or confessions from him or from a third person, punishing him for an act which he or a third person has committed or is suspected of commiting, intimidating or exerting pressure on a third person, or for any other reason grounded in some form of discrimination". This text does not include pain or suffering resulting solely from lawful punishment inherent in or caused by such punishment,

reduction to slavery;
persecution;
deportation or forcible transfer of population;
all other inhumane acts'.

In this new text, the Special Rapporteur preferred to use the title "Crimes against humanity" rather than the title adopted on first reading, which was "Systematic or mass violations of human rights."

D. Exceptionally Serious War Crimes

The crime which was termed as "exceptionally serious war crimes" received unanimous and express reservations from the Member States. These reservations were concerning the establishment of an exact dividing line between the "grave breaches" defined in the Geneva Convention and Additional Protocol I and the "exceptionally grave breaches" stipulated in the draft adopted on first reading. Finding these reservations valid, the Special Rapporteur proposed the following new text which is entitled "War Crimes" (the draft article adopted on first reading in Article 22 had referred to it as "Exceptionally serious war crimes").

"For the purposes of this Code, a war crime means:

1. Grave breaches of the Geneva Conventions of 1949, namely
   (a) Wilful killing;
   (b) Torture or inhuman treatment, including biological experiments;
   (c) Wilfully causing great suffering or serious injury to body or health;
   (d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
   (e) Compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
   (f) Wilfully depriving a prisioner of war or a civilian of the rights of fair and regular trial;
   (g) Unlawful deportation or transfer or unlawful confinement of a civilian;
   (h) Taking civilians as hostages.

2. Violations of the laws or customs of war, which include, but are not limited to:
   (a) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
   (b) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
   (c) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;
   (d) Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
   (e) Plunder of public or private property.

E. International Terrorism

The Special Rapporteur sought to take into account the criticism of most Member States that the notion of international terrorism should not be limited to agents or representatives of a State. He also agreed with the view of the Member States that the terrorism could also be committed by individuals acting on behalf of private groups or associations. Although there were difficulties in reaching consensus on a general definition of terrorism, he noted that it was not altogether impossible. Considering these, he proposed that the draft adopted on first reading should be amended in the following way:

"2. The following shall constitute an act of international terrorism: undertaking, organizing, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create a state of terror (fear or dread) in the minds of public figures, groups of persons or the general public in order to compel the aforesaid State to grant advantages or to act in a specific way."

In paragraph (1), the Special Rapporteur included individuals as perpetrators of international terrorism, whether acting alone or belonging to private groups or associations. It provided: An individual, who as an agent or a representative of a State, or as an individual, commits or orders the commission of any of the acts enumerated in paragraph 2" ...(which is mentioned above).

F. Traffic in Narcotic Drugs

The inclusion of article 25 on traffic in narcotic drugs was justified by the Special Rapporteur on the ground that the powerful drug trafficking

organizations were threatening the stability and security of some States. In this regard, he noted the observation of Swiss Government which stated: "After all, such traffic can be regarded as a common crime, motivated mainly by greed. Such an approach, however, disregards an evolution which has revealed even closer links between international drug trafficking and local or international terrorism....Apart from the harmful effects it has on health and well-being, international drug trafficking has a destablizing effect on some countries and is therefore an impediment to harmonious international relations."

Accordingly, the Special Rapporteur proposed a new text simplifying the one adopted on first reading. It described the acts which constituted "Illicit traffic in narcotic drugs". These were : "undertaking, organizing, facilitating, financing or encouraging any production, manufacture, extraction, preparation, offering for sale, distribution, and delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation, or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law". Paragraph (3) provided. "For the purposes of paragraph 2, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property".

Deliberations in the Commission

The Special Rapporteur's thirteenth report was appreciated by a number of members of the ILC for its political wisdom, realism and pragmatism in taking into account the views of Governments in an effort to ensure the widest possible acceptance of the draft Code. Some members, however, felt that the reduction of crimes as defined in the Draft Code by the Special Rapporteur were too drastic and it relied too heavily on the views expressed by a limited number of Governments. However, some members favoured the minimalist approach adopted by the Special Rapporteur to ensure a meaningful Code strictly confined to the most serious crimes that posed a serious and immediate threat to the peace and security of the whole of mankind, as recognized by the international community; to give priority to the crimes whose prosecution was provided for by well-established rules of international law and, customary rules whose application would not depend on the form of the future instrument; to exclude crimes on which there was insufficient existing practice or which were mainly of historical significance. However, other members favoured a maximalist approach to provide a comprehensive code; to strengthen international law as well as international peace and security; to protect the fundamental interests of

the international community in preserving life, human dignity and property rights; and to achieve a more appropriate balance between political realism and legal idealism.

There were, however, different views as to the possibility and the desirability of using appropriate criteria to determine an exhaustive list of crimes against the peace and security of mankind and whether it should be by way of amendment, as a consequence of the necessary consensus emerging at a later stage.

The discussion relating to 'Aggression' (art. 15) in the ILC brought into focus the nature of this crime and difficulties involved in elaborating a sufficiently precise definition of aggression for purposes of individual criminal responsibility. The definition of aggression adopted on first reading, which was drawn from General Assembly resolution 3314 (XXIX), was viewed as unsatisfactory by a number of members who felt that it was too political and too vague for purposes of determining individual criminal responsibility. However, other members felt that the definition, which represented a minimum of agreement, could be adopted for the purposes of the Code, noting in particular the listing of cases of aggression containing specific factoral elements that could be incorporated in definition of the crime. In this regard, attention was also drawn to a 1975 protocol amending the Treaty of Rio adopted by the Organization of American States which had been influenced by resolution 3314 (XXIX) and contained an article listing the constituent elements of aggression.

Within these broad parameters members sought to consider the definition of "aggression". There was a brief debate on the importance of distinguishing between acts of aggression and wars of aggression. Some members felt that the notion of a war of aggression indicated the level of magnitude required for the conduct to result in individual criminal responsibility, noting the use of the term in the Charter of the Nuremburg Tribunal and the Nuremburg Principles. The members also considered the role of 'Security Council' in determining the definition of the crime of aggression and the determination of individual criminal responsibility. Several members emphasized the importance of clearly distinguishing between the functions of the Security Council and those of a judicial body.

Regarding the definition of "intervention" as proposed in article 17 by the Special Rapporteur, some members favoured the deletion of the definition considering the nebulous character of the underlying concept and the lack of rigour required by criminal law. There were, however, various suggestions to incorporate some elements of the deleted text in other articles, such as those relating to aggression and terrorism.

As regards the provision relating to "Colonial domination and other forms of alien domination" in article 18, some members favoured its deletion on the ground that it was virtually extinct and that there was lack of a precise definition required for criminal law. However, other members felt that colonial domination and foreign occupation were not a thing of the past; that there was still cases of the denial of the right to self-determination by the use of force; that the glaring disparity between the political and economic situation of the States of the North and that of the States of the South precluded any premature optimism as to the final disappearance of all forms of colonial domination.

There was general agreement that the crime of genocide should be included in the Code and should be defined on the basis of the widely accepted Convention on the Prevention and Punishment of the Crime of Genocide. Members, however, suggested certain changes in the terminologies which did not essentially concern the substantive aspects of the definition of "genocide".

There was an endorsement of the proposed deletion of the crime of *apartheid* by some members. However, several members felt that, although *apartheid* as such had ceased to exist, the problem of "institutionalization of racial discrimination still persisted in some parts of the world and that consideration should be given to the Special Rapporteur's proposal to include a general provision that would apply to any system of institutionalized racism by whatever name in any State".

The Special Rapporteur's proposal to replace the present title of article 21 with "Crimes against humanity" was welcomed by some members as a reflection of the original concept of the Code as well as the wording used in the Charter of the Nuremberg Tribunal, the Nuremberg Principles and in some penal codes. However, other members preferred to retain the previous title, "Systematic or mass violations of human rights", to identify the criteria that distinguished the crimes covered by the present articles from ordinary crimes. In this regard, a preference was expressed for the definition of crimes against humanity contained in the Statute of the *ad hoc* tribunal for the former Yugoslavia which closely followed the Charter of the Nuremberg Tribunal and applied only in time of war.

Some members welcomed the Special Rapporteur's decision to revert to the traditional notion of war crimes and to abandon the idea of introducing the new concept of "exceptionally serious war crimes" which had given rise to concerns regarding its meaning and its implications for existing international humanitarian law. Some members also endorsed the Special Rapporteur's approach, which closely followed the Statute of the International

Criminal Tribunal for the former Yugoslavia, while attention was drawn to some drafting innovations in the present article which might require further consideration.

Several members expressed support for the Special Rapporteur's decision to eliminate the crime of recruitment of mercenaries. This, some members pointed out, could be linked to the crime of aggression, in so far as they involved the participation of agents of the State, or as acts of international terrorism. There were also different views as to whether the crime of international terrorism should be included in the Code. Some members expressed serious doubts as to the possibility of elaborating a general definition with the necessary provision for criminal law. There was also some question as to whether every terrorist act would constitute a crime against the peace and security of mankind or otherwise meet the criteria for the inclusion of crimes in the Code.

Some members felt that illicit drug trafficking should be included in the Code as it constituted a serious scourge that affected the sovereignty of small States. Many small States were unable to prosecute perpetrators of such traffic when carried out on a large scale in their own territory; some States were virtually helpless in the face of illicit drug trafficking. However, other members favouring its exclusion expressed the following view:

Illicit drug trafficking did not meet the criteria for a crime against the peace and security of mankind; it was unlikely to endanger international peace and security unless it was combined with other crimes; and that the international cooperation arrangements provided the necessary means and machinery for the suppression of illicit drug trafficking since most cases could be effectively prosecuted in the national courts.

Some members shared the Special Rapporteur's view that damage to the environment should not be included in the Code because it did not meet the criteria for a crime against the peace and security of mankind. However, other members felt that the article should be retained, with the Drafting Committee taking into account the observations of Governments. In this regard, the view was expressed that wilful and serious damage to the environment was a fact of life not just in the present, but for future generations. There was also a view that certain kind of environmental damage would unquestionably threaten international peace and security, such as the deliberate detonation of nuclear enterprises or pollution of entire rivers and should be characterized as crimes against the peace and security of mankind. Reference was also made by the members to certain criminal attempts to illicitly dump chemical or radioactive wastes that was particularly

harmful to the environment in the territory or in the territorial waters of developing countries.

As regards penalties, the view was expressed that it would be sufficient to incorporate one article setting out the minimum and maximum limits for all the crimes in the Code, with the severity of the penalties corresponding to the seriousness of the crimes and the court being left to exercise its discretion within those limits. Some members, however, emphasized that any provision on penalties should be made consistent with the corresponding provision in the draft Statute for an International Criminal Court. Accordingly, it was suggested that it would be sufficient to prescribe an upper limit for all the crimes, leaving it to the courts to determine the penalty in each particular case.

Decisions by the Commission

The Special Rapporteur, at the conclusion of the Commission's discussion on the thirteenth report, summarized the main ideas that had emerged during the discussion. Furthermore, the Commission decided to refer to the Drafting Committee articles 15 (Aggression), 19 (Genocide), 21 (systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) for consideration as a matter of priority on second reading in the light of the proposals contained in the Special Rapporteur's thirteenth report and of the comments and proposals made in the course of the debate in the plenary. The Commission further decided that consultations would continue as regards article 25 (Illicit traffic in narcotic drugs) and 26 (Wilful and severe damage to the environment). As regards the question of "wilful and severe damage to the environment" the Commission decided to establish a Working Group that would meet at the beginning of the forty-eighth session to examine the possibility of covering it in the draft Code. The Commission also reaffirmed its intention to complete the second reading of the draft Code at its forty-eighth session.

The Chairman of the Drafting Committee (Mr. Yankov) while presenting the Drafting Committee's report pointed out that the report was of a tenative character, for the Committee had not had enough time to complete the whole set of draft articles. So, in the light of this he noted the Drafting Committee's recommendation that the Plenary should consider the present report as an "interim document" and should defer adoption of the articles until the next session.

III. THE LAW AND PRACTICE RELATING TO RESERVATIONS TO TREATIES

At its forty-seventh session, the International Law Commission considered the First Report of the Special Rapporteur, Mr. Alain Pellet.[4] The report comprised an Introduction and three Chapters. Chapter I dealt with the Commission's previous work on reservations and the outcome. Chapter II contained a brief inventory of the problem of the topic and the third chapter discussed the possible scope and form of the Commission's future work on this topic.

The introduction to the Report emphasized that it has no doctrinal pretensions, and that it endeavours to enumerate the main problems raised by the topic, without in any way prejudging the Commission's possible response regarding their substance. The Special Rapporteur outlined that in view of the wish of the General Assembly to have a preliminary study to determine the final form to be given to the work on the topic he had deemed it advisable to submit to the Commission precise proposals in this regard. In as much as the topic had already been considered on a number of occasions by the Commission, the report sought to furnish an overview of that work and proposed solutions that would not jeopardize earlier advances and yet allow for the progressive development and codification of the law on reservation to treaties.

Commission's Previous Work on Reservations and its Outcome

Chapter I of the Report dealing with the Commission's previous work on Reservations and the outcome was primarily designed to recapitulate the topic's long history, starting in 1950 with the consideration of the first report of the then Special Rapporteur, Mr. James Brierley, and ending in 1986 with the adoption of the Vienna Convention on Treaties between States and International Organizations or between International Organizations. In the opinion of the Special Rapporteur the five important stages in that process had been the (i) Advisory Opinion of the International Court of Justice in 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*; (ii) first report of the then Special Rapporteur, Sir Humphrey Waldock, in 1962 which had led to the Commission's adoption of a flexible system; (iii) adoption in 1969 of article 2 paragraph 1(d) and articles 19 to 23 of the Vienna Convention on the Law of Treaties; (iv) adoption in 1978 of article 20 of the Vienna Convention on the Succession of States in respect of Treaties; and finally (v) adoption in 1986 of articles of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

4. See A/CN. 4/470 and corr. 1 and 2.

which essentially reproduced the corresponding provisions of the Vienna Convention on the Law of Treaties, 1969.

An exhaustive survey of the preparatory work on the provisions of the three abovementioned Conventions led him to conclude *inter alia* that the work had been arduous and a balance had to be struck between widely differing doctrinal and political opinions. Secondly, solutions had, in the past, been arrived only at the cost of "judicious ambiguities". The third inference drawn is that there had hitherto been a clear development in favour of an increasingly strong assertion of the right of States to formulate reservations to the detriment to the right of other contracting States to oppose such reservations, even if the right of other contracting States to oppose on an individual basis the entry into force of the treaty between themselves and the reserving State was maintained. A fourth conclusion drawn from the survey of the preparatory work on the provisions of the earlier Conventions was that the Convention on the Succession of States in respect of Treaties, 1976 by express referral and the Convention between States and International Organizations or between International Organizations, 1986 by virtually reproducing the provisions of the Convention on the Law of Treaties, 1969 had strengthened the system established by the 1969 Convention and which given its many ambiguities and gaps had little that was systematic about it.

Inventory of the Problem of the Topic

Chapter II of the report entitled 'Brief Inventory of the Problem of the Topic' was divided into two sections the first of which dealt with 'The ambiguities of the provisions relating to reservations in the Vienna Convention on the Law of Treaties' and the second dealt with the 'Gaps in the provisions relating to reservations in the Vienna Convention on the Law of Treaties'. The Special Rapporteur began with the premise that the three relevant Vienna Conventions have allowed major uncertainties to persist with regard to the legal regime applicable to reservations and emphasized that such uncertainties are well demonstrated by the often vacillating and unclear practice of States and international organizations, especially when they are confronted with difficult concrete problems when acting as depositaries. It then went on to present an inventory of the problems owing either to ambiguities in the provisions on reservations or to gaps in the Vienna Convention on the Law of Treaties, 1969.

Permissibility of Reservations

On the issue of permissibility of reservations the Special Rapporteur posed the problem whether the question of permissibility or impermissibility

of a reservation can be decided objectively and in the abstract or does it depend in the end on a subjective determination by the contracting State. By way of a concrete example the Rapporteur posed the question whether a reservation which obviously clashes with the object and purpose of the treaty or even a reservation prohibited by the treaty but accepted by all the other parties to the treaty can be described as an impermissible reservation. Obviously such a reservation is impermissible and the question of opposability arises only at a later stage and only in respect of permissible reservation. There is thus a presumption in favour of the permissibility of reservations and this is consistent with the text of article 19 of the Vienna Conventions. However, it is pointed out that this presumption in favour of permissibility of reservations is not invulnerable and falls if the prohibition is prohibited explicitly or implicitly by the treaty or if it is incompatible with the object and purpose of the treaty. It remained to be seen, the Rapporteur said, how to determine whether these conditions are met on the one hand, and what the effects may be of a reservation which would be impermissible according to those criteria on the other.

Doctrinal Differences/Conflicting view points/Permissibilists vs. Opposabilitists

It may be stated that in this part of the report (Chapter II) the Special Rapporteur had listed a long list of questions which, in his opinion, posed problems and sought suggestions on the order in hierarchical importance in which they might be placed. Many of these problems have their roots in the opposing schools of permissibility and opposability to reservations to treaties. The proponents of the permissibility school consider that a reservation contrary to the object and purpose of the treaty was void, *ipso facto and, ab-inito* regardless of the reactions of the co-contracting States. On the other hand, the adherents of the opposability school held the view that the sole test as to the validity of a reservation consisted of the objections of the other States. The Special Rapporteur had argued that if the "permissibilists" were right the nullity of a reservation incompatible with the object and purpose of the treaty could be invoked before an international tribunal or even before a municipal court even if the State causing the nullity of the reservation had not objected to it (the reservation). If, on the other hand, the "opposabilitists" were right a State could not avail itself of a reservation contrary to the object and purpose of the treaty even if the other States had accepted it.

Identification of Issues

A reference was made above to a number of thorny questions that the Special Rappoteur had raised in this report. The Special Rapporteur