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First report on the draft code of offences against the peace and security of mankind, by Mr. D. Thiam, Special Rapporteur

Topic:

Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

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DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

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First 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. By its resolution 36/106 of 10 December 1981, the General Assembly once again referred to the International Law Commission the question of offences against the peace and security of mankind and requested it to resume its work with a view to elaborating a draft code which would take into account new developments in international law.

2. Pursuant to that request, the Commission appointed a Special Rapporteur at its thirty-fourth session and requested him to submit an introductory report on the topic.[1]

3. The fact is that, at this stage, the present report can only be exploratory. Its purpose is to put to the Commission as a whole a number of questions, the answers to which will guide the Special Rapporteur. A prerequisite for codification of the subject-matter covered by the title "offences against the peace and security of mankind" is that certain possible approaches should be pointed out and that certain essential choices, which are indicated in the following paragraph, should be made.

4. What is the scope of our subject-matter? What method should be followed in codifying it? Should we deal with the question of implementation of the code? In other words, should we simply draw up a list of offences against the peace and security of mankind, leaving aside all the problems raised by its actual implementation, or should we consider the question of penalties and of the international penal jurisdiction competent to enforce the code? Such are the questions which the

[1] *Yearbook ... 1982*, vol. II (Part Two), p. 121, paras. 252-256.

Special Rapporteur invites the Commission to join him in pondering. First of all, however, it seems necessary to give a brief account of the evolution of the political and theoretical issues involved.

5. The present report will therefore consist, after a historical review, of three parts: scope of the draft codification; methodology of codification; implementation of the code.

CHAPTER I

Evolution of the codification of international penal law

6. The necessity of elaborating a penal code for the international community and establishing an international penal jurisdiction became apparent at the end of the First World War. A rough distinction may be made between two periods in the evolution of international penal law: (*a*) after the First World War; (*b*) after the Second World War.

A. After the First World War

7. The former German Emperor, William II, owed his life to the absence of an international penal code and of any generally agreed rules for bringing to trial persons responsible for international crimes, the Netherlands Government of the day having invoked the principle *nullum crimen sine lege* as a ground for declining to surrender the ex-monarch to the Allies for trial. Nevertheless, the atrocities committed during the First World War had led to repeated statements by politicians to the effect that war crimes would not go unpunished. In particular, on 4 October 1918, the acts of destruction committed by the retreating German troops had resulted in a warning by the French Government that systematic violations of law and of humanity, and acts contrary to international law and to the principle of human civilization, would entail civil, financial and penal liability for those committing them.

8. An outgrowth of this warning was the establishment, on 23 February 1919, of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The Commission, after recognizing the right of any belligerent State to bring before its courts individuals, including heads of State, who had been guilty of violations of the laws and customs of war, proposed the establishment of an actual international jurisdiction to pass judgment on crimes against persons of different nationalities and excesses committed in camps for inter-Allied prisoners, and on the responsibility arising from unlawful orders given by enemy civil or military authorities which had affected the armed forces or civilian populations. Although no action was taken on this proposal, it marked an important step in the intellectual elaboration of the concept of international penal justice.

9. The Commission's report was adopted, but with reservations on the part of some of its signatories which made a nullity of the provisions relating to international penal justice. Those making the reservations argued that violations of the laws and customs of war were not international crimes under any written law or any international convention. They also argued that the acts of sovereigns entailed their political responsibility but not their penal responsibility.

10. Thus the setting in which the issue of the responsibility of former Emperor William II was joined was hardly propitious. Despite a study by Professors François Larnaude and Albert de La Pradelle, who even at that early date were of the view that heads of State, and hence the former Emperor, could incur penal responsibility and be tried by an international jurisdiction, the authors of the Treaty of Versailles ruled out any legal responsibility on the part of the former Emperor.

11. In the end, article 227 of the Treaty of Versailles[2] referred only to his political responsibility:

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
>
> A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating *the solemn obligations of international undertakings and the validity of international morality.** It will be its duty to fix the punishment which it considers should be imposed.
>
> ...

12. It was obvious that any criminal prosecution based on violation of international morality had no chance of acceptance, and the Netherlands Government had no difficulty in rebutting it and thus frustrating the move to extradite the former Emperor.

13. The provisions of articles 227 to 230 of the Treaty of Versailles, which sought to organize at the international level punishment for crimes against peace and for violations of the law of war, ultimately left no mark, apart from their value as a legal precedent.

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[2] *British and Foreign State Papers, 1919,* vol. CXII (London, H.M. Stationery office, 1922), p. 103. The relevant extract from the Treaty of Versailles (Part VII: Penalties) is reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction,* memorandum by the Secretary-General (Sales No. 1949.V.8), p. 60, appendix 3.

14. It should, however, be noted that a great deal was being done at the theoretical level during the years between the wars. The advances in thinking took place under the impetus of the legal associations, especially the International Law Association, the InterParliamentary Union and the International Association for Penal Law, forums where ideas and men came face to face in free scholarly debates in which—it is true—idealism prevailed over realism but which had the merit of raising the issue of legal penalties for international offences and thus opening the way for the decisions taken in 1945, after the Second World War, which will be discussed later. Hugh Bellot, Count Henri Carton de Wiart, Henri Donnedieu de Vabres,[3] Nicolas Politis, Quintiliano Saldaña, Mégalos Caloyanni and Vespasien V. Pella[4] left their mark on the course of events.[5]

15. At the Thirty-first Conference of the International Law Association, in 1922, Hugh Bellot submitted a motion on the urgent need for the establishment of a permanent international criminal court. He submitted to the Association in 1924 a draft which was approved, as amended, in 1926.[6] The draft envisaged the establishment of a Penal Division within the PCIJ whose jurisdiction would extend to charges of violations of the laws and customs of war of a penal character and to cases referred to it by the Council or Assembly of the League of Nations.

16. At the same time, the Inter-Parliamentary Union, on the initiative of Vespasien V. Pella,[7] took up the question in 1924; and, the following year, at its Washington conference,the Union adopted a resolution recommending that the PCIJ should be given jurisdiction to deal with international offences and international crimes.[8] Under the terms of the resolution, crimes committed by States would be tried by the full Court, while individual crimes would be referred to a special division. The conference also appointed a subcommittee to draft an international legal code.

17. Lastly, the International Association for Penal Law, in 1926, the very year in which it was established, had placed the question of international penal justice on the agenda of its first congress. It, too, recommended that the PCIJ should be given penal jurisdiction. In 1928, the International Association for Penal Law adopted a draft statute for the establishment of a criminal chamber within the PCIJ.[9] The author of the draft, Vespasien V. Pella, also attached his name to a draft international penal code which the three associations had asked him to prepare and which was published on 15 March 1935 under the title *Code répressif mondial*.[10]

18. Hans Kelsen, for his part, advocated the establishment of an international organization to replace the League of Nations, one of whose organs would be an international court competent to try individuals charged with unlawful use of force or with war crimes and which would also be competent to hear appeals against judgments of national courts in cases involving a violation of international law.[11]

19. However, these scholarly efforts, laudable as they were, proved fruitless. Along with the scholars, diplomats themselves, in the subdued style which they so often affect, were echoing the concerns of the international community at the threats to peace which were a feature of the period between the wars. Conflagrations had broken out here and there, not only on the continent of Europe (reoccupation of the Rhineland (1936), Spanish civil war (1936), annexation of Austria (1938)), but also in Asia (invasion of Manchuria by Japanese troops (1931)), in Latin America (war between Bolivia and Paraguay (1932)) and in Africa (invasion of Ethiopia (1935)). Diplomatic efforts during this period were directed towards organizing collective security by outlawing war of aggression.

20. Mention may be made, simply by way of reminder, of the Geneva Protocol of 2 October 1924, which established the principle of compulsory arbitration and, for the first time, qualified war of aggression as an international crime.[12] Note should also be taken of the Declaration of 24 September 1927 adopted at the eighth Assembly of the League of Nations, which reproduced the 1924 wording and regarded war of ag-

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[3] Donnedieu de Vabres, *Introduction à l'étude du droit pénal international* (Paris, Sirey, 1922), p. 36; *Les principes modernes du droit pénal international* (Paris, Sirey, 1928), pp. 403 *et seq.*; "La Cour permanente de justice internationale et sa vocation en matière criminelle", *Revue internationale de droit pénal* (Paris), vol. I (1924), p. 175.

[4] Pella, *La criminalité collective des Etats et le droit pénal de l'avenir* (2nd ed.) (Bucharest, Imprimerie de l'Etat, 1926); "La répression des crimes contre la personnalité de l'Etat", *Recueil des cours de l'Académie de droit international de La Haye, 1930-III* (Paris, Sirey, 1931), vol. 33, p. 677.

[5] See J.-B. Herzog, *Nuremberg: un échec fructueux?* (Paris, Librairie générale de droit et de jurisprudence, 1975), pp. 25-31.

[6] See "Report of the permanent International Criminal Court Committee", ILA, *Report of the Thirty-fourth Conference, Vienna, 1926* (London, 1927), p. 109. The text of the draft statute of the International Penal Court adopted by the Association is reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction ...*, p. 61, appendix 4.

[7] Pella, "La criminalité de la guerre d'agression et l'organisation d'une répression internationale", report presented to the Twenty-third Conference of the Inter-Parliamentary Union, *Compte rendu de la XXIII^e Conférence* (Washington and Ottawa, 1925), p. 205.

[8] *Ibid.*, pp. 46-50 (English text); text reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction...*, p. 70, appendix 5.

[9] The text of the draft statute adopted by the Association in 1928 and revised in 1946 is reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction ...*, p. 75, appendix 7. See also Pella, *La guerre-crime et les criminels de guerre* (Paris, Pedone, 1946), p. 129; 2nd ed. (Neuchâtel, Editions de la Baconnière, 1964).

[10] Pella, "Plan d'un code répressif mondial", *Revue internationale de droit pénal* (Paris), vol. 12 (1935), p. 348.

[11] Kelsen, *Peace through Law* (Chapel Hill, The University of North Carolina Press, 1944), pp. 127 *et seq.*, annexes I and II.

[12] Protocol for the Pacific Settlement of International Disputes, adopted by the fifth Assembly of the League of Nations (League of Nations, *Official Journal, Special Supplement No. 21*, p. 21).

gression as a crime.[13] Unfortunately, the 1924 Protocol was not ratified and the 1927 Declaration was simply a set of principles without any system of penalties.

21. This entire process did, however, lead up to the most significant manifestation: The General Treaty for Renunciation of War as an Instrument of National Policy of 27 August 1928 (the Kellogg-Briand Pact),[14] which formed the basis for the Nürnberg International Military Tribunal because, on the day war was declared in 1939, it was binding on 63 States, including Germany, Italy and Japan. However, while the Kellogg-Briand Pact made war illegal, it did not make it criminal, at least according to the theory which had prevailed in the Treaty of Versailles and which had made it impossible to indict William II, except on moral and political grounds.

22. But simultaneously with this movement towards a general prohibition of war, realism required that it should continue to be regulated. Hence the signing of the Washington Treaty of 6 February 1922, concerning the use of submarines and noxious gases in warfare.[15] Article 3 of the Treaty provided that violations of the laws of war would be considered criminal. However, the Washington Treaty never came into effect, for lack of ratification. Other well-known agreements and conventions were also adopted: the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, of 17 June 1925,[16] which supplemented the provisions of the Hague Declaration of 29 July 1899,[17] and the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, of 27 July 1929.[18] These instruments confirmed and strengthened the provisions of the Hague Convention of 1907.[19] It should, however, be noted that, for our purposes, all these instruments had the same weakness and the same inherent defect: they established prohibitions without attaching any penalties. Donnedieu de Vabres placed them in the category of *leges imperfectae,* which impose moral or political obligations without any real penalty.

23. Accordingly, during the period leading up to the Second World War, there was an effort by the international community on both the scholarly and the diplomatic and political levels to try to protect the international order by law. However, codification had its ups and downs as a result of random events, unfortunately of a horrifying and tragic nature. For instance, in 1934, the assassination in Marseilles of King Alexander of Yugoslavia and President Barthou rekindled strong feelings in the international community. France, supported by other European countries, decided to take the matter before the League of Nations. It is true that it was dealt with only from the standpoint of terrorism,[20] an approach which was much too restricted but which does show how the codification of international penal law has often been linked to current events and has, unfortunately, depended greatly on day-to-day developments. The French initiative resulted in the adoption, by the International Conference on the Repression of Terrorism, of the Convention for the Creation of an International Criminal Court, of 16 November 1937.[21] However, the events leading up to the Second World War prevented its ratification and entry into force.

B. After the Second World War

24. By the end of the Second World War, there had been little progress in the matter. During the war, some important declarations, including the Inter-Allied Declaration signed at St. James's Palace on 13 January 1942 by the United Kingdom Government and the Governments-in-exile in London,[22] the Inter-Allied Declaration of 17 December 1942, issued simultaneously in London, Moscow and Washington,[23] and the Moscow Declaration of 30 October 1943,[24] done in the name of the "Big Three", expressed the need for "punishment, through the channel of organised justice", of those responsible for war crimes. The Allied Powers had solemnly undertaken not to permit a repetition of the hesitations and errors which had characterized the attitude of the Allies after the First World War. Those political declarations having been noted, it should be stated that, from the legal standpoint, the most important instrument was the Agreement for the prosecution and punishment of the major war criminals of the European Axis, of 8 August 1945, together with the Charter of the International Military Tribunal annexed thereto,[25] The Nürnberg system had been established. Subsequently, the International Military Tribunal for the Far East was established with the adoption of its Charter on 19 Janauary 1946.[26]

25. The Nürnberg system is undoubtedly an important precedent, to which we shall revert. But its incidental and contingent features and the *ad hoc* character of the

[13] Declaration concerning Wars of Aggression (*ibid. No. 54,* p. 155).

[14] League of Nations, *Treaty Series,* vol. XCIV, p. 57.

[15] M. O. Hudson, ed., *International Legislation* (Washington), vol. II (1922-1924) (1931), p. 794, No. 66.

[16] League of Nations, *Treaty Series,* vol. XCIV, p. 65.

[17] J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (3rd ed.) (New York, Oxford University Press, 1918), p. 225.

[18] League of Nations, *Treaty Series,* vol. CXVIII, p. 303.

[19] Scott, *op. cit.,* p. 100.

[20] See C. Eustathiadès, *La Cour pénale internationale pour la répression du terrorisme et le problème de la responsabilité internationale des Etats* (Paris, Pedone, 1936).

[21] League of Nations, document C.547(1).M.384(1).1937.V, reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction ...* , p. 88, appendix 8.

[22] See *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, H.M. Stationery Office, 1948), pp. 89-90.

[23] *Ibid.,* p. 106.

[24] See United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis,* memorandum by the Secretary-General (Sales No. 1949.V.7), p. 87, appendix I.

[25] United Nations, *Treaty Series,* vol. 82, p. 279.

[26] *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

tribunal which it instituted are matters for regret. The criticisms levelled at the Nürnberg system are too well known to require much discussion here. It has been blamed for violating the principle *nullum crimen sine lege, nulla poena sine lege,* since the acts were made crimes and the penalties were established after the event. It has been criticized for placing the vanquished under the jurisdiction of the victors and for setting up *ad hoc* jurisdictions, whereas the protection of those brought to trial and the rights of the defence required that the offences and the penalties should have been established beforehand. There is no need to enter into the argument here. For our purposes, the important point is that the issue has still not been settled, almost 50 years after that landmark event. There again, no sooner had the lights of Nürnberg been extinguished than the discussion became bogged down, apart from some flare-ups which seemed to be related to certain incidents and a number of more or less sporadic crises.

26. The almost religious atmosphere which followed the atrocious events of the Second World War, and the soul-searching and meditation to which those events had given rise, caused mankind to take a hard look at itself after the unprecedented cataclysm. In the aftermath, world leaders prescribed a number of measures which, over and above the historic Judgments of Nürnberg and Tokyo, were designed to prevent the recurrence of such events. Recourse to law, the primacy of which seemed to have been acknowledged and accepted, was at that time regarded as a remedy and, above all, a deterrent to international crime. The main concern was to determine the principles which should, in future, guide the conduct of men and States. As was to be expected, the Nürnberg Judgment was scrutinized first, in an attempt to determine the principles by which that important international tribunal had been guided.

27. The Commission was entrusted with this task by General Assembly resolution 177 (II) of 21 November 1947. The discussion of the subject in the Commission dealt principally with the question as to whether the principles laid down in the Charter and Judgment of the Nürnberg Tribunal constituted principles of international law. The Commission held that the Nürnberg Principles had been endorsed by the General Assembly itself and that its own task was, therefore, merely to identify and formulate them; and this it did. However, by the same resolution, the General Assembly also directed the Commission to prepare, at the same time, a "draft code of offences against the peace and security of mankind". The draft code, prepared by the Commission in 1951,[27] was submitted to the General Assembly at its sixth session, when consideration of it was postponed until the following session. At its seventh session, in 1952, the General Assembly decided not to place the topic of the draft code on its agenda and to refer it back to the Commission. After certain modifications, the draft was resubmitted to the General Assembly at its ninth session, in 1954.[28] The Assembly suspended consideration of it, however, on the grounds that the code and the definition of aggression being prepared by a special committee whose report had not yet been completed were interrelated.[29]

28. After many ups and downs, the General Assembly finally requested the Secretary-General, in resolution 33/97 of 16 December 1978, to invite Member States and relevant organizations to submit their comments on the draft, and to prepare a report for submission at its thirty-fifth session, in 1980.[30] Such was the status of the topic at the time of the adoption of resolution 36/106 of 10 December 1981, cited in paragraph 1 of the present report.

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[27] See the report of the Commission on its third session, *Yearbook ... 1951*, vol. II, pp. 134 *et seq.*, document A/1858, para. 59.

[28] See the report of the Commission on its sixth session, *Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54.

[29] General Assembly resolution 897 (IX) of 4 December 1954.

[30] A/35/210 and Add.1 and 2 and Add.2/Corr.1.

CHAPTER II

Scope of the draft codification

29. Delimitating the scope of the proposed codification means answering two basic questions: Which offences? Which subjects of law?

A. Offences to which the codification applies

30. There are two distinctions to be made:

(*a*) Crimes under international law and crimes under internal law;

(*b*) Political crimes and crimes under ordinary law.

1. THE DISTINCTION BETWEEN CRIMES UNDER INTERNATIONAL LAW AND CRIMES UNDER INTERNAL LAW

31. Crimes under international law, namely those defined by international law without any reference to internal law, should be distinguished from another category of crimes which, though they admittedly have consequences and effects capable of transcending frontiers, are not as a rule crimes under international law. Co-operation between States for the punishment of the latter category of crimes has at times led to confusion,

which it would be well to dispel. Rapid transport and communication facilities have aided international brigandage. Many ordinary-law criminals today make extensive use of such facilities in order to evade justice in the country where they committed their crimes. Some mutual assistance has been organized among the malefactors of various countries, who shelter each other and exchange information, and thus succeed in eluding police and courts at the national level.

32. In response, States have been induced to organize co-operation, which is all the more necessary because of a well-established tradition that makes the territoriality of penal law the fundamental principle of contemporary criminal law. Thus there has developed within internal law a discipline which is wrongly termed, in French at least, "international penal law", but which is in fact an internal discipline, its subject-matter being the internal laws which delimitate the jurisdiction of foreign courts and the authority of judgments outside the territory of the State in which they were rendered. The fact that, because of the need for co-operation in this field, countries decided to make the principle of the territoriality of penal law less rigid may have been misleading, and this discipline was styled "international penal law". But the crimes to which the discipline relates are, as a rule, crimes under internal law, the courts competent to try them are national courts, and they may become international crimes only by virtue of conventions or of the circumstances in which they were committed. In this respect, they are different from crimes that are international by their very nature, which fall directly under international law irrespective of the will of States.

33. Some writers[31] think that the principle of State sovereignty and its corollary, the territoriality of penal law, will be diluted with the advent of a new international order, and that the legal discipline just discussed, which is concerned with the study of conflict of laws and of jurisdictions and the conventions pertaining thereto, will be superseded by a new discipline whose scope will expand, since it will relate to the constantly increasing range of crimes under international law *stricto sensu*, which are not subject to any conflict of laws and jurisdictions. The ambit of this new discipline, the name of which remains in dispute,[32] will be the higher universe, with no frontiers, where offences are considered in and of themselves, without regard to territoriality. This idealized world may come about one day. In the meantime, common sense dictates that we look at the situation as it exists at present; and this situation is quite different. It is characterized by the variety of sources and origins of international crime, which endows the concept with very different features.

34. Side by side with crimes that are international by their nature, namely those which fall directly under international law, there exist crimes which are international by virtue of a convention and international crimes which are so called solely because of the circumstances in which they are committed. This coexistence destroys the unity of the concept of international crime, under which three different categories are distinguishable. The first category of crimes, that of crimes under international law *stricto sensu*, or crimes which are international by their nature, comprises crimes that assail sacred values or principles of civilization—for example, human rights or peaceful coexistence of nations—which are to be protected as such. In accordance with these principles, slavery, aggression, colonialism and *apartheid*, for example, are considered crimes under international law. Crimes which adversely affect a common heritage of mankind, such as the environment, may also be placed in this category. The second category covers crimes which have become international solely for the purposes of punishment and which have been transposed from the national to the international level by conventions adopted to that end. The third and last category concerns cases in which a combination of circumstances has caused the offence to be transferred from the realm of internal law to that of international law. This occurs whenever a State becomes the author of or an accomplice in the offence. The distinction is not, of course, so clear-cut in practice. Some crimes which are international by their nature are the subject of conventions, such as the Convention concerning Forced or Compulsory Labour,[33] or the International Convention on the Elimination of All Forms of Racial Discrimination.[34] But, in many cases, censure predates the convention, and the latter merely confirms a moral advance. A case in point is the condemnation of slavery. Moreover, the third category of crimes is not *sui generis*, since it encompasses crimes which are internal crimes and whose internationalization is due solely to the fact that a State is implicated in their perpetration. As this category has no specific character, it could, if necessary, be disregarded. But it is indispensable to mention it for the purposes of the study.

35. The relative value of the proposed distinction is therefore obvious. This distinction does, however, enable us to ask an essential question. Which category of crimes is to be covered by the codification? It seems that, in 1954, the Commission was concerned primarily with the first category, crimes that are international by their nature or, in other words, fall directly under international law without passing through the "antechamber" of an international convention, or crimes which, although covered by a convention, would have been considered crimes under international law even in the absence of such a convention. The question, then, is whether the Commission will maintain its earlier position. As already stated, the peace and security of mankind can be affected by offences which are not

[31] See, for example, Pella, *La criminalité collective des Etats et le droit pénal de l'avenir* (*op. cit.*).

[32] This discipline is propounded under the name of inter-State penal law, or universal penal law, or supranational penal law, or international penal law.

[33] Convention No. 29 adopted on 28 June 1930 by the General Conference of ILO at its fourteenth session, International Labour Office, *Conventions and Recommendations, 1919-1966* (Geneva, 1966), p. 155.

[34] Signed at New York on 7 March 1966, United Nations, *Treaty Series*, vol. 660, p. 211.

necessarily international crimes by their nature. However, at its third session, in 1951, the Commission took the view that there would be no need for it to deal with such offences. Thus it left aside piracy, counterfeiting, damage to submarine cables, and so forth. The debate is now reopened. Crimes of this kind may become international crimes when perpetrated by, or with the complicity of, a State, and some of them have assumed such importance and are committed on such a scale that it is reasonable to ask whether they have not made the shift from internal law to international law and become international crimes by their nature. Such is the case of hijacking of aircraft. In any event, it is clear that the distinction between crimes under internal law and crimes under international law is relative and at times arbitrary. We shall revert to this point when we consider the methodology of codification. The question, in any case, is whether the Commission will maintain the dividing line, as it did in 1954.

2. The distinction between political crimes and crimes under ordinary law

36. For the 1954 draft code, the Commission took the view that the category of offences against the peace and security of mankind "should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security".[35] This distinction between ordinary and political crimes has since been severely criticized. For one thing, the distinction between "political" and "non-political" is sometimes difficult to establish. And when it does exist, it shifts and is awkward to define. The political motivation for an act is not easy to determine. Depending on their philosophical, moral or ideological outlook, States have different opinions on the political nature of an act and its underlying motive. As an old saying goes: "What is true on this side of the Pyrenees becomes a fallacy on the other side", an idea that was arrestingly, and sarcastically, expressed by Balzac when he said: "Conspirators are brigands when vanquished and heroes when victorious". One might add that the fallacies of today are sometimes the truths of tomorrow. Graveyards are full of those who fell victim to the moral blindness and fanaticism of their contemporaries. It has also been observed that it is dangerous to transpose a concept of internal law—that of a political crime—to the level of international law. Under internal law, a political crime is defined as an action directed against the form of a government or the political order of a State. By this definition, punishment would seem to concern solely the internal order of the State concerned.

37. What is more, the political element is generally considered to be a factor for mitigating and making more humane the conditions in which persons guilty of political crimes are detained and the treatment accorded to them. One philosophy, still very much in vogue, tends to confer on political offenders heroic stature or the halo of a martyr. They are viewed by some countries with a condescending attitude which thwarts or hampers international co-operation in the punishment of this type of offence and precludes all possibility of extradition. In view of the present division of the world into different ideological and political systems, universal punishment for political crimes would appear to be unfeasible. It would be idle to deny the truth of such assertions. But this is not, to all appearances, the weakest point of the Commission's position. In actual fact, the majority of offences against the peace and security of mankind are politically inspired. Nazism, which was responsible for the heinous crimes of the last world war, was a political doctrine based on an ideology that affirmed the superiority of one race and one nation and the transcendence of one State. In most cases, the perpetrators of crimes with world-wide dimensions take refuge in a belief and a faith in order to salve their consciences. Thus the political crime may exist in both the internal and the international orders. But not all offences against the peace and security of mankind necessarily have a political content. Serious harm done to the environment may be a matter of self-interest and be prompted by purely selfish motives. It is nevertheless an offence against the peace and security of mankind if its seriousness and scope are such as to impair a fundamental interest of the international community. It may be that the authors of the Charter of the Nürnberg Tribunal were struck not so much by the political content of the crimes with which they were concerned as by their gravity, their atrociousness, their scale and their effects on the international community.

38. Be that as it may, the Commission should reexamine this important question with a view to determining which crimes fall into the category of offences against the peace and security of mankind and by what criteria such crimes can be identified. The political criterion appears inadequate. Some political crimes concern the internal order alone. Conversely, some crimes under ordinary law necessarily concern the international order because of the extent of their effect on the international community. Let us take as an example the traffic in narcotic drugs, which today is frequently organized at the world level. Inasmuch as it endangers the health of mankind in general, and not only the health of the nationals of a given country, it must be granted that it is in some cases an international crime; and when it is organized with the complicity of a State, it may become an offence against the peace and security of mankind. Yet the motives for trafficking are in almost all cases motives of self-interest. The same is true of counterfeiting. That counterfeiting could be organized by a State is no gratuitous assumption. The question was discussed in the Council of the League of Nations on 10 June 1926 in connection with the discovery in Hungary of an enterprise which was producing counterfeit French banknotes in the denomination of 1,000 francs. It was considered by many at the time that the production of counterfeit currency in such circumstances was something "absolutely inadmissible in international relations, and that, if such acts were

[35] See the report of the Commission on its third session (see footnote 27 above), p. 134, para. 58 (*a*).

repeated, an international authority would be found" to condemn them.[36] This discovery led to the International Convention for the Suppression of Counterfeiting Currency, of 20 April 1929,[37] whose purpose was the international protection of all currencies rather than the establishment of co-operation to enable individual States to protect their own currencies. Moreover, the allusion to an international forum was significant.

39. It follows from this that offences against the peace and security of mankind may be committed either for political reasons or for purely selfish ones and that the criterion for them must be sought elsewhere. In its search for such a criterion, the Commission will surely find it necessary to look at the provisions of article 19 of part 1 of the draft articles on State responsibility.[38] Paragraph 2 of the article states that an international crime results from the breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the international community as a whole. The adjectives "essential" and "fundamental" denote a degree of gravity of the international offence, that gravity being associated with an objective criterion and a subjective criterion.

40. The objective criterion is a fundamental interest of the international community. The subjective criterion is the evaluation of the offence by the international community itself. It is the subjective element—the evaluation of the offence by the international community and the way in which the offence is perceived by that community—which determines whether the offence is to be transposed from the internal to the international level and made a crime under international law. Indeed, the process is the same in national penal legislation as well. It is the seriousness with which an offence is viewed by the collective conscience within the national community that determines whether it is a crime or a delict, and the law is merely a subsequent confirmation of this subjective judgment.

41. Although article 19 defines international crimes as a whole, it does not define an offence against the peace and security of mankind. Yet the latter has its own specificity. The Special Rapporteur will analyse this concept in the part of the report which follows. In any event, we can see from the foregoing how difficult it is to delimitate the subject. That which was outside the scope of codification in 1954 will today seem to qualify for coverage. The transition from the internal to the international order occurs imperceptibly, often by the effect of *jus cogens*. Frequently, too, activities are transferred from the internal to the international order owing to the intervention of States in ever broader areas. Furthermore, as we shall see, the very complexity of the concept of an offence against the peace and security of mankind, and the variety of its sources, make any delimitation of the subject difficult.

B. Subjects of law

42. One interesting question is which subjects of law international criminal responsibility may be attributed to. The Commission previously decided to confine its draft to acts by individuals and to exclude from its field of inquiry the question of the criminal responsibility of other legal entities, including States. The Commission thus saw eye to eye with the Nürnberg Tribunal, which stated that crimes were committed by men, not by abstract entities, and had to be punished under international law.

43. There is an interesting theoretical debate here. It should first be noted that the problem is posed in different terms according to whether civil or criminal matters are involved. Whereas in civil matters the subject of international law is the State, in criminal matters the subject of international law is the individual. This reverse relationship prompted a spirited exchange in the Sixth Committee when it took up Nürnberg Principle I, as formulated by the Commission.[39] There were those who sought in Principle I, according to which any person who committed an act which constituted an international crime was responsible therefor and liable to punishment, confirmation that the individual could always be a subject of international law. Others, on the contrary, took the view that the concept of the legal personality of the individual should be limited to international penal law, where it was justified only because, under penal law, conscious individuals alone could incur responsibility; the concept was an exception stemming from the very nature of penal law, and it remained the rule that the State was the primary subject of public international law. Conventions which have established direct links between the individual and international law are still the exception. Strictly speaking, the question of the individual as a subject of international law goes beyond the scope of the present study, which is confined to international penal law. The only question which concerns us here is whether legal entities can be brought before an international criminal jurisdiction. A legal entity may be a group, an association or a State. Despite the position of the Nürnberg Tribunal, there is no unanimity on this question among jurists. More and more of them take the opposite view and consider that the criminal responsibility of legal entities cannot continue to be ignored.

44. The question of the criminal responsibility of legal entities is posed not only in international law, but also in municipal law. Under the laws of some countries today, commercial companies, for example, may be tried for criminal offences, such as economic crimes, and are liable to financial penalties. In its draft articles on State responsibility, the Commission itself has adopted the

[36] League of Nations, *Official Journal, 7th year, No. 7* (July 1926). *Minutes of the fortieth session of the Council* (7-10 June 1926), 4th meeting (public), p. 871, at p. 873.

[37] *Idem, Treaty Series*, vol. CXII, p. 371.

[38] *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[39] See the report of the Commission on its second session, *Yearbook ...1950*, vol. II, p. 374, document A/1316, part III, "Formulation of the Nürnberg Principles".

aforementioned article 19 (see para. 39 above), paragraph 2 of which refers to international crimes. Article 19 lists a number of offences considered to be international crimes: aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, *apartheid* and actions impeding the safeguarding and preservation of the environment. This list is declaratory and not exhaustive. The inclusion of article 19 in the draft on State responsibility has reopened the debate. The question is whether the Commission's position, which was to exclude States from the scope of the 1954 draft code, can still be maintained today. If it cannot, the Commission will have to reshape the 1954 draft substantially, thus putting an end to the long-drawn-out theoretical debate—no doubt extremely interesting, but apparently interminable—between advocates and opponents of the theory of criminal responsibility of States.

45. In his work, *La criminalité collective des Etats et le droit pénal de l'avenir*, Pella considered whether such high legal entities as States could be brought before a criminal jurisdiction.[40] The concept of the criminal State, which was hardly conceivable at the turn of the century, has come increasingly to the fore because of Pella's patient research and doggedness. The need to establish the criminal responsibility of States can be justified on the grounds that measures of coercion involving the use of force, although sometimes necessary to stop aggression, for example, are not perceived to be acts of justice. The aggressor State will always think that it yielded not to the force of law, but simply to force. it will consider itself defeated rather than guilty. The concept of criminal responsibility of States therefore introduces an essential element of morality in bringing the guilty State to an awareness of its wrongdoing towards the international community. Moreover, Pella argued, States are not mere fictions. Citing well-known theories relating to collective psychology and the collective will, according to which every human group has feelings, reflexes and a will distinct from those of its members, Pella saw in these elements a basis for the theory of criminal responsibility of States, resting on the collective will of the nation. That collective will, he contended, was expressed through the nation's constitutional organs, especially in the case of such serious decisions as a declaration of war. Rejecting Napoleon's aphorism that no one is answerable for collective crimes, Pella took the view that establishing the criminal responsibility of States would expose each and every individual to the threat of a sanction that would serve as a deterrent against international crime. It must be admitted that there has been growing interest in the concept of the criminal State. The difficulty of applying this concept is no less evident. Apart from actions which may be taken under Chapter VII of the United Nations Charter and which, strictly speaking, are not penalties, but measures, coercion of a State is difficult. The odds are that a State cannot be brought before an international criminal jurisdiction unless it has had the misfortune to be defeated. The Commission will again have to make a decision on this important question and say whether it intends to embark on a fabulous adventure that borders on science fiction, at least as things stand at present in the world order. Toppling the State from the lofty pedestal where it was held in awe like the gods of antiquity, making it a creature susceptible to error and wrongdoing and prescribing for it a course of conduct and a code of ethics to be followed under pain of coercive sanctions would clearly amount to a complete reversal of hitherto prevailing ideas and concepts.

46. There are those who believe that there can be found in the Charter of the Nürnberg International Military Tribunal the genesis of the idea that criminal organizations, viewed as groups—that is to say, as legal entities—can incur criminal responsibility. On 16 May 1945, the United Nations War Crimes Commission unanimously adopted recommendation C.105(1), paragraph (*b*) of which recommended that Governments should "commit for trial, either jointly or individually, all those who, as members of these criminal gangs, have taken part in any way in the carrying out of crimes committed collectively by groups, formations or units".[41] That recommendation influenced the drafting of the Charter of the Nürnberg Tribunal,[42] and in particular article 6, which stated that the Tribunal had the power to try major war criminals, whether they were accused as individuals or as members of organizations. This came very close to declaring that criminal organizations could be brought before a criminal jurisdiction. It would have been dangerous to take that further short step. A reading of articles 9 and 10 is quite instructive and shows that the Charter of the International Military Tribunal did not attempt at all to establish the penal responsibility of criminal organizations as legal entities. In fact, those articles merely gave the Tribunal competence to declare a given organization a criminal organization. Such a declaration had to precede any prosecution of the organization's members before national courts. Six Nazi organizations were declared criminal organizations during a trial which took place separately from the proceedings against the accused. The declaration of criminality was only a preliminary, an essential pre-condition for individual prosecution of members of the organizations. It cannot, therefore, be deduced from the mere existence of the aforementioned texts that there was the least inclination to establish the international criminal responsibility of legal entities. However, the controversy did not die down after Nürnberg. Even the difficulty of enforcing a coercive penalty on a State did not give pause to those who support the theory of the responsibility of legal entities. Such entities, they argue, can be subjected to penalties appropriate to their nature, such as reprimands and fines. States can be ordered to dismantle war factories. A kind of *capitis diminutio* can be imposed on them, which would curtail their legal capacity by, for example, deny-

[40] *Op. cit.*; see also, by the same author, "La responsabilité pénale des personnes morales", *Actes du deuxième Congrès international de droit pénal* (Bucharest, October 1929) (Paris, Godde, 1930), p. 582.

[41] See *History of the United Nations War Crimes Commission ...* (*op. cit.*), p. 296.

[42] See footnote 25 above.

ing them the right to manufacture certain types of armaments. To date, there has been no judicial precedent ordering such measures. The function of the Nürnberg Tribunal was not to pass judgment on States. The decisions which did so were taken by the Governments of the victorious States, not by their courts.

47. One difficulty, of course, is distinguishing between penalties and sanctions. The term "penalty" is a misnomer unless it refers to the outcome of a judicial decision; a sanction, on the other hand, may result from a non-judicial act. Still, it must be admitted that the present trend is towards a preference for the terms "measures" and "countermeasures" to describe actions decided on by a State or an international organization in response to, or in order to prevent, acts likely to cause damage. In the view of some writers, this distinction derives from an intellectual approach which has no practical application. Donnedieu de Vabres, in his report to the first International Congress on Penal Law, in 1926, asserted:

> ... Penalties [imposed on a State] are not different in nature from the economic, financial or military measures envisaged as coercive measures in Article 16 of the Covenant [of the League of Nations]. ...[43]

Endorsing this opinion, the Swiss jurist Jean Graven wrote:[44]

> A sanction, whether described as a "penalty" or a "measure", is a sanction; what matters is not the name, but the thing itself. It may prevent and chastise, it may be severe and cause atonement, it may intimidate or protect, it may teach a lesson, impose a fine and prevent a recurrence of the crime; so much the better if it has all these diverse effects! But is it really necessary to insist and ordain at all costs that, if it is termed a "penalty", it will have certain effects and, if a "measure", certain other effects, solely and exclusively?
>
> ...
>
> A variety of sanctions, diplomatic, political, economic or military, may be imposed on a State; a State which has a host of material, territorial and intellectual assets and privileges may find all of them substantially affected by measures ranging from the severance of diplomatic relations to the sequestration of property, the destruction of installations and the demolition of factories, from blockades, embargoes and boycotts to heavy fines, levies and seizure of assets, and from assault landings to military occupation. ...

However, despite the opinion of this eminent jurist, it must be admitted that, while penalties and measures may often have the same effect, they are not of the same nature and do not have the same legal basis. Furthermore, measures may be preventive, whereas penalties are imposed after the event.

48. In any case, the Commission must harmonize its positions by bringing its 1954 draft code on offences against the peace and security of mankind into line with article 19 of part 1 of the draft articles on State responsibility. This seems to be the appropriate place for a few brief observations on the method to be adopted in elaborating the draft.

[43] *Premier Congrès international de droit pénal* (Brussels, 26-29 July 1926), *Actes du Congrès* (Paris, Godde, 1927), p. 408.

[44] Reply to the questionnaire of the International Association for Penal Law and the International Bar Association (November 1949). See also "Principes fondamentaux d'un code répressif des crimes contre la paix et la sécurité de l'humanité", *Revue de droit international, de sciences diplomatiques et politiques* (A. Sottile) (Geneva), vol. 28 (1950), pp. 381-382.

Chapter III

Methodology of codification

49. The first observation that comes to mind on examining the draft code prepared by the Commission in 1954 is that it contains no general part, except for the statement that offences against the peace and security of mankind are crimes under international law. The Commission deliberately refrained from formulating a criterion for identifying which of the vast range of crimes under international law were crimes against the peace and security of mankind. In addition, no reference is made to any general principle of penal law, such as the rule *nulla poena sine lege*, to the theory of justified acts (self-defence or participation in an action recommended or decided upon by the United Nations) or to the theory of extenuating circumstances. The Commission was no doubt justified in thinking that certain general principles of law now form an integral part of general public international law.

50. In the case of the principle *nulla poena sine lege*, however, the Commission's motives do not seem to have been quite so simple. The Commission had originally stated that principle in a draft article 5, which read as follows:

> 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.[45]

The Commission eventually deleted this draft article 5 and deferred consideration of the question of penalties until such time as it came to discuss enforcement of the code, and more specifically the question of a penal jurisdiction. The fact remains that that decision gives the draft as produced a rather curious appearance. What we have is a catalogue, a mere listing of offences, without any operational character. A penal code which says nothing about penalties is of no more use to contemporary society than the mummies of the Pharaohs. The principle *nulla poena sine lege* would make it unenforceable. That principle, which was reaffirmed in

[45] See the report of the Commission on its third session (see footnote 27 above), p. 137.

the Universal Declaration of Human Rights of 10 December 1948 (art. 11, para. 2) is one of the pillars of penal justice.[46] It constituted the basis for the refusal by the Netherlands authorities to surrender former Emperor William II to the Allies for trial after the 1914-1918 war, and also for some of the criticisms that were levelled at the judgment of the Nürnberg Tribunal. Jean-André Roux, Honorary Counsellor to the French Court of Cassation, wrote:

> ... the maxim *nulla poena sine lege*, which some quite prominent authors have apparently found it easy to discard ... must on the contrary govern international criminal law just as it dominates national penal law. The more highly placed the offender who is threatened with prosecution, the more precise must be the conditions governing his responsibility and determining the penalties which he incurs. ...[47]

The principle *nulla poena sine lege* may seem difficult to apply in the field of international law, because of the variety of national legal systems. Yet it would appear that offences against the peace and security of mankind, being among the most odious and most monstrous of offences, should not be difficult to penalize by reference to the most severe penalties prescribed under national laws.

51. As for self-defence, this is a concept endorsed by Article 51 of the Charter of the United Nations, which refers to the "inherent right of individual or collective self-defence". One is, of course, aware of all the controversies aroused by the concept of self-defence, both in itself and as regards the difficulties in identifying self-defence in each specific case. The Commission itself did not venture to attempt any definition of the term in its draft articles on State responsibility[48] because of the controversies surrounding that legal concept. It simply noted the existence of that primary rule both in the United Nations Charter and in customary international law. There nevertheless remains the question as to whether the concepts referred to above did not have a place in a draft criminal code. It is true that, as has just been mentioned, the draft on State responsibility included some relevant articles concerning circumstances precluding the wrongfulness of an international act. But it must be borne in mind that that draft was more generally concerned with civil responsibility, whereas ours deals with criminal responsibility, although both often arise from the same offence. In any event, it will be for the Commission to decide whether it will adhere to its earlier approach or whether it now intends to formulate a criterion and refer to general principles of penal law, in the form of a few introductory articles.

52. Enunciating a criterion would have another advantage. It might serve to link the proposed list to a common denominator, to a guiding thread, and thus make it plain that the proposed list was provisional and not exhaustive. It has been said that non-criminal acts often shade imperceptibly into criminal acts, and some practices and usages that were for long considered sacrosanct have already been cast on the scrap-heap of history. It is not very long ago that some serious writers, and even ecclesiastics, were producing works sanctioning the right to colonize,[49] and that colonial law was among the traditional courses at universities. Consequently, any list of international offences must be presented in such a way that it can be seen to be provisional and contingent. Between the time of Nürnberg and 1954, the date of the Commission's latest draft, considerable changes had already been observed; and since 1954 there have been further changes. When the Commission was directed in 1947 to formulate the principles contained in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, it set forth under Principle VI those offences which were considered at the time to be crimes under international law.[50] The main headings were aggression and preparation for aggression, violations of the laws or customs of war, and crimes against humanity, but only when committed "in execution of or in connexion with any crime against peace or any war crime".

53. By 1954, the Commission had already considerably lengthened the list of crimes enunciated and, in addition, had eliminated the need for a link between crimes against peace and war crimes, on the one hand, and crimes against humanity, on the other, which had previously been required in order for the latter to be regarded as offences. Additional offences against the peace and security of mankind were therefore identified and set forth in the 1954 draft. They were the following:

(*a*) The organization, encouragement or toleration by the authorities of a State of incursions by armed bands into the territory of another State;

(*b*) The undertaking, encouragement or toleration by the authorities of a State of activities calculated to foment civil strife in another State;

(*c*) The undertaking, encouragement or toleration by the authorities of a State of terrorist activities or of activities calculated to carry out terrorist acts in another State;

(*d*) Acts by the authorities of a State in violation of its obligations under a treaty 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;

(*e*) The annexation by the authorities of a State, contrary to international law, of territory belonging to another State;

(*f*) Intervention in the internal or external affairs of a State by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind;

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[46] General Assembly resolution 217 A (III) of 10 December 1948.

[47] See Pella, *La criminalité collective des Etats et le droit pénal de l'avenir* (*op. cit.*), p. cxxxii, "enquête internationale".

[48] See art. 30 and the commentary thereto of part 1 of the draft articles on State responsibility, *Yearbook ... 1979*, vol. II (Part Two), pp. 115 *et seq.*

[49] J. Folliet, *Le droit de colonisation: étude de morale sociale et internationale* (Paris, Bloud et Gay, 1933).

[50] See footnote 39 above.

(*g*) Acts by the authorities of a State or by private individuals committed with intend to destroy, in whole or in part, a national, ethnic, racial or religious group as such.

54. Is this list, drawn up in 1954, in addition to the one which derives from the Nürnberg Charter, still satisfactory? Can it be regarded as exhaustive in the light of the general principles of international law and of the present state of world consciousness? Or must the scope of our research be extended? The answer does not seem to be in doubt, as we have already indicated. During the last quarter of a century, the international community has gained awareness of a number of imperatives, which have become categorical imperatives and are set forth in United Nations resolutions. Thus we mentioned decolonization. Thus there is also an obvious need to protect the sovereignty of peoples over their natural wealth and resources. Again, the use of modern means and techniques for research purposes, if not controlled, exposes mankind to serious dangers. Environmental problems have accordingly assumed a new dimension and are now a matter of international public interest. Problems of racial segregation, to mention another topic, have come within the field of codification, which appears to act as a magnetic field in view of the force of attraction it exerts on anything that may pollute or disturb the international public order. Thus the transition from what is lawful to what is unlawful occurs more and more through the effect of that force of attraction.

55. No doubt in the case of criminal matters of the kind with which we are concerned, the statement of a general rule would not suffice. The principle *nullum crimen sine lege* requires that every unlawful act should be expressly defined and declared to be an offence in order to be punishable. It is not by chance that consideration of the 1954 draft code was made conditional on a prior definition of aggression. On the other hand, merely listing criminal acts without relating them to a common principle does not appear satisfactory. There might be a temptation to regard the list as exhaustive, as established *ne varietur,* whereas in fact we are dealing with a singularly evolutive field. Since 1954, many matters have been the subject of individual declarations or conventions which govern them and which restrict the activities of individuals and States. The need to include such matters in the present draft has often been questioned on the grounds that the code would then duplicate the conventions in question. The Commission will be discussing this point. If it agrees that all offences against the peace and security of mankind should fall within the scope of our topic, irrespective of their source (*jus cogens,* convention, custom), then it will be necessary to look into the relevant conventions and derive from them such lessons as may serve the purposes of the present codification. There is a further consideration: some conventions attach no penalties, or only very minor ones, to the acts which they declare to be offences. One example is the Tokyo Convention on offences and certain other acts committed on board aircraft, of 14 September 1963;[51] and while the Hague Convention for the suppression of unlawful seizure of aircraft, of 16 December 1970,[52] declares such offences to be criminal, it prescribes no penalties and leaves that task to States. The Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)[53] is a code of conduct, simply spelling out behavioural obligations, and there is no convention governing this area and providing for penalties. Many more examples could be cited.

56. It should also be noted that some matters regulated by conventions and excluded from the scope of codification in 1954 would perhaps fall within it today in the light of a review. The Commission did not consider, in 1950, that offences against the peace and security of mankind included piracy. But what view should one take, for example, of the seizure of aircraft mentioned above? Here we have an offence which is, perhaps improperly, called "air piracy" but which is not motivated by any desire for financial gain or personal profit and is often based on purely political considerations. When the seizure is effected by individuals acting with the encouragement or complicity of a State, we are confronted with an act which, depending on its scope and consequences, may jeopardize the peace and security of mankind. In the view of the Special Rapporteur, such an offence, regardless of the conventions governing it, should be regarded as a crime under international law, as an offence which is, by its very nature, subject to that law. It is no doubt a complicated situation, involving two distinct acts: the injurious act itself, namely the seizure of an aircraft, which is punishable under the Hague Convention of 16 December 1970, and the wrongful act of a State, entailing its civil responsibility for injury to another State. However, the question of the criminal responsibility of the State, as author of the unlawful act, might also be considered for complicity in a crime under international law. Such a situation can imperil the peace and security of mankind.

57. Here we are in that grey area where offences are of an ambiguous nature and where the internal order shades almost imperceptibly into the international order. That being the case, arriving at a criterion for identifying an offence against the peace and security of mankind becomes a hazardous task. If, as has been mentioned, the Commission adheres to its 1954 position, the task will be less arduous: an offence against the peace and security of mankind is any offence which, by its nature, is covered by international law, in that it infringes a lofty principle of human civilization. If, on the other hand, the Commission understands offences against the peace and security of mankind to include not only offences that are international by their very nature, but also offences which are covered by international law

[51] United Nations, *Treaty Series,* vol. 704, p. 219.

[52] *Ibid.,* vol. 860, p. 105.

[53] See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), chap. I.

as a result of a *convention*, then its task will be considerably more extensive. And what if the Commission wanted to cover all cases in which a State is the author of or an accomplice in an international offence? In that case, the whole of international penal law would have to be reviewed, because any offence is capable of becoming an international offence if a State participates in its commission. As Professor Malaurie wrote in his preface to the excellent manual by Claude Lombois: "There is no such thing as an offence which is an internal offence by its nature; any offence may become international if an element of extraneousness is discernible."[54] However, the Commission, without going as far as that, will no doubt consider whether or not it is desirable to include in the codification that whole area covered by conventions where offences are international not by their nature, but by the will of States. If it considers that approach inappropriate, then it will adhere to its 1954 position and the debate will be simplified accordingly.

58. It is clear, in any event, that the scope depends on the criterion selected. The possible criteria for offences against the peace and security of mankind are the following: (*a*) a narrow criterion: an offence which is international by its nature; (*b*) a broader criterion: any offence which is international by its nature or as the result of a convention; (*c*) a still broader criterion which would add to those two categories any offence involving the participation of a State. It would seem that the draft code should in any case include, as an introduction, a general part indicating, if possible, the criterion adopted for the codification, thus permitting a better delimitation of the subject.

[54] C. Lombois, *Droit pénal international* (2nd ed.) (Paris, Dalloz, 1979), p. v.

CHAPTER IV

Implementation of the code

59. The questions of an international penal code and of an international jurisdiction are closely interrelated. They are so linked together that neither can advance without the other. However, the Commission took the view that it should deal with offences first and consider the question of penalties only at a later stage. In keeping with that approach, it eventually decided to delete from its 1954 draft code article 5, concerning the rule *nulla poena sine lege* (see para. 50 above), which it felt was more bound up with the imposition of the penalty and hence with the existence of an international jurisdiction. However, implementation of the penalty also presupposes the existence of a scale of penalties. This point was mentioned above.

60. There were several courses open to the Commission: it could itself establish the penalties applicable to each of the offences concerned; or, as at Nürnberg, it could leave that to the judge; or, lastly, it could refer to national legislation. The question remains open for discussion. But, in any event, there has to be a jurisdiction. The establishment of an international penal jurisdiction is the most difficult issue. It is not that this is inconceivable in theory. The Commission itself, in answer to a question put to it by the General Assembly,[55] replied that it was possible and desirable to establish such a jurisdiction.[56] In fact, many drafts have been produced to that end. They were mentioned in our review of the history of the codification. From the beginning, there have been arguments between realists and idealists as to the practical possibility of making such a jurisdiction work, of making it effective. Pella wrote in the *Revue générale de droit international public*:

> For a quarter of a century, it has been repeatedly stated that elaborating an international penal code and refusing to establish the necessary jurisdiction to enforce it means formulating rules of international law on the basis of the idea that their enforcement depends on the fluctuating fortunes of war and not on stable elements consisting of a pre-existing and permanent organization of international justice.[57]

The Chairman of the Commission at its second session, Georges Scelle, said on 9 June 1950 that

> ... if such an organ were not set up, what would be the point of defining the Nürnberg principles ...? If, as a preliminary step, an international organ were created, there would be some chance of a real court of international justice being established which would be competent to judge all war criminals, to whichever side they belonged. ...[58]

Following that statement, the Commission decided to answer the question put to it in the affirmative. After considering the reports of R. J. Alfaro[59] and A. E. F. Sandström,[60] the Commission even proposed the establishment of a separate penal jurisdiction, instead of a chamber of a pre-existing court.[61]

61. Pursuant to that recommendation, the General Assembly, by its resolution 489 (V) of 12 December

[55] General Assembly resolution 260 B (III) of 9 December 1948.

[56] See the report of the Commission on its second session (see footnote 39 above), p. 379, para. 140.

[57] Pella, "La Codification du droit pénal international", *Revue générale de droit international public* (Paris), vol. LVI (1952), p. 415.

[58] *Yearbook ... 1950*, vol. I, p. 22, summary record of the 43rd meeting, para. 41.

[59] *Yearbook ... 1950*, vol. II, p. 1, document A/CN.4/15.

[60] *Ibid.*, p. 18, document A/CN.4/20.

[61] See *Yearbook ... 1950*, vol. I, pp. 24-28, summary record of the 44th meeting, paras. 1-63; see also the report of the Commission on its second session (see footnote 39 above), p. 379, paras. 141-145.

1950, decided to establish a committee composed of the representatives of 17 Member States for the purpose of preparing "proposals relating to the establishment and the statute of an international criminal court". The work of this Committee of Seventeen was to be based on one or more preliminary drafts prepared by the Secretary-General. On 31 August 1951, the committee approved a draft for the establishment of an international criminal court.[62] The draft was transmitted to Governments, but only a few of them made observations on it.

62. A new committee was established for the same purpose in 1952,[63] its terms of reference being to re-examine the draft prepared in 1951, to explore its implications and to study the relationship between the proposed court and the United Nations and its organs.[64] After a number of vicissitudes, the General Assembly finally decided, in 1954, to suspend consideration of the draft pending submission of the report of another committee, the Special Committee on the Question of Defining Aggression.[65] The Assembly thus made the definition of aggression a pre-condition for a code of offences against the peace and security of mankind. When a draft Definition of Aggression was proposed to the General Assembly in 1974,[66] the question was taken up anew but was again referred to the Sixth Committee, to be considered jointly with the question of a code of offences against the peace and security of mankind.

63. Thus the question arose whether this vicious circle could be broken, since consideration of each of the drafts was linked to consideration of the other. It therefore seems appropriate to see whether the Commission should not prepare a draft statute for an international jurisdiction as a necessary and vital complement to the draft code. The Commission might seek the views of the General Assembly on that point. It must, however, be noted that the ups and downs of the proposal for the establishment of an international criminal court are also due to widespread scepticism, and no doubt to the current state of international affairs. That scepticism was expressed again only recently, with pithiness and grim humour, in the following terms: "An international tribunal of the Nürnberg type is more an incantatory psychodrama than a really useful legal instrument."[67] The authors of that statement actually go much further, since they consider that any attempt at prosecution for international offences is really superfluous, and that preventive measures and subsequent reparations are more to the point than punishment as such. They take the view that "war crimes and crimes against humanity or peace have the force of a *fait accompli* which makes any criminal conviction pointless ..." and that, unless one wants to doctor the dead, the concern should be for prevention rather than cure. It is startling to encounter such a rejection of any international criminal jurisdiction. Nevertheless, this view reflects the feeling of impotence which holds many people in its grip and puts a damper on enthusiasm. It is also argued that the penalties imposed by such a jurisdiction would hardly be exemplary, "even if surrounded with international ceremony", and even if, at the time when they were pronounced, they resulted in "a satisfying catharsis for a traumatized public opinion".

64. Some writers, without espousing the more extreme elements of these arguments, do note the lack of any international power of coercion. But in reply to this, those in favour of an international jurisdiction refer to Articles 94 and 39 of the Charter of the United Nations, which deal, respectively, with giving effect to decisions of the ICJ and with measures under Chapter VII of the Charter. It has also been pointed out that the State of which a guilty party is a national cannot be forced to surrender him unless that State has been conquered.

65. Lastly, it has been argued that the establishment of an international criminal court would contravene the principle of the sovereignty of States and its corollary, the territoriality of penal law. This, as we have seen, is the weakest argument, since the existence of an international order, and of crimes under international law, is now generally accepted. Defining and punishing such crimes is not a matter for State sovereignty but for the international order. Moreover, in present circumstances, the establishment of such a jurisdiction would, of course, involve conventions to which States would necessarily be parties.

66. As for the principle of the territoriality of penal law, that principle is now subject to exceptions because of the need for international co-operation in suppressing banditry. In that connection, the theory of the active or passive personality of penal law and the theory of real protection are sometimes invoked to enable a State to apply its own law to offences committed by its nationals abroad, or to protect them when they are the victims of offences committed abroad, or to apply its own law to offences by which it is injured, irrespective of any consideration of the *lex loci delicti commissi* or of the law to which the offender himself is subject. The principle of universality has even been applied when an offence, because of its magnitude, endangers the material and moral interests of mankind. That principle formed the basis of the Charter of the Nürnberg International Tribunal. Admittedly, everything is a matter of degree, but the principle of State sovereignty is perfectly com-

[62] See "Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951" (*Official Records of the General Assembly, Seventh Session, Supplement No. 11* (A/2136)), annex I, "Draft statute for an international criminal court".

[63] General Assembly resolution 687 (VII) of 5 December 1952.

[64] See "Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953" (*ibid., Ninth Session, Supplement No. 12* (A/2645)).

[65] General Assembly resolution 898 (IX) of 14 December 1954.

[66] See "Report of the Special Committee on the Question of Defining Aggression, 11 March-12 April 1974" (*ibid., Twenty-ninth Session, Supplement No. 19* (A/9619)). The Definition of Aggression was adopted on the basis of this report: General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[67] M.-F. Furet, J.-C, Martinez and H. Dorandeu, *La guerre et le droit* (Paris, Pedone, 1979), p. 294.

patible with the existence of an international order providing the basis for a code of international penal law.

67. However, it is for the Commission to take a clear decision and set the limits of its task, the role of the Special Rapporteur at the present stage being simply to take stock of the problems which arise and to evoke answers. Moreover, as has been suggested (see para. 63 above), the Commission might be well advised to question the General Assembly about its terms of reference and whether or not it is necessary also to draft a statute for the international jurisdiction. If the Assembly replied in the affirmative, it would appear that the Commission could hardly complete that task during its present term of office, in view of the other topics on its agenda. However, the Commission may take the view, as it did in 1954, that, pending the establishment of an international jurisdiction, penalties could be imposed by national courts. That view is certainly not to be disregarded, but its drawbacks must be recognized; for there are two alternatives. One is that the authors of an offence are tried by their own national courts, which is often impossible so long as they occupy a high place in the hierarchy of the State or Government. In that case, must one wait for a change of régime or an internal upheaval before the guilty parties can be apprehended and tried? The other alternative is trial by the courts of the States directly injured, in which case guarantees of objectivity and impartiality might be seriously lacking. Jules Basdevant, who signed on behalf of France the 1937 Convention for the Creation of an International Criminal Court[68] aimed at repressing terrorism, speaking of national courts, said that

> ... the methods of procedure of such courts, their view of the possibly complicated circumstances of the case before them, the perhaps doubtful authenticity of the evidence and the nature of the judgment rendered might be viewed in a different light in different countries. Indeed, the court's decision in such a case might well lead to political tension between the country affected by the terrorist offences and the country in which judgment was passed.[69]

It is precisely in view of cases of this kind that it may be desirable, for the sake of good feeling between nations, to bring the offender before judges whose impartiality and independence are beyond question. Moreover, the consistency of public international law requires harmonization of judicial decisions, which is difficult to ensure in the absence of an international jurisdiction. Lastly, what about cases where the issue is the criminal responsibility not of individuals, but of the State? In such cases, a State could hardly be summoned to appear before another State to answer for criminal acts.

68. Such are the arguments, stated briefly and no doubt incompletely, for and against an international criminal jurisdiction. The decision rests with the Commission. If it should decide to embark on this undertaking, only then would there arise the technical problems mentioned by the Special Rapporteur, at this stage, purely for reference purposes. Those problems involve organization, procedure, institution of proceedings, preliminary investigation, trial, defence, civil actions, appeals, execution of decisions, and so on. Consideration of such problems would, of course, be premature because it depends on whether or not it is thought desirable to establish a statute for an international criminal court.

[68] See footnote 21 above.

[69] League of Nations, *Proceedings of the International Conference on the Repression of Terrorism* (Geneva, 1-16 November 1937) (publication No. 1938.V.3), p. 59.

Chapter V

Conclusion

69. This report has consisted of a review of the problems involved in codifying the topic of offences against the peace and security of mankind. As announced at the thirty-fourth session of the Commission, it is an introductory report which has attempted to make an inventory—no doubt incomplete—of the problems, in order to evoke joint thinking and answers. Those problems concern:

(a) *The scope of the topic, and in particular*:

1. *The nature of the offences.* What offences should the codification cover? What are the specific features of an offence against the peace and security of mankind? What distinguishes it from other international offences? Must it necessarily include a political element?

2. *The subjects of law.* (Individuals? Groups? States? All three together?)

(b) *The method*

Deductive method: should one start with a general definition of an offence against the peace and security of mankind? Or should one adopt the *inductive* method, consisting of seeking in positive law, including international conventions, what is now considered to constitute an offence against the peace and security of mankind?

(c) *Implementation of the code*

Should the Commission take up the question of implementation of the code or, in other words, the establishment of an international criminal jurisdiction and the rules of procedure required for its functioning?

70. Such are the questions on which the Special Rapporteur solicits the thoughts and suggestions of the Commission. He is fully aware that he has not covered all the problems. However, should the report give rise to a wide-ranging and thorough discussion, the Special Rapporteur will have achieved his purpose.