crimes. In this regard, the Draft Code confirms that the principle *nullum crimen sine lege* must be considered with some degree of laxity in international law. It should be taken into account that “lege” does not only mean *lex scripta* but rather the broad field of international law. The law in which the crimes involved are to be found comprises multilateral treaties, customary law, general principles of law, and fundamental principles of international law such as those set out in Article 2 of the United Nations Charter.

Therefore, in present general international law there is no great difference between included and excluded crimes against the peace and security of mankind. If the general provisions of the Draft Code passed into general international law, the principle of universal jurisdiction, and the obligation to extradite or prosecute, will be applicable to the crimes against the peace and security of mankind not embodied in Part II of the Draft Code. Bearing this in mind, in what respect is a crime affected by its exclusion or inclusion in the Draft Code? The United Kingdom Government put it in other terms. When it commented on illicit traffic in narcotic drugs, considered by this Government as a “borderline case” for inclusion in the Code, the United Kingdom stated: “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”.⁹⁰

1. The Stigmatizing Function of the Draft Code

The first part of the answer is that criminalization within a Code of Crimes against the Peace and Security of Mankind, along with other abhorrent acts, has a not insignificant pedagogic value and a certain preventive effect. The stigmatization accomplished by the Code will not be a definitive deterrent for potential criminals (there is no such thing anyway) but at least it may show which criminal acts the international society rejects more forcefully. Although states may effectively prosecute these crimes in their territory, it is obvious that strong international cooperation is needed. One aspect of the international fight against crime would be the solemn declaration according to which certain conduct is considered to be a crime so heinous that the international community as a whole understands that it belongs with the most condemnable category amongst the crimes.

The stigmatization function should be regarded as transcendental, even if the statistical probabilities of an individual being effectively prosecuted

⁹⁰ Doc. A/CN.4/448, 93.

for certain crimes, such as wilful and severe damage to the environment in peace time, seem remote. The drafting of any criminal code gives a complete view of the protected values of a given society, and the criminalization of certain acts is one of the most useful tools that a society has to preserve what are considered to be the most sacred values. The Statute and the Nuremberg Tribunal had to protect fundamental values that were previously stigmatized only in the cultural conscience of mankind. After that experience, it seems unwise to wait for the real occurrence of these abhorrent (and perfectly feasible) acts to characterize them as international crimes.

2. Second Function of the Code: Extended Jurisdiction

From a more pragmatic point of view, the exclusion of some crimes from the Draft Code may deprive them of the extended jurisdiction that the included crimes enjoy. If the relevant provisions on jurisdiction of the Draft Code become general international law, those provisions will be applicable to the excluded crimes as far as these crimes qualify as crimes against the peace and security of mankind. On the contrary, if the Draft Code is embodied in a treaty (be it an autonomous treaty, or be it annexed to the Statute for an International Criminal Court), the general provisions will be applicable only to the crimes provided in the Code and to those states party to the treaty. Excluded crimes against the peace and security of mankind will not enjoy in general terms the principle of universal jurisdiction, nor will they be covered by the obligation to extradite or prosecute, unless the treaty is ratified by a substantial majority of the states and begins to be regarded as general international law.

Some states might be opposed to the application of extended jurisdiction to the crimes against the peace and security of mankind, and indeed this extension merits further reflection. The principle of universal jurisdiction was traditionally confined to a few crimes, such as piracy; more recently the principle was affirmed with respect to war crimes, and the tendency to apply the principle also to terrorism and drug trafficking was observed.⁹¹ The confirmation of the principle in the Draft Code may signify one more step in the direction of its consolidation in general international law. This could raise states' fears in two respects. On the one

⁹¹ See *Restatement, Third, of the Foreign Relations Law of the United States*, 1987, Sec. 404, Comment (a); L. Henkin, "International law: politics, values and functions: General Course on Public International Law", *RdC* 216 (1989), 290 and 301; and note 28 *supra*.

hand, the idea of their nationals being prosecuted and tried for crimes against the peace and security of mankind by other states may not be agreeable to the states. However, this is an unavoidable consequence of the principle of universal jurisdiction. Reciprocity ought to be accepted if the principle is to be applied in true fairness. In theory, the general interest in prosecuting and trying alleged criminals should override the particular interest of the state in protecting its nationals. Nevertheless, whenever a partial trial or an unjust sentence takes place, the state may exert diplomatic protection over its nationals. On the other hand, certain alleged criminals may escape justice if they are tried in a state which actually seeks to shield them by invoking universal jurisdiction. Article 12 para.2 of the Draft Code endeavours to mitigate this problem. Article 12 para.2 lit.(a) (i) (ii) allows an international criminal court to try an individual for the same crime when in the previous trial the national court characterized the crime as an ordinary one, or the proceedings were not impartial. Article 12 para.2 lit.(b) provides that an individual may be tried again for the same crime by a national court of another state if "(i) the act which was the subject of the previous judgement took place in the territory of that State; or (ii) that State was the main victim of the crime". This innovative exception favours prosecution by any injured state, and tends to guarantee that a state may punish the crimes against the peace and security of mankind that prejudiced it. It is true that the damaged state might come up against a refusal to extradite from the custodial state which, fulfilling its obligation, has tried the alleged criminal. Yet the Draft Code imposes not the obligation to extradite, but only the obligation to extradite *or* prosecute.⁹²

Notwithstanding the problems that obviously remain, the jurisdictional system of the Draft Code is more satisfactory than the system of present international penal cooperation. Nowadays, a state may be a safe haven for an alleged criminal against the peace and security of mankind, and this state has no obligation (or only a weak one) under general international law. According to the Draft Code, the state in whose territory the alleged criminal is staying will have an obligation to extradite or prosecute, and if the trial were not impartial or there were another state which was the main victim of the crime, the individual may be prosecuted and tried again.

⁹² See Section III.2, *supra*.

3. Third Function of the Draft Code: A Guide for International and National Courts

The Draft Code contains characterizations which are useful as a guide for the prosecution, trial, and punishment of the crimes described therein. Those characterizations may be used by both international and national courts. As far as these characterizations were already established in the Nuremberg Charter and Judgment, and in the Principles adopted by the Commission in 1950, they belong to general international law. As regards the innovations of the Draft Code, one will have to wait for the evolution of the Code in order to know whether these new characterizations pass into general international law. In any case, the guidelines set out in the Draft Code have attached a certain authoritativeness, since they have been drawn up by the ILC, and generally speaking have a good chance of becoming general international law. On the contrary, the Commission did not elaborate a brief formulation of the excluded crimes, and therefore there is no precise wording that could be used as a guide. Consequently, if an international or national court should wish to prosecute and try one of the excluded crimes as a crime against the peace and security of mankind, the court will be compelled to find a formulation in general international law, after having reached the conclusion that it may have before it a crime of such kind. This is the course of action which is suggested by the commentary to the Draft Statute for an International Criminal Court. Article 20 of the Draft Statute merely enumerates the "crimes under general international law" over which the Court will have jurisdiction. The Draft Statute does not seek to characterize these crimes, but the commentary indicates the method that should be followed by the Court in this respect: the Court should not only survey multilateral treaties and custom, it should also take into account Security Council resolutions. The commentary also mentions the characterizations set out in the Commission's Draft Code of 1991.

National and international courts alike will have to follow a similar pattern when they endeavour to prosecute and try extremely serious criminal acts under the same conditions as crimes against the peace and security of mankind. This may be shown by the following example. A group of "Unabomber" like scientists tries to draw the attention of the states towards the inadmissibility of contamination by provoking long-term, widespread and severe damage to the natural environment. A state not injured by this repugnant act arrests one of the scientists (who is not its national) and deems it correct to prosecute and try him as a criminal against the peace and security of mankind. The national court will have to search in general international law in order to satisfy itself that there is a characterization of the crime, and perhaps the court could pay attention

to Article 26 of the Commission's 1991 Draft Code. The same will apply to hypothetical prosecutions against crimes consisting of terrorism or drug trafficking.

Articles 8 and 16 of the 1996 Draft Code place the crime of aggression in a somewhat similar position to that of the excluded crimes. The Draft Code does not seek to characterize the crime of aggression, thereby remitting its definition to general international law. It is obvious that this remittance might be dangerous if the freedom left to the courts is used in an arbitrary manner. A court may convict an individual for aggression on the basis of certain acts which are not to be considered as aggression in the characterization contained in general international law. The ILC tried to mitigate this unwanted problem by limiting the jurisdiction over the crime of aggression as provided in Article 23 para.2 of the Draft Statute for an International Criminal Court, and in the last two sentences of Article 8 of the Draft Code.⁹³ Even so, the construction of the crime of aggression by an international or national court based on general international law might prove controversial.

The danger of too broad a formulation remains unaffected for the crimes against the peace and security of mankind excluded from the Draft Code. Some degree of uncertainty is always difficult to avoid, and this also applies even to the well specified crimes of the Code. What is "arbitrary imprisonment" in Article 18 lit.(h)? When is such unjust conduct carried out "on a large scale"? But the problem is much more worrying for the excluded crimes. There may be many examples. Some individuals who have just carried out a coup d'état in a small country are arrested in another state of the region. The custodial state, pondering that a trial would not be impartial neither in the first state (where the coup has installed a dubious government) nor in the state(s) of which the individuals are nationals, decides to prosecute the alleged criminals under the charges of armed intervention and recruitment of mercenaries as crimes against the peace and security of mankind. The national court of the custodial state may formulate a characterization of those crimes according to general international law that might seem to be too broad to the national state of the alleged criminals, and the latter state may try to exert diplomatic protection. Unfortunately, national and international courts cannot have at their disposal the secure guide of a written formulation of the excluded crimes. But this is a consequence of having reduced the list of crimes and at the same time having sent its definition to general international law. It would

⁹³ Curiously enough, the wording of Article 8 was modified by the Commission during the drafting of the commentary. Compare Docs. A/CN.4/SR.2439, 6-9; A/CN.4/SR.2463, 11-15; and A/CN.4/SR.2465, 3.

have been much better to include characterizations as precise and as demanding as possible of every criminal act eligible as one of the most serious for the international community.

IX. The Do-It-Yourself Code

Apart from the Draft Code, there are a number of other *codes* at our disposal for the time being. To start with, there is the synthetic *à la carte* code of the 1994 Draft Statute. Next come the mini-codes, or *ad hoc* codes expressed in the Statutes of the international criminal tribunals for the former Yugoslavia and for Rwanda, endorsed by the Security Council. And finally and fortunately there will always be the unwritten “code” — the general international law “code” — of crimes against the peace and security of mankind. The ILC’s Draft Code should have approached the general international law “code” as closely as possible. Since there are reasons to believe that a certain gap remains between the latter two, as this study has tried to show, this author feels tempted to offer his reflections on how to merge, as it were, the Draft Code and the ideal “code”. It seems quite probable that the forthcoming plenipotentiary conference on the establishment of an international criminal court will develop the provisions on jurisdiction of the Commission’s 1994 Draft Statute,⁹⁴ and those provisions would become yet another type of “code”, a “jurisdictional code” (though still *à la carte*). Equally not unthinkable is the possibility of the General Assembly’s referring the Draft Code back to the ILC at some time for reconsideration or redrafting, according to Article 23 para.2 of the Statute of the Commission. In any case, the Draft Code cannot be regarded as a definitive instrument, because of the dynamic character of criminal international law. For these reasons, any ideas for improving the Draft Code should not be rejected.

A change in the title of the Draft Code is not essential, but may help to clarify the concept and facilitate naming this type of crimes. During the immediate post-war period “crimes against peace, war crimes, and crimes against humanity” were spoken of, and there was no common denomination. The expression used today was invented in 1946 by an advisor to the U.S. President, and is clearly influenced by the language of the United Nations Charter.⁹⁵ The expression “peace and security of mankind” is too unintelligible a phrase, as opposed to “international peace and security”,

⁹⁴ See Section V, *supra*.

⁹⁵ See Third report by Mr. Thiam, ILCYB 1985, Vol. II (part 1), Doc.A/CN.4/387, paras. 20–67.

which is clearer. On the other hand, one of the particular crimes, the crime against humanity, is defined with a much broader term than the general kind. This incongruity is tempered in English, for “mankind” and “humanity” are introduced, but this is not so in French and Spanish (at least). Bearing in mind that the phrase “crimes against the peace and security of mankind” seems condemned forever to belong to the arcane language of specialists, it would be preferable to use a more understandable name, such as “crimes against the fundamental values of humanity”, or “crimes against the international community”, or much better and simpler “crimes against humanity”. If the last option were to be endorsed, the crimes called as such at present could be renamed “systematic or mass violations of human rights” (as in the 1991 Draft Code), “grave violations of human rights”, or the like.

Regarding the general provisions, the consequences of the jurisdictional system set out in the Draft Code should be carefully analysed. As it was stated *supra*,⁹⁶ the principle of universal jurisdiction was introduced almost inadvertently, and it has yet to be seen what the practical outcome of its application would be. If universal jurisdiction becomes consolidated in general international law with respect to crimes against the peace and security of mankind, it will be essential to build up a mechanism in order to avoid legally recognized criminal *forum shopping*. There always have been, and probably always will be, safe havens for alleged international criminals, but criminal international law should strive for the reduction and disappearance of these havens. The granting of jurisdiction over crimes against the peace and security of mankind to any state should be accompanied by pertinent provisions that satisfactorily guarantee the fair use of this jurisdiction. In this author’s view, Articles 12 of the Draft Code and 42 of the Draft Statute, declaring exceptions to the *non bis in idem* rule, do not suffice to impede alleged offenders being shielded from criminal responsibility in some less than scrupulous states.

As far as the list of crimes is concerned, it seems obvious that the list should be expanded *de lege ferenda*. But here two options might be envisaged. On the one hand, the inclusion of the “political” crimes against the peace and security of mankind could be demanded. However these crimes are not very popular among an important group of states. The exclusion of these crimes (except aggression) from the 1994 Draft Statute was significant. Isolated voices that clamour for the inclusion of those crimes in the Draft Code could be heard in the Sixth Committee during the 51st General Assembly, but the majority of states praised the Commission for the deletion of those crimes. In consequence, the criminaliza-

⁹⁶ See Sections III.2, and VIII.2, *supra*.

tion of individual acts that are necessary for carrying out crimes of state such as colonial domination or intervention does not seem feasible. Personally, I do not share the pessimistic view that it is not possible to draft the definition of those criminal acts in a few words. This pessimistic view entails a medieval conception of human capabilities. It is of course possible to describe in a few words the heinous acts which constitute aggression, intervention, or recruitment of mercenaries and it is of course possible that a national or international criminal court could prosecute and try the individuals who commit or participate in those acts. The trouble is that political will is not yet ripe enough to criminalize in an objective form these crimes against the peace and security of mankind.

On the other hand, the list of crimes should include criminal acts such as drug trafficking, terrorism, crimes against internationally protected persons, or wilful and severe damage to the environment. The Draft Statute for an International Criminal Court and the subsequent work of the Preparatory Committee, which tends to maintain the extent of the jurisdiction of the court, invite us to seriously consider the expansion of the list of the Draft Code. Apart from that, the crimes mentioned are supported by widely accepted multilateral treaties, and are regarded as contrary to the ends of the international community as a whole.

It is not easy to foresee how the Draft Code could be changed in the near future. Nonetheless, the final form of the list of crimes both in the Draft Statute and in the Draft Code raises the crucial question of the characterization of the crimes. Taking into account the instruments hereto available, there are three main courses of action regarding the characterization of each particular crime. First, there is the mere enumeration contained in Article 20 lit.(a) to (d) of the Draft Statute. Simply expressing the name of the crime necessitates the commentary to illuminate the tribunal. The advantage of this form of characterization is flexibility, its drawback, uncertainty. Second, the description of the crimes against humanity and against United Nations personnel in the Draft Code are good examples of what could be regarded as an intermediate way of characterizing a crime. In both examples, the Commission described in a broad yet precise fashion several criminal acts and made it clear that those acts had to be carried out under certain conditions in order to reach the status of crimes against the peace and security of mankind. Finally, Article 20 lit.(e) of the Draft Statute provides the third approach to characterization. Criminal acts are described in great detail in particular treaties, but the court may determine at any moment that the acts under consideration are not grievous enough to be prosecuted or tried. The lack of flexibility of this third approach has no compensation in certainty.

Admittedly, a criminal court would have to interpret and construe any penal norm when assessing whether acts from reality conform to a verbal

description or not. But a criminal court should not elaborate the very characterization of a crime. While drawing up the Draft Code, the Commission had to pick and choose from among provisions similar to those found in the treaties listed in the Draft Statute. At the same time, the Commission had to describe certain general conditions for the occurrence of the crimes, such as the massive or repetitive character of the acts. Following this method, the crime against United Nations personnel, for instance, was not literally taken from Article 9 of the 1994 Convention, but the threshold of the characterization was increased for the purposes of the Draft Code. Undoubtedly, the two approaches of the Draft Statute are easier than the unpleasant task of redrafting the description of the crimes, yet this *ad hoc* characterization is necessary if any code or jurisdictional provisions are to have a general and precise value. According to the first approach, there would be the risk of double definition of a crime which is only referred to by a noun. The trouble with the third approach may arise when states would like the international court to prosecute and try an individual for crimes not exactly foreseen in the particular treaties.

X. Concluding Remarks

During the cold war, the confrontation between the two blocks made progress in international law difficult. At present, states find themselves face to face with international law, and a new and clear tension between them may be envisaged. The definition of the most serious international crimes is a very delicate matter which is in many cases intimately linked to the interests of states. There have been a number of historical events since World War II in which the members of governments or the officials of different states could have been accused as alleged criminals under international law. Unfortunately, it is very likely that this situation will continue in the future. Therefore, the characterization of acts constituting crimes against the peace and security of mankind is a hard task and it is to be expected that the states will oppose a broad definition of the crimes. In the *ad hoc* international courts (for example, those for the former Yugoslavia and Rwanda) the definition of the crimes has a limited value in space and time. In the Draft Statute for an International Criminal Court, there is a mere list of crimes, and jurisdiction is established on a voluntary basis. The characterizations of a Code are more compromising because they may come to have a general value.

The very existence of the Code is an attempt to rationalize a central field of international law. The existence of a Code makes it possible to introduce juridical objectivity into the political and moral condemnation of serious attacks on international society. The absence of a Code, where the criminal

acts are described beforehand, allows for a subjective or even arbitrary assessment of such acts. In this sense, it can be affirmed that the process of preparation of a criminal Code with the most abominable acts that a human being may commit is one more aspect of the old struggle for law. During the last four centuries, the Western countries have elaborated the fundamental principle of political life, the rule of law, the government of Law and not of men, the *règne de la Loi*, or *Rechtsstaat*, with the same aim of limiting arbitrariness in the exercise of power, and of affirming human freedom, equality and dignity. Although proceeding from different origins, these ideas have a concurrent content in the 20th century, and are considered as one of the pillars of constitutional government. Nowadays, these ideas fight to fulfil themselves in states from all the regions of the world.⁹⁷ At the same time, it seems obvious that the principle of the rule of law has an expansive force and yet has to exercise its influence in the international sphere.⁹⁸ However, the fact is that this struggle for law will be different in the international field since it will not be led by vigorous judges (as happened in England), nor by proud assemblies (as in the United States or France), nor by audacious jurists (as in Germany), nor by brave politicians (as in many countries in the third world today). The long history of the elaboration of the Draft Code tends to show that neither can the struggle for law in the international arena be led by the states. Perhaps the demand for the rule of law may be required by international civil society. This is a slow process which will occur in the 21st century, and its result cannot yet be known. What is evident at present, though, is that the establishing of a Code of the most serious crimes that can be committed, quite often in the name of the states, is just another chapter in this fervent struggle sustained by law, or, in other words, reason, against unlimited power.

⁹⁷ See among others C. Friedrich, *Constitutional Government and Democracy*, 4th edition, 1968, Chapter XXVI; N.S. Marsh, "The rule of law as a supra-national concept", in: *Oxford Essays in Jurisprudence*, 1961, 223 et seq.

⁹⁸ See I. Brownlie, "International Law at the 50th anniversary of the UN: General Course on Public International Law", *RDC* 255 (1995), Chapter XV; M. Ortega Carcelén, *Hacia un gobierno mundial. Las nuevas funciones del Consejo de Seguridad de Naciones Unidas*, 1995, Chapters 4 and 7.