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FOURTH REPORT ON THE DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

by

Mr. Doudou Thiam, Special Rapporteur

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INTRODUCTION

1. This report deals with crimes against humanity, war crimes, related offences, general principles and the draft articles. It will therefore consist of five parts:

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Part IV: general principles

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PART I - CRIMES AGAINST HUMANITY

2. We shall first consider crimes against humanity prior to the 1954 draft, and then crimes against humanity in that draft.

A. Crimes against humanity prior to the 1954 draft

3. The term "crime against humanity" first appears in the London Agreement of 8 August 1945 establishing the International Military Tribunal of Nürnberg. In the course of the preparatory work it had become apparent that certain crimes committed during the Second World War were not, strictly speaking, war crimes. These were crimes whose victims were of the same nationality as the perpetrators, or nationals of an allied State.

4. These crimes were committed for different motives. As early as March 1944, the United States representative on the Legal Committee proposed that crimes committed against stateless persons or any other person by reason of their race or religion should be declared "crimes against humanity". In his view, these were crimes against the very foundations of civilization, wherever or whenever they were committed.

5. Thus, crimes against humanity were defined as offences separate from war crimes in the Nürnberg charter (art. 6, para. (c), in Law No. 10 of the Allied Control Council (art. II, (1) (c)), and lastly in the charter of the International Military Tribunal for the Far East (art. 5, para. c).

6. It should be recalled that crimes against humanity as defined in the aforementioned instruments were linked to the state of belligerency. For some time, this historical circumstance prevented the crimes against humanity from being regarded as an autonomous concept, for the jurisdictions established to punish crimes against humanity considered only offences directly or indirectly related to the war. It must be acknowledged that war naturally provides the best opportunity

and most propicious circumstances for the perpetration of crimes against humanity. War and crimes against humanity go hand in hand. As will be seen, most war crimes are also crimes against humanity. Although the term "crime against humanity" appeared only recently, the phenomenon to which it refers has a long history. It is as old as war. That is why war crimes and crimes against humanity were long confused with one another. The concept of war crimes encompassed that of crimes against humanity and the penalties inflicted for the former constituted punishment for the latter also.

7. In the introduction to his draft international penal code, 1/ Professor Chérif Bassiouni notes that the first treaties between the Egyptians and the Sumerians for the regulation of war were concluded before 1000 B.C.; that the ancient Greeks and Romans enacted laws on the right of asylum and the treatment of the wounded and prisoners, and that war was also regulated in the Muslim era. The problem was also dealt with at the Lateran Councils and the Councils of Lyons in the twelfth and thirteenth centuries. The doctrinal bases for the regulation of armed conflicts were laid down in the Summa Thelogica of Saint Thomas Aquinas and De jure belli ac pacis, by Grotius.

8. In Asia, the civilizations of the Chinese (Sun Tzu, The Art of War, fourth century B.C.) and the Hindus (Book of Manu, about the same period) likewise regulated war and adopted measures to protect the wounded and old people.

9. Humanitarian law has developed considerably in modern times (Paris Declaration (1856), Geneva Red Cross Convention (1864), St. Petersburg Declaration (1868), Brussles Declaration (1874), the Hague Conventions (1899 and 1907), Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925), Geneva Conventions of 12 August 1949 and the Additional Protocols of 10 June 1977).

10. It is true that these instruments were primarily concerned with war crimes. However, as already noted and as will be explained in greater detail below, war crimes are often indissolubly linked to crimes against humanity, and the distinction between the two is not always clear. In drawing up the Nürnberg principles in 1950, the International Law Commission touched on this aspect of the question in principle VI, paragraph (c). The autonomy of crimes against humanity was merely relative, in so far as the repression of such crimes depended on the existence of a state of war.

11. However, this relative autonomy has now become absolute. Today, crimes against humanity can be committed not only within the context of an armed conflict but also independently of any such conflict. It is, of course, necessary to define the content of this concept. This is an area which lends itself to romanticism; a lyrical style has sometimes been used even in judicial decisions, which are necessarily couched in terms that are strict and cold.

1/ Revue internationale de droit penal, Edition Eres, Toulouse (France) first and second quarters 1981.

1. Meaning of the word "humanity"

12. The first question to consider is the meaning of the word "humanity". As Mr. Henri Meyrowitz has observed 2/ "the ambiguity of the term 'humanity' invites us to be cautious when seeking to introduce this concept into the definition of incrimination". He perceives this word as having three meanings: that of culture (humanism, humanist): that of philanthropy and that of human dignity. A crime against humanity could then be conceived in the threefold sense of cruelty directed against human existence, the degradation of human dignity and the destruction of human culture. Viewed in the light of these three meanings, a crime against humanity becomes quite simply "a crime against the entire human race". In English it has been called a "crime against human kind".

13. Some writers prefer the term "crime against the human person" to the term "crime against humanity". But the former would certainly raise the difficult problem, which will be faced later in this report, of whether a crime against humanity must necessarily be of a character or not, that is, whether any serious attack on an individual constitutes a crime against humanity. If the individual is viewed as the "custodian" and guardian of human dignity, the "custodian of the basic ethical values" of human society, a crime against humanity can be perpetrated in the form of an attack on a single individual, provided that it has a specific character which shocks the human conscience. There is, as it were, a natural link between the human race and the individual: one is the expression of the other.

14. The Constance Tribunal, ruling in application of "Law No. 10 of the Allied Control Council, declared that the legal good protected by that Law is the individual with his moral value as a human being, possessing all the rights that all civilized peoples clearly recognize he possesses". 3/ This was a judgement rendered by German courts trying crimes against German nationals committed by other German nationals. However, the same idea is found in a decision of the British Supreme Court ruling by virtue of the same law on acts committed by war criminals, in which it stated that, "Law No. 10 was based on the idea that within the sphere of civilized nations there are certain standards of human conduct which are so essential for the conduct of mankind and the existence of any individual that no State belonging to that sphere has the right to abandon them". 4/

15. To sum up, in the term "crime against humanity", the last word means the human race as a whole and in its various individual and collective manifestations.

2/ La répression par les tribunaux allemands des cuimes contre l'humanité et de l'appartenance à une organisation criminelle, thesis, Paris, Librairie générale de droit et de jurisprudence, 1960, pp. 344 ff.

3/ Constance Tribunal in the Tiblessen-Suddeutsche Juristen-Reitung Judgement, 1947, col. 337, quoted by Meyrowitz, op. cit., p. 346.

4/ Meyrowitz, op. cit., p. 347.

2. Meaning of the word "crime" in the expression "crime contre la paix et la securité de l'humanité" (offence against peace and security of mankind)

16. In internal law the word "crime" refers to the most serious offences, both in the three-tier division ("contraventions" (petty offences), "délits" (correctional offences) and "crimes" (criminal offences)) and in the two-tier division (correctional offences and criminal offences).

17. We may then pose the question whether the same holds true in international law. Draft article 19 on the international responsibility of States deals with "crimes et délits internationaux" ("international crimes and delicts") and paragraph 4 states: "Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict".

18. It may be questioned, however, whether the meaning of the word "crime" as used in article 19 coincides exactly with its meaning in the term "crime contre la paix et la securité de l'humanité". That coincidence is not obvious; in any event, it was not always obvious. Originally, the word "crime" in the term "crime contre la paix et la securité de l'humanité" was a generic expression synonymous with "offence". It covered all categories of criminal acts. Of course, in most cases the acts covered were "crimes" (criminal offences) in the technical sense of the term. But sometimes the term "crime" also covered correctional offences or even petty offences. The charters of the international military tribunals (Nürnberg and Tokyo), as well as Law No. 10, used the word "crime" (crime) in the general sense of offence, whatever the gravity of the offence concerned. In that connection attention has been drawn to a decision of the Supreme Court of the British Zone 5/ rendered in connection with an appeal from a judgement which, by reason of the penalty inflicted, which was a light one, had wrongly described the act as a "délit contre l'humanité" ("offence against humanity"). 5/ According to the decision rendered by the Supreme Court, the word "offence" did not exist in Law No. 10, even if the penalty inflicted corresponded to that kind of transgression. The word "crime" (crime) in the terms "crime against humanity" and "war crime" is a general term covering acts of different degrees of gravity, although, as noted above, in most cases it referred to very serious acts. The word "crime" was synonymous with "offence" in the broadest sense of that term. It covered petty offences as well as the most serious acts. It is for that reason that article 50 of the 1949 Geneva Convention subsequently drew a distinction between "grave breaches" and other breaches.

19. Today, the Internatonal Law Commission has taken a decision on the matter. It has decided that the word "crime" (offence) should not cover all offences, but only the most serious ones.

5/ Meyrowitz, op cit., p. 246. [The term "offence against humanity" in a translation of the Special Rapporteur's French text and not a quotation from the official text of the Court's decision.]

3. Content of crimes against humanity

20. Defining the content of the word "humanity" and that of the word "crime" is not sufficient to define the content of the term "crime against humanity". This concept is so rich in substance that it is difficult to encapsulate it in a single formula. Several definitions have been suggested, but each has emphasized one or more essential elements of these crimes, not all their elements simultaneously.

21. Some definitions emphasize the character of the crime: its barbarity, brutality or atrocity. Thus, the Austrian Act of 16 June 1945 states: "Any person who, during the period of National Socialist tyranny, and in abuse of his authority, placed others in an intolerable situation, or maltreated others for motives of political animosity, is guilty of the crime of barbarity and brutality". This formula has been criticized. According to some, barbarity and atrocity are not necessary elements. The "humiliating and degrading treatment" and the "outrages upon personal dignity" referred to in the 1949 Geneva Convention likewise constitute crimes against humanity.

22. Other definitions stress the infringement of a right: "infringement of fundamental rights": the rights to life, physical well-being, health, freedom, cleanliness, etc. (resolution of the eighth International Conference for the Unification of Penal Law, Brussels, July 1947).

23. Yet others emphasize the mass nature of crimes against humanity (extermination or enslavement of peoples or groups of individuals). The question has, however, been widely discussed and the condition that such crimes must necessarily be mass crimes has not always been accepted. It is true that article 19 of the draft articles on State responsibility refers to a breach "on a widespread scale" of an international obligation. But this point of view is not unanimously accepted.

24. The concept is so rich in substance that the debate could go on forever. Some writers stress the legal personality of the perpetrator. In their view, crimes against humanity are State crimes. According to Eugène Aronéanu "a crime against humanity, before being a crime, is an act of State sovereignty, an act by which a State attacks, for racial, national, religious or political reasons, the freedom, rights or life of a person or group of persons". 6/ Other writers, however, consider that crimes against humanity can also be committed by individuals, even if they are exercising a power of the State.

25. The only element which seems to be unanimously accepted is the motive. All writers, all judicial decisions and all the resolutions of international congresses agree that what characterizes a crime against humanity is the motive, that is, the intention to harm a person or group of persons because of their race, nationality, religion or political opinions. What is involved is a special intention which forms part of the crime and gives it its specific nature.

6/ Le crime contre l'humanité, Paris, Dalloz, 1961.

26. In effect, articles 6 (c) of the Nürnberg charter, article II (1c) of Law No. 10 of the Allied Control Council, and article 5 (c) of the Charter of the International Military Tribunal for the Far East all refer to the motive for the criminal act, although the wording used sometimes varies. That is the reason why those who drafted these texts, in defining a crime against humanity, preferred not to limit themselves to a synoptic formula but rather to combine a general definition with an illustrative list.

27. Even in this case, however, the autonomy of the concept remained limited and subordinated to the existence of a state of war, as noted above. Such was the state of law prior to 1954.

B. Crimes against humanity in the 1954 draft

28. The 1954 draft first rendered crimes against humanity autonomous by detaching them from the context of war. It then endowed the concept with a bipartite content by drawing a distinction between the crime of genocide and other "inhuman acts". These two offences are covered in article 2, paragraphs 10 and 11, of the 1954 draft. The problem which arises at this stage is to determine why the 1954 draft separated "genocide" from "inhuman acts".

1. Genocide

29. There is no doubt that genocide, as described in article 2, paragraph 10, and the "inhuman acts" described in paragraph 11, of that article constitute crimes against humanity. There are, however, divergent views concerning the specific nature of genocide, depending on the angle from which it is considered: in effect, it can be considered from two angles: its purpose and the number of victims involved.

(a) The purpose of genocide

30. If genocide is considered from the angle of its purpose, there can be no doubt that a distinction must be drawn between this crime and other inhuman acts. The purpose here is, indeed, to "destroy, in whole or in part, a national, ethnic, racial or religious group". It is true that other inhuman acts may likewise be committed for national, racial or religious reasons, but the purpose is not necessarily to destroy a group considered as a separate entity. Genocide has specific features when viewed from this angle.

(b) The number of victims

31. From this angle, the question is to determine whether there is a difference between genocide and other inhuman acts. Some writers consider that there is no difference between genocide and other crimes against humanity. According to Stefan Glaser "it seems certain that the drafters of the Convention on Genocide and of the draft Code intended to acknowledge that genocide had been committed even when the act (murder, etc.) was committed against a single member of the group with

the intention of destroying the latter in whole or in part". 7/ In his view "it is the intention which is decisive".

32. The question then arises whether the other crimes against humanity referred to as "inhuman acts" in the 1954 draft imply the existence of a mass element. This is an important question which arises in the decisions of the military tribunals established by virtue of Law No. 10.

33. There was a certain current of opinion in favour of a mass element. According to the Legal Committee of the United Nations War Crimes Commission: "isolated offences did not fall within the notion of crimes against humanity". 8/ As a rule, systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed or whose subjects had become their victims. 9/

34. Contrary views were, however, expressed, which are to be found in particular in the reports submitted to the eighth International Conference for the Unification of Penal Law.

35. In the Brazilian report to that Conference, Professor Roberto Lyra expressed the following opinion: "Any act or omission which constitutes a serious threat or physical violence towards an individual by reason of his nationality, race, or religious, philosophical or political views, shall be deemed a crime of lèse-humanité." 10/

36. Similarly, a resolution of the Congress of the Movement national judiciare français states: "Any persons who exterminate or persecute an individual by reason of his nationality, race, religion or opinions are guilty of crimes against humanity and punishable as such".

7/ Droit international pénal conventionnel, Brussels, Etablissements Emile Bruylant, 1970, p. 112.

8/ History of the United Nations War Crimes Commission and the development of the laws of war, published for the United Nations War Crimes Commission by H.M. Stationery Office, London, 1948, p. 179.

9/ Ibid.

10/ Memorandum prepared by Mr. Vespasien Pella at the request of the United Nations Secretariat (A/CN.4/39), para. 140. See also Yearbook of the International Law Commission, 1950, vol. II, p. 349.

37. Henri Meyrowitz discusses this question at length in his interesting thesis. He contends that

> "Crimes against humanity must in fact be interpreted as comprising not only acts directed against individual victims but also acts of participation in mass crimes.
>
> "...
>
> "It is no longer necessary that there should be a plurality of victims or a plurality of acts. The concept of a crime against humanity doubtless derived from a historical criminal phenomenon whose main characteristic was its mass nature: a great number of acts, a great number of agents, a great number of victims ... but 'a mass nature' ... is not a constituent element of the offence". 11/

38. Mr. A. Boissarie, formerly Procureur Général at the Paris Court of Appeals, had prepared a draft convention, article 5 of which provides that "Crimes against humanity are crimes committed against a human individual or group, by reason of nationality, religion or opinions". 12/

39. The report prepared by Mr. Pompe, rector of the University of Utrecht, and Mr. Kazemier, former adviser to the Minister of Justice of the Netherlands, stated: "it is a crime against humanity to exterminate or place in an intolerable situation, in breach of the general principles of law recognized by civilized peoples, an individual or a group of individuals, by reason of their nationality, their religion or their opinions". 13/

40. Mr. Sawicki, Advocate General in Warsaw, affirmed in his report to the same Congress: "Any person who commits an offence jeopardizing the life, health, bodily integrity, liberty, honour or property of a person or a group of persons shall if the act was committed for reasons of nationality, religion, race or political beliefs, be guilty of a crime against humanity." 14/

41. Professor Graven, the Swiss representative, stated:

> "Any person who, without right and for reasons of race, nationality, religion, political beliefs or opinions, attacks and endangers the liberty, health, bodily integrity or life of a person or a group of persons, in

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11/ Op. cit. p. 253.

12/ Pella, loc. cit., para. 140, Yearbook of the International Law Commission, 1950, vol. II, p. 350.

13/ Ibid.

14/ Ibid.

particular by deportation, enslavement, ill-treatment or extermination, whether in time of war or in time of peace, commits a crime against the human person (or against humanity), and is punishable therefor." 15/

42. At the same Congress, Professor Bondue, the representative of the Holy See, stated in his report that he considered that "any attack upon ... the rights of any human person, by reason of his opinions, nationality, race, caste, family or profession" constituted a crime against humanity. 16/

43. Legal writers thus disagree over the problem of whether a crime against humanity is necessarily of a mass nature or not. The same disagreement appears in judicial practice.

44. The Supreme Court of the British Zone considered that the mass element was not essential to the legal definition of a crime against humanity; it refers not only to extermination - which implies a mass element - but also murder, torture or rape, which can involve a single isolated act. 17/

45. The American military tribunals, on the other hand, considered that the mass element formed an integral part of a crime against humanity. In trial No. 3 it charged the accused with having participated "knowingly in a system of cruelty and injustice". According to the tribunal, the definition should not cover isolated cases of atrocities or persecution. 18/

46. The United Nations War Crimes Commission, after studying the definitions contained in the Nürnberg and Tokyo charters and Law No. 10, expressed the view that "Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims." 19/

15/ Ibid.

16/ Ibid.

17/ Eutscheiduogen des Obersten Gerichtshof für die Britische Zone in Shafsachen, pp. 13 et 231, Meyrowitz, op. cit., p. 254.

18/ American Military Tribunals, case III, vol. I, p. 985; cited by Meyrowitz, op. cit., pp. 252.

19/ History of the United Nations War Crimes Commission and the development of the laws of war, op. cit., p. 179.

47. In the draft articles on State responsibility, the view that the crime must be of a mass nature appears to prevail since, according to draft article 19, paragraph 3 (c), an international crime may result from "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being".

48. The distinction resulting from the mass nature of the act is, in any case, not conclusive. There are those who still consider that the systematic violation of a single human right is a crime against humanity.

49. The question then arises whether the element of seriousness could serve as a differentiating factor. Mr. Stefan Glaser believes that genocide is "only an aggravated case" of a crime against humanity. The two concepts differ only in degree and not in nature. 20/ According to Mr. Glaser, the distinction is all the more difficult to maintain because, when the motives are considered, the difference between destroying an "ethnic group" and destroying a "political group" is not apparent.

50. Vespasien V. Pella does not share that view. According to him, the two concepts of genocide and crime against humanity do not overlap. "Indeed", he writes, "there is no genocide within the meaning of the Convention of 9 November 1948 if the act was directed against a political group. By contrast, persecution for political reasons may constitute a crime against humanity within the meaning of Article 6 (c) of the charter of the Nürnberg Tribunal". 21/ Carrying his reasoning to extremes, he considers that the difference between the two concepts is such that genocide should be excluded from the Code. He notes that there is a separate Convention on Genocide which makes superfluous its inclusion in a code of offences against the peace and security of mankind. According to him, "the independence and separate existence of the Convention on Genocide should be maintained".

51. That extreme argument seems unacceptable; moreover, it was not accepted by the Commission in 1954. If all the wrongful acts which are the subject of a convention had to be excluded from the Code, the latter would be nothing more than an empty shell. Furthermore, most of the conventions do not cover the criminal aspect of wrongful acts, which is precisely the subject of the present draft Code.

(c) Belligerency

52. It was also considered that belligerency might constitute an element that would serve to differentiate between the two concepts. The Nürnberg charter, as we

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20/ Op. cit., p. 109.

21/ Memorandum prepared by Mr. Vespasien Pella at the request of the United Nations Secretariat (A/CN.4/39) paras. 141-142. See also Yearbook of the International Law Commission, 1950, vol. II, p. 351.

have seen, linked crimes against humanity with the state of belligerency. The Military Tribunals discussed the problem at great length. The Law Reports reflect the debates in these terms: "while the two concepts may overlap, genocide is different from crimes against humanity in that, to prove it, no connection with war need be shown". 22/

53. In 1954, the International Law Commission excluded belligerency as a factor for distinguishing between crimes against humanity and genocide. However, it retained the distinction between the two concepts, each of those offences being the subject of a separate paragraph (paras. 10 and 11 of art. 2 of the 1954 draft).

54. The Special Rapporteur considers that, for reasons which are based on the specific nature of the crime of genocide, the latter should be assigned a separate place among crimes against humanity.

55. As for the formulation of the draft article, it must first be noted that the word "genocide" does not occur in the 1954 draft. However, article 2, paragraph 10, deals expressly with that phenomenon, and all of the acts listed in that paragraph are acts of genocide. Moreover, the word "genocide" is used and defined in article II of the Convention of 9 November 1948. Except for that difference, the 1954 text reproduces the 1948 text word for word.

56. With regard to the elements contained in the two texts, it may be queried whether the words "national, ethnic, racial" do not sometimes overlap, and whether pleonasms do not, perhaps, occur, particularly in the use of the words "ethnic" and "racial". It is clear that although those concepts may overlap they are not identical.

57. A national group often comprises several different ethnic groups. States which are perfectly homogeneous from an ethnic point of view are rare. In Africa, in particular, territories were divided without taking account of ethnic groups, and that has often created problems for young States shaken by centrifugal movements which are often aimed at ethnic regrouping. With rare exceptions (Somalia, for example), almost all of the African States have an ethnically mixed population. On other continents, migrations, trade, the vicissitudes of war and conquests have created such mixtures that the concept of the ethnic group is only relative and may no longer have any meaning at all. The nation therefore does not coincide with the ethnic group but is characterized by a common wish to live together, a common ideal, a common goal and common aspirations.

58. The difference between the terms "ethnic" and "racial" is perhaps harder to grasp. It seems that the ethnic bond is more cultural. It is based on cultural values and is characterized by a way of life, a way of thinking, and the same way of looking at life and things. On a deeper level, the ethnic group is based on a cosmogony. The racial element, on the other hand, refers more typically to common physical traits. It therefore seems normal to retain these two terms, which give

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22/ The Law Reports of Trials of War Criminals, vol. XV, p. 138.

the text on genocide a broader scope covering both physical genocide and cultural genocide.

59. We will now turn to the other category of crimes against humanity, designated in the 1954 text as "inhuman acts".

2. Inhuman acts

60. Article 2, paragraph 11, of the 1954 draft does not give a general definition of inhuman acts but provides a list of such acts. However, while the list in article 10 concerning genocide is limitative, the list in article 11 is illustrative.

61. Indeed, this area includes very diverse acts which are very varied in their manifestations. The nature of crimes against humanity changes with technological progress. The expression "crime against humanity" dates back to the Second World War, precisely because of the cruelty made possible by such progress. Because of that evolving nature, any attempt to list all the crimes against humanity would narrow the scope of the subject and might allow offences which are sometimes difficult to imagine before they are committed to go unpunished.

62. Without anticipating what will be said elsewhere about war crimes (some of which, as will be seen, are confused with crimes against humanity), we can recall the method of the Hague Convention of 18 October 1907. In the preliminary declaration, it is stated that:

> "The high contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgement of military commanders.
>
> "...
>
> "Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

63. Although there is no reference in the draft Code to the principles of the law of nations, the usages established among civilized peoples, the laws of humanity and the dictates of the public conscience, it is certain that those were the principles which governed the 1954 text. Moreover, the Code makes it quite clear that inhuman acts are not limited to those listed in it.

3. Apartheid

64. There is no doubt whatsoever that apartheid is a crime against humanity. In any case, only those who resist the course of history can have any doubts on that score. In his second report, the Special Rapporteur listed all the international

instruments relating to apartheid. Moreover, if the concept of jus cogens has any meaning, this case provides one of its most justified applications.

65. Some without questioning the criminal nature of apartheid, thought that the term was too much linked to a specific system to be the basis of a general rule. But that is not the prevailing argument. Apartheid, like many other crimes, has its specific traits. Involuntary and voluntary homicide and murder are crimes which have specific characteristics but which nevertheless derive from the same basic act: killing. But that same act has a different degree of seriousness according to each case. In the code, apartheid, like genocide, has a certain degree of autonomy, even though both are inhuman acts.

C. Serious damage to the environment

66. According to article 19, paragraph 3 (d), of the draft on the international responsibility of States, "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas" is an international crime.

67. It is not necessary to emphasize the growing importance of environmental problems today. The need to protect the environment would justify the inclusion of a specific provision in the draft Code.

PART II - WAR CRIMES

68. This concept calls for some comments concerning terminology problems, followed by substantive comments, and lastly some remarks concerning methodology problems.

A. Terminology problems

69. Here we are faced at the outset with a terminological difficulty. In traditional international law the term "war" did not refer only to a sociological and political phenomenon, but first and foremost to a legal concept reflecting a state of international relations which creates rights and obligations for those who wage it. War itself was a right linked to sovereignty. The purpose of international conventions was therefore not to prohibit war but merely to regulate it. The idea of an international convention prohibiting war, except in cases of self-defence, is relatively recent, dating from the 1928 Kellogg-Briand Pact. It gained ground especially after the Second World War, with the San Francisco Charter.

70. However, while war is today a wrongful act, it is an enduring phenomenon. Unfortunately, the same is true for many other crimes. It is not enough to declare an act illegal or prohibit it for mankind to be rid of it. The injunction against voluntary homicide and murder is age-old. Nevertheless, regrettably, voluntary homicide and murder occur every day. If prohibiting an act were enough to banish it from human behaviour, there would be no police, no legal system and no penal systems.

71. Thus, the prohibition of war did not make it disappear. It can be said, however, that prohibiting war placed it in a new perspective which entails legal implications. The first is, naturally, that the "declaration of war" becomes a wrongful act. Nowadays, war, even when declared in the manner formerly required, is considered as aggression.

72. Yet even though war has become a wrongful act and can no longer legitimate any right, the basic phenomenon, that is, armed conflict, still exists and one would have to be very naïve indeed not to continue to be concerned by it. The 1954 draft Code prohibited the "violation of the laws or customs of war". In order to find a formula in conformity with the law, it was suggested that the term "war" should be deleted from that expression. It would be absurd to consider an act criminal while laying down rights and duties for its perpetrators. However, to refrain, for that reason, from limiting the excesses and abuses which are committed during armed conflicts would be more than naïve, it would be foolish and wrong.

73. Moreover, the prohibition of war does not rule out situations (self-defence, peace-keeping operations) in which the use of force, although allowed, must he restricted to well-defined limits.

74. Therefore, a law of armed conflict remains essential. The only problem that arises in this regard is one of terminology, that is, whether the term "war" should be abandoned and replaced by the term "armed conflict".

75. There are arguments in favour of this idea, particularly since the appearance of new types of armed conflict which do not always pit State against State but may pit State entities against non-State entities (national liberation movements, partisan movements, etc.). Non-international conflicts were covered as early as 1949 by article 3 of the first Geneva Convention. The 1977 Additional Protocols to the 1949 Geneva Conventions concerning armed conflicts confirmed this idea, namely, that the conflict need not be one between States for the "laws or customs of war" to be applicable. Article 1, paragraph 4, of Protocol I provides that the Protocol covers "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination". As a result of this provision, combatants and prisoners of wars of national liberation have been put in the same category as combatants and prisoners of war "of any other armed conflict", within the meaning of article 2 common to all the Geneva Conventions.

76. It follows from these brief remarks that the concept of war in the traditional sense has been shattered. It no longer includes inter-State relations exclusively but encompasses any armed conflict pitting State entities against non-State entities. In other words, it is no longer war in the formal sense, but in the material sense, that is, it is its content (the use of armed force) which is referred to here. Therefore, the term "war" is used in this report in its material sense of armed conflict and not in its formal and traditional sense of inter-State relations.

B. Substantive problems: war crimes and crimes against humanity

77. These problems concern the distinction between a war crime and a crime against humanity. It is not always easy to draw a distinction between a war crime and a crime against humanity. Whether one considers these two concepts from the point of view of their content or that of their scope, will be seen to overlap; this often makes it difficult to distinguish between them.

78. Although the two concepts are distinct, the same act may, at the same time, constitute a war crime and a crime against humanity. If voluntary homicide and murder are committed during an armed conflict, they may constitute crimes against humanity as well as war crimes. To be deemed as such, it is enough for them to have been committeed for political, racial or religious motives. The same deeds, committed for the same motives outside the context of armed conflict, are simply crimes against humanity.

79. This possible dual characterization has its advantages. Indeed, characterization as a crime against humanity makes it possible to punish acts that could not be characterized as war crimes. Crimes committed in time of war by nationals against other nationals might go entirely unpunished were they not characterized as crimes against humanity.

80. Because of the motive involved, the two offences do not have the same content and therefore do not have the same scope. A war crime is narrower in scope. It can only be committed in time of war, whereas a crime against humanity can be committed in time of peace as well. A war crime can only be committed among enemies, whereas a crime against humanity can be committed against victims who are not enemies and even by a State against its own nationals.

C. Methodology problems

81. The question arises as to what is the best way of indicating what constitutes a war crime: a general definition or an enumeration?

82. Enumeration has always presented difficult problems. It is difficult if not impossible to draw up an exhaustive list of "war crimes". The preliminary Paris Peace Conference, which was responsible for drawing up the list of violations of the laws and customs of war by the German and allied forces during the First World War, prepared a list consisting of 31 crimes.

83. During the Second World War, Sir Cecil Hurst, representative of the United Kingdom and President of the Commission, once again raised the question of what should be considered a "war crime". The Commission was daunted by the enormous scope of the undertaking. It simply revived the list drawn up in 1919 while recognizing the principle that the list was not exhaustive, and that there might be other crimes that did not appear on it, in view of subsequent developments. There were in actual fact new proposals. For example, the taking of hostages was added upon the proposal of the representative of Poland. Likewise, random mass arrests were defined as crimes. It was also acknowledged that it was necessary to bear in

mind the preamble of the 1907 Convention, which stated that the list of crimes appearing in that instrument was not limitative, and that the general principles of law recognized by civilized nations should make it possible to characterize as war crimes all acts which seriously contravened those principles.

84. The charter of the Nürnberg Tribunal mentions "violations of the laws or customs of war", which "shall include, but not be limited to, murder, ill-treatment", etc. Law No. 10 refers to "violations of laws or customs of war, including but not limited to, murder, ill-treatment ...".

85. The International Military Tribunal for the Far East referred, on the other hand, to "conventional war crimes: Namely, violations of the laws or customs of war". But there was no enumeration, not even a non-limitative one.

86. The debate is open once again. In the case of the subject-matter under consideration, it is best to leave well alone and to temper idealism with realism. Sir David Maxwell Fyfe said, "I do not think it practicable to produce a code of elaborate and detailed definitions." Vespasien Pella was more categorical: "It is impossible in the present circumstances to draw up a complete list of violations of the laws and customs of war." J. Spiropoulos, Rapporteur for the 1954 draft Code, was of the same mind:

> "In connection with the draft code, the view has been expressed that one should set up an exhaustive enumeration of all acts which would constitute war crimes. ... In our opinion such an undertaking would meet with the most serious difficulties, since there are deep divergencies of opinion on very important subjects concerning the laws and customs of war." 23/

He thought it necessary to adopt a general definition of war crimes while leaving to the judge the task of deciding whether the case under consideration involved such a crime. "However", he added, "we do not object to adding a list of violations of the rules of war to the general definition, provided, however, that this list does not exhaust the acts to be considered as 'war crimes'".

87. In 1954 the Commission adopted the method of a general definition and nothing more.

88. We are once again at the crossroads. Two draft articles have been proposed in this report, the first, a synthesis based on the 1954 draft, and the second, a combination of the two methods.

23/ Report by J. Spiropoulos, Special Rapporteur. See Yearbook of the International Law Commission, 1980, vol. II, p. 253, doc. A/CN.4/25, paras. 78 and 79.

PART III - RELATED OFFENCES

89. It has been said that the nature of offences against the peace and security of mankind often implies the concursus plurium ad delictum. The phenomenon of participation is the rule in this regard, hence the importance of the concepts of complicity and conspiracy when considering these crimes.

90. Attempts to commit such crimes will also be considered as a related offence.

91. The 1954 draft Code simply describes these acts as offences without analysing or defining them and no comments on them are to be found in the preparatory work now, the transposition of certain concepts of internal law to international law sometimes results in incoherence. Here, however, these concepts become really distorted when they enter the sphere of international law and sometimes their content or meaning changes. It will therefore be interesting to see what becomes of the concepts of complicity and conspiracy when they enter that sphere.

A. Complicity

92. In the context of a criminal act committed through participation, the accomplice plays a role distinct from that of the principal. The two are not accused of the same acts. For example, in the case of murder, the physical act of killing is distinct from providing the means to kill. While the two offences are related (theoretically, one is linked to the other), each retains its own character. As their material content differs, they constitute two concepts having two distinct legal characterizations. However, in some cases, it is difficult to determine the legal content of either. In internal law, the content of complicity varies in scope, depending upon the legislation concerned.

1. Complicity in internal law

(a) Limited content of complicity in internal law

93. Article 60 of the French Penal Code sets forth the various cases of complicity. The latter may take the form of instigation, provision of means, or aiding and abetting.

94. In general, under French law, complicity does not include acts committed after the principal offence. Concealment, for instance, is an offence distinct from complicity.

95. Of course, French penal law also recognizes cases of extended complicity. For example, article 61 of the Penal Code equates certain cases of concealment with complicity: concealment of robbers or perpetrators of crimes against the security of the State or the public peace. According to the Code, the perpetrator of such an act, committed after the principal act, "shall be punished as an accessory". But this kind of complicity owes its autonomy to the law alone. Although the penalty incurred is the same as that incurred by the principal, the offence is autonomous: it is covered by a special provision of the Penal Code and is not a jurisprudential application of the general theory of complicity.

96. The laws of many other countries limit complicity to acts committed prior to or concomitantly with the principal act; acts committed later do not constitute complicity and are defined as autonomous offences. The Penal Code of the Federal Republic of Germany limits complicity to the provision of advice or assistance, that is, to previous or concomitant acts. The 1951 penal code of Yugoslavia (art. 265), that of the German Democratic Republic (art. 134), and that of Hungary (art. 184) make concealment a separate offence. In general, there are countries in which complicity is limited to acts committed prior to or concomitantly with the principal act.

(b) Extended content of complicity in internal law

97. Extended complicity tends to include acts committed after the principal act instead of making them autonomous offences. According to Igor Andrejew, some Soviet writers are in favour of the concept of "contact" with the offence. 24/ According to these writers, any intentional activity related to an offence that is being committed or has already been committed by other persons may constitute a case of complicity; for example, any act interfering with the prevention or discovery of the offence. There are four kinds of contact: concealment of the perpetrator, concealment of property, consent and non-denunciation.

98. Anglo-American law recognizes both the accessory before the fact and the accessory after the fact. The accessory after the fact is guilty of a form of extended complicity, a concept which, as will be seen, was used in the decisions of the International Tribunal of Nürenberg and the allied tribunals. Other legal systems also incorporate the concept of originator (auteur intellectuel) within the idea of complicity. According to these systems, some forms of participation such as instigation, conception of the act, or sometimes even the giving of an order, in which there is no physical participation, are considered as complicity.

99. These brief references to comparative law show how difficult it is to assign a content to the concept of complicity in internal law. Depending upon the legislation concerned, the boundary between the concepts of perpetrator, co-perpetrator, accomplice and receiver or concealer shifts, thereby affecting the content of complicity. Consequently, the content of the concept of complicity may be either extended or limited. Sometimes the accomplice is confused with the co-perpetrator, the originator and even the receiver or concealer. Sometimes the accomplice is simply the instigator or the person who aided and abetted.

2. Complicity in international law

100. It will be noted that here, too, the word accomplice may have a limited or an extended meaning, depending on the circumstances.

24/ Le droit pénal comparé des pays socialistes, Paris, Pedone, 1981, p. 61 ff.

(a) Limited content of complicity in international law

101. This content appears to derive from the Charters of the International Military Tribunals. Article 6 (c) of the Charter of the International Tribunal of Nürnberg singles out "leaders, organizers, instigators and accomplices". Article 5c of the International Military Tribunal for the Far East singles out "leaders, organizers, instigators and accomplices". Article 2 of Law No. 10 of the Allied Control Council singles out as having committed a crime any person who was:

(i) a principal, or

(ii) an accessory to the commission of any such crime or ordered or abetted the same, or

(iii) took a consenting part therein, or

(iv) was connected with plans or enterprises involving its commission, or

(v) was a member of any organization or group connected with the commission of any such crime, or

(vi) with reference to paragraph 1 (a), that is, crimes against the peace, held a high political, civil or military ... position ... or held high position in ... financial, industrial or economic life.

102. One observation comes immediately to mind: the texts appear to draw a distinction between complicity and certain related concepts. Thus the charter of the Nürnberg Tribunal separated accomplices from leaders, organizers, and even instigators. The charter of the International Military Tribunal for the Far East, too, drew a distinction between accomplices and leaders, organizers and instigators. Law No. 10 establishes several categories of perpetrators within which the accessory is separated from the person who "ordered or abetted" the crime, the person who "took a consenting part" therein, and the person who, with respect to certain crimes (especially crimes against peace), held "a high political, civil or military ... position ... or held high position in financial, industrial or economic life".

103. On reading these texts, one wonders what constitutes complicity: what is an accomplice if he is not the instigator or the person who ordered, directed, organized, or took a consenting part in the crime? Perhaps complicity consists solely in aiding or abetting or the provision of means, the only elements not expressly referred to.

104. In fact, those who drafted these texts were prompted more by concern for efficiency than by concern for legal exactitude or rationality. The use of varied terms and expressions that are often synonymous and that overlap can be explained by the desire to let no act go unpunished. It was essential to let no act slip through the net, to neglect no aspect of the complex situation in an era in which crime had taken on the most varied, subtle and insidious forms. It was difficult to know in what capacity an individual had acted. Often those having the most responsibility, those at the top of the hierarchy, those who conceived of and

ordered the crimes that were committed were not the actual perpetrators, and it was difficult to consider them as accomplices and their subordinates as the principals. In the context of the times, group crime predominated and it was difficult to distinguish protagonists from accomplices and even, generally speaking, from all those who participated in a mass action.

105. The fact remains that by characterizing the various kinds of participation in an autonomous way, the texts limited the content of complicity proper.

(b) Extended complicity in international law

(i) Complicity of leaders

106. In certain cases, domestic legislation had not hesitated to extend the concept of complicity to include leaders, thereby broadening its content. It was considered that they had organized or tolerated the act defined as a crime, or even conceived of the act, thereby extending the concept of complicity to cover the originator.

107. Thus, for example, the French Ordinance of 28 August 1944 states: "Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organized or tolerated the criminal acts of their subordinates". A similar provision is to be found in article 3 of the Luxembourg Act of 2 August 1947, under which superiors in rank who have tolerated the criminal activities of their subordinates may be charged, according to the circumstances, as co-authors or as accomplices. Similarly, an Act of 10 July 1947 was enacted in the Netherlands, under which (art. 27 (a), para. 3) "any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraphs 1 and 2". The Greek Constitutional Act 73/1945 relating to the punishment of war criminals states:

> "Where a subordinate is charged as the actual perpetrator of a war crime and his superiors in rank may not likewise be punished as perpetrators under articles 56 and 57 of the Penal Code, the said superiors in rank shall be considered as accomplices if they have organized or tolerated the criminal act".

Article 9 of the Chinese Act of 24 October 1946 governing the Trial of War Criminals states: "Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals".

108. It follows from these provisions that the concept of complicity may encompass acts which have consisted of organizing, directing, ordering or tolerating. This extension of complicity rests upon an assumption of responsibility attaching to the superior in rank. It is assumed that the latter has knowledge of all the activities of his subordinates, and the fact that he has not prevented a criminal act or plan is equivalent to complicity.

109. The same view is to be found in judicial decisions. The United States Supreme Court, in the Yamashita Trial, rejected a request for Habeas Corpus from the Japanese General Yamashita in the following words: "It is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by 'permitting them to commit' the extensive and widespread atrocities specified. The question then is whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the Law of War and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result". The reply given by the Court was affirmative. 25/ It is assumed that complicity attaches to a commanding officer whose subordinates have committed a criminal act. The commanding officer must produce proof that it was impossible for him to prevent the commission of the crime under consideration.

110. This assumption was extended to members of the Government. According to the judgement of the Tokyo Tribunal, 26/ responsibility for prisoners of war rested not only upon officials having direct and immediate control of prisoners but also, in general, upon members of the Government, military or naval officers in command of formations having prisoners in their possession and officials in departments concerned with the well-being of prisoners. "It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill treatment". Dereliction of this duty, whether through voluntary abstention or negligence, makes superiors in rank accomplices in the crimes which may be committed.

111. Furthermore, in the Hostages Trial, it was stated that "a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about". 27/

112. The concept of complicity thus understood is, therefore, broader than that embodied in the charters of the International Tribunals or in Law No. 10 and goes beyond aiding or abetting. This form of complicity is now defined as autonomous offence in Protocol 1, article 86.

(ii) Complicity and concealment

113. Complicity has on occasions been extended to include concealment. This was particularly true of cases of illegal appropriation or disposal of goods which had

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25/ The Law Reports of Trials of War Criminals, vol. II, p. 70.

26/ Ibid., vol. XV, pp. 72 and 73.

27/ Ibid., vol. XV, p. 70.

belonged to Jews who were exterminated. In the Funk Trial, 28/ the accused, in his capacity as Minister of Economic Affairs and President of the Reichsbank, had concluded an agreement under which the SS delivered to the Reichsbank the jewellery, articles made of gold and bank notes removed from the victims. The gold obtained from the frames of spectacles and from teeth was deposited in the vaults of the Reichsbank. According to the judgement: "Funk claimed that he had no knowledge of any of these deposits. The Tribunal is of the opinion that he either had knowledge of what the Reichsbank received or deliberately closed his eyes to what was happening". There was explicit or implicit consent to acts of concealment of goods improperly acquired by the bank, subsequent to the death of their owner.

114. The judgement rendered in the Pohl case is even more explicit. In Case No. 4 the United States Military Tribunal stated: "The fact that Pohl himself did not actually transport the stolen goods to the Reich or did not himself remove the gold from the teeth of dead inmates does not exculpate him. This was a broad criminal programme, requiring the co-operation of many persons, and Pohl's part was to conserve and account for the loot ... Having knowledge of the illegal purposes of the Action and of the crimes which accompanied it, his active participation even in the after-phases of the Action make him particeps criminis in the whole affair". 29/

(iii) Complicity and membership in a group or organization

115. All members do not play the same role within an organization. There is an internal hierarchy of leaders and subordinates, of those who organize and those who execute orders. Consideration of the links between complicity and the position of leader has just shown that it is difficult to separate these two categories into actual perpetrators and accomplices. They could as well be separated into physical perpetrators and originators, into direct perpetrators and indirect perpetrators.

116. Here, however, the act characterized as a crime is of a different nature, namely, voluntary membership in the organization, or voluntary participation in a group. Rather than trying in vain to establish who within the group or organization is the perpetrator and who is the accomplice, article II, paragraph 2 (a) of Law No. 10 regards membership in a group or organization as an autonomous offence. The necessary and sufficient condition is membership in a group or organization. Law No. 10 thus made membership an autonomous offence, from the moment when the entity in question becomes implicated in a criminal affair.

117. The Commission will have to consider whether the Code should conform with Law No. 10 and the Nürnberg charter by making membership a separate offence, or whether, on the contrary, it should defer to the general theory of participation and entrust to the judge the task of determining, in each specific case, the role played by the member of the organization.

28/ Meyrowitz, op. cit., p. 377.

29/ H. Meyrowitz, op. cit., pp. 377 and 378.

B. The limits of extended complicity: complot and conspiracy

118. Here, it is a question of the limits of complicity, complot and conspiracy. The situation described is specified in article 6 (c) of the Nürnberg charter, which relates in particular to "accomplices participating in the formulation or execution of a common plan or conspiracy". According to this provision, persons who have participated in such a plan "are responsible for all acts performed by any persons in execution of such plan". This provision also formed the subject of article V, paragraph 2, of Law No. 10.

119. It will be noted that, in this case, criminal responsibility is particularly broad since it goes beyond the act committed by a person. It involves a collective responsibility which goes even further than the concept of complot as recognized in continental European law. In French law, for example, a complot is regarded as an autonomous offence and punished as such. If a complot has been followed by a commencement of execution, aggravating circumstances come into play which increase the penalty incurred, since individual responsibility is involved. On the other hand, a complot is strictly limited to acts which may affect the authority of the State or the integrity of national territory or which may lead to civil war.

120. In the case of article 6 (c) of the Nürnberg charter, or of article V, paragraph 2, of Law No. 10, the offence referred to rests, as has just been stated, upon a collective responsibility and is not dependent upon a commencement of execution. Moreover, it is not limited, at least in the Nürnberg charter, to a single category of crimes, but covers all crimes specified in that charter: crimes against peace, war crimes and crimes against humanity. It is true, as will be seen, that the Nürnberg Tribunal did not maintain this broad definition and restricted the application of the concept to crimes against peace. Nevertheless, the provisions of the charter went much further.

121. The reservations embodied in the decisions of the Nürnberg Tribunal may be explained by the fact that the provisions in question were based on a concept peculiar to common law and which is known as conspiracy. Conspiracy is an original concept which characterizes as a crime an agreement between individuals with a view to committing a criminal act. It is the agreement itself which is criminal, independently of the criminal act which may have been committed. The agreement to commit a murder is punishable even if the murder has not been committed and even if there has been no commencement of execution. This offence is based on collective responsibility. Contrary to the general principle of criminal law under which the individual is responsible only for his own acts, for acts which may be ascribed to him personally, conspiracy attaches collective criminal responsibility to all those who have participated in the agreement. This responsibility is added to that incurred personally by each individual for the acts which he has actually committed as a result of this agreement. It was this concept of conspiracy which inspired the drafting of the texts mentioned above, and it was on this same concept that the charge was based.

122. The Tribunal did not agree with the interpretation advanced by the prosecution and was of the opinion that the wording of the last paragraph of article 6 did "not add a new and separate crime to those already listed" but was simply "designed to establish the responsibility of persons participating in a common plan". 30/ Even in this case, the Tribunal set aside the charge of conspiracy for war crimes and crimes against humanity and retained it only for crimes against peace. In other words, the Tribunal regarded it solely as a crime of responsible government officials, for a crime against peace can be committed only by such officials.

123. Attorney-General Jackson, however, had requested the broadest possible application of conspiracy, for which he offered an impressive and systematic explanation. Among the principles every day enforced in courts of the United Kingdom and the United States in dealing with conspiracy, the following are the most important:

> First, "No formal meeting or agreement is necessary. It is sufficient, although one performs one part and other persons other parts, if there be concert of action and working together understandingly with a common design to accomplish a common purpose.
>
> "Secondly, one may be liable even though he may not have known who his fellow conspirators were or just what part they were to take or what acts they committed, and though he did not take personal part in them or was absent when the criminal acts occurred.
>
> "Third, there may be liability for acts of fellow conspirators although the particular acts were not intended or anticipated, if they were done in execution of the common plan.
>
> "...
>
> "Fourth, it is not necessary to liability that one be a member of a conspiracy at the same time as other actors, or at the time of the criminal acts. When one becomes a party to a conspiracy, he adopts and ratifies what has gone before and remains responsible until he abandons the conspiracy with notice to his fellow conspirators.
>
> "...
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> "Members of criminal organizations or conspiracies who personally commit crimes, of course, are individually punishable for those crimes exactly as are those who commit the same offenses without organizational backing. The very essence of the crime of conspiracy or membership in a criminal association is

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30/ Trial of the major war criminals before the International Military Tribunal: Official text in the English language, 42 volumes, Nürnberg, 1947-1949 vol. VIII, pp. 365-366. Quoted in Meyrowitz, op. cit., pp. 427-428.

> liability for acts one did not personally commit, but which his acts facilitated or abetted. The crime is to combine with others and to participate in the unlawful common effort, however innocent the personal acts of the participants, considered by themselves." 30/

The Attorney-General explained that the basis and justification of these sweeping priorities was the need to defend society "against the accumulation of power through aggregations of individuals."

124. The system thus described is therefore based upon a twofold responsibility: individual responsibility and collective responsibility, which are not mutually exclusive, but coexist. This concept of conspiracy, unknown in continental law, does not coincide precisely with any concept of continental law. It is not precisely the same thing as either complicity or complot. It is close to complicity, in that the participants "facilitate or encourage", as the Attorney-General says. But it is close to complot to the extent that it involves an agreement to execute a common plan.

125. In accepting the concept of conspiracy only for crimes against peace and rejecting it for war crimes and crimes against humanity, the Nürnberg Tribunal seems to have accepted only the "complot" aspect of the concept. In fact, where crimes against peace as defined in the Nürnberg charter are concerned (the initiation of invasions of other countries and of wars of aggression; the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties and agreements, or participation in a plan or an agreement for the accomplishment of one of these crimes), the agents, as has been said, can only be responsible government officials, linked to each other by their joint action. They are co-perpetrators and not accomplices, and their action may be seen as a plot against the external security of another State.

126. However, the question may arise whether conspiracy is closely related only to "complot", or whether it is not also to some extent similar to complicity. We have just said that the Attorney-General himself used the expression "facilitate or abetted" in respect of the concept of conspiracy, an expression which enters into the definition of complicity. Conspiracy really seems to include the notion of complicity when the plan is executed within an organization involving hierarchical relations between the leaders and the actual perpetrators, because in that case, complicity may operate between the leaders and the subordinates. According to Claude Lombois 31/ conspiracy, as a crime against peace, is a collective responsibility based on the solidarity of responsible government officials. As a war crime or a crime against humanity, conspiracy becomes a general theory of criminal participation which "makes it possible to hold responsible those who planned the whole as well as those who executed the details". Thus conspiracy may include both the principal acts (aggression), and acts of complicity (execution of an order).

31/ Droit pénal international, 2nd ed., Dalloz, 1979, p. 155.

127. The time has now come to raise the question of the limits of complicity, that is, whether complicity, even in a broad sense, should encompass acts committed by a member of an organization or acts committed in the execution of a common plan, or whether membership in a criminal organization or participation in a common plan should be qualified directly on separate offences.

128. We know that there are cases in internal law where these offences are autonomous. In French law, for example, apart from the complot, whose aim is to undermine the authority of the State, there is the association of persons for unlawful purposes, whose aim is attacks on persons and property. These offences are autonomous: they have been created by the law and do not arise from a jurisprudential construction based on the theory of complicity. Generally speaking, it appears that when the offence presents certain specific characteristics (preparation or execution within the framework of an organization or a common plan), this circumstance induces the national legislator to make it an autonomous offence, even if it might have been penalized on the basis of complicity.

129. The charters of the international military tribunals did the same in distinguishing between acts of complicity and acts committed within the framework of an organization.

130. As for the 1954 draft, it confined itself to complicity on the one hand and conspiracy on the other, without defining their content. Moreover, it included no provision relating to the membership in an organization or to participation in a common plan. The Commission will have to discuss this point.

131. If the Commission decides to abide by what was done in 1954, that is, to make complicity an offence without defining it, it would then have to indicate in a commentary what content this concept should have in international law: instigation, aiding, abetting, provision of means, order, explicit or tacit consent, or subsequent acts of participation aimed at concerting the offender or the corpus delicti. These concepts, in the view of the Special Rapporteur, should be part of the content of the concept of complicity. In other words, complicity must be understood in the broad sense. On the other hand, the need to make membership in an organization or participation in a common plan an offence must first be carefully discussed. Even though criminal responsibility is in principle based on individual and identifiable acts attributable to a specific perpetrator, it should not be forgotten that this is an area in which most actions are undertaken or executed jointly. Groups and organizations are the privileged means for perpetrating mass crimes, as the crimes involved here often are, and it is sometimes difficult to isolate the role of each person. These organizations, which provide a haven of criminal anonimity, must be discouraged. If the Commission decides not to make such phenomena autonomous offences, they will then come within the ambit of extended complicity, and this theory might, perhaps, cover the situations concerned. It is useful to note in this connection that the Convention on the Prevention and Punishment of the Crime of Genocide itself specifically refers in article III (b) to "conspiracy to commit genocide", which is typically an application of the theory of conspiracy.

The difficulty of the problems dealt with in this chapter derives from the fact that they involve concepts whose limits are not defined clearly. Complicity and conspiracy are undoubtedly different at the conceptual level, but there is always a certain degree of complicity among the members of a conspiracy.

C. Attempt

132. Attempt still has to be examined. The 1954 draft makes attempt an offence, but here too, it does not indicate the content of the concept. It is therefore necessary to consider whether attempt should be regarded in international criminal law, and particularly in the case of offences against the peace and security of mankind, as having the same content as in internal law.

1. In internal law

133. The content of attempt, in internal law, is not always easy to determine. We know that attempt means any criminal enterprise which has failed only as a result of circumstances independent of the perpetrator's intention, but there is still lively debate about when attempt begins and what its point of departure is.

134. It is customary to divide the criminal process into phases. The iter criminis, "the path of the crime" or the "trajectory of the crime", includes four successive stages: the project phase, which may be oral or written; the preparatory phase, which may involve tangible acts (organization, plans, setting up of the necessary equipment, etc.); the commencement of execution; and lastly, the actual commission of the crime. The problem is to determine at what stage attempt begins, which is somewhat like trying to square the circle. Following their own inclinations, some consider that attempt begins with the intention, whereas others consider that attempt begins with the preparatory acts, while still others link attempt to the commencement of execution.

135. It would certainly be going too far to equate a simple intention, even one that is publicly expressed, with an attempt. It is true that certain legislations have defined simple intentions (threat, association of persons for unlawful purposes, conspiracy, etc. as separate crimes, but those acts were identified and defined as crimes because of their particular seriousness. In general, however, a simple intention, even if expressed out loud, does not constitute an attempt.

136. Consideration of the theory that an attempt exists when there are preparatory acts likewise indicates that a positive reply cannot be taken for granted. The operations which enter into the preparation of an act may have many purposes, and it cannot be determined in advance what the author's purpose was. Someone might tear down a fence to prevent a fire from spreading, but they might also tear it down to take advantage of the fire and enter somebody else's house. Someone might break down a door to save a person in danger but they might also do so to take advantage of that person's difficulties in order to commit theft, and so forth.

137. The question then arises whether it is commencement of execution which constitutes the attempt? That is the solution adopted, for example, in the French Penal Code, which regards any commencement of execution which failed or was halted only because of circumstances independent of the perpetrator's intentions as an attempt. Even so, it is necessary to determine what constitutes commencement of execution. It is not easy to draw a distinction between commencement of execution and preparatory acts. Some turn to objective criteria: the acquisition of the physical means for committing the crime, for example, would constitute a preparatory act, but when one "starts to make use of it", that is the commencement of execution. Others turn to subjective criteria: the intention to use those means.

138. Certain national legislations were not, in the beginning, embarrassed by these subtleties. Soviet law, for example, in its "guiding principles" states specifically that "the stage of execution of the intention of the perpetrator does not in itself influence the penalty, which is determined by the extent of the danger which the offender and the act he has committed represent" (art. 21). A circular on the 1920 draft stated that: "the outward forms of execution of the act, the degree to which intentions were realized, the forms of complicity in violating the law, lose their meaning as limits necessarily defining the extent of the punishment or the penalty itself". 32/ Today the Principles (art. 15) provide for the penalization of attempt and preparatory acts; the court is obliged to take into consideration the nature and degree of social danger of the acts committed, "but also the extent to which the criminal intent is realized and the factors which prevented the offence from being perpetrated". 33/

139. As regards the penalization of attempt, the socialist countries can be divided into three groups. The first group consists of those which abide by the general principle of penalizing attempt and preparatory acts: the USSR, Czechoslovakia, Albania, Poland, People's Democratic Republic of Korea, and so on. Another group penalizes only attempt, in general, but leaves it to the law to set the penalty for specific preparatory acts (Bulgarian Code, art. 17), (Hungarian Code, art. 11, para. 1), etc. Lastly, a third group penalizes attempt and preparatory acts only in the cases stipulated by law. For example, the 1951 Yugoslav Penal Code (art. 16) and the same country's 1976 Code (art. 19) punish only attempt to commit offences punishable by imprisonment of five years or more.

140. This is a solution closely related to the one used in the French Penal Code, which lays down the general rule that attempt is punishable only in the case of criminal offences but that attempt to commit correctional offences may be qualified as offences only in the cases stipulated by law.

141. It is clear, therefore, that the systems vary. As for the content, some legislations draw a distinction between attempt and preparatory acts, with each

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32/ Igor Andrejew, op cit., p. 60.

33/ Ibid.

category being the subject of separate provisions. Other legislations do not draw this distinction and make attempt a crime only in the case of serious offences; others make attempt a crime without drawing a distinction between serious offences and other offences. All, however, recognize attempt as a juridical concept.

2. In international law

142. Where offences against the peace and security of mankind are concerned, the problem is more delicate. The 1954 draft made preparatory acts and attempt two separate offences.

143. If those two offences are maintained, drawing a distinction between preparatory acts and attempt will be even more difficult. In fact, many preparatory acts are ambiguous ones which can just as easily be interpreted as acts preparing a defence as acts preparing an aggression. Their lawfulness depends on the intention and that is not always easy to determine. The border line between attempt and preparation will be a moving one and often elusive.

144. If the Commission does not accept preparatory acts, the difficulty will remain, but it will not, as in the preceding case, be a matter of establishing the border line between two wrongful acts but rather of establishing the borderline between what is lawful and what is wrongful. The scope of attempt may be more or less extended, depending upon the jurisdiction that is required to consider, in each case, whether or not the act involved falls within the ambit of attempt. The charters of the international military tribunals contained no provisions relating to attempt. Is that because in the minds of their drafters attempt was confused with preparatory acts? We cannot say. On the other hand, we may assume that since these charters were designed to deal with a specific set of circumstances, namely the need to punish acts committed by a régime, they did not need to refer to a crime which was unlikely to occur. In fact, abortive actions, that is, criminal enterprises which failed despite the intentions of their perpetrators, were rare during the régimes of that brutal and domineering dictatorship, which for a time encountered no insurmountable obstacle in its path, but attempt does not exist unless the enterprise has been thwarted by an event outside of the control of its perpetrator.

145. Today, attempt has entered international law by way of the Convention on the Prevention and Punishment of the Crime of Genocide, article III (d) of which refers specifically to this offence.

PART IV - GENERAL PRINCIPLES

146. The general principles may be classified according to whether they relate to:

A. The juridical nature of the offence;

B. The nature of the offender;

C. The application of criminal law in time;

D. The application of criminal law in space;

E. The determination or extent of responsibility.

A. Principles relating to the juridical nature of offences against the peace and security of mankind

147. This part needs no lengthy explication. Its content has already been established in the resolution concerning the principles of international law recognized in the charter of the Nürnberg Tribunal and in the judgement of the Tribunal. The offences involved are crimes under international law, defined directly by the latter, independently of national law. Hence, the fact that an act may or may not be punishable under internal law does not concern international law, which has its own criteria, concepts, definitions and characterizations.

B. Principles relating to the international offender

1. The offender as a subject of international law

148. We shall not revert to the disputes, which, throughout the preceding reports, have pitted the partisans and adversaries of the criminal responsibility of the State against each other. The Commission has decided for the time being to confine itself to the criminal responsibility of the individual, and consequently any individual guilty of a crime under international law is subject to punishment.

2. The offender as a human being

149. These rights are those which belong to any human being appearing before a criminal jurisdiction to answer for an offence (the charter of the Nürnberg Tribunal (art. 16), the charter of the International Military Tribunal for the Far East (art. 9), the Universal Declaration of Human Rights (art. 11, para. 1), Additional Protocol II to the Geneva Conventions (art. 6, para. 2), etc. According to this principle, every individual accused of a crime enjoys the jurisdictional guarantees granted to every human being.

C. Principles relating to the application of criminal law in time

150. Two principles are involved here: that of the non-retroactivity of criminal law and that of the applicability of statutory limitations to criminal law. We shall now consider how these two principles of internal law are applied in international law.

1. The non-retroactivity of criminal law

(a) Content of the rule

151. The content of the rule nullum crimen sine lege, nulla poena sine lege may vary according to the sources of law cited.

152. According to a legalistic conception preferred in certain systems of law, the only law is written law. According to this school of thought, a system of law based on custom necessarily ignores the principle nullum crimen sine lege, because custom is not law, just as general principles, natural law and moral or philosophical maxims and prescriptions are not law. The strictness of this concept finds its origin and justification in a break with the often arbitrary practices of the ancien régime.

153. This concept first appeared in France during the Revolution, and spread throughout continental Europe. Even though it disappeared for a time in certain countries (in Germany, for example, under the National Socialist régime, with the application in 1935 of paragraph 2 of the Penal Code, which introduced "the holy instinct of the people" as the source of criminal law), or underwent certain changes when recourse was made to interpretation by analogy, the rule nullum crimen sine lege has remained a fundamental principle of continental criminal law and of the legal systems based on it. In refusing to surrender the ex-Emperor to the Allies, the Netherlands declared that "if in the future the League of Nations were to set up an international jurisdiction competent to try, in the case of a war, acts described as offences in and subject to penalties prescribed by pre-existing legislation, it would be a matter for the Netherlands to associate itself with the new system".

154. That concept was referred to again a quarter of a century later by Mr. André Gros, representative of France to the conference at which the charter of the Nürnberg Tribunal was prepared. Proceeding from the principle that under existing international law a war of aggression was still not a wrongful act, he declared:

> "We do not want criticism in later years of punishing something that was not actually criminal, such as launching a war of aggression. ... It is often said that a war of aggression is an international crime, and as a consequence it is the obligation of the aggressor to repair the damages caused by his actions. But there is no criminal sanction. It implies only an obligation to repair damage. We think it will turn out that nobody can say that launching a war of aggression is an international crime - you are actually inventing the sanction." 34/

34/ Memorandum prepared by Vespasien Pella at the request of the United Nations Secretariat (A/CN.4/39, para. 32). See also Yearbook of the International Law Commission, 1950, vol. II, p. 312.

155. This point of view, which in the context of today's international law seems almost heretical, was not so at the time, at least for the supporters of written law as the source of criminal law. Vespasien Pella thought that "international order can be maintained or secured only on the basis of written law" and that "in international relations, Governments and public opinion will certainly never agree to a system under which a few judges, however eminent and respected, have sovereign discretion and are bound by no written law". 35/ The dissenting opinion of Mr. Henri Bernard, Judge of the Tokyo Tribunal, was similar: he said that "the charter of the Tribunal itself was not based on any law in existence when the offences took place" and that "so many principles of justice were violated during the trial that the Court's judgement certainly would be nullified on legal grounds in most civilized countries". 36/

156. However, this rigid concept is not widely shared. Everything depends on what meaning is ascribed to the word lex in the maxim nullum crimen sine lege. If the word lex is understood to mean not written law but droit in the sense of the English word "law", then the content of the rule will be broader. It will cover not only written law but also custom and general principles of law. It has been said that the rule nullum crimen sine lege is foreign to the Anglo-American system precisely by reference to written law alone, but that is incorrect. The rule nullum crimen sine lege, nulla poena sine lege is based upon the protection of the individual against arbitrary action, but the protection of the individual is one of the most solid common law traditions. The fact that the rule is not explicitly formulated in certain countries in no way means that it is unknown there.

157. It is this flexible content which is best suited to the spirit of international law and the techniques for its elaboration. Nevertheless, precisely because of the debates to which its content gave rise, the application of this rule was disputed at the Nürnberg Trial.

(b) The rule nullum crimen sine lege and the Nürnberg Trial

158. For some, the rule was violated; for others it was respected.

(i) The rule was violated

159. According to one theory, the Nürnberg charter and Law No. 10 were subsequent to the acts described as offences. Those acts, at least in the case of crimes against peace and crimes against humanity, did not constitute criminal offences. According to this theory, the violation is even more flagrant in respect of crimes against humanity, that concept being quite recent since it dates from the charter of the Nürnberg Tribunal. According to Donnedieu-de-Vabres, the French Judge at the Tribunal, incrimination for crimes against humanity constituted a flagrant violation of the spirit and letter of the principle of the legality of offences and penalties. 37/

35/ Ibid., para. 66.

36/ Ibid., para. 62.

37/ Donnedieu-de-Vabres, Le procès de Nuremberg, 1947, p. 243. Meyrowitz, op. cit., pp. 350-351.

(ii) The rule was respected

160. Those who maintain that the rule was respected ascribe a different content to this concept. For them, the rule of non-retroactivity is not limited to formulated law; it also relates to natural law, which existed before the acts described as crimes were committed. Even if the texts are new, the law which inspired them is not new law. From this standpoint, the judgement had a declaratory character. That was the thesis of the Nürnberg Tribunal, but the judgement was also based on considerations of justice. Law, in order to deserve the name, must also meet the requirements of justice. The maxim nullum crimen, nulla poena sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue for in such circumstances the attacker must know that he is doing wrong and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.

161. This concept of justice, going beyond the letter of the law, was the decisive factor. Summum jus, summa injuria, the formula of Cicero, could not find a better application. Many writers have recalled it at suitable moments. According to the American Judge Francis Biddle, "the question then was not whether it was lawful but whether it was just to try Goering and his associates for letting loose, without the slightest justification, the brutally aggressive war which engulfed and almost destroyed Europe. But thus the answer is obvious". 38/ Professor J. Graven also stressed the idea of justice:

> "It is incorrect to think that this principle - the principle of a reaction which is just at a given time or in given circumstances - is necessarily the guarantee of the law and that it may be disregarded without violating the law. The traditional rule does not, and cannot, constitute an absolute, constant obstacle to prosecution and punishment. It must, and should, protect the innocent, not the criminal. The higher principle underlying the law must be sought not in the form but in the substance. It must not be forgotten that the form is only a way of ensuring respect for the law." 39/

Kelsen had the same thought when he declared that "justice required the punishment of these men, in spite of the fact that under positive law they were not

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38/ "Le procès de Nuremberg", Revue internationale de droit pénal, 1948, No. 1, p. 8.

39/ Discussion of the principle nullum crimen sine lege and its application to the Nürnberg Trial, Radio Geneva, 28 January 1946.

punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails". 40/

(c) Non-retroactivity and contemporary law

162. Non-retroactivity in contemporary international law derives from international instruments. The Universal Declaration of Human Rights, article 11, paragraph 2, provides that: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed". The European Convention for the Protection of Human Rights and Fundamental Freedoms uses approximately the same wording in its article 7, but adds a very explicit paragraph 2 with respect to the general principles: "This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations".

163. In conclusion, the rule nullum crimen sine lege, nulla poena sine lege is applicable in international law, but the word "law" must be understood in its broadest sense, which includes not only conventional law but also custom and the general principles of law.

2. Non-applicability of statutory limitations to offences against the peace and security of mankind

164. It must be noted at the outset that the application of statutory limitations in internal law is neither a general rule nor an absolute one.

165. This concept is unknown in the internal law of many countries. It is unknown in Anglo-American law. It did not exist until recently in the laws of countries such as Germany, Austria, Switzerland and Italy. It appeared in the French code during the time of Napoleon, dictated by considerations of convenience or criminal policy. It is justified by the need to refrain from reopening closed wounds or reawakening calmed emotions or passions.

166. Nor is the application of statutory limitations an absolute rule because, even in the countries which do apply them, there are exceptions. In France, for example, such limitations are not applicable to serious military offences or offences against national security.

167. Lastly, many do not regard the application of statutory limitations as a substantive rule but only as a procedural rule. Of course, this opinion is not unanimous. Some feel that the application of statutory limitations is a

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40/ The International Law Quarterly, 1947, p. 165.

substantive rule because it deals with punishment, but the very existence of this controversy shows how relative the scope of the rule is.

168. In international law the application of statutory limitations is not recognized in the writings of Jurists. One would also seek it in vain in the conventions and declarations that appeared before or after the Second World War. The concept is not mentioned in the 1942 St. James Declaration, the 1943 Moscow Declaration or the 1945 London Agreement. The fact that the problem subsequently became a source of concern is due to the circumstances. After Nürnberg, the prosecution and trial of war criminals had to continue, but the rule concerning the application of statutory limitations in certain national legal systems might prevent their extradition.

169. Pending the drafting of an international convention, several countries tried to solve the problem in their own internal law. The Soviet Union, for example, decreed the non-applicability of statutory limitations to war crimes and crimes against humanity committed by the National Socialist régime, whatever time had elapsed since the crimes were committed. Poland, too, introduced a similar provision in the new Polish Penal Code (Code of 19 April 1969). In France, an Act of 26 December 1964 declared that statutory limitations were not applicable to crimes against humanity because of their very nature, and so on.

170. In other States the limitation period was extended or distinctions were made between categories of offences. In Germany, for example, the limitation period was extended from 20 to 30 years for murder, whereas statutory limitations were declared to be non-applicable in the case of genocide.

171. The Council of Europe, for its part, has requested the Committee of Ministers to invite member Governments to take immediate measures to prevent crimes committed for political, racial or religious motives before and during the Second World War, and more generally, crimes against humanity, from going unpunished through the application of statutory limitations or any other means. It should be noted, however, that the French Act and the Council of Europe resolution referred only to crimes against humanity.

172. These examples, cited by way of illustration, do not exhaust the question but indicate the various approaches taken by States when the Economic and Social Council of the United Nations prepared the draft Convention which was adopted on 26 November 1968. This Convention is simply declaratory in character. Because the offences involved are crimes by their very nature, statutory limitations are not applicable to them, regardless of when they were committed.

D. Principles relating to the application of criminal law in space

173. There is hardly any need to recall the principles which determine the rules of competence in criminal cases: the principle of the territoriality of criminal law, the principle of the personality of criminal law, the principle of universal competence, and so forth. Whereas the first gives competence to the judge of the

place where the crime was committed, the second gives competence to the judge of the nationality of the perpetrator or the judge of the nationality of the victim. Universal competence gives competence to the court of the place of arrest, regardless of where the offence was committed. Lastly, there could also be a system giving competence to an international court.

174. After the Second World War, several systems were combined - that of international competence through the establishment of the International Military Tribunal at Nürnberg, reservation being made for the dispute which arose as to whether this Tribunal was international or not: 41/ for some writers, the Nürnberg Tribunal was an inter-allied court rather than an international one. For others, it was a court of occupation, but that is not the problem under consideration here. Parallel to this Tribunal, which had competence to try the major war criminals regardless of where the crimes were committed, there were courts established under Law No. 10. Those courts were not national courts either, but international courts established pursuant to the London Agreement. These courts did not differ in nature from the Nürnberg Tribunal. There was only a distribution of competence, or, as Georges Scelle would have said, a division of functions. Lastly there were national courts established by Governments with competence to judge war crimes at the places where they had been committed. The various systems described above were thus combined.

175. Such crimes were punished not only on the basis of territorial competence, but also, at times, on the basis of universal competence. This system, based on a right to punish, goes back very far into the past. Grotius had already taught (De jure belli ac pacis, book II, chap. XX, para. XL (1)) that "kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever". This principle gives rise to the maxim: aut dedere aut punire. There are numerous examples of such universal competence being applied to war crimes. The British Military Tribunal, for example, judged crimes committed in France against British prisoners of war (Wapertal, 21 May 1946). 42/ Another British Tribunal judged crimes committed in Norway against British prisoners of war, (Brunswick, 2 April 1946). 43/ It might, however, be concluded that this was so because in these cases the victims were British. There is an example of a British Military Tribunal judging crimes committed in the Netherlands one of the victims of which was of Dutch nationality (24-26 November 1945 at Almedo). The American Military

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41/ Paul Reuter, Le Jugement du Tribunal militaire international de Nuremberg, Dalloz, 1946, 77-80.

42/ The Law Reports of Trials of War Criminals, vol. V, pp. 45 ff.

43/ Ibid., vol. XI, pp. 18 ff.

Tribunals proceeded in the same way. At Wiesbaden, an American military commission judged crimes, the victims of which were several hundred Soviet and Polish nationals (8-15 October 1945). 44/

176. It is clear from the foregoing that, in the absence of an international jurisdiction, the system of universal competence must be accepted for offences against the peace and security of mankind. Because of their nature, they clearly affect the human race wherever they are committed and irrespective of the nationality of the perpetrators or the victims.

E. Principles relating to the determination and scope of responsibility

1. General considerations

177. Having established the principle that any wrongful act entails the responsibility of its author, the exceptions to this principle, also known as "justifying facts" must be examined. We shall also examine the concepts of extenuating circumstances and exculpatory pleas, which, however, are not on the same level.

178. Justifying facts concern primary rules, that is to say the basis of responsibility. In the case of the international responsibility of States, there are circumstances precluding wrongfulness, which are considered in chapter V of the draft articles on that topic; similarly, in the case of the criminal responsibility of individuals, the question arises whether the existence of certain facts does not deprive an act of its criminal character. Thus posed, the problem is whether or not an act is lawful. What is in question is not the material existence of the act, but rather its wrongful character.

179. On the other hand, extenuating circumstances and exculpatory pleas are situated on the level of secondary rules, in that they concern not the basis, but the scope of responsibility. Once the criminal character of a given act has been established, the consequences arising therefrom for the perpetrator may vary according to the degree to which he is responsible. We come here to the question of penalty or punishment. In internal law, it is the judge who, on the basis of objective and subjective considerations, determines the penalty to be imposed on the perpetrator of the act, within a given range of penalties and taking into account the circumstances of the offence, the personality of the perpetrator, his background, his family situation, and so forth.

180. Extenuating circumstances differ from exculpatory pleas in that, unlike the latter, they do not preclude the imposition of a penalty but can only mitigate it. However, both exculpatory pleas and extenuating circumstances are situated at the

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44/ On all these points see H. Meyrowitz, op. cit., p. 165.

level of the imposition of penalties. Unlike justifying facts, they do not efface the wrongful character of the act. Justification, on the other hand, does efface its wrongful character. In a sense, it constitutes an exception to the principle of criminal responsibility in that an act which, as a general rule, constitutes an offence, loses its wrongful character as a result of a justifying fact.

181. It is clear that consideration of penal justification falls within the scope of this study, since it relates to the basis of responsibility, but it may be queried whether extenuating circumstances and exculpatory pleas should be considered here. As has just been noted, these concepts are related to the imposition of penalties. However, the Commission has not yet decided clearly whether the present draft should also include an examination of the penal consequences of an offence. If, as seems likely, this draft is to be limited to a list of offences, leaving the prosecution and punishment of those offences to States, then it will be for the latter to apply their own internal laws in the matter of criminal penalties. However, there is no reason why consideration should not be given to the possibility of the draft indicating the offences for which exculpatory pleas could be offered or extenuating circumstances involved, leaving it to the judges in the national courts to accept or reject such pleas.

182. The application of the principle nullum crimen sine lege would lead us to consider the code of offences on being completely autonomous vis-à-vis the draft articles and the international responsibility of States. There is also a second reason: the Code will apply also to individuals, whatever definition of the subjects of law is agreed upon. The responsibility of individuals, however, is necessarily governed by a régime different from that which governs State responsibility. Moreover, certain concepts which exist in criminal law and which are applicable here, are not applicable to the draft on State responsibility. This is so in the case of command of the law or superior order, since States have no superiors and receive orders only from themselves. Moreover, in the case of States, the question of the capacity in which they acted does not arise, whereas, in the case of individuals, it is not immaterial to know whether they acted in their personal or official capacity.

183. Differences also appear when the question is examined from another standpoint. Although the draft on the international responsibility of States contains a definition of an international crime in article 19, it is concerned primarily with the "civil" consequences of such a crime, that is to say, principally, reparation (restitutio in integrum or compensation); it is not concerned with the punitive consequences.

184. It therefore seems necessary in this report to consider, from the angle of individual criminal responsibility, the facts which preclude that responsibility, which constitute exceptions to it.

2. Exceptions to criminal responsibility

185. In certain legal systems, exceptions to the principle of criminal responsibility may have two sources: a legal source and a source in judicial practice. In French law, for example, some legal authors draw a distinction between justifying facts, which are exceptions based on the law, and causes of non-attributability, a jurisprudential construction which goes beyond legal exceptions. Legal exceptions are necessarily limited. Since the rule is that there must be a legal basis for every offence - in application of the principle nullum crimen sine lege - any exception to this rule must likewise have a legal basis. One principle is the corollary of the other.

186. The very rigidity of this system, however, quickly led legal writers and judicial organs to go beyond the narrow confines of formal law to seek solutions better suited to the complex realities of criminal responsibility. There are situations for which the law makes no provisions, in which condemning a person would be to commit an injustice, even if such condemnation were irreproachable in the strictly legal sense. Culpability is often based on the intention to commit an offence. As a result of this evident fact, legal writers and judicial organs have elaborated a whole theory of penal justification by taking into account the concepts of will, intention, good faith, judgement and discernment. On the basis of these concepts, they have expanded the scope of exceptions to criminal responsibility to include cases for which the law makes no provision.

187. Thus, besides legal justifications which eliminate the wrongful character of an act, such as self-defence, a command of law or order of a lawful authority, there is also the state of necessity, which derives from judicial practice. Naturally, this expansion has been effected prudently and with restraint so as not to undermine the principle of responsibility itself. However, the existence of these two sources, which are to be found in certain legal systems, is explained by the fact that written law, which predominates in such systems, is incapable of adapting to and expressing all the contours and nuances of a reality that is ever-changing, particularly in the field of human psychology. Thus French legal writers distinguish between the objective causes and the subjective causes of non-responsibility, the first having their origin in law and the second in judicial practice.

188. German law has elaborated the theory of "antijuridicity". According to this theory, an act may be antijuridical in two ways: by being contrary to written law, or by being contrary to law. In other words, there may be in an act a formal illegality and a material illegality or wrongfulness, the latter having its origin in the breach of certain rules of conduct or of judgement called "norms of civility" or "norms of culture". 45/

189. In reality, the distinction drawn between exceptions that are legal in origin, known as justifying facts, and exceptions originating from judicial practice, known

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45/ Roger Merle and André Vitu, Traité de droit criminel, 9th ed., Editions Cujas, Paris Ve, p. 510.

as causes of non-culpability, is of interest only from the doctrinal angle, in so far as it classifies these concepts according to their source, and in so far as, in the first case, the offence does not exist, while in the second case it exists, but cannot be attributed to its author in the absence of culpability. In both cases, however, the consequences are identical so far as criminal responsibility is concerned. Both preclude such responsibility.

190. Such considerations are not of particular significance in common law, where the legal element is not predominant in the definition of the offence. An offence is constituted by a material element, which is the act, and a moral element, which is the intention. The intervention of written law is not necessary, as we have just seen.

191. This brief overview enables us to define the content of the concept of the justifying fact, for our present purposes. One cannot adopt a strictly legalistic approach in defining this concept. Rather, it must be interpreted in its broad sense as any fact, whatever its provenance, which contributes to the elimination of responsibility, any fact which constitutes an exception to the principle of criminal responsibility. We will therefore consider the following:

(a) Coercion;

(b) Stated necessity and force majeure;

(c) Error;

(d) Superior order;

(e) The official position of the perpetrator of the offence;

(f) Reprisals and self-defence.

(a) Coercion

192. Coercion is the threat of an imminent peril from which it was impossible to escape except by committing the offence. The peril itself must constitute a grave threat, its gravity being determined by precise criteria: immediate threat to life or to physical well-being. Of course, coercion can be either moral or physical. In both cases, it is considered a justifying fact.

193. In the Krupp Trial, the Court ruled that the question of coercion "must be determined from the standpoint of the honest belief of the particular accused in question" and that "the effect of the alleged compulsion is to be determined not by objective but by subjective standards". 46/ Here it is moral coercion which is involved. In the Einsatzgruppen Trial, the Tribunal was even more explicit: "Let

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46/ The Law Reports of Trials of War Criminals, vol. II, p. 148.

it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns ... No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever". 47/

194. In other words, coercion may be pleaded if it constitutes an imminent and grave peril to life or physical well-being. It goes without saying that this peril must be irremediable and that there must be no possibility of escaping it by any other means.

(b) State of necessity and force majeure

195. Unlike coercion, state of necessity takes account of the will of the author. A person faced with a danger chooses to commit a wrongful act in order to escape that danger. The case of the mother who steals a loaf from the baker to prevent her children from starving to death is the classic example of the offence committed through necessity. In French law, the offence committed through necessity is a construction derived from judicial practice. But the latter has attached strict conditions to state of necessity, notably the condition that a necessary offence is justified only in so far as it has safeguarded an interest greater or at least equal to the interest sacrificed. This is somewhat similar to the rule contained in article 33 of the draft on State responsibility, which provides that state of necessity cannot only be invoked against a peremptory norm of international law.

196. State of necessity must be distinguished from certain similar concepts, particularly coercion and force majeure. As we have just seen, while in the case of coercion, the author has no choice, in the case of state of necessity a choice does exist. By making a choice, the author of the act avoids one development rather than another. This is an important element which also distinguishes state of necessity from force majeure. In the case of force majeure, as in the case of coercion, the author is subjected to an unforeseeable and irresistible force. The concept of state of necessity therefore possesses a certain conceptual autonomy, despite the similarities and the elements which it has in common with the other concepts which we have just examined.

197. Despite the differences mentioned above, the exceptions of necessity, coercion or force majeure are subject to the same basic conditions:

(i) There must be a grave and imminent peril;

(ii) The author must not have contributed to the emergence of this peril;

(iii) There should be no disproportion between the interest sacrificed and the interest protected.

198. These last two conditions have been explicitly set out also in judicial decisions. In the I. G. Farben case, the Tribunal ruled that: "The excuse of necessity cannot be admitted when the accused who invokes it has himself been

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47/ Ibid., vol. VIII, p. 91.

responsible for the existence or the execution of an order or decree, or when his participation has exceeded that which was required of him or was the result of his own initiative". 48/ The same is true of defendants who had not only obeyed instructions, but who, on their own initiative, had requested an increase in the abnormal number of workers assigned to them. 49/ Thus, fault on the part of a defendant who raises the plea renders his argument inadmissible.

199. In the Krupp case, the condition of proportionality was formulated in the following terms:

> "... in all fairness it must be said that in any view of the evidence the defendants, in a concentration camp, would not have been in a worse plight than the thousands of helpless victims whom they daily exposed to danger of death, great bodily harm from starvation, and the relentless air raids upon the armament plants; to say nothing of involuntary servitude and the other indignities which they suffered. The disparity in the number of the actual and potential victims is also thought provoking". 50/

In other words, there must be proportionality between the interest being protected and the interest sacrificed, which excludes from the scope of application crimes against humanity and crimes against peace. Such crimes are out of proportion to any other act.

200. The basic conditions applicable to the three concepts of coercion, state of necessity and force majeure being the same, the distinctions that have just been discussed do not exist in all legal systems. In common law, for example, force majeure, state of necessity and coercion are sometimes indistinguishable.

201. The International Law Commission, in the chapter of its draft on the international responsibility of States, devoted separate articles to force majeure and state of necessity; moreover, it has dealt with coercion in chapter V concerning the responsibility of a State for an act of another State.

202. The question might be asked whether a special article should be devoted to force majeure in this report. This concept, at least in certain legal systems, is more closely related to the general theory of civil liability and, if it arises in criminal law, it does so in connection with unintentional offences such as homicide by negligence, resulting, for example, from a traffic accident. The Special Rapporteur has nevertheless introduced this concept because of the different meaning which it may have in other legal systems and in order to cover all possible cases. It is for the International Law Commission to decide.

48/ American Military Tribunals, on case VI, vol. VIII, p. 1,179; quoted in Meyrowitz, op. cit., p. 404.

49/ Ibid., case V, vol. VI, pp. 1,200 ff; quoted in Meyrowitz, op. cit, p. 404.

50/ Ibid., case X, vol. IX, pp. 1,439 ff; quoted in Meyrowitz, op. cit., pp. 404-405.

(c) Error

203. The question may be asked whether error should be included among the exceptions to responsibility. If culpability rests upon intention, i.e. the will to commit the offence, error must then be included, if not among the causes which eliminate the offence, at least among the causes of non-imputability. Error, indeed, removes the culpable intention. It is essential, of course, that the error should not derive from an inexcusable fault on the part of the person committing it. This matter will be taken up again later.

204. There can be two forms of error: error of law and error of fact.

(i) Error of law

205. Error of law is clearly related to the implementation of an order which has been received when the agent is called upon to assess the degree to which the order is in conformity with the law. It may also exist independently of any order when the agent acts upon his own initiative, believing that his action is in conformity with the rules of law. Lastly, the error may exist on two levels: the legality of the act in question in relation to the internal order and the legality of the same act in relation to the international order.

(a) Internal legality

206. The act in question may be in conformity with the internal law of the person performing that act. It may also violate that law. But, in either case, the problem is one of internal legality, which is not the concern of this report.

(b) The lawfulness of the act

207. It nevertheless happens that an act which is in conformity with internal law may, on the other hand, violate international law. The case then involves a conflict between the internal order and the international order, which must be settled in favour of the latter as against the former. This follows from the application of the general principle whereby a crime under international law exists independently of the internal order, a principle which is consistent with article 6 (c) of the Nürnberg charter. An application of this principle is also to be found in article II (5) of Law No. 10, which set aside the benefits of an amnesty granted under the Nazi régime and reinstated the criminal nature of the acts.

208. While an exception based on error of law is not readily admissible in internal law - a citizen may not claim ignorance of his own national legislation - the question is treated differently in international law, particularly with regard to war crimes and crimes against humanity. Sometimes, on account of the evolution of international law and of the techniques of war, certain concepts become obsolete and others emerge. Furthermore, this is an area where rules and customary practices which do not derive from any agreement tend to prevail.

209. It is for this reason that the decisions of the International Tribunals admitted error of law in international law in certain cases. In the High Command Trial it was stated, inter alia, that a "military commander may not be considered to be criminally responsible as a result of a simple error of judgement regarding controversial legal problems". 51/ Error of law was also invoked in the I. G. Farben Trial. The United States Military Tribunal stated that:

> "As custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilized nations as to alter the substantive content of certain of its principles; technical advancement in weapons and tactics used in the actual waging of war may have rendered obsolete or inapplicable certain rules relating to the actual conduct of hostilities and what is considered legitimate warfare". 52/

210. It therefore appears that error of law may, in certain circumstances, be accepted as a defence. But only in certain circumstances. A distinction must be made here between war crimes and crimes against humanity. While the argument based on error of law may be accepted with respect to war crimes, on account of certain doubts concerning the rules in question, it appears to be much more difficult to accept this argument with respect to crimes against humanity. These crimes may not, in principle, be justified on the grounds of error regarding wrongfulness. The judicial precedents set a condition which is almost impossible to fulfil. The error must have been unavoidable. In other words, the agent must have brought into play all the resources of his knowledge, imagination and conscience and despite that effort, he must have found himself unable to detect the wrongful nature of his act. The Supreme Court of the British Zone decided as follows: "it is not necessary that the agent should have characterized his action and its consequences as wrongful; it suffices that he could have made this characterization, a condition which will generally be fulfilled. When an offence against humanity has been committed, no one may exonerate himself from blame by pleading that he did not detect or was blind to it. He has to answer for that blindness". 53/ If the perpetrator was blinded by a deep faith in a political ideology or led astray by the propaganda of a régime, that would not exonerate him from blame. He should have known, by consulting his conscience, that the act of which he is accused was wrongful.

211. The basis of this judicial practice appears, in the final analysis, to be the concept of fault. To be unaware of a rule of law is a fault. In particular, a defendant who invokes internal legality should have been aware that this legality was inconsistent with international law. Thus, a physician who believes in a political ideal and who kills a mental patient in the name of that ideal may perhaps be acting in conformity with the internal law of his country, but he is

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51/ The Law Reports of Trials of War Criminals, vol. I, p. 70.

52/ Ibid., vol. XV, p. 185.

53/ H. Meyrowitz, op cit., p. 296.

violating international law. His blindness is a fault. He has not drawn upon his internal resources or upon "that tension of conscience" which would have enabled him to detect the error regarding the wrongfulness of his act. The German Federal Court, upon an appeal by the Public Prosecutor, quashed the judgement of an assize court with the pronouncement that "if the agent had subjected his conscience to the tension which one is entitled to expect of him, he would have found the right answer to the question of knowing what is lawful and what is wrongful". 54/

212. As a result of these judicial decisions, a crime against humanity may not in practice admit of any justifying fact through an error of law. No error of law can excuse a crime which is motivated by racial hatred or political prejudices.

(ii) Error of fact

213. Error of fact relates to a false representation of a material fact, unlike error of law, which relates to a false representation of a rule of law. In both cases, the error must not involve fault if the person who commits it is to be exonerated from responsibility.

214. Error of fact has been invoked, at times before the International Tribunals. In the Carl Rath and Richard Thiel Trial, 23-29 January 1948 at Hamburg, the Judge Advocate stated that it would be a good defence to the charge of having executed certain Luxembourg nationals if an accused could show that he honestly believed that he has participated in the execution of someone who had been conscripted into the German army and condemned to death.

215. Here, however, as was the case with respect to error of law, this concept cannot breach the barrier of crimes against humanity. This barrier is unbreachable, for no error of fact can justify a crime against humanity. A person who mistakes the religion or race of a victim may not invoke this error as a defence, since the motive for his act was, in any case, of a racial or religious nature.

216. With regard to war crimes, on the other hand, the error must be of an unavoidable nature, i.e. it must assume the characteristics of force majeure, in order to relieve the person who commits it from any responsibility. An error which derives from negligence or imprudence, in other words an error which could have been avoided, does not exonerate the person who commits it from responsibility. In this case, the error may constitute simply a reason for reducing the penalty, but such a situation is not here under consideration.

217. To sum up, the error, whether of law or of fact, must be of an unavoidable nature in order to exonerate the person who commits it from responsibility for a war crime. It cannot in any circumstances justify a crime against humanity or a crime against peace.

54/ H. Meyrowitz, op. cit., p. 298.

(d) Superior order

218. With regard to the question whether superior order constitutes an autonomous justifying fact, it should be noted that in the case of compliance with a wrongful order, three situations may arise. The person who executes the order may have complied with it with full knowledge of its implications. In this case, he has committed a fault which may be considered an act of complicity. Alternatively, he may have acted under coercion or he may have been the victim of an error. The two latter cases fall within the scope of the subject under discussion. Accordingly, we shall proceed with consideration of the relationship of the order to, respectively, coercion and error.

(i) The order and coercion

219. The principle of compliance with superior orders gives rise to a very difficult problem, for which there are three possible solutions: one can admit the theory of passive compliance, with the corollary that the person who executes the order is freed from responsibility in all cases; one admits the responsibility of that person, which implies that he has the right to criticize the order and to refuse to execute it - this is the so-called "intelligent bayonets" theory; or, lastly, one adopts an intermediate solution which makes a distinction according to whether the wrongfulness was obvious or not.

220. Both the theory of passive compliance and the so-called "intelligent bayonets" theory have been rejected in judicial practice and the writings of jurists, which have taken the concept of an obviously illegal order as constituting the borderline between the duty to comply and the duty not to comply. When the wrongfulness of an order is obvious, it is the duty of a subordinate to refuse to execute it. He may not, in principle, avoid criminal responsibility when he executes an order whose wrongful character is beyond question.

221. However, it may be asked whether this rule should not be applied with some flexibility in the case of coercion. Coercion has just been defined as a grave, imminent and irremediable peril which threatens life or physical well being. In such circumstances, it would be too much to demand that compliance be refused in all cases. Despite the strictness of the principle set forth in article 8 of the Nürnberg charter, whereby an order from a superior does not free the perpetrator of a crime from responsibility, it cannot be forgotten that criminal responsibility rests on freedom and that in the absence of freedom there can be no responsibility. The judgement of the Nürnberg Tribunal, commenting on article 8 of the charter, stated that "the criterion for criminal responsibility, as found in one form or another in the criminal law of most countries, bears no relation to the order which has been received. It lies in moral freedom, in the perpetrator's ability to choose with respect to the act of which he is accused". The Tribunal thus stated clearly that the fact to be taken into consideration was not the order itself but the freedom of the perpetrator to execute or not to execute that order.

222. The rule which links the order as a source of non-responsibility to coercion was subsequently cited among "the Nürmberg principles" and in the draft code of 1954, article 4 of which reads as follows: "The fact that a person charged with an

offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order". This provision is less strict than the principle set forth in the Nürnberg charter, where the strictness may be explained by the fact that the charter applied to major war criminals, persons whose level of authority was such that it was incompatible with blind obedience or coercion. The offences of which they were accused were not offences of persons executing orders but offences which were regarded as constituting abuse of their positions of command. Here, on the other hand, it is a question of taking account of different circumstances, whereby the agent may act under the influence of external factors which have affected, guided or weakened his will.

223. These circumstances must certainly be carefully examined in each case. It is a question of specifics. All the objective and subjective elements, including the personality of the perpetrator, the nature of his duties and the context in which the order was given, must of course be assessed. In the trial of Field Marshal Von Leeb, the United States Military Tribunal established the bases upon which the defence of coercion might be accepted:

> "The defendants in this case who received obviously criminal orders were placed in a difficult position, but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defence. To establish the defence of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong." 55/

Coercion was also judged to absolve a person from his duty not to comply with an order which was obviously wrongful by the Supreme Court of the British Zone. The Court stated that article II, paragraph 4 (b), of Law No. 10, despite its formal strictness, left room for the defence of coercion. What had to be established was whether the text ruled out the application of articles 52 and 54 of the German Penal Code concerning moral coercion in the case of an obviously illegal order. The response of the Supreme Court was negative.

224. However, this relaxation of article 8 of the Nürmberg charter and of article II, paragraph 4 (b), of Law No. 10 should not give rise to the belief that the dams have been breached and that any fact may be considered as a peril or a serious threat which may be equated with coercion. The circumstances must be analysed and examined with a fine-tooth comb. It is through consideration of the circumstances that the judge must become convinced that the order was accompanied by coercion.

55/ American Military Tribunals, case XII, vol. XI, p. 509, quoted in Meyrowitz, op. cit., p. 405.

225. Thus, he must be certain that it was coercion alone which led to compliance with the order. If it were established that, despite the reality of the coercion, the agent was propelled by another motive, coercion would not be retained as an admissible defence. Likewise, account must be taken of the nature of the agent's duties and of the degree of risk associated with them. Thus, if the agent was aware, in advance, of the risk to which he would be exposed as a result of the responsibilities which he accepted, he would not be able to invoke the concept of coercion in his defence. An intelligence agent or a secret service agent would not be able to invoke in his defence the risk to which he was exposed by his duties if, under coercion, he were to commit an act which was inconsistent with his allotted tasks. The Supreme Court judged that he had taken on his clandestine political work with full knowledge of the implications. The British Supreme Court stated that his was "one of those situations where the legal order requires of a person, by exception, behaviour which went beyond that of human nature and consisted in overcoming the instinct of self-preservation". As H. Meyrowitz states, "just as sailors, policemen, firemen, and soldiers in the course of war, are obliged to endure the danger which threatens their life or their physical well being, so might the defendant be required to endure the danger which he faced as a result of a freely taken decision". 56/

226. Nevertheless, despite the necessary strictness of the conditions mentioned above, compliance with an obviously wrongful order may, if the order takes the form of an act of coercion, constitute an admissible defence in certain circumstances.

227. Naturally, the unbreachable barrier of crimes against humanity remains, and no exception of any kind can circumvent it. As has been stated, a crime against humanity, on account of its very characteristics, can admit of no justification. No act of coercion can justify genocide or apartheid, for example.

(ii) The order and error

228. We must now consider whether an order can constitute an exception on the grounds of non-responsibility in cases other than that of coercion.

229. When an order is not obviously wrongful, its appraisal may leave room for a margin of error. We shall not revert to the previous discussions dealing with error of law. An agent who receives an order may believe that the order is lawful, since the wrongfulness is not obvious. He does not even have any reason to suspect, a priori, the order which he has received if it emanates from a competent higher authority. Moreover, it must be stated that, in principle, a lawful order is the rule and a wrongful order the exception. A commander generally takes care not to exceed the limits of the law: that is, indeed, the basis of his authority. Furthermore, since discipline is, as they say, the strength of armies, and since promptness of execution is the prerequisite for efficiency, a subordinate cannot be expected to go too far in exercising his right to criticize in this context.

56/ Meyrowitz, op. cit., p. 406.

230. Apart from this fact, legal rules are not always easy to interpret and, as has been stated, this is particularly true in the case of rules of international law. In such cases, the execution through error of a wrongful order presents the problem of the responsibility of the person who complied with it.

231. Certain legislative bodies have already attempted to solve the problem within the context of internal law. Thus, paragraph 509 of The Law of Land Warfare of the United States provides that "the fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful". In considering error, it was noted that the error could not constitute a cause of non-responsibility unless the error was unavoidable, given the circumstances in which it was committed. The same idea is found again in the text which has just been cited.

232. As regards judicial practice, the same idea is set forth in the Field Marshal List Trial: "An officer is bound to execute only the legal orders which he receives. Whoever transmits, gives or executes a criminal order becomes a criminal if he has recognized, or should have recognized, the criminal nature of the order. It is quite certain that a Field Marshal of the German army with more than 40 years of experience as a career officer was or should have been aware of the criminal nature of that order". 57/ In the Field Marshal Von Leeb Trial, referred to above, the Tribunal declared: "Before making a pronouncement concerning the responsibility of the defendants in this trial, it is necessary to determine not only whether the order in question was, in itself, criminal, but also whether its criminal nature was evident". 58/

233. It follows from these various elements that compliance through error with a wrongful order may constitute an admissible exception. But here, as in the case of an order which is executed under coercion, the factor to be considered is not the order but the error. The error must possess the characteristics specified in the paragraph which deals with this concept. But, provided that the error demonstrates these characteristics, it may exonerate the person who executed the order.

234. In conclusion, it may be asked whether compliance with a wrongful order resulting from coercion or error constitutes an autonomous concept within the context of reasons for admitting absence of criminal responsibility. It may also be asked why, in the writings of jurists, a separate place is reserved for it among the justifying facts or reasons for absence of responsibility. An order is not in

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57/ American Military Tribunals, case VII, vol. XI, p. 1,277; quoted in Meyrowitz, op. cit., p. 398.

58/ Ibid., case XII, vol. XI, p. 512; quoted in Meyrowitz, op. cit., pp. 398-399.

itself a justification. It is an attribute of the position of command resulting from the normal exercise of authority, without which there would be neither rigour nor discipline. Its corollary is compliance. Compliance is as normal as the order, and neither should in itself justify an exceptional theory of criminal responsibility. If that has been the case, it is because they have been mistakenly confused with other concepts with which they may coincide but must, never be confused.

235. That being said, the Special Rapporteur has nevertheless proposed a draft article relating to compliance with the orders of a superior, with the aim of opening a debate on the question. It will perhaps be found that compliance through coercion or error formally demonstrates, despite everything, certain distinctive characteristics linked to the existence of the order itself. This would also be an acceptable assumption. Moreover, the concept of superior order already bears the stamp of respectability and has now a measure of acceptance in the manuals, and one should not always seek to upset established practice.

(e) Official position of the perpetrators

236. A distinction must be drawn between political responsibility and criminal responsibility.

237. Political responsibility obeys the constitutional rules of the country concerned. This form of responsibility is outside the scope of this draft. International law cannot intervene in the process whereby peoples choose their form of government, at least in the present circumstances. Similarly, the criminal responsibility of heads of State can be implemented at the internal level without involving international law. This is so, for example, in the case of high treason, where the accused are brought before national courts in application of internal law.

238. On the other hand, there are cases where the question arises whether the position of head of State, precisely because a head of State embodies the sovereignty of his country, would not be an obstacle to the implementation (mise en oeuvre) of international criminal responsibility. In principle, a State organ acting in this capacity is not responsible under international law. This principle, however, admits of one exception today, in the case of offences against the peace and security of mankind. The third report dealt at length with the two capacities in which an individual can act: either as a private individual or as an organ of a State. The emergence of the individual as a subject of international law coincided with the occurrence of offences imputable to individuals as organs of a State. It has been said that offences against the peace and security of mankind are often inseparable from the power to command. If heads of State, members of governments or responsible Government officials were protected by immunity, international criminal law would be rendered inoperative. The official position of the perpetrator of an international crime should not constitute a protective shield.

239. This rule was confirmed by article 7 of the Nürnberg charter. That article was based on two draft articles submitted during the preparatory work by the United States and the Soviet Union. According to the first draft, submitted on 30 June 1945 to the London Conference, "any defence based upon the fact that the accused is or was the head or purported head or other principal official of a State is legally inadmissible and will not be entertained". 59/ According to the second draft, submitted on 2 July 1945, "the official position of defendants, whether as heads of State or responsible officials in various departments, shall not be considered as freeing them from responsibility or mitigating punishment". 60/ The text finally adopted became article 7 of the Nürnberg charter, according to which "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".

59/ Jackson Report, loc. cit., p. 124.

60/ Ibid., p. 180.

240. Article 6 of the charter of the International Military Tribunal for the Far East provides that "neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires".

241. The divergence between the two charters with regard to mitigating circumstances is not of interest in this part of the report, which is devoted exclusively to justifying facts.

(f) Reprisals and self-defence

(i) Reprisals

242. Reprisals are defined as an act by a State in response to a preceding act by another State committed in violation of international law. The aim of reprisals may be to stop the preceding act, prevent it from recurring or simply to avenge and punish.

243. The question arises whether reprisals, thus defined, are lawful, in other words, whether they constitute justifying facts that would absolve their perpetrator from all responsibility. The assumption here, of course, is that these are armed reprisals; unarmed reprisals are not being examined in this report. Armed reprisals may be seen in two different ways. They may be considered as an aggression and constitute a crime against peace, or they may constitute a war crime if they have occurred during an armed conflict.

244. When armed reprisals are directed against another State, in one of the forms defined by the 1974 Definition of Aggression, the question arises whether these acts lose their wrongful character because they constitute a response to a wrongful preceding act. The problem was debated in the International Law Commission during the elaboration of the 1954 draft. The lawfulness of reprisals was defended by the Special Rapporteur, Spiropoulos. He wrote:

> "In spite of the serious fears which have been expressed for the authority of the code to be drafted, in the event of its acknowledging the plea of reprisals, we cannot see how the plea of reprisals could not be admitted." 61/

The Special Rapporteur went on to conclude that "there cannot be any doubt that the plea of reprisals must be admitted, provided the reprisals are legal, i.e., are exercised in conformity with international treaties and customary law". 62/ Under this system of law, reprisals, although lawful, were bound by certain limits and

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61/ Report by J. Spiropoulos, Special Rapporteur. See Yearbook of the International Law Commission, 1950, vol. II, p. 253, doc. A/CN.4/25, para. 141.

62/ Ibid., para. 147.

subject to pre-conditions; moreover, the reprisal measure was not to be manifestly disproportionate to the preceding act, as occurred in the Naulilaa incident.

245. Today, the trend has been reversed, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, of 24 October 1970, provides that "States have a duty to refrain from acts of reprisal involving the use of force".

246. The problem which arises with regard to the present draft is to decide whether there should be a special provision indicating that armed reprisals do not constitute a justifying fact. It seems that the reply should be in the negative, for recourse to armed force under conditions not provided for in the Charter of the United Nations constitutes aggression as already defined in the draft Code and in General Assembly resolution 3314 (XXIX) of 14 December 1974.

247. Another problem is that of reprisals in time of war, which raise questions of humanitarian law. As Jean-Jacques Rousseau said, "war is not a concern between man and man but between State and State, in which individuals are only enemies accidentally, not as men, or as citizens, but as soldiers; not as members of a country, but as its defenders". 63/

248. Seen in this light, reprisals should be examined in relation to humanitarian law, that is, in relation to their consequences for prisoners of war and civilian populations or, in other words, persons who are not or are no longer combatants. It sometimes happened that these categories of persons were not spared during the Second World War. Such reprisals occurred particularly in the form of the execution of hostages. Regrettably, such acts occur even today, in various theatres of operations throughout the world.

249. The problem of protecting these categories of persons had been dealt with only in occasional and fragmentary provisions, such as article 50 of the fourth Hague Convention of 18 October 1907, regarding the laws and customs of land warfare, article 34 of the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War; and article 87 (3) of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War.

250. The first systematic attempt at a solution was very recent, beginning with Additonal Protocol I to the Geneva Conventions. Part IV of this Protocol, in articles 52 (1), 53 (c), 54 (4) and 55 (2), prohibits reprisals against the civilian population, civilian or cultural objects, the natural environment and objects indispensable to the survival of the population. In the view of the representative of the International Committee of the Red Cross to the Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, the application of this law is not based on reciprocity; the representative of the Ukrainian Soviet Socialist Republic added that, if it were,

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63/ The Social Contract, book I, chap. IV.

it would amount to establishing the law of retaliation. The debate concerning the effectiveness of the prohibitions set forth in the Protocol will not be discussed here. Some writers have felt that the law relative to reprisals set forth in Protocol I was "fictional law".

251. The problem which arises, de lege ferenda, is whether reprisals carried out in violation of the above-mentioned texts should be defined as a separate offence. It would seem not. Indeed, such an offence would quite simply be a violation of the "laws and customs of war", or, if one prefers, the law of armed conflicts. There is already a provision in the Code concerning this question.

(ii) Self-defence

252. Self-defence can only be invoked as a justifying fact in the case of aggression. Where there is aggression, the responsibility of the State and the responsibility of the individual have the same content ratione materiae. These two responsibilities, however, are superimposed on each other and do not merge. They do not have the same content ratione personae. However, there is a tendency to confuse them simply because the individuals in question, in the case of aggression, are of necessity responsible government officials. But these two concepts cannot be governed by the same rules because of the diversity of juridical persons, and must therefore be treated separately.

253. It has just been said that self-defence can be invoked as a justifying fact only in the case of aggression, and not in the case of war crimes. On the battlefield, when hostilities have broken out, armed conflict has begun and a state of war exists, one cannot speak of self-defence between the combatants, because the attack unfortunately becomes as legitimate as the defence as long as the "laws and customs of war" are respected.

254. There will be no separate article on self-defence; it will be dealt with in relation to aggression under the general heading of justifying facts.

3. Summary

255. In brief, it can be seen that the theory of justifying facts, in practice, and despite the generality of the wording used in the draft articles, will involve varying applications, having a different scope depending on the offences or categories of offences in question. There are three distinct situations:

(a) Crimes against humanity cannot be justified by the motives which inspire them and from which they are inseparable. No justification can be found in the fact of killing in order to destroy an ethnic group, or killing for racial or religious reasons.

(b) Crimes against peace can have no justification outside of self-defence in case of aggression.

(c) Justifying facts and causes of non-responsibility may apply - in a very limited number of cases - only in relation to war crimes. Even then, it should be specified - but is it really necessary? - that this is true only if these war crimes do not, at the same time, constitute crimes against humanity.

4. Exculpatory pleas and extenuating circumstances

256. To speak of exculpatory pleas and extenuating circumstances in respect of offences against the peace and security of mankind may appear incongruous. How could the perpetrators of the most serious, hateful and monstrous crimes on the scale of offences be allowed to offer exculpatory pleas or invoke extenuating circumstances?

257. The reply could be affirmative in some cases. But these exemptions or mitigation of punishment are then linked to questions of fact and not to questions of law, and are not likely to be found in a code if that code is limited to primary rules. Moreover, as has been said, they are linked to the application of penalties and are often taken into consideration within a scale of such penalties. A code which does not prescribe penalties cannot contain provisions on exculpatory pleas or extenuating circumstances.

258. The Nürnberg charter left to the judge the responsibility for establishing the applicable penalty, which could be the death penalty. As a result, the Nürnberg and Tokyo charters contained provisions concerning extenuating circumstances. Article 8 of the Nürnberg charter admitted extenuating circumstances when the defendant had acted pursuant to order of his Government or of a superior. Article 6 of the Tokyo charter allowed the Tribunal the possibility of considering extenuating circumstances either by reason of an order received or even by reason of the official position of the accused.

259. Since the code, in its present state, does not prescribe penalties, it cannot prescribe measures concerning ways of applying these penalties.

CONCLUSION

260. These seem to be the offences and the principles governing the matter. It will undoubtedly be noted that the texts and judicial decisions analysed are, unfortunately, too closely linked to the circumstances of the Second World War. However, it should be recalled that the term "offence against the peace and security of mankind" is itself a result of these circumstances. Some decisions have of course been rendered by national courts since the Second World War, particularly concerning war crimes. They do not contribute anything particularly new in relation to the judicial practice which has been analysed here and from which we have sought to isolate certain elements which, detached from their context, may be general and abstract enough to be raised to the level of legal concepts and rules.

PART V - DRAFT ARTICLES

261. The draft articles relate to the subject as a whole. The following remarks may be made:

(a) Articles 1, 2 and 3 of the previous draft have been reworded. A number of members of the International Law Commission and of the Sixth Committee did not consider it necessary to include a precise definition of offences against the peace and security of mankind. In addition, the definitions proposed, and particularly the one taken from article 19 of the draft on State responsibility, were very controversial. A new article 1 has therefore been proposed, which avoids the difficulties just mentioned;

(b) Any reference to political organs and any elements that would encroach on the domain of the judge has been removed from the definition of aggression;

(c) The definition of the other offences has been based on existing conventions, sometimes reproducing the texts thereof in full or in part. A more general alternative has also been proposed, however, so as to enable the Commission to choose between or to combine provisions;

(d) General principles have emerged either from the study of existing conventions or from the study of judicial precedents. Some principles will apply more generally to crimes against peace or to crimes against humanity, while others will apply more generally to war crimes. They are, however, formulated according to a somewhat synoptic approach, in order to respect the unity of the subject-matter, while provision is made for exceptions and restrictions in certain individual cases.

262. The draft articles consist of two parts: an introduction and a list of offences.

CHAPTER I

INTRODUCTION

Part I - Definition and characterization

Article 1 - Definition

The crimes under international law defined in this draft code constitute offences against the peace and security of mankind.

Article 2 - Characterization

The characterization of an act as an offence against the peace and security of mankind, under international law, is independent of the internal order. The fact that an action or omission is or is not prosecuted under internal law does not affect this characterization.

Part II - General principles

Article 3 - Responsibility and penalty

Any person who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment.

Article 4 - Universal offence

1. An offence against the peace and security of mankind is a universal offence. Every State has the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory.

2. The provision in paragraph 1 above does not prejudge the question of the existence of an international criminal jurisdiction.

Article 5 - Non-applicability of statutory limitations

No statutory limitation shall apply to offences against the peace and security of mankind, because of their nature.

Article 6 - Jurisdictional guarantees

Any person charged with an offence against the peace and security of mankind is entitled to the guarantees extended to all human beings and particularly to a fair trial on the law and facts.

Article 7 - Non-retroactivity

1. No person shall be convicted of an action or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind.

2. The above provision does not, however, preclude the trial or punishment of a person guilty of an action or omission which, at the time of commission, was criminal according to the general principles of international law.

Article 8 - Exception to the principle of responsibility

1. Apart from self-defence in cases of aggression, no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind. As a consequence:

(a) The official position of the perpetrator, and particularly the fact that he is a Head of State or Government, does not relieve him of criminal responsibility;

(b) Coercion, state of necessity or force majeure do not relieve the perpetrator of responsibility, unless a grave, imminent and irremediable peril exists;

(c) The order of a Government or of a superior does not relieve the perpetrator of responsibility, unless a grave, imminent and irremediable peril exists;

(d) An error of law or of fact does not relieve the perpetrator of responsibility unless, in the circumstances in which it was committed, it was unavoidable for him;

(e) In any case, the exceptions mentioned above do not eliminate the offence, if the fact invoked in his defence by the perpetrator originated in a fault on his part.

2. Similarly, they do not eliminate the offence if the act with which the perpetrator is charged violates a peremptory rule of international law or if the interest sacrificed is higher than the interest protected.

Article 9 - Responsibility of the superior

The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence.

Commentary

Articles 1 to 7 do not call for any particular comment, except to point out, with regard to the principle of non-retroactivity, that paragraph 2 ensures that this rule is not restricted to sources of written law.

With regard to article 8, it will be noted that paragraph (e) ensures that crimes against humanity and crimes against peace are excluded in practice. The scope of the exceptions will be limited, in certain hypotheses, mainly to war crimes.

With reference to article 9, the Commission may also leave the hypothesis in question to be covered by the general theory of complicity.

It should be remembered, however, that these are offences committed within the framework of a hierarchy, which therefore almost always involve the power to command. It may therefore be useful to provide a separate basis and an independent written source to cover the responsibility of the leader.

CHAPTER II

OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 10 - Categories of offences against the peace and security of mankind

Offences against the peace and security of mankind comprise three categories: crimes against peace, crimes against humanity and war crimes or [crimes committed on the occasion of an armed conflict].

Part I - Crimes against peace

Article 11 - Acts constituting crimes against peace

The following constitute crimes against peace:

1. The commission by the authorities of a State of an act of aggression.

(a) Definition of aggression

(i) Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition;

(ii) Explanatory note - In this definition, the term "State":

(a) Is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;

(b) Includes the concept of "group of States" where appropriate.

(b) Acts constituting aggression

Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression, without this enumeration being exhaustive:

(i) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however, temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(ii) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(iii) The blockade of the ports or coasts of a State by the armed forces of another State;

(iv) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(v) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(vi) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(vii) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

(c) Scope of this definition

(i) Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful;

(ii) Nothing in this definition, and in particular paragraph (b), could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Commentary

This definition is taken from resolution 3314 (XXIX) of 14 December 1974, but it does not reproduce the passages relating to the evidence and the consequences of aggression or to interpretation. This is because interpretation and evidence are matters within the competence of the judge. The penal consequences are the subject of the present draft articles.

2. Recourse by the authorities of a State to the threat of aggression against another State.

3. Interference by the authorities of a State in the internal or external affairs of another State, including

(a) Fomenting or tolerating, in the territory of a State, the fomenting of civil strife or any other form of internal disturbance or unrest in another State;

(b) Exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind.

Commentary

Paragraph 2 does not call for any comment. It is taken from the 1954 text. Paragraph 3, concerning intervention, is taken from the 1954 text, with amendments. It is intended to cover not only the fomenting of civil strife but all forms of internal disturbance or unrest. Paragraph 3 (b) expands the scope of intervention beyond political forms, and includes coercive measures of an economic nature.

4. The undertaking, assisting or encouragement by the authorities of a State of terrorist acts in another State, or the toleration by these authorities of activities organized for the purpose of carrying out terrorist acts in another State.

(a) Definition of terrorist acts

The term "terrorist acts" means criminal acts directed against another State or the population of a State and calculated to create a state of terror in the minds of public figures, or a group of persons or the general public.

(b) Terrorist acts

The following constitute terrorist acts:

(i) Any act causing death or grievous bodily harm or loss of freedom to a head of State, persons exercising the prerogatives of the head of State, the hereditary or designated successors to a head of State, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;

(ii) Acts calculated to destroy or damage public property or property devoted to a public purpose;

(iii) Any act calculated to endanger the lives of members of the public through fear of a common danger, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity;

(iv) The manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.

Commentary

This text reproduces, as regards the definition of terrorism, the terms of the 1937 Convention but also covers certain new forms of terrorism, such as the seizure of aircraft and violence against diplomats.

5. A breach of obligations incumbent on a State under a treaty which is designed to ensure international peace and security, particularly by means of:

(i) Prohibition of armaments, disarmament, restrictions or limitations on armaments;

(ii) Restrictions on military preparations or on strategic structures or any other restrictions of the same kind.

6. A breach of obligations incumbent on a State under a treaty prohibiting the deployment or testing of weapons, particularly nuclear weapons, in certain territories or in space.

Commentary

This text supplements the 1954 draft by envisaging certain acts covered by subsequent conventions on the deploymnt or testing of weapons.

7. The forcible establishment or maintenance of colonial domination.

8. The recruitment, organization, equipment and training of mercenaries or the provison to them of means of undermining the independence or security of States or of obstructing national liberation struggles.

A mercenary is any person who:

(i) Is specially recruited locally or abroad in order to fight in an armed conflict;

(ii) Does, in fact, take a direct part in the hostilities;

(iii) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;

(iv) Is neither a national or a party to the conflict nor a resident of territory controlled by a party to the conflict;

(v) Is not a member of the armed forces of a party to the conflict;

(vi) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

Commentary

This definition is taken from article 47 of Additional Protocol I to the Geneva Conventions of 1949.

Part II - Crimes against humanity

Article 12 - Acts constituting crimes against humanity

The following constitute crimes against humanity:

1. Genocide, in other words any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

(i) Killing members of the group;

(ii) Causing serious bodily or mental harm to members of the group;

(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) Imposing measures intended to prevent births within the group;

(v) Forcibly transferring children from one group to another group.

Commentary

This definition is taken from the Convention on the Prevention and Punishment of the Crime of Genocide (art. II).

2. First alternative

Apartheid, in other words the acts defined in article II of the 1976 International Convention on the Suppression and Punishment of the Crime of Apartheid and, in general, the institution of any system of government based on racial, ethnic or religious discrimination.

2. Second alternative

Apartheid, which includes similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman act committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

Commentary

This definition is taken from the International Convention on the Suppression and Punishment of the Crime of Apartheid.

3. Inhuman acts which include, but are not limited to, murder, extermination, enslavement, deportation or persecutions, committed against elements of a population on social, political, racial, religious or cultural grounds.

4. Any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

Part III - War crimes

Article 13 - Definition of war crimes

First alternative

(a) Any serious violation of the laws or customs of war constitutes a war crime.

(b) Within the meaning of the present draft Code, the term "war" means any international or non-international armed conflict as defined in article 2 common to the Geneva Conventions of 12 August 1949 and in article 1, paragraph 4, of Additional Protocol I of 10 June 1977 to those Conventions.

Second alternative

(a) Definition of war crimes

Any serious violation of the conventions, rules and customs applicable to international or non-international armed conflicts constitutes a war crime.

(b) Acts constituting war crimes

Consequently, the following acts constitute war crimes:

(i) Attacks on persons and property, including intentional homicide, torture, inhuman treatment, including biological experiments, the intentional infliction of great suffering or of serious harm to physical integrity or health, the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;

(ii) The unlawful use of weapons, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction (in particular first use of atomic weapons).

Commentary

The first alternative uses the term "war" in its material sense and not in its formal sense. The second alternative uses the term "armed conflict" in preference to the word "war". Paragraphs (i) and (ii) are common to the two alternatives.

Part IV - Related offences

Article 14

The following also constitute offences against the peace and security of mankind:

A. First alternative

Conspiracy [complot] to commit an offence against the peace and security of mankind.

A. Second alternative

Participation in an agreement with a view to the commission of an offence against the peace and security of mankind.

Commentary

These two alternatives for A will enable the Commission to hold a discussion on the content of conspiracy [complot]. Should an agreement to commit an offence against the peace and security of mankind (i.e. "conspiracy") also be treated as an offence?*

B. (a) Complicity in the commission of an offence against the peace and security of mankind.

(b) Complicity means any act of participation prior or subsequent to the offence, intended either to provoke or facilitate it or to obstruct the prosecution of the perpetrators.

Commentary

If the Commission does not wish to define complicity, paragraph (b) could be included in a commentary.

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* Translator's note: Concerning the terminological problem regarding the terms "conspiracy" and "complot" and the possible distinction between them, see paras. 118-131 of this report.

C. Attempts to commit any of the offences defined in the present Code.

Commentary

Since the offences defined in the present Code consist of the most serious offences, attempts to commit them are necessarily punishable and there is no need to distinguish here between instances in which the attempt would be punishable and instances in which it would not.
