

A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind

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I. Introduction

The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind has been half a century in the making. In 1947, the General Assembly of the United Nations requested the International Law Commission (ILC) to formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal and to prepare a draft Code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the Nuremberg principles.¹

Although the ILC commenced its work in 1949, and submitted a Draft Code five years later,² the General Assembly did not take any action on the Code until the end of 1981 when it invited the ILC to resume its work.³ In 1991, the ILC provisionally adopted the draft articles of the Code and transmitted them to governments for their observations. The adoption of the 1991 Draft Code was, however, complicated by the process of adopting a statute for a permanent criminal court, which the General Assembly had that same year invited the ILC to consider. Thus, the 1991 Draft Code was referred back to the Drafting Committee. Following this Committee's report, the ILC, at its forty-eighth session, held from 6 May to 26 July 1996, adopted the text of a set of twenty draft articles constituting the Code of Crimes against the Peace and Security of Mankind (hereinafter 'the 1996 Draft Code' or 'the Draft Code').

The history of the Draft Code reveals an important fact, namely that the task of drafting it was commissioned by the General Assembly *before* many of the normative sources on which it would rely had come into being. Indeed, with the exception

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1 GA Res. 177(II), 21 November 1947 (A/177(II)).

2 *Yearbook of the International Law Commission 1954*, vol. II, pp. 150-152, document A/2673.

3 GA Res. 36/106, 10 December 1981.

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of the Hague Convention (IV) of 1907 and the Nuremberg Charter, practically *all* of the conventional and charter-based sources of international criminal law and international humanitarian law, which substantially, if not entirely, overlap with the subject matter of the Draft Code, have emerged *since 1947*, in particular the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the Geneva Conventions of 1949 and the Additional Protocols of 1977 thereto, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. This posed a fundamental problem for the drafters of the Code. If the Code departed from the texts of these instruments, then it might create contradictions in the law and sow the seeds of confusion. But if it merely reproduced those texts *verbatim*, then it would be otiose. How then was the Draft Code to coexist alongside these instruments and what use was it to make of them?

The approach taken by the ILC has been to transplant the operative elements of various conventions and instruments, while modifying those provisions where it sees fit. In particular, additional elements have been added to what are already international crimes in order to elevate them to the status of the more serious crimes against the peace and security of mankind. This issue will be taken up in the next section. Unfortunately, however, this activity has not been carried out consistently and it has not had the virtue of rationalizing or simplifying the existing law. Rather, the reverse has occurred, as this article will attempt to demonstrate. It will be submitted that if the Code does not rationalize the existing law into a more coherent *corpus*, departing from the texts of international instruments only when they are seen to contain imperfections or where the law has since developed, then it will be simpler for national courts or the permanent criminal court to have recourse to those existing instruments and to customary law rather than to the Code. Thus, if its present deficiencies are not redressed, the sad conclusion may be drawn that it is better for the administration of international criminal law if the Code is simply not adopted at all.

II. Commentary

A. Crimes against the Peace and Security of Mankind versus Other Crimes under General International Law

It is fundamental to an analysis of the ILC's *modus operandi* to understand that a distinction is implicitly drawn in the Draft Code between crimes against the peace and security of mankind,⁴ on the one hand, and other crimes under general interna-

⁴ In fact, the ILC even leaves open the possibility that there are *other* crimes against the peace and security of mankind than those appearing in the Draft Code: 'Paragraph 1 [of Article 1] restricts the scope and application of the present Code to those crimes against the peace and security of mankind that are set out in Part II. This provision is *not intended to suggest that the present Code covers exhaustively all crimes against the peace and security of mankind*, but rather to indicate that the scope and application of the Code are limited to those crimes dealt with in Part II'. Com-

tional law such as genocide, war crimes, and so forth, on the other. In some cases, the ILC seems to consider that a crime such as genocide is *also* a crime against the peace and security of mankind. In other cases, additional criteria are introduced to elevate crimes under general international law to the status of crimes against the peace and security of mankind. For example, under the Draft Code, only war crimes which are *large-scale* or *systematic* are considered to constitute crimes against the peace and security of mankind:

These general criteria for war crimes under the Code are based on the view that crimes against the peace and security of mankind are the most serious on the scale of international offences and that, in order for an offence to be regarded as a crime against the peace and security of mankind, it must meet certain additional criteria which raise its level of seriousness.⁵

The rationale behind the additional criteria chosen is that only those crimes under general international law which meet the additional criteria are so serious *as to threaten the peace and security of mankind*. In this way, the ILC uses this distinction to modify definitions of certain crimes, adding additional criteria, *without, however, any authority for so doing*. The authority is quite simply absent because there is no normative source for crimes against the peace and security of mankind or for their criteria of identity. The Draft Code itself is the only source of law for these crimes *defined as* crimes against the peace and security of mankind. Hence, the ILC's work in this area is inevitably pure innovation.

The problem with this is that the pre-eminent authority for making determinations as to whether an event of any description constitutes a threat to the peace and security of mankind lies with the Security Council of the United Nations. Under the Charter of the United Nations, the Security Council has 'primary responsibility for the maintenance of international peace and security'.⁶ To adopt an approach whereby *every* offence is premised on a threat to peace and security, as opposed to an approach which simply treats the title 'code of crimes against the peace and security of mankind' as a general chapeau for *all crimes under international law*, runs certain risks. First, it would mean that a prosecution under the Draft Code could always be challenged by the defence whenever the Security Council has not antecedently determined that the facts in question constitute a threat to international peace and security. Second, if every offence under the Draft Code *must actually threaten peace and security*, then it must be admitted that certain offences which do *not* in a particular instance pose any such threat may fall within the Draft Code, while in other circumstances crimes which do *not* fall within the Draft Code, such as the assassination of a Head of State, *do* present just such a threat.

This problem is a *leitmotif* to the Draft Code.

mentary to the Draft Code (hereinafter 'Commentary'), in *Report of the International Law Commission on the Work of its Forty-eighth Session (A/51/10)*, 14-15 (emphasis added).

5 Commentary, at 113.

6 Article 24(1) of the United Nations Charter.

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B. Jurisdictional issues

The Draft Code, and the ILC's Commentary thereto, also pose, at the outset, a number of jurisdictional problems (the term 'jurisdiction' here being used in its broadest sense), which are not resolved entirely satisfactorily. The first is the relationship between the Draft Code and the Draft Statute of the Permanent Criminal Court. The ILC mentions the possibility of the Code being incorporated in the Statute of an international criminal court,⁷ but leaves the matter to the General Assembly to decide.⁸ Until the matter is resolved, however, there is likely to be a lot of muddle, including a real risk of duplication with the work of the Preparatory Committee on the Establishment of an International Criminal Court, as the latter observed in its most recent Report.⁹ On the basis of the conclusion herein expressed that the Draft Code is unworkable in its present form, it is submitted that the best solution would be for the Permanent Criminal Court to exercise its jurisdiction over crimes under general international law as defined by existing treaties, including the Charter of the International Military Tribunal at Nuremberg, and for the Statute therefore to be adjectival rather than substantive.

The second, closely related issue is the relationship between the Draft Code and the *jurisdiction* of any future permanent criminal court. The Draft Code is intended to function as a jurisdictional basis for both domestic courts and the future international permanent criminal court.¹⁰ This in itself is unproblematic. The problem arises when the Code tries to *limit* domestic jurisdiction. Under Article 8, for example, the Draft Code would vest almost exclusive jurisdiction in the permanent criminal court. Article 8 reads, in part:

Jurisdiction over the crime set out in article 16 [Crime of Aggression] shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

This provision is objectionable inasmuch as it purports, with respect to aggression, to *bar* national jurisdiction, except with respect to the state which committed the aggression. Three comments are in order. First, this is not really codification, but rather international legislation over the jurisdiction of national courts. An example will make clear that it is a dubious enterprise. Let us suppose that a state which has not adopted the Code nor signed any convention establishing an international criminal court decides to prosecute a foreign national before its own courts for the crime of aggression. Whereas prior to the Code, there was nothing which would expressly

7 Commentary, at 13.

8 Commentary, at 14.

9 See A/51/22, para.52: 'A number of delegations, expressed the view that the crimes [within the jurisdiction of the court] should be clearly defined in the Statute. However, some delegations envisaged the Statute as a procedural instrument and expressed concern about possible duplication of or interference with the work of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind.'

10 See Article 8 of the Draft Code, 'Establishment of jurisdiction', and Articles 9 and 10, as well as the Commentary thereto.

bar such a prosecution, the advent of the Code would make the prosecution *ultra vires*.

Second, Article 8 flies directly in the face of the precedent set at Nuremberg, where the Allies tried 'the major war criminals of the European Axis'. In the Nuremberg Judgment, the International Military Tribunal declared that in establishing the Tribunal and the law it was to apply, the Allied signatory powers had 'done together what any one of them might have done singly'.¹¹ In other words, each of the Allied countries was entitled to prosecute German nationals for *inter alia* crimes against peace, i.e. aggression. Under the Draft Code, however, the Nuremberg trials could not take place.

The third comment relates to the manner in which, in all likelihood, the permanent criminal court would have jurisdiction over aggression, namely that it would only have jurisdiction if the Security Council had already determined the existence of an act of aggression on the part of the state whose national was the subject of the prosecution.¹² Thus not only would jurisdiction over aggression be confined to a permanent criminal court, but a prosecution could only be brought with the unanimous consent of the five Permanent Members of the Security Council. This would mean that aggression would in all likelihood never be charged with respect to actions by the USA, UK, France, Russia or China, or their allies.

The justification given by the ILC for restricting prosecutions for aggression to a permanent criminal court or to the state which committed the aggression is that '... the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security'.¹³ But how can one say *a priori* that any such exercise of jurisdiction would *invariably* have serious implications for international peace and security? What if the Security Council had already determined that the state in question had committed aggression? Why would another state's prosecution necessarily threaten international peace and security? Could not that matter be left to the prosecuting state to decide?

This unravelling by the ILC of norms which have already entered into acceptance in international law affords an example of what Philip Allott has called 'the unmaking of international law',¹⁴ revealing 'the long-term destructive

11 *The Trial of German War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg* (1949) Part 21, at 444. Admittedly, this conclusion derived from the fact that Germany had unconditionally surrendered to the Allies and that the latter were entitled to legislate for the former.

12 See Article 23(2) of the ILC's Draft Statute for a Permanent Criminal Court: 'A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.' (A/49/10). See also *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/51/22, para. 73.

13 Commentary, at 50.

14 Allott, 'State Responsibility and the Unmaking of International Law', 29 *Harv. Int'l L.J.* (1988) 1, at 4.

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effect of a government-dominated commission on the development of international law'.¹⁵

C. Principles of Criminal Liability: *Actus Reus* and *Mens Rea*

A cardinal principle of criminal law is *actus non facit reum, nisi mens sit rea*. In accordance with this maxim, and that of *nullum crimen sine lege*, any criminal code should clearly specify the *actus reus* and the *mens rea* required in respect of each crime. Unfortunately, the Draft Code does not adopt a consistent approach when dealing with this issue.

1. *Mens Rea*

Article 2(3) of the Draft Code provides in part:

An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual (a) *intentionally* commits such a crime [...] (emphasis added).

The Draft Code thus purports to establish intention as the requisite *mens rea* for crimes against the peace and security of mankind other than aggression, leaving aside for the moment inchoate forms of liability discussed below. Having done this, however, it proceeds in its substantive provisions to enumerate many other forms of *mens rea* which belie the simple statement in Article 2(3)(a): 'with *intent* to destroy, in whole or in part, a national, ethnic, racial or religious group, as such' (Article 17 – genocide); '*deliberately ... calculated*' (Article 17(c) – genocide); 'when committed *intentionally ... with a view to preventing or impeding* (a United Nations operation) from fulfilling its mandate' (Article 19(1) – crimes against United Nations and associated personnel); '*wilfully*' (Article 20(a)(iii) – war crimes); '*wantonly*' (Article 20(a)(iv) – war crimes); 'in the *knowledge* that' (Article 20(b)(iii) and (iv) – war crimes); '*wilfully* in violation of international humanitarian law' (Article 20(c) – war crimes); '*calculated to cause*' (Article 20(e)(i) – war crimes).¹⁶

It is clear in most of these cases why these formulae are used. For example, it would be impossible to imagine the crime of genocide being defined without the formula, 'with intent to destroy, in whole or in part, a national, ethnic, racial or re-

15 An interesting parallel with Allott's comments on the draft articles on State Responsibility and their 'fundamental structural feature - the postulation of a concept of "responsibility-arising-from-wrongfulness" distinct from the wrongful act and from the consequences of a wrongful act' is also found in the transition from the 1991 Draft Code's enumeration of crimes - 'aggression', 'genocide' - to that of the 1996 Draft Code - 'crime of aggression', 'crime of genocide'. From a drafting point of view, this formula is inept. In national law, one does not refer to 'crime of murder', 'crime of theft', but to 'murder' and to 'theft'. But the difference is significant from another point of view. Under Article 16 of the Draft Code an individual is responsible for the crime of aggression, whereas state responsibility in this regard is referred to in terms of aggression simple. Is it too much to imagine that this is an attempt to retreat from the notion of crimes of state? Otherwise, why drive a chimerical wedge between aggression and the crime of aggression?

16 Emphasis added throughout.

ligious group, as such', which is enshrined in the Genocide Convention and is fundamental to the notion of genocide. This being the case, however, the Draft Code should not then put forward a deceptively simple, intention-based *mens rea* requirement for crimes against the peace and security of mankind when, in reality, the *mens rea* differs from crime to crime and requires a careful perusal in each case of the provision in question. The approach taken in the Draft Code runs the risk not only of duplication but also of confusion in any criminal trial conducted in accordance with its provisions, since at trial the prosecution will have to prove, beyond a reasonable doubt, that every element of the offence in question is present. It must be clear to all the Parties from the start whether a given offence comprises, for example, four elements or five.

In some instances, moreover, it is not just a question of duplication; the *mens rea* requirements are actually in contradiction. See, for example, Article 20(e)(ii) – 'wanton destruction of cities, towns or villages, or devastation not justified by military necessity'. 'Wantonly' is closer in meaning to 'recklessly' than to 'intentionally', and is, in fact, a lower threshold. An army commander may destroy a church by taking a high and, let us assume, unjustifiable risk that the church will be destroyed by his shelling, without, however, *intending* to destroy it (i.e. wanton destruction). Alternatively, he may destroy the church because that is his aim (i.e. intentional destruction). Both types of destruction should fall under the Code – wanton destruction because it is expressly provided for in Article 20(e)(ii) and intentional destruction because it is *a fortiori*. However Article 2(3)(a), which stipulates a *general* requirement of *intentional* behaviour, sheds doubt on whether there is indeed liability for wanton destruction.

Thus, and for the reasons elaborated in the next section, it is submitted that the ILC should do away with Article 2 altogether. Instead, it should reinstate, *mutatis mutandis*, the more succinct text of Article 3 of the 1991 Code.¹⁷

17 Article 2 of the 1996 Draft Code reads:

Individual responsibility

1. A crime against the peace and security of mankind entails individual responsibility.
2. An individual shall be responsible for the crime of aggression in accordance with article 16.
3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:
 - (a) intentionally commits such a crime;
 - (b) orders the commission of such a crime which in fact occurs or is attempted;
 - (c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;
 - (d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
 - (e) directly participates in planning or conspiring to commit such a crime which in fact occurs;
 - (f) directly and publicly incites another individual to commit such a crime which in fact occurs;
 - (g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

Article 3 of the 1991 Draft Code read:

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2. *Actus Reus*

The ILC's approach of 'cutting and pasting' norms, to use computer jargon, is illustrated by the way in which it has tinkered with the *actus reus* of various international crimes. When so doing, it often uses non-legal language in preference to tried-and-tested formulae. There are good reasons, however, for retaining legal terminology which over time has acquired a precise meaning in preference to everyday words which may have a number of meanings. An example is provided by Article 2(3)(b), which uses the phrase, '... orders the commission of such a crime which in fact occurs ...'. This wording fails to capture the intended idea that there must be a *causal link* between the order and the crime which is committed. Another example appears in Article 18(f), with the expression, 'institutionalised discrimination ... resulting in *seriously disadvantaging* a part of the population'.¹⁸

The Draft Code also features several undefined terms with little or no authority for their inclusion. For example, in Article 2(3)(d), on accomplice liability, 'knowingly aiding and abetting' is not considered sufficient to create such liability. Such aiding and abetting must be 'direct and substantial'. But whereas 'aiding', 'abetting' and 'knowingly' are terms with a long pedigree in criminal law, it is anyone's guess what 'direct' and 'substantial' mean in this context. The commentary offers the explanation, '... the form of participation of an accomplice must entail assistance which facilitates the commission of a crime *in some significant way*',¹⁹ but this does not really clarify the matter.

In general, Article 2 is unnecessarily verbose. All it had to state was that there is liability for aiding and abetting, attempts, incitements and conspiracies. This the 1991 Draft Code did most admirably.²⁰ It is very difficult to see why the ILC departed from the previously clear formula.

Responsibility and Punishment

1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.

3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.

18 Emphasis added. This example is also illustrative of poor draftmanship. Article 18(f) should at least read, '... institutionalised discrimination ... resulting in serious disadvantage to a part of the population.' For other examples of poor drafting, see Article 11(1): 'An individual charged with a crime against the peace and security of mankind ... shall have the rights: ...' (list from Article 14(3) of the ICCPR follows). This should at least read, 'shall have the following rights:' It is unclear why the Code does not simply borrow the pithy formula of the ICCPR, viz. 'shall be entitled to the following minimum guarantees, in full equality ...'. Another example is Article 11(2): 'An individual convicted of a crime shall have the right to his conviction being reviewed according to law'. This would be better phrased: 'An individual convicted of a crime shall have the right to have his conviction and sentence reviewed according to law.'

19 Commentary, at 24.

20 See *supra* note 16.

The Draft Code also adds many qualifying words which do not appear in accepted definitions of offences and defences. For instance, under Article 6, superiors are responsible for their subordinate's acts 'if they knew or had reason to know, *in the circumstances at the time*, that the subordinate was committing ... such a crime'. The italicized words, absent from the corresponding provisions in the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) (Article 7(3)) and the International Criminal Tribunal for Rwanda (ICTR) (Article 6(3)), are quite unnecessary. If a superior has reason to know an offence has been committed, then obviously he has reason to know 'in the circumstances at the time'. The commentary indicates that the phrase 'in the circumstances at the time' is borrowed from Article 86(2) of Additional Protocol I of 1977. But in Additional Protocol I, the phrase makes sense because the formula used there is 'knew' or 'had information which should have enabled them to conclude in the circumstances at the time ... [that a crime had been committed]'. The Draft Code should either use that formula or the 'knew or had reason to know' formula of the ICTY and ICTR Statutes. Typically, and with predictably incoherent results, the Draft Code tries to use both: 'the text of this article is based on the three instruments in the preceding paragraph [Additional Protocol I, the ICTY Statute and the ICTR Statute]'.²¹

D. The Crimes: Articles 16 – 20

1. Article 16 – Aggression

The issue of aggression is one which has, traditionally, been linked to the notion of state responsibility. This is made clear in Article 16 of the Draft Code, under which an individual may be found responsible for a crime of aggression if that person 'actively participates in or orders the planning, preparation, initiation or waging of aggression *committed by a State*' (emphasis added). Yet the Draft Code, as an international criminal code, is meant to determine individual criminal responsibility, and not that of a state. The Draft Code tergiversates by separating the subject-matter jurisdiction of Article 16 from any connection with state responsibility, while nevertheless requiring a determination as to whether aggression was committed by a state:

The words 'aggression committed by a State' clearly indicate that such a violation of the law by a State is a *sine qua non* condition for the possible attribution to an individual of responsibility for a crime of aggression. None the less, the scope of the present article is limited to participation in a crime of aggression for the purposes of individual criminal responsibility. It therefore does not relate to the rule of international law which prohibits aggression by a State.²²

21 Commentary, at 36.

22 Commentary, at 85.

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It would seem more appropriate, given that the Security Council alone has the power under Article 39 of the Charter of the United Nations to determine 'the existence of any ... act of aggression', that an international criminal code dissociate itself from dealing with issues where its jurisdiction may be curtailed by a decision of an outside body. An international criminal code may thus be better served by removing any reference to the actions of a state and by adhering instead to the disclaimer in Article 4 of the Draft Code:

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

An analogous approach can be found in the jurisprudence of the ICTY, for example in the *Rajic* Rule 61 Decision. In that case, it was necessary for the Trial Chamber, in order to have jurisdiction under Article 2 of the Statute of the ICTY (grave breaches of the Geneva Conventions) to be satisfied, *prima facie*, that the offences allegedly committed by the accused, Rajic, were committed in the context of an international armed conflict. The Prosecution submitted *inter alia* that this condition was fulfilled because of the involvement of the Republic of Croatia in the war in Bosnia and Herzegovina at the pertinent time. The Chamber so found.²³ This determination was reached, however, only for the purposes of the attribution of individual responsibility and was of no legal effect *vis-à-vis* the Republic of Croatia.

Moreover, to distance itself from the notion of state responsibility, any Draft Code provision should not provide for individuals to be found '*responsible* for a crime of aggression', as the 1996 Draft Code does, but rather to be found '*guilty* of a crime of aggression'.

2. Article 17 – Genocide

While 'cutting and pasting' runs the risk of producing an incoherent text, a danger also exists that vital provisions may not survive the 'cutting' part of the process. This is the case of the Draft Code's article on Genocide. Its provisions are taken *verbatim* from Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('the Genocide Convention').²⁴ However, it neglects the

23 'The Chamber finds that, for purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an international one' (para. 13, IT-95-12-R61). The Republic of Croatia filed a request on 30 April 1996 to appear as *amicus curiae* in all matters involving its responsibility, rights and legal interests and, in particular, sought leave to be heard as *amicus curiae* in the *Rajic* Rule 61 proceedings with respect to the issue of the nature of the conflict in the former Yugoslavia. The Chamber rejected Croatia's request, without prejudice to its ability to renew it at trial (See *Third Annual Report of the ICTY*, para. 65).

24 UNTS 78, at 277.

other punishable acts enumerated in Article 3 of that Convention, which cast a larger net than simply condemning the crime of genocide *per se*.

Article 3 of the Genocide Convention states that not only should genocide be considered as an act which is punishable under the Convention, but that 'conspiracy to commit genocide', 'direct and public incitement to commit genocide', 'attempt to commit genocide', and 'complicity in genocide' should also be punishable. Furthermore, Article 6 of the Genocide Convention calls on the contracting parties to try those charged with the acts enumerated in Article 3 before a municipal tribunal where the crimes occurred or 'such international penal tribunal as may have jurisdiction'. Given the provisions of the Genocide Convention, it is scarcely conceivable that an international criminal code could include the crime of genocide and yet not provide explicitly for jurisdiction over incitement to commit, complicity in, or attempted genocide. This oversight is compounded by events of the recent past. The case of Rwanda has demonstrated that genocide takes many faces and that incitement may very well be the most odious of crimes, even if the offence incited does not take place at all or on the scale incited (see below). It is also noteworthy that the Statutes of the ICTY and the ICTR have provisions which correspond exactly to Articles 2 and 3 of the Genocide Convention.²⁵ Furthermore, the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) states that these provisions are 'crimes under international law for which individuals shall be tried and punished' and that the Genocide Convention 'is considered part of international customary law'.²⁶

Against this it may be countered that Article 2(3) of the Draft Code, which deals *inter alia* with inchoate forms of liability,²⁷ would cover the 'other punishable acts' in Article 3 of the Genocide Convention. This is only partly true, however. Although there is a rough correspondence between the 'other punishable acts' under the Genocide Convention and the inchoate forms of liability enumerated in the Draft Code, there are also significant discrepancies, as the following chart demonstrates (discrepancies are marked in italics).

It can be seen from this chart that the neat formulae of the Genocide Convention have only approximate counterparts in the Draft Code. Moreover, additional requirements for liability, which do not appear in the Genocide Convention, are stipulated in the Draft Code. Most notably, with the exception of attempt to commit genocide, the Draft Code requires that the complete offence, i.e. genocide, *actually be committed in each case*. Hence, we find the recurrent phrase, 'which in fact occurs'. But this is a significant and, it is submitted, unwarranted addition. Under the Genocide Convention, simple agreement with another to commit genocide might be sufficient to constitute a punishable act, irrespective of whether the agreement is

25 Viz. Article 2(3) of the Statute of the ICTR and Article 4(3) of the Statute of the ICTY.

26 UN Doc. S/25704, para. 45.

27 The term, 'inchoate offences' refers to offences which may be committed notwithstanding that the substantive offence to which they relate – 'the complete offence' – has not been committed (i.e. attempts, conspiracies and incitements).

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Inchoate offence under the Genocide Convention	Article of the Genocide Convention	Corresponding offence under the Draft Code	Article of the Draft Code
conspiracy to commit genocide	Article 3(b)	<i>directly participates in planning or conspiring to commit [genocide] which in fact occurs</i>	Article 2(3)(e)
direct and public incitement to commit genocide	Article 3(c)	directly and publicly incites <i>another individual</i> to commit [genocide] <i>which in fact occurs</i>	Article 2(3)(f)
attempt to commit genocide	Article 3(d)	attempts to commit [genocide] <i>by taking action commencing the execution of [genocide] which does not in fact occur because of circumstances independent of his intentions</i>	Article 2(3)(g)
complicity in genocide	Article 3(e)	knowingly aids, abets or otherwise assists, ²⁸ <i>directly and substantially</i> , in the commission of [genocide], <i>including providing the means for its commission</i>	Article 2(3)(d)

ever put into effect. Likewise with incitement, if a person addresses a crowd and implores its members to commit genocide, then he should be liable to punishment, as suggested above, *irrespective of whether the genocide is in fact carried out*.

If the Draft Code had incorporated the substantive provisions of the Genocide Convention *in toto*, then there would be clear liability for attempt, incitement and conspiracy to commit genocide, as well as for complicity. Instead, there are only partially equivalent formulations, which, moreover, raise the threshold for liability. This would be justified if the ILC could demonstrate that international law has developed in this direction. But no such development is argued for. In fact, quite the opposite is indicated by the proviso that it 'does not in any way affect the application of the general principles independently of the Code [sic] or of similar provisions contained in other instruments, notably article III of the Convention on the Prevention and Punishment of the Crime of Genocide'.²⁹

In fact, there *have been* developments of the law relating to genocide, provided by the jurisprudence of the ICTY, which the ILC could take into account. For exam-

28 Since the notion of aiding and abetting is synonymous with being an accomplice, the difference in wording is not considered here to be a discrepancy. Hence, it is not italicized.

29 Commentary, at 21.

ple, it is essential to genocide that *a group* be targeted. The ICTY's emerging case law on this subject appears to favour a *subjective* test in this regard – namely, that it is sufficient if a number of individuals be *conceived of as a group by the perpetrators*, and it is not necessary that they *actually* form a group by any objective standard. This subjective test is made clear in the Rule 61 Decision in the case of the *Prosecutor v. Radovan Karadzic and Ratko Mladic* (IT-95-5/18-R61), in which Trial Chamber I noted that 'the intent [to commit genocide] may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group ...'.³⁰ Just as identifying 'racism' does not imply that *there are races*, a charge of genocide need not imply that human society is in fact composed of discrete ethnic, national or religious groups. It is submitted that the ILC would do well to adopt this progressive approach.

3. Article 18 – Crimes against Humanity

Article 18 enumerates eleven offences which are to be considered crimes against humanity if they are committed in a 'systematic manner or on a large scale and instigated or directed by a government or by any organisation or group'. These offences are murder, extermination, torture, enslavement, persecution, discrimination which violates fundamental human rights, arbitrary deportation, arbitrary imprisonment, forced disappearance, rape, and other inhumane acts.

Among its other features, it is worth remarking that Article 18 does not include as a requirement of crimes against humanity that the prohibited acts be committed against a civilian population. This is striking inasmuch as Article 6(c) of the Nuremberg Charter, which provided the chief inspiration for the Rapporteur's draft,³¹ on crimes against humanity, referred to 'murder, extermination, enslavement, deportation and other inhuman acts *committed against any civilian population ...*'.³² Likewise, the Statutes of the ICTY and ICTR provide for jurisdiction over crimes against humanity only when the crimes are directed 'against any civilian population'.³³

Although the Commentary to the Draft Code does not offer an explanation why the victimization of a civilian population does not feature as an element of the offence of crimes against humanity, justification may nevertheless be found in recent jurisprudence, notably the *Barbie* case. In that case, the French *Cour de Cassation* considered that members of the resistance, in particular French partisans, could be the victims of crimes against humanity. This case was further endorsed by the ICTY in the Rule 61 Decision in the *Vukovar Case* (IT-95-13-R61). In its Decision, the

30 Decision of Trial Chamber I, 11 July 1996, para. 94.

31 Commentary, at 94: 'The definition of crimes against humanity contained in article 18 is drawn from the Nuremberg Charter, as interpreted and applied by the Nuremberg Tribunal, taking into account subsequent developments in international law since Nuremberg.'

32 Article 6(c) of the Charter of the International Military Tribunal, in the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, UNTS 82, at 280-300. (emphasis added)

33 Article 5 of the Statute of the ICTY and Article 3 of the Statute of the ICTR.

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Trial Chamber referred to the Commission of Experts, established pursuant to Security Council Resolution 780, which stated that 'it seems obvious that [crimes against humanity] apply first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms.'

The Trial Chamber went on to comment:

This conclusion is supported by certain case law, particularly the Barbie case. In that case, the French *Cour de Cassation* said that 'inhumane acts and persecution which, in the name of a State practising a policy of ideological hegemony, were committed systematically or collectively not only against individuals because of their membership in a racial or religious group *but also against the adversaries of that policy whatever the form of the opposition*' could be considered a crime against humanity. (Cass. Crim. 20 December 1985).³⁴

If indeed this was the reasoning behind the ILC's decision to remove any reference to civilian populations in Article 18, then, it is submitted, it is a welcome, progressive development in the law.

In other respects, however, the text of Article 18 includes phrases which appear somewhat arbitrary. For example, the phrase 'instigated or directed by a government or by an organisation or group', which is absent from the Statutes of the ICTY and the ICTR, is not only new but also vague. It is unclear what would constitute a 'group' – even a loose collection of a few individuals could conceivably constitute a group.

Lacunae such as these may be left to judicial interpretation. This, however, raises a general issue. Where should the balance be struck between a Code which is so comprehensive as to leave no room for development through case law and a Code which does leave certain issues to be developed by judges applying the Code? The civil law tradition favours a precise and comprehensive code. Yet in common law, there may not be a criminal code at all, or, if there is one, resort to it may nonetheless require consulting case law which has given a more exact meaning to the text of the code. The ILC might consider to what extent it would envisage the Draft Code being moulded over time by judicial interpretation.

The sub-paragraph in Article 18 on 'institutionalised discrimination' is meant to cover apartheid.³⁵ The additional requirement, however, that such discrimination must not only involve the violation of fundamental human rights and freedoms but must also result in 'seriously disadvantaging a part of the population', seems too restrictive. The policy of segregation which operated in the southern states of the USA before the civil rights era was described as being 'separate but equal'. Should it not be sufficient for an apartheid-type crime that there be discrimination on racial, etc. grounds, without requiring proof of the further elements added by the 1996

³⁴ Decision of Trial Chamber I, 3 April 1996, para. 29 (emphasis added).

³⁵ Commentary, at 99: 'It is in fact the crime of apartheid under a more general denomination.'

Draft Code? Is not a policy of 'separate but equal', in other words, sufficiently criminal to come within the Draft Code?

4. Article 19 – Crimes against United Nations and Associated Personnel

In general, this article is somewhat objectionable insofar as it treats United Nations personnel as a select class, and thus the ILC appears, in effect, to be protecting its own. This is particularly so, since the 1996 Draft Code has substantially reduced the list of crimes enumerated in the 1991 draft.³⁶ To so substantially reduce the scope of the Code, removing 'Threat of aggression', 'Intervention', 'Colonial domination and other forms of alien domination', 'Apartheid', 'Recruitment, use, financing and training of mercenaries', 'international terrorism' and 'illicit traffic in narcotic drugs', while retaining 'Crimes against United Nations personnel', which for all its importance does not appear worthy to rank alongside 'aggression', 'crimes against humanity', 'genocide' and 'war crimes', is regrettable.

It is certainly true, however, that the prohibition contained in Article 19 might have been useful in previous United Nations 'peace-keeping' missions. However, paragraph 2 of Article 19 provides that:

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

In practice, it may be very difficult to say when United Nations forces are to be considered combatants, and when not. A Chapter VII mandate does not necessarily imply that the forces deployed under that mandate are combatants. They may, for example, be 'peace-keepers'.

This crime under Article 19 also requires a somewhat special *mens rea* in that the perpetrator must commit his crimes 'with a view to preventing or impeding that operation from fulfilling its mandate'. Does this mean that the perpetrator must *know* what the United Nations mandate is? Given that even United Nations personnel may on occasion be in doubt as to their own mandate – witness the confusion in Somalia and the bitter arguments over the precise mandate in Bosnia and Herzegovina of UNPROFOR – and the considerable room for interpretation of a United Nations mandate, this would be an extremely difficult element to prove. It is also strange that the article requires that the crimes be committed 'in a systematic manner or on a large scale'. Surely an isolated act of hostage-taking of UN personnel would be a crime against United Nations personnel?

36 'With a view to reaching agreement, the Commission has considerably reduced the scope of the Code. On first reading in 1991, the Draft Code comprised a list of 12 categories of crimes. Some members have expressed their regrets at the reduced scope of coverage of the Code. The Commission acted in response to the interest of adoption of the Code and of obtaining support by Governments.' A/CN.4/L.527/Add.1, p.1.

5. Article 20 – War Crimes

The nadir of the Draft Code is achieved by Article 20. The virtue of any penal code lies in its brevity and clarity. Yet Article 20 not only fills nearly three pages, it also consists of some *seven* categories of war crimes. The first category consists of what the Commentary calls ‘grave breaches of international humanitarian law as embodied in the 1949 Geneva Conventions’.³⁷ The second category comprises the grave breaches listed in Article 85(3) of Additional Protocol I. The third contains the grave breaches listed in Article 85(4) of Additional Protocol I. In the fourth are the violations covered by sub-article (e) of Article 4(2) of Additional Protocol II, while the other sub-articles of Article 4(2), including (e), are reproduced almost *verbatim* in the Draft Code’s sixth category of war crimes. The fifth category is made up of violations of Hague Law, plus one grave breach, namely that listed in Article 85(3)(d) concerning demilitarized zones. In the sixth are serious violations of international humanitarian law applicable in non-international armed conflict, as embodied in common Article 3 of the 1949 Geneva Conventions and Article 4 of Additional Protocol II. Finally, the seventh category covers Articles 35 and 55 of Additional Protocol I, concerning protection of the natural environment, with three new elements added. Astonishingly, one of these new elements, which does not appear in Additional Protocol I, allows for the defence of ‘military necessity’. To provide that the intentional infliction of ‘widespread, long-term and severe damage to the natural environment’ may be justified by military necessity runs counter not only to the text of Additional Protocol I, but also to the whole spirit of the times, which recognizes that the infliction of such damage on the natural world cannot be tolerated in any circumstances.

In sum, Article 20 is a towering babel of international humanitarian law norms. There is, moreover, substantial overlap among its seven categories of war crimes. For example, torturing to death a person *hors de combat* could violate (a)(i), (b)(iv), (d) and (f)(i) – four separate provisions in the same article.

As stated, the first category of war crimes purports to consist of grave breaches of international humanitarian law as embodied in the 1949 Geneva Conventions,³⁸ although the text itself does not in fact mention grave breaches at all. Also omitted is the concept that the listed acts, to be prohibited by the Geneva Conventions, must be committed against ‘protected persons or property’. The notion of ‘protected persons or property’, so particular to the grave breaches system of the Geneva Conventions, is instead replaced by the phrase ‘in violation of international humanitarian law’. This is question-begging. Are the acts only in violation of international humanitarian law if they are committed against ‘protected persons or property’ or might they extend to other categories of person or property, such as persons placed *hors de combat* within the terms of common Article 3 of the Geneva Conventions? If the latter, then the sixth category of war crimes listed in Article 20 would be superfluous

37 Commentary, at 114.

38 *Ibid.*

because the first category would then also apply to 'conflicts not of an international character'.

In fact, by referring to acts committed 'in armed conflict not of an international character', and thus insisting on a dichotomy which did not appear in the 1991 Draft Code, the 1996 Draft Code takes a very large step back indeed. International humanitarian law is fast moving in the direction of obliterating this distinction altogether. The ICTY has had much to say on this subject. In the *Tadic* interlocutory appeal decision of 2 October 1996, which has come to be regarded as a landmark in this area of law, the Appeals Chamber declared:

97. Since the 1930s ... the aforementioned distinction [between the law applicable to international armed conflict and that applicable to internal armed conflict] has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict ... It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign states are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign state?

The Appeals Chamber thus suggests recourse to the concept of 'serious violations of international humanitarian law', which can be applied to a core of crimes irrespective of the nature of the conflict.

Judge Abi-Saab in a separate opinion to the above decision reached the same result by a different route, by arguing that the 'grave breaches' regime of the Geneva Conventions can apply equally to internal or international armed conflict:

As a matter of treaty interpretation ... it can be said that this normative substance has led to a new interpretation of the [Geneva] Conventions as a result of the 'subsequent practice' and *opinio juris* of the States parties: a teleological interpretation of the Conventions in the light of their object and purpose to the effect of including internal conflicts within the regime of 'grave breaches'. The other possible rendering of the significance of the new normative substance is to consider it as establishing a new customary rule ancillary to the Conventions, whereby the regime of 'grave breaches' is extended to internal conflicts. And under either, Article 2 of the Statute applies – the same as Articles 3, 4 and 5 – in both international and internal conflicts.

A general problem with Article 20 is its haphazard extraction of norms, a process to which the Geneva Conventions and the Protocols do not, for reasons of textual integrity, lend themselves. Cautionary words against this approach are to be found in the International Committee of the Red Cross's Preliminary Remarks to the Third Geneva Convention relative to the Treatment of Prisoners of War, where it is stated that:

Some of the details [of this Convention] may seem superfluous; repetition and lack of harmony between certain provisions may also cause surprise. It should, how-

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ever, be remembered that, whilst throughout concerned with the Convention as an instrument in International Law, the [Diplomatic] Conference had constantly in mind a special use to which it was to be put – regulations to be posted in prisoner of war camps and comprehensible not only to the authorities, but to the ordinary reader. Furthermore, the Conference did not hesitate to sacrifice neatness in the interest of unanimous agreement. These are reasons, which with the difficulty of establishing official legal texts simultaneously in two languages, may account for, and even justify, most of the textual imperfections to be found in the Prisoners of War Conventions.³⁹

Thus, it is submitted, what is needed is an approach much more along the lines of the 1991 Draft Code's Article 22, 'Exceptionally serious war crimes', which *distils* from the Conventions, as they have developed in practice and in the jurisprudence, a *core of acts* which are criminal irrespective of the nature of the conflict in which they occur.

III. Conclusion

Although the 1991 Draft Code, which was the culmination of nearly a half century of work, was considered, by the consensus of most international criminal law experts, insufficient as it stood,⁴⁰ the ILC's newly adopted 1996 Draft Code rejects all past work and appears to have lost its way in attempting to forge new ground. As a result, the ILC may well have caused the totality of its work in this area to be for nought. With the adoption of a Statute of a Permanent Criminal Court looming nearer, and the ILC having only its 1996 Draft Code to show for nearly fifty of work, it may be that the ILC has now ensured that a Code of Crimes against the Peace and Security of Mankind will never come into being.

39 International Committee of the Red Cross, *The Geneva Conventions of August 12 1949* (1970) 14.
40 Cherif Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind* (1993) viii.