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THIRD REPORT

RELATING TO A DRAFT CODE OF OFFENCES AGAINST
THE PEACE AND SECURITY OF MANKIND

by

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Special Rapporteur

CONTENTS

	<u>Page</u>
PART I - GENERAL OBSERVATIONS	7
PART II - OBSERVATIONS AND PROPOSALS RELATING TO THE DRAFT CODE .	11
I. <u>Title of the Draft Code</u>	11
(a) Text adopted by the Commission	11
(b) Comments by Governments	11
(c) Comments by the Special Rapporteur	11
II. <u>Article 1 of the Draft Code</u>	11
(a) Text adopted by the Commission	11
(b) Comments by Governments	12
(c) Comments by the Special Rapporteur	12
(d) Proposals by the Special Rapporteur	12
III. <u>Article 2 (1) of the Draft Code</u>	13
(a) Text adopted by the Commission	13
(b) Comments by Governments	13
(c) Comments by the Special Rapporteur	13
(d) Proposals by the Special Rapporteur	14
IV. <u>Special Question: Definition of Aggression</u>	14
V. <u>Article 2 (2) of the Draft Code</u>	15
(a) Text adopted by the Commission	15
(b) Comments by Governments	16
(c) Comments by the Special Rapporteur	16
VI. <u>Article 2 (3) of the Draft Code</u>	16
(a) Text adopted by the Commission	16
(b) Comments by Governments	16
(c) Comments by the Special Rapporteur	17
(d) Proposals by the Special Rapporteur	18
VII. <u>Article 2 (4) of the Draft Code</u>	18
(a) Text adopted by the Commission	18
(b) Comments by Governments	18
(c) Comments by the Special Rapporteur	18
(d) Proposals by the Special Rapporteur	18
VIII. <u>Article 2 (5) and (6) of the Draft Code</u>	19
(a) Text adopted by the Commission	19
(b) Comments by Governments	19
(c) Comments by the Special Rapporteur	19

CONTENTS (cont'd.)

	<u>Page</u>
IX. <u>Article 2 (7) of the Draft Code</u>	20
(a) Text adopted by the Commission	20
(b) Comments by Governments	20
(c) Comments by the Special Rapporteur	20
(d) Proposals by the Special Rapporteur	20
X. <u>Article 2 (8) of the Draft Code</u>	21
(a) Text adopted by the Commission	21
(b) Comments by Governments	21
(c) Comments by the Special Rapporteur	21
XI. <u>Article 2 (9) and (10) of the Draft Code</u>	21
(a) Text adopted by the Commission	21
(b) Comments by Governments	22
(c) Comments by the Special Rapporteur	22
XII. <u>Article 2 (11) of the Draft Code</u>	22
(a) Text adopted by the Commission	22
(b) Comments by Governments	22
(c) Comments by the Special Rapporteur	23
XIII. <u>Article 2 (12) of the Draft Code</u>	23
(a) Text adopted by the Commission	23
(b) Comments by Governments	23
(c) Comments by the Special Rapporteur	24
XIV. <u>Article 3 of the Draft Code</u>	25
(a) Text adopted by the Commission	25
(b) Comments by Governments	26
(c) Comments by the Special Rapporteur	26
(d) Proposals by the Special Rapporteur	27
XV. <u>Article 4 of the Draft Code</u>	28
(a) Text adopted by the Commission	28
(b) Comments by Governments	28
(c) Comments by the Special Rapporteur	29
(d) Proposals by the Special Rapporteur	30
XVI. <u>Article 5 of the Draft Code</u>	30
(a) Text adopted by the Commission	30
(b) Comments by Governments	30
(c) Comments by the Special Rapporteur	31

CONTENTS (cont'd.)

	Page
XVII. <u>Proposals by certain Governments for the Insertion</u> <u>in the Draft Code of Offences other than those</u> <u>already defined in it</u>	31
(a)	31
(b) Proposals by Governments	32
Comments by the Special Rapporteur	

THIRD REPORT
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PART I

GENERAL OBSERVATIONS

1. In submitting the present report to the International Law Commission, the Special Rapporteur wishes to make certain brief observations.
2. In accordance with article 16 (j) of its Statute, the International Law Commission is required to reconsider its draft code in the light of Governments' comments and then to prepare a final draft.
3. Governments' replies relating to the Commission's work have been published by the Secretariat in A/2162 and Add.1^{1/}: "Comments received from Governments regarding the draft code of offences against the peace and security of mankind and the question of defining aggression". This document contains the replies of the following 14 countries: Bolivia, Chile, Costa Rica, Denmark, Egypt, France, India, Indonesia, Iraq, the Netherlands, Nicaragua, Union of Soviet Socialist Republics, the United Kingdom and Yugoslavia.
4. However, not all of these replies contain comments on the provisions of the draft code. Consideration of these replies shows that: The Bolivian Government makes no actual comments but merely transmits to the Secretary-General, for such action as may be deemed appropriate, a study prepared by Dr. Manuel Duran P., Professor of Criminal Law and Dean of the Faculty of Law of the University of San Francisco Xavier at Sucre. The Chilean Government declares its acceptance of the Commission's draft and considers that it can be approved without the introduction of any amendments or additions to the text. The replies of the Governments of Denmark, France, India, Indonesia, Nicaragua and the Union of Soviet Socialist Republics contain no references to the draft code although some of them make more or less detailed mention of the question of defining aggression.

^{1/} General Assembly, Official Records, Seventh Session, agenda item 54, Annexes.

5. The replies of the Governments of Costa Rica, Egypt, Iraq, the Netherlands, the United Kingdom and Yugoslavia contain critical observations, in varying degrees of detail, on the articles of the draft code.
6. It might at first be thought from the small number of these replies that revision of the draft code in the light of Governments' observations might not be a matter of great difficulty. That conclusion would not be correct, however; a comparison of Governments' comments shows that their conclusions are often diametrically opposed.
7. Generally speaking, where one view is held by several Governments, the Special Rapporteur has revised the corresponding article in the manner proposed. Where, on the other hand, the observations are essentially divergent, he has endeavoured to adhere to the text adopted by the International Law Commission, except where the force of a particular argument has seemed to him to call for amendment of the original text.
8. With regard to the arrangement of the material in the report, the Special Rapporteur considered it advisable to begin in each case by reproducing the article as adopted by the International Law Commission at its third session,^{2/} followed by a summary of Governments' comments, and his own comments. In conclusion, he has where necessary drafted the text which he proposes to the Commission as the final text of the draft code.
9. The Special Rapporteur would have preferred to reproduce Governments' observations verbatim instead of summarizing them, thereby saving the members of the Commission the trouble of referring to the actual text of the replies. He was obliged, however, to follow the General Assembly's instructions and avoid as far as possible quoting from texts already published by the United Nations.
10. In view of those instructions, the Special Rapporteur even considered the possibility of merely referring to A/2162 and Add.1 for Governments' observations. However, he would then have had to quote Governments' replies in the part of the text containing his personal observations, and that would have made them less clear.

^{2/} See: Report of the International Law Commission covering the work of its third session, General Assembly, Official Records, Sixth Session, Supplement No. 9 (A/1858), paragraph 59.

11. The Special Rapporteur wishes to point out that the study prepared by Dr. Manuel Duran P., (Bolivia), communicated by the Permanent Delegation of Bolivia to the Secretary-General, is not a reply by a Government. Nevertheless he has treated it in the same way as the replies submitted direct by Governments, since it was transmitted to the Secretary-General by a Government and published by the Secretary-General in the same document as the replies from other Governments.

12. In conclusion, the Special Rapporteur wishes to draw the Commission's attention to the fact that sentiment in the General Assembly is no longer as favourable to the Code as it was at the time when the Commission was instructed to prepare it. The International Law Commission must draw from that fact any conclusions which it thinks relevant when preparing the final text of the draft code.

PART II

OBSERVATIONS AND PROPOSALS RELATING TO THE DRAFT CODE

I. Title of the Draft Code

(a) Text adopted by the Commission

"Offences against the peace and security of mankind"

(b) Comments by Governments

Dr. Manuel Duran P. (Bolivia) considers that the above title should be replaced by the following:

"Offences against the peace, security and integrity of mankind", since the acts mentioned in article 2 (9) of the draft code constitute first and foremost attacks on the integrity of mankind.

The Netherlands Government considers that the title of the draft code might give rise to misunderstandings since the term "offences against the security of mankind" should be taken to include the crimes against humanity and the conventional war crimes. As, however, the title of the code is a term of current use, the Netherlands Government does not suggest an alteration of this title.

(c) Comments by the Special Rapporteur

For the reasons given by the Netherlands Government and because the title of the draft code has been adopted by the General Assembly itself, the Special Rapporteur does not propose any change.

II. Article 1 of the Draft Code

(a) Text adopted by the Commission

"Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punishable".

(b) Comments by Governments

Dr. Manuel Duran P. (Bolivia) points out that it would be desirable to emphasize that the offences referred to in the draft code are "ordinary offences in international law" which cannot be considered as political offences.

The Yugoslav Government wishes it to be made clear that responsibility under international law is not precluded by the fact that an offence is not punishable under the municipal law of the country of the person who has committed it.

The United Kingdom Government criticizes the text of article 1 and, in particular, the use of the words "for which the responsible individuals shall be punishable"; it considers the term "punishable" ambiguous.

(c) Comments by the Special Rapporteur

The Special Rapporteur does not consider it necessary to amend the text of article 1, which must clearly be read together with the opening sentence of article 2: "The following acts are offences against the peace and security of mankind".

He does not think it essential to state explicitly that responsibility under international law is not precluded by the fact that an offence is not punishable under the municipal law of the country of the person who has committed it (Yugoslav proposal), since article 1 expressly provides that individuals responsible for any one of the crimes defined in the draft code are responsible and shall be punishable.

In view of the United Kingdom Government's reply stating that the term "the responsible individuals shall be punishable" appears superfluous and that, in particular, the term "punishable" is ambiguous, the sentence in question might well be deleted.

(d) Proposals by the Special Rapporteur

The following text is proposed for article 1.

"The offences against the peace and security of mankind defined in this Code are crimes under international law, for which the responsible individuals shall be liable to punishment"

III. Article 2 (1) of the Draft Code

(a) Text adopted by the Commission

"The following acts are offences against the peace and security of mankind:

(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."

(b) Comments by Governments

Dr. Manuel Duran P. (Bolivia) considers that the word "including" is redundant because of all the acts of aggression, the most serious is characterized precisely by the employment of armed force against another State. In his opinion, the word "principally" should have been used instead of "including". Moreover, the concept of "national or collective self-defence" and the conditions which must be fulfilled before it can be regarded as a justification, should be clarified.

The United Kingdom Government considers that this paragraph should simply read "any act of aggression" omitting all the words which at present follow the word "aggression", because it takes the view that a satisfactory definition of aggression is extremely difficult to find. It considers that the text proposed by the International Law Commission covers only certain aspects of the problem and that it employs terms which themselves require definition.

(c) Comments by the Special Rapporteur

In the foregoing paragraphs, the Special Rapporteur has confined himself to Governments' comments on the text of article 2 (1) adopted by the International Law Commission, and has left for future consideration the question whether the term "aggression" in the text should be defined or not.

If the Commission wishes to dispense with a definition of "aggression" it could adopt a United Kingdom proposal and merely say "any act of aggression". The words "including the employment by the authorities of a State of armed force against another State" would then seem superfluous since the concept of aggression

used in the same sentence refers particularly to the use of force which constitutes the main form of aggression. It also seems unnecessary to include the words "for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations" since it is clear that cases of legitimate self-defence or the implementation of a decision or recommendation of a competent organ of the United Nations would never logically constitute "aggression" as a crime under International Law.

(d) Proposals by the Special Rapporteur

It is proposed to draft article 2 (1) as follows:

- (1) "Any act of aggression".

IV. Special Question: Definition of Aggression

The text prepared by the International Law Commission contains no specific definition of the concept of aggression. But, after discussing the report of the International Law Commission on the "Question of defining aggression"^{3/}, the General Assembly adopted resolution 599 (VI), which states that

"although the existence of the crime of aggression may be inferred from the circumstances peculiar to each particular case, it is nevertheless possible and desirable, with a view to ensuring international peace and security and to developing international criminal law, to define aggression by reference to the elements which constitute it."

Moreover, the same resolution requested States Members,

"when transmitting their observations on the draft code to the Secretary-General, to give in particular their view on the problem of defining aggression".

^{3/} See Report of the International Law Commission covering the work of its third session. General Assembly, Official Records: Sixth Session, Supplement No. 9 (A/1858), Chapter III.

The International Law Commission should therefore consider whether it is required to include a definition of the concept of aggression in the final text of the draft code. It should be noted in this connexion that, at the instance of the General Assembly (resolution 688 (VII)), the question of defining aggression has been studied by a Special Committee which drew up a report,^{4/} and that that report, together with the relevant comments by Governments, will be considered at the ninth session of the United Nations General Assembly.

It should also be noted that in their comments on the draft code some Governments have expressed themselves in favour of defining aggression and have also given their views on the procedure the International Law Commission should follow in any attempt it may make to define it (see the comments of the Governments of Costa Rica, Egypt, France, Indonesia, Iraq and Yugoslavia).

Since the question of defining aggression is on the agenda of the General Assembly itself, it may be asked whether it is appropriate for the International Law Commission to consider the matter at its present session and whether it might not be preferable to await the outcome of the General Assembly's consideration of the matter. On the other hand, the formulation of a definition of aggression by the Commission would undoubtedly greatly facilitate future work by the Assembly in the matter.

That being so, the Special Rapporteur leaves it to the Commission to decide whether it wishes to undertake the formulation of such a definition and confines himself to pointing out that the report of the above-mentioned Special Committee (A/2638) and the comments of Governments concerning the draft code might serve as the basis for any work which the Commission may undertake on this subject.

V. Article 2 (2) of the Draft Code

(a) Text adopted by the Commission

"(2) Any threat by the authorities of a State to resort to an act of aggression against another State".

^{4/} Report of the Special Committee on the Question of Defining Aggression, General Assembly, Official Records: Ninth Session, Supplement No. 11 (A/2638).

(b) Comments by Governments

The Netherlands Government wishes to retain only the concept of an immediate threat of armed force. It expressly excludes the notion of so-called "economic and ideological" aggression and suggests the adoption of the definition of aggression given at the end of its comments on article 2 (1) of the draft code.

The United Kingdom Government, while acknowledging that there is no objection of principle to the inclusion of paragraph (2) in the draft code, uses the paragraph to illustrate the dangers attendant upon a definition of aggression, and more particularly upon a partial definition such as that contained in the draft code.

(c) Comments by the Special Rapporteur

The concept of "immediate threat" referred to by the Netherlands Government comes close to that of imminent aggression, although it is not identical with it. Is it only an "immediate" threat that should be defined as an offence against the peace and security of mankind? The Commission's text does not make for a solution of this problem. Perhaps it might be advisable to make no change in that text, leaving it to the court which eventually applies the code to determine in each individual case whether the threat from a given State does or does not constitute an international crime.

VI. Article 2 (3) of the Draft Code

(a) Text adopted by the Commission

"(3) The preparation by the authorities of a State for the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations".

(b) Comments by Governments

The Government of the Netherlands proposes that paragraph 3 should be worded as follows:

"The preparation of aggression by the authorities of a State".

The Government of Yugoslavia suggests that the word "planning" should be retained in paragraph 3 in order to lay more emphasis on combating the preparation of aggression.^{5/}

The Government of the United Kingdom calls the use of the term "armed force" in the second line^{6/} particularly dangerous. Furthermore, since "planning is only to be punishable if it results in actual preparatory acts", it might be asked, in that Government's view, "at what precise point does planning become preparation". It is to be feared that an ill-disposed State might allege "that mere consultations about possible joint defensive measures to be undertaken by a group of States constituted not merely planning but actual preparation".

For these reasons the Government of the United Kingdom suggests the following wording for paragraph 3:

"The preparation by the authorities of a State for the employment of aggression,"
or simply:

"The preparation of aggression by the authorities of a State".

(c) Comments by the Special Rapporteur

If, as the Commission seems to wish, the preparation of aggression is also to be treated as an international crime, there seems to be no good reason to restrict the reference to the employment of armed force against another State. The Special Rapporteur considers it would be more logical to refer to the preparation of aggression in general.

The Yugoslav suggestion seems to be well taken.

^{5/} Paragraph 7 (b) of the "Letter (dated 18 June 1952) from the permanent representative of Yugoslavia to the United Nations concerning the draft code of offences against the peace and security of mankind" in document A/2162 and Add.1.

^{6/} Report of the International Law Commission covering the work of its third session. General Assembly, Official Records: Sixth Session, Supplement No. 9 (A/1858), paragraph 59, article 2 (3).

(d) Proposals by the Special Rapporteur

The following text is proposed for Article 2, paragraph 3:

"(3) The preparation by the authorities of a State of aggression against another State."

VII. Article 2 (4) of the Draft Code

(a) Text adopted by the Commission

"(4) The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose".

(b) Comments by Governments

The Government of Yugoslavia wishes for more precision in the wording of this paragraph in order to provide clearly for the responsibility both of the individual members of the bands and of the authorities of a State who tolerate or organize them.

The United Kingdom Government's criticisms of the Commission's text are similar to those of the Yugoslav Government cited above. In its opinion, it would be desirable for the Commission to make it clear that an offence is committed by the members of any armed bands that effect incursions and also to include a specific provision establishing the responsibility of a State on whose territory such bands are organized.

(c) Comments by the Special Rapporteur

The comments by the United Kingdom and Yugoslav Governments seem to call for the amendment of the text adopted by the Commission along the lines those Governments suggest.

(d) Proposals by the Special Rapporteur

It is proposed that article 2, paragraph 4, should be worded as follows:

"(4) The toleration, encouragement or organization by the authorities of a State of armed bands for the purpose of effecting incursions into the

territory of another State or the toleration of the use by such armed bands of the territory of that State as a base of operations or as a point of departure for incursion into the territory of another State, as well as direct participation in such incursion."

VIII. Article 2 (5) and (6) of the Draft Code

(a) Text adopted by the Commission

"(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

"(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State".

(b) Comments by Governments

Professor Manuel Duran P. (Bolivia) considers the Commission should define as a crime action by the authorities of a State to foment or encourage "fifth columns" or "unlawful penetration".

The Government of the United Kingdom points out that the phrases "terroristic activities" and "terroristic acts" are not defined, and expresses fear that paragraphs 5 and 6, in the form adopted by the Commission, may afford a basis on which States acting in bad faith can attack the actions and policies of neighbouring countries.

(c) Comments by the Special Rapporteur

Since the text of these two paragraphs was drafted after very thorough consideration by the Commission, the Special Rapporteur doubts the advisability of making any change. To encourage or foment "fifth columns" would constitute an international crime, in the Special Rapporteur's opinion, only if that was an act preparatory to aggression. He does not think that the existence of fifth columns as such should be defined as a criminal act. The same applies to "unlawful

penetration", especially as the term "unlawful penetration" has no very precise meaning. Finally, with regard to the fear expressed by the United Kingdom, the Special Rapporteur does not see how the concepts "terrorist activities" and "terrorist acts" could be defined. The same difficulties would be encountered as those raised by the definition of the concept of aggression.

IX. Article 2 (7) of the Draft Code

(a) Text adopted by the Commission

"(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character."

(b) Comments by Governments

The Government of the United Kingdom expresses the opinion that only major breaches of such treaties could be regarded as having a criminal character; it wonders whether it might not be preferable to omit paragraph 7 and to rely on the terms of any future conventions on the limitation of armaments for the sanctions to be imposed in the event of breaches.

(c) Comments by the Special Rapporteur

The Commission might either delete paragraph 7 or word it to provide for criminal responsibility only for major breaches of these obligations.

(d) Proposals by the Special Rapporteur

The following text is proposed for paragraph 7:

"(7) Acts by the authorities of a State constituting a major breach of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character".

X. Article 2 (8) of the Draft Code

(a) Text adopted by the Commission

"(8) Acts by the authorities of a State resulting in the annexation, contrary to international law, of territory belonging to another State or of territory under an international regime".

(b) Comments by Governments

Professor Manuel Duran P. (Bolivia) wishes the Commission also to define the annexation of a territory contrary to the will of the inhabitants as an international crime.

The Government of the United Kingdom, while raising no objection of principle to the idea expressed in paragraph 8, doubts the need to retain the paragraph since any annexation would normally involve one or more of the acts already specified in paragraphs (1) to (6). In addition, this Government criticizes the use of the word "resulting" in the Commission's text.

(c) Comments by the Special Rapporteur

The Commission's text seems satisfactory and the Special Rapporteur does not therefore propose any change.

XI. Article 2 (9) and (10) of the Draft Code

(a) Text adopted by the Commission

"(9) Acts by the authorities of a State or by private individuals, committed with intent to destroy, in whole or in part, a national, ethnical, 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 of the group to another group."

"(10) Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article."

(b) Comments by Governments

Professor Manuel Duran P. (Bolivia) wishes the Commission to define as a crime "the case where a group is subjected to living conditions which render its normal life within the national community impossible and which are incompatible with the free development of its activities and personality".

The Government of the Netherlands requests the deletion of the words "cultural grounds" from paragraph 10, so that the wording does not deviate from that of the Charter of Nürnberg.

In the view of the Government of Yugoslavia, the crimes against humanity listed in paragraph 10 should be punished regardless of whether they have or not been committed in connexion with other offences defined in article 2, wherever they are committed in an organized manner.

(c) Comments by the Special Rapporteur

The comments of the Governments are mutually contradictory and the Special Rapporteur is not therefore in a position to suggest any specific changes in the text adopted by the Commission.

XII. Article 2 (11) of the Draft Code

(a) Text adopted by the Commission

"(11) Acts in violation of the laws or customs of war".

(b) Comments by Governments

The Government of Yugoslavia wishes acts in violation of the laws or customs of war to be considered offences against the peace and security of mankind, regardless of the nature of the armed conflict.

(c) Comments by the Special Rapporteur

The Yugoslav Government's comment does not specify the type of conflict to which the words "in the course of an armed conflict" refer. In speaking of "the laws or customs of war", the Special Rapporteur has in mind the instances in which these laws or customs are applicable under international law. Only on this supposition is their violation conceivable. If, then, the laws or customs of war are applicable in an armed conflict, their violation constitutes a crime in international law under the draft code. The draft code cannot, however, determine the nature of the armed conflicts in respect of which the laws or customs in question will be applicable nor will it be able to extend the scope of their applicability.

XIII. Article 2 (12) of the Draft Code

(a) Text adopted by the Commission

"(12) Acts which constitute:

- (i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or
- (ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or
- (iii) Attempts to commit any of the offences defined in the preceding paragraphs of this article; or
- (iv) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article."

(b) Comments by Governments

The Netherlands Government wishes to make the following distinction: In regard to "crimes against peace" (article 2, paragraphs (1) to (8)), the concept of "conspiracy" should be interpreted in the sense of the Nürnberg sentences, where it was limited to cases in which the accused had had a function on the policy-making level. Similarly, "direct incitement" should be limited to direct incitement to aggression as defined in paragraph (1) of

article 2. Lastly, the Netherlands Government considers that there is no ground for penalizing attempts in this context; the same is held to apply to the notion of complicity, which does not occur in the Nürnberg sentences.

The Netherlands Government is, on the other hand, of the opinion that the four forms enumerated in paragraph (12) of article 2 should be maintained as they stand in so far as they relate to genocide and crimes against humanity (article 2 (9) and (10)) and to acts in violation of the laws or customs of war (article 2 (11)).

The United Kingdom Government, while recognizing that paragraph (12) is right in principle, fears that its application may give rise to grave difficulties. What exactly, for example, is an "attempt" to threaten aggression or an "attempt" to prepare for the employment of armed force against another State?

(c) Comments by the Special Rapporteur

In his first report on the draft code, the Special Rapporteur included the offences referred to in article 2 (12), following the example of the Convention on the Prevention and Punishment of the Crime of Genocide (A/CN.4/25, chapter V)^{7/} The inclusion of these offences in the draft code raised no difficulties where the text which the Special Rapporteur had the honour to submit to the Commission was concerned. However, the version adopted by the Commission enumerated such crimes as the "threat" to resort to aggression, "preparation" for the employment of armed force against another State, the "encouragement" of activities calculated to foment civil strike, etc. There is therefore some basis for the doubts voiced by the United Kingdom Government regarding the advisability of retaining paragraph (12) as it stands in the draft code.

The Special Rapporteur suggests that the following solutions might be considered:

^{7/} The Convention on the Prevention and Punishment of the Crime of Genocide is reproduced under number 1021, in Volume 78 of the United Nations Treaty Series, page 279.

- (i) The text of paragraph (12) might be retained as it stands.
While it is true that, as the United Kingdom Government points out, difficulties would arise in the application of the paragraph, it would be for the judges to overcome such difficulties by means of a reasonable interpretation.
- (ii) Another solution would be to leave paragraph (12) as it is and to specify that it would apply only in so far as it is compatible with the definition of the offences referred to in paragraphs (1) to (11).
- (iii) A more drastic solution would be to eliminate paragraph (12) altogether. The result would be that the code would no longer define as punishable acts declared to be such by other international conventions. Thus, for example, "conspiracy" and "complicity" are punishable under article 6 of the Charter of the Nürnberg Tribunal, while the concepts of "incitement", "attempt" and "complicity" are to be found in the Convention on the Prevention and Punishment of the Crime of Genocide (article III).

The concepts of "incitement" and "attempt" are also found in the several countries' municipal legislation concerning war crimes.

- (iv) Yet another solution, less drastic than that mentioned under (iii), would consist in specifying in paragraph (12) the offences defined in paragraphs (1) to (11) to which the concepts of "conspiracy", "incitement", "attempt" and "complicity" are applicable. It seems to the writer that this is the best solution.

XIV. Article 3 of the Draft Code

(a) Text adopted by the Commission

"The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code."

(b) Comments by Governments

The Egyptian Government objects that this article is in flat contradiction with the recognized principles of constitutional law, and hence unlikely to be acceptable to a good many States, particularly the monarchical States.

The Netherlands Government does not quite understand what is meant by the words "responsible government officials" and wonders whether the article is really necessary.

The Government of Yugoslavia considers the text adopted by the Commission to be unsatisfactory because it merely provides that the fact that a person acted as Head of a State or as responsible government official does not relieve him of responsibility, while this fact should actually constitute an aggravating circumstance.

The United Kingdom Government, recalling that the reference to Heads of States gave rise to great difficulties during the drafting of the Convention on Genocide suggests that the text should be given further consideration in the light of the discussions which took place at that time.

(c) Comments by the Special Rapporteur

The doubts expressed by the Governments of Egypt and the United Kingdom in regard to the advisability of retaining the term "Head of State" in the final text seem justified. It is true that Heads of State are expressly mentioned in article 7 of the Charter of the Nürnberg Tribunal; however, during the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide, several delegations drew the attention of the Sixth Committee of the General Assembly to the fact that the reference to "Heads of State" in the Convention would preclude its ratification by monarchic States. The expression "des gouvernants" used in the original French text, which had originally been translated into English by the words "Heads of States" was later replaced by the term "constitutionally responsible rulers" in view of the danger that the term "Heads of States" would also render internationally responsible constitutional Heads of State who had no responsibility under the municipal law of their own countries. ^{8/}

^{8/} Official Records of the Third Session of the General Assembly, Part I, Legal Questions, Sixth Committee, Summary Records of Meetings, 21 September - 10 December 1948, 96th meeting.

In regard to the Netherlands Government's comment that the term "responsible government official" is not clear, the Special Rapporteur draws attention to the discussion which took place on this subject in the Sixth Committee of the General Assembly during its third session in 1948.^{9/} Doubts were in fact expressed as to the exact implications of the term "gouvernants". However, it is clear from the records of the discussions that the word "gouvernants" embraces "those having the actual responsibility of power" (French representative's definition; see the summary record of the 93rd meeting, p.315). Since there can be no further doubt regarding the meaning of the word "gouvernants" and since the same term is used in the Convention on Genocide, the Special Rapporteur sees no reason to remove it from the final text to be adopted by the Commission.

In regard to the Netherlands Government's reservations concerning the usefulness of article 3, the Rapporteur wishes to stress that the Commission felt that it should insert that article in the draft code in order to dispel any doubt that all persons holding public office, however highly placed, were criminally responsible under international law. On this point the Commission has merely followed the Charter of the Nürnberg Tribunal (A/CN.4/SR.110, paragraphs 1-29).

Finally, in regard to the Yugoslav Government's comment that it would be desirable to regard the fact that the author of an offence under the draft code had acted as Head of a State or as a responsible government official as "constituting an aggravating circumstance", the Special Rapporteur doubts the advisability of introducing such a principle into the draft code.

(d) Proposals of the Special Rapporteur

It is proposed that article 3 should be worded as follows:

"The fact that the author of one of the offences defined in this code acted as a responsible government official does not relieve him of his responsibility under international law".

^{9/} Ibid., 93rd meeting.

XV. Article 4 of the Draft Code

(a) Text adopted by the Commission

"The fact that a person charged with an offence defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him."

(b) Comments by Governments

Professor Manuel Duran P. (Bolivia) suggests that the Commission should specify clearly that, in the case of an offence ordered by the law or imposed by authority, the legality of the act does not constitute a defence.

The Egyptian Government feels that the term "moral" is too vague and might give rise to divergencies of view as to its exact meaning. According to the Egyptian Government it would be possible to adopt an unambiguous wording such as "The fact that a person acted pursuant to an order of his government or of a superior does not relieve him from responsibility in international law, provided that, in the existing circumstances, the possibility of acting contrary to such an order was open to him".

The Netherlands Government suggests the insertion after the word "responsibility" of the words "in case he could be aware of the criminal character of the Act". According to this Government, the article in question could be applied only in case the accused knew or could have known that the order was given in violation of international law.

The Yugoslav Government believes that the inclusion of a provision on the possibility of a moral choice as a condition for responsibility for the commission of these offences would have an adverse effect both as regards prevention and as regards an effective application of the code by the courts. In its view, the last sentence of this article should therefore be amended in conformity with article 8 of the Charter of the Nürnberg Tribunal to read "but may be taken into consideration in mitigation of punishment, when the court deems fit".

The United Kingdom Government, taking into consideration that everything in this article turns on the exact meaning of the phrase "provided a moral

choice was in fact possible to him", wonders whether the article should not include some of the phraseology at present contained in the commentary, for instance, the very last sentence of the commentary, although that, too, contains terms such as the word "possible", the effect of which in the context is open to a number of different interpretations.

(c) Comments by the Special Rapporteur

On the question whether article 4 should expressly stipulate that provisions of law do not justify the commission of the offences provided for in the draft code, the Special Rapporteur confines himself to recalling that during the discussion of the text of the Convention on the Prevention and Punishment of the Crime of Genocide a similar proposal by the Soviet Union^{10/} was rejected by the General Assembly.^{11/}

In regard to the actual principle laid down in article 4, the Governments which gave their views on this point expressed contradictory opinions. While the Yugoslav Government wished to return to the wording of the Charter of the Nürnberg Tribunal, under which an order by a superior was recognized only as a cause for mitigation of punishment (see also the study prepared by Professor Manuel Duran P., document A/2162 and Add.1), the Governments of Egypt, the Netherlands and the United Kingdom accept the principle adopted by the Commission, though the Governments of Egypt and the United Kingdom propose that the term "moral" should be replaced by a more specific word. The Netherlands Government in particular does not accept, in this case, the responsibility of a person accused of an offence under the draft code unless the accused "could have been aware of the criminal character of the act".

^{10/} A/C.6/215/Rev.1/Corr.1, paragraph 5.

^{11/} Official Records of the Third Session of the General Assembly, First Part, Legal Questions, Sixth Committee, Summary Record of the 83rd meeting, page 313.

In view of these divergencies of opinion, the Special Rapporteur refrains from suggesting to the Commission that it should modify the principle it has adopted. He believes, however, that an amendment of the text on the lines suggested by the Egyptian and United Kingdom Governments would show more clearly the scope of the principle adopted.

(d) Proposals by the Special Rapporteur

It is proposed that article 4 should be worded as follows:

"The fact that a person charged with an offence defined in this code acted pursuant to order of his government or of a superior does not relieve him from responsibility in international law unless, in the circumstances at the time, it was possible for him not to comply with such order."

XVI. Article 5 of the Draft Code

(a) Text adopted by the Commission

"The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence".

(b) Comments by Governments

Professor Manual Duran P. (Bolivia) feels that in deference to the generally accepted principle nulla poena sine lege it will be necessary to lay down in the code, in a separate article, that the competent tribunal will be authorized to impose the most adequate penalty, taking into consideration not only the gravity of the offence but also the personality of the offender.

The Government of Costa Rica takes the view that, if this article is allowed to stand as drafted, the code will be open to the same criticisms as were levelled against the Nürnberg Tribunal, which had to institute and apply penalties that had not been previously determined by any rule of positive law. While it is true that the Commission says that it has taken into account the generally accepted principle nulla poena sine lege, this maxim of criminal law presupposes a clear determination beforehand of the penalty applicable to each category of offence.

The Egyptian Government, which holds that under the article in question, the power to determine the penalty for each offence is delegated to the competent court, feels that this delegation of power is not only a departure from the

principle nulla poena sine lege, but would also represent a real danger, since the discretion of the judges on the competent court might be influenced by various considerations, not necessarily of a legal nature. The Egyptian Government therefore considers that it would be preferable to try to determine an adequate penalty for each offence, with minimum and maximum penalties where necessary.

According to the Yugoslav Government, article 5 should specify that the court may pass any sentence, including sentence of death.

The United Kingdom Government considers the article to be quite out of place in the context of the draft code. In so far as the various offences specified in the code are, or are made, offences under the municipal laws of different countries, it will be for the laws of those countries to specify the nature of the penalties for any offence. In so far as the question of punishment, and of the penalties to be imposed, is regulated by an international convention, it will be for that convention to prescribe the penalties to be applied. In the view of the United Kingdom Government it would be better to omit article 5.

(c) Comments by the Special Rapporteur

Among the foregoing comments, those of Professor Manuel Duran P. (Bolivia), the Government of Costa Rica and the United Kingdom Government object that the text adopted by the Commission has not taken the principle nulla poena sine lege into account. The Special Rapporteur considers that these criticisms are justified. Moreover, for the reasons mentioned in the comments of the United Kingdom Government, article 5 seems out of place in the context of the draft code. In these circumstances, the Special Rapporteur has no hesitation in suggesting that the article should be deleted.

XVII. Proposals by certain Governments for the
insertion in the draft code of offences
other than those already defined in it

-(a) Proposals by Governments

Two Governments propose additions to the list of offences drawn up by the International Law Commission.

Thus, the Iraqi Government proposes that the following paragraph (13) should be added to article 2:

"Failure of a State to observe and implement resolutions of the General Assembly and the Security Council that are designed for the preservation of peace and the prevention of international tension".

The Yugoslav Government is of the opinion that the offences listed in the draft code should include: economic blockade and other similar forms of economic pressure, war-mongering propaganda, membership in criminal organizations, and crimes of omission, i.e., the responsibility of persons who fail to prevent the commission of any of the crimes defined in the code, provided they were in a position to do so.

(b) Comments by the Special Rapporteur

The comments by the Iraqi and Yugoslav Governments summarized above are important enough to merit the Commission's attention.

With regard to the Iraqi Government's proposal to define as an international crime the failure of a State to observe and implement resolutions of the General Assembly and the Security Council that are designed for the preservation of peace and the prevention of international tension, it must be said that it does not seem logical to lay down penal sanctions for failure to observe recommendations either by the General Assembly or by the Security Council which, inasmuch as they are "recommendations", do not in principle establish legal obligations.

The legal situation is not the same in respect of decisions. It may well be that a Government's failure to act in such cases might be defined as an offence against peace entailing criminal responsibility.

With regard to the proposals by the Yugoslav Government, the Special Rapporteur ventures to make the following comments:

He doubts that defining an economic blockade and other similar forms of economic pressure as an "international crime" entailing penal responsibility could meet with the agreement of many Governments. The concept of an "economic blockade" is somewhat vague and covers such varied situations that it hardly seems advisable to make it an international crime. Furthermore, as the United Kingdom Government remarks in its comments, the code "can only deal with acts that are not merely illegal or contrary to international law, but are also criminal, that is to say, have an inherent element of criminality".

With regard to "war-mongering propaganda" the Special Rapporteur notes that the question of propaganda was discussed at the time of the drafting of the Convention for the Prevention and Punishment of the Crime of Genocide^{12/} and that the General Assembly declined to define propaganda in favour of the commission of the crime of genocide as an international crime.^{13/}

As to the idea of membership in criminal organizations, the Special Rapporteur does not think that the mere fact of belonging to a criminal organization should be defined as an international crime. In his view only the activity of members of the organization should be punishable.

With regard to the idea expressed by the Yugoslav Government that failure to act, that is to say, abstention from action by persons "who fail to prevent the commission of any of the crimes defined in the code, provided they were in a position to do so" should also be characterized as an international crime, the Special Rapporteur is very much inclined to agree with it, the more so as he had suggested the adoption of the principle in his first report (A/CN.4/25) on the draft code. However, since the Commission did not think fit to act on his suggestion he is reluctant to bring the matter up again, and will accordingly leave it to the Commission to do so if it wishes.

^{12/} A/C.6/215/Rev.1/Corr.1, paragraph 4 f.

^{13/} Official Records of the Third Session of the General Assembly, part I, Legal Questions. Sixth Committee, Summary Record of the eighty-seventh meeting, page 253.