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**Second report on the draft code of offences against the peace and security of mankind, by
Mr. Doudou Thiam, Special Rapporteur**

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draft statute for an international criminal court**

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DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 5]

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Second report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur

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Introduction

1. This report will be extremely brief. Its sole aim is to have the International Law Commission determine, before drafting any articles, the list of acts classified as offences against the peace and security of mankind.

2. At its thirty-fifth session, the Commission discussed general problems arising out of the codification of offences against the peace and security of mankind. It appeared that a number of questions were controversial, and the Commission deemed it advisable to submit them to the General Assembly, at its thirty-eighth session, in order to obtain answers, or at least guidance.

3. The questions involved were:

(a) With regard I to the content *ratione personae* of the subject, whether international criminal responsibility could be attributed to a State;

(b) With regard to the implementation of the Code, the Commission wanted the General Assembly to indicate its mandate more clearly, in particular with regard to the preparation of a statute of an international criminal jurisdiction.¹

4. However, the debates in the Sixth Committee of the

* Incorporating document A/CN.4/377/Corr.1.

¹ See *Yearbook . . . 1983*, vol. II (Part Two), p. 16, para. 69.

General Assembly have not dispelled this uncertainty. In its resolution 38/138 of 19 December 1983, the General Assembly "recommends that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the International Law Commission should continue its work on all the topics in its current programme." Under these circumstances, the Special Rapporteur considers that, for the time being, the subject should be limited to the less controversial questions until more precise replies are received from the General Assembly and from Governments.

5. As things stand, it appears that minimum agreement can be reached only as regards the following approach: to reconsider the 1954 draft code² and expand, as appropriate, the list of offences proposed by it so as to reflect the international reality of today. Of course, such an approach leaves intact the above-mentioned problems, which might be taken up again at a later stage.

6. The preparation of this report has also been guided by another consideration: it appeared reasonable and logical that, before draft articles were submitted, agreement should first be reached on the list of offences classified as offences against the peace and security of mankind. It would serve no purpose, and would be a waste of time, to prepare articles on offences which the Commission would not subsequently retain as relevant to the subject. This report will therefore deal solely with the content *ratione materiae*. It will be confined to a catalogue. Its purpose is to formulate a list of offences today considered as offences against the peace and security of mankind, in other words to bring up to date the list prepared by the Commission in 1954.

7. The scope of this report having thus been provisionally delimited, the Special Rapporteur's approach will be dominated by the following consideration: the Commission is to prepare a *code of offences against the peace and security of mankind, and not an international penal code*. Consequently, many offences which undoubtedly constitute international crimes will not, for that reason alone, be included in the proposed draft. Indeed, the following must always be borne in mind: *all offences against the peace and security of mankind are international crimes, but not every international crime is necessarily an offence against the peace and security of mankind*.

8. It will therefore be necessary to examine international crimes to see which constitute offences against the peace and security of mankind. It will be recalled in this connection that the criterion chosen by the Commission at its thirty-fifth session was that of *extreme seriousness*.³ The Commission was unanimous on that point. The difficulty is that this criterion is a highly subjective one, which is bound up with the state of the international conscience at a given moment. That is not unique to the subject dealt with here. In internal law, the classification of offences into petty offences, less serious offences and serious offences is dependent on subjective criteria which take into account

the seriousness of the act involved, and this seriousness itself is evaluated in accordance with the state of public conscience, political and ethical convictions, and so on. The international dimension simply means that the offences have greater repercussions in that they affect peoples, races, nations, cultures, civilizations and mankind when they conflict with universal values. The seriousness is evaluated in terms of these elements.

9. Article 19 of part 1 of the draft articles on State responsibility⁴ defines an international crime with reference to this criterion of seriousness. However, while this criterion has always been the distinguishing feature of international crimes, it should be recognized that its basis was, for a long time, a narrow one, merging principally with *aggression* or *war crimes*. The concept of a crime against humanity, which emerged mainly after the Second World War, was closely associated with the state of war, and the Charter of the Nürnberg International Military Tribunal itself recognized as crimes against humanity only those committed in the context of war. Belligerency and criminality were intimately associated.

10. Today, the concept of an international crime has acquired a greater degree of autonomy and covers all offences which seriously disturb international public order. The way towards this change had already been opened widely by legal theory. Georges Scelle said that "any action which disturbed international public order was a crime under international law."⁵ Vespasien V. Pella considered that "actions or non-actions which violate the elementary principles considered as absolutely necessary for the maintenance of universal order and of international peace" were international infractions.⁶ In his study on the criminal responsibility of the Hitlerites, Professor Trainin also went beyond the concept of a war crime and considered an international crime to be "an infringement of the connection between States and peoples, a connection which constitutes the basis of relations between nations and countries."⁷

11. All these definitions converge, in substance, with article 19 of part 1 of the draft articles on State responsibility, according to which an international crime results from the breach of an international obligation so essential for the protection of fundamental interests that its breach is recognized as a crime by the international community as a whole. It is therefore clear that the concept of an international crime today goes beyond the Nürnberg context in the sense that it is less connected with the crimes of the Second World War, and covers far wider areas. Moreover, the need to revise the 1954 draft code is justified, in part, by this extension of the concept of an international crime. The 1954 draft itself departed from the Nürnberg context by defining crimes against humanity regardless of any relation to war crimes.

² *Yearbook ... 1954*, vol. II, pp. 151-152 document A/CN.4/39, para. 54. The text of the draft code is reproduced in *Yearbook ... 1983*, vol. II (Part Two), p. 11, para. 33.

³ *Yearbook ... 1983*, vol. II (Part Two), pp. 13-14, paras. 47-48.

⁴ *Yearbook ... 1976*, vol. II (Part Two), pp. 95-96. See also *Yearbook ... 1983*, vol. II (Part Two), p. 14, para. 53.

⁵ *Yearbook ... 1949*, p. 188, summary record of the 26th meeting, para. 34.

⁶ Pella, "The criminality of wars of aggression and the organization of international repressive measures", report submitted at the twenty-third Inter-Parliamentary Conference (see Inter-Parliamentary Union, *XXIIIrd Conference* (Washington and Ottawa, 1925), p. 103).

⁷ A. N. Trainin, *Hitlerite Responsibility under Criminal Law* (London, Hutchinson, 1945).

12. However, although today there is a definition of an international crime, an offence against the peace and security of mankind has yet to be defined. Whence does such an offence derive its distinctiveness? At its thirty-fifth session, the Commission took the view that offences against humanity constituted the category of the most serious offences.⁸ The difficulty lies in distinguishing between the most serious and the less serious. There is no objective dividing line between the two, and even if such a dividing

line existed, it would shift with changes in international opinion.

13. That is why it is not enough to establish the excessively general criterion of seriousness. A catalogue of conventions, resolutions and declarations adopted by the international community must be compiled, so that some useful lessons may be learned.

14. In this matter, the Commission is amply assisted by its previous work, and this report may thus be divided into two parts: (a) offences covered by the 1954 draft code; (b) offences classified since 1954.

⁸ *Yearbook* . . . 1983, vol. II (Part Two), pp. 13-14, para. 47.

CHAPTER I

Offences covered by the 1954 draft code

15. First of all, it should be ascertained whether the Commission is to include all the offences covered by the 1954 draft code. That draft dealt with three categories of offences, which will be considered in succession:

(a) Offences against the sovereignty and territorial integrity of States;

(b) Offences violating the prohibitions and limitations on armaments or the laws and customs of war;

(c) Crimes against humanity, also called crimes of *lèse-humanité*.

A. Offences against the sovereignty and territorial integrity of States

16. The offences against the sovereignty and territorial integrity of States contained in the 1954 draft code consist basically of aggression and its offshoots: civil war, terrorism, annexation of territory belonging to another State or intervention in its internal or external affairs. These offences are covered in paragraphs (1) to (6), (8) and (9) of article 2 of the 1954 draft, which read as follows:

(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 of a competent organ of the United Nations.

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

(3) The preparation by the authorities of a State of 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 of a competent organ of the United Nations.

(4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

(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.

...

(8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law.

(9) The intervention by the authorities of a State in the internal or external affairs of another 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.

17. All these provisions derive from the general principles of law and from Article 2, paragraph 4, of the Charter of the United Nations. They are reflected also in later provisions, in particular articles 2, 3 and 4 of the draft declaration on rights and duties of States (General Assembly resolution 375 (IV) of 6 December 1949) and in paragraph 3 of General Assembly resolution 290 (IV) of 1 December 1949, which calls upon every nation to refrain from any threats or acts, direct or indirect, aimed at fomenting civil strife and subverting the will of the people in any State, as well as in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (General Assembly resolution 2131 (XX) of 21 December 1965).

18. It should be noted also that these principles already influence the law of treaties and the law of international responsibility. Today, instruments such as the 1969 Vienna Convention on the Law of Treaties⁹ (articles 51 and 52) make express mention of coercion of a representative of a State or coercion of a State as grounds for the invalidity of a treaty, and the draft articles on State responsibility deal (article 28 of part 1)¹⁰ with the responsibility of a State for coercion exerted on another State to secure the commission of an internationally wrongful act.

19. At the present time it is thus clear that the paragraphs quoted above from article 2 of the 1954 draft code are supported by a very broad conventional base and cannot be called into question today, at least in so far as the substance is concerned, while the question of the wording

⁹ United Nations, *Juridical Yearbook* 1969 (Sales No. E.71.V.4), p. 140.

¹⁰ *Yearbook* . . . 1979, vol. II (Part Two), p. 94.

remains open. In this connection, the new Definition of Aggression¹¹ will perhaps make it possible to draft a more detailed text.

B. Offences violating the prohibitions and limitations on armaments or the laws and customs of war

20. The second group of provisions contained in the 1954 draft code relates to *violations of restrictions and limitations on armaments and of the laws and customs of war*.

21. Paragraph (7) of article 2 refers to:

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.

22. Paragraph (12), which is very brief, refers to:

Acts in violation of the laws or customs of war.

These provisions, which are designed to limit the risks of war and then, if war breaks out, to render it less cruel, show a certain realism and are given concrete expression in many conventions, in particular the four Geneva Conventions of 12 August 1949¹² and the Additional Protocols of 8 June 1977.¹³

23. The international community has long been concerned with arms limitation. Even before the Hague Convention of 1907,¹⁴ there was the St. Petersburg Declaration of 11 December 1868,¹⁵ and subsequently the Hague Convention of 1899,¹⁶ banning explosive weapons and asphyxiating gases respectively. Then came the Treaty of Washington of 6 February 1922¹⁷ (not ratified), which was based on article 171 of the Treaty of Versailles,¹⁸ and then the Geneva Protocol of 17 June 1925,¹⁹ which established a general prohibition on the use of asphyxiating gases.

24. Following the Second World War, the United Nations embarked on a systematic study of the rules relating to the prohibition or restriction of the use of "certain weapons".²⁰

25. The efforts made to update the prohibitions of the Geneva Protocol of 1925 resulted in the Convention on the

Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 10 April 1972,²¹ which does not, unfortunately, cover chemical weapons.

26. But what about nuclear weapons? These are mentioned by the General Assembly for the first time in its resolution 41 (I) of 14 December 1946, and subsequently in many other resolutions: resolutions 299 (IV) of 23 November 1949, 380 (V) of 17 November 1950, 502 (VI) of 11 January 1952, 704 (VII) of 8 April 1953, 715 (VIII) of 28 November 1953, 808 (IX) of 4 November 1954, 914 (X) of 16 December 1955, 1653 (XVI) of 24 November 1961, 1801 (XVII) of 14 December 1962 and 2164 (XXI) of 5 December 1966.

27. However, there is no text prohibiting the use of nuclear weapons for combat purposes. Such weapons certainly fall within the category of weapons of mass destruction, but that does not resolve the problem. Many delegations have raised the problem of the use of nuclear weapons and called for its explicit condemnation as an offence against the peace and security of mankind. It is argued, however, that these weapons are based on the strategic concept of deterrence. Seen from this viewpoint, the problem of prohibition would seem to be insoluble, because prohibition would run counter to the very concept of deterrence. It will be noted that the draft international penal code drawn up by the International Association of Penal Law remains silent on the subject.²² The debate will be opened in chapter II of this report. It is necessary to consider now the provisions of the draft relating to the third group of offences, those termed crimes against humanity.

C. Crimes against humanity

28. Crimes against humanity are dealt with in paragraphs (10) and (11) of article 2 of the 1954 draft code, as follows:

(10) Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

- (i) Killing members of the group;
- (ii) Causing serious bodily or mental harm to members of the group;
- (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) Imposing measures intended to prevent births within the group;
- (v) Forcibly transferring children of the group to another group.

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a

¹¹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹² United Nations, *Treaty Series*, vol. 75.

¹³ United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*

¹⁴ J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), p. 100.

¹⁵ Déclaration relative à l'interdiction des balles explosives en temps de guerre (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1873), vol. XVIII, p. 474).

¹⁶ Scott, *op. cit.*, p. 225.

¹⁷ M. O. Hudson, ed., *International Legislation* (Washington (D.C.), 1931), vol. II (1922-1924), p. 794, No. 66.

¹⁸ G. F. de Martens, ed., *op. cit.*, 3rd series (Leipzig, Weicher, 1923), vol. XI, p. 323.

¹⁹ League of Nations, *Treaty Series*, vol. XCIV, p. 65.

²⁰ See *Napalm and Other Incendiary Weapons and All Aspects of their Possible Use* (United Nations publication, Sales No. E.73.I.3). See also the report on conventional weapons prepared within the framework of the

fourth session of the Diplomatic Conference on Humanitarian Law (Geneva, March-June 1977), *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974-1977), vol. XVI, p. 505, document CDDH/IV/224/Rev.1 (Bern, Federal Political Department, 1978).

²¹ United Nations, *Treaty Series*, vol. 1015, p. 163.

²² C. Bassouni, *International Criminal Law - A Draft International Criminal Code* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1980).

State or by private individuals acting at the instigation or with the toleration of such authorities.

29. All these acts constitute crimes against humanity, although this was not specifically mentioned in the 1954 draft. Moreover, these provisions are but a restatement of article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.²³ Some thought that there was no point in making further mention of the crime of genocide in the 1954 draft.²⁴ They considered that the Convention on Genocide should be totally autonomous in order to avoid the difficulties that might arise in certain instances, in particular in a case where measures for the implementation of the code were not taken, in the event that States that were parties to both instruments entered reservations with regard to one or the other. They also considered that genocide is a crime against humanity and is covered by that category of offences.

30. In fact, it seems difficult not to mention genocide in the code, because it is a typical offence. The mention of genocide would not deprive the 1948 Convention of its autonomy. It should further be noted that article 19 of part I of the draft articles on State responsibility²⁵ highlights genocide by including it in the list of serious violations of international law.

31. It may be wondered whether the category of offences grouped under the term "crimes against humanity" has a certain specificity and obeys its own régime, distinct from the general régime of the protection of human rights. The problem of human rights has, for several decades, been assuming considerable proportions. A whole legal system has developed, based on the defence of the individual as a subject of law. This system is aimed principally at defending the individual against abuses of power, and laws and courts to protect individual rights exist in many countries.

32. However, human rights violations considered in this light should not be confused with crimes against humanity. The latter are different. In the first case, a person is affected as an individual, or more precisely as a human being, vested as such with imprescriptible rights, such as freedom of religion, freedom of opinion and expression, freedom to come and go, freedom of association and freedom of assembly. A crime against humanity, however, relates to different concepts: race, nationality, and political or religious entities. It is directed against groups born or constituted on the basis of these criteria. If such a crime affects the individual, it does so indirectly; the crime is directed against him not as an individual, but because he belongs to a given nation, ethnic group or political or religious grouping.

33. In order to draw a distinction between violations of human rights thus defined and crimes against humanity, it could be said that, in the case of the former, it is the individual whose fundamental rights are infringed, whereas in the case of the latter, the offences concern all mankind. If

this distinction were watertight, it could serve as a dividing line and it would then be said that violations of human rights, in the sense of the rights of the individual, fall within the scope of internal law, whereas crimes against humanity fall within the scope of international law. As noted above (paragraph 31), many internal legal systems have set up mechanisms to defend the rights of the individual by making it possible to seek remedy in the national courts against abuses of power. It is true that the primary aim of such legal action is to secure the annulment of improper decisions or to obtain civil compensation. However, when the acts involved are also criminal in nature, their perpetrators can be prosecuted in the criminal courts. This is true, for example, of acts of violence committed by agents of the State.

34. However, the protection of the aforesaid individual rights is currently being extended to some degree into the international sphere. This trend is reflected in the Universal Declaration of Human Rights of 10 December 1948,²⁶ and the International Covenant on Civil and Political Rights of 16 December 1966.²⁷ Furthermore, in some regional organizations individuals are permitted in certain cases to sue their Governments in the international courts for actions which they consider to be contrary to fundamental human rights. For example, there is a European Court of Human Rights. At present the distinction is not as definite as it might seem. The two types of violations cannot be entirely separated from one another, for they overlap. Mass violations of human rights by a State within its own sphere of sovereignty are no different, in essence, from crimes of *lèse-humanité* committed by a State against the nationals of another State. When violations of human rights attain a certain dimension or a certain degree of *cruelty* within a State, they offend the universal conscience and tend to fall within the province of international law. At this point it is necessary to ask whether the two concepts—that of crimes against humanity and that of violation of human rights considered from the standpoint of the freedoms of the individual—are autonomous. According to Stanislas Plawski:

... Fundamental human rights are covered by public international law and their destruction jeopardizes the very existence of that law and of international morality, on which that law is based. Any challenge to human rights imperils the principles of human civilization.²⁸

That is also the opinion of Pella, who writes in his memorandum on the draft code of offences against the peace and security of mankind that "the international protection of human rights and the protection of international peace form an indivisible whole."²⁹ Pella cites numerous authorities in support of the thesis of the indivisibility of the international protection of human rights and the defence of peace, in particular President Truman, who, in an address delivered on 24 October 1949, on the occasion of the laying of the cornerstone of the United Nations building, said that "disregard of human rights is the beginning of tyranny and,

²³ United Nations, *Treaty Series*, vol. 78, p. 277.

²⁴ See Pella, "La codification du droit pénal international", *Revue générale de droit international public* (Paris), vol. LVI (1952), pp. 398-399.

²⁵ See footnote 4 above.

²⁶ General Assembly resolution 217 A (III).

²⁷ United Nations, *Treaty Series*, vol. 999, p. 171.

²⁸ S. Plawski, *Etude des principes fondamentaux du droit international pénal* (Paris, Librairie générale de droit et de jurisprudence, 1972), p. 106.

²⁹ *Yearbook* ... 1950, vol. II, p. 278, para. 44.

too often, the beginning of war.”³⁰ Similarly, Henri Laugier, Assistant Secretary-General of the United Nations, said that “any deliberate and systematic violation of human rights in a country is a threat to the peace of the world, and consequently cannot be shielded by national sovereignty.”³¹

35. Just recently, Jean-René Dupuy, Professor at the Collège de France, in an interview published in the newspaper *Le Monde*, referred to “human rights without which peace is violence” and to “non-intervention in the internal affairs of other States, which is the surest means of shutting out what may be happening inside other countries.”³²

36. It is true that human rights have a certain normative content, on the basis of which efforts are on occasion made to regulate the conduct of nations; but this is no reason for indulging in excessive optimism. It cannot be maintained, without exaggeration, that all violations of human rights fall within the scope of international law. Here again, the seriousness of the violation is the deciding factor. Pella recognized this in his memorandum:

... For the time being the only offences having the status of international offences would be those which are of particular seriousness and which for that reason constitute crimes against humanity.

But he added:

Within these limits, ... the mere fact that an individual is the victim of a violation of internationally recognized human rights creates a direct relationship between him and the international community.³³

37. Thus in certain cases protection of human rights tends to be detached from internal law and to fall directly within the scope of international law. Indeed, as has just been said (paragraph 34 above), beyond a certain point, violations of a human right are in substance tantamount to crimes against humanity.

38. There are countless international instruments relating to the protection of human rights. They relate, in particular, to compulsory labour, discrimination in respect of employment and occupation, equal remuneration for male and female workers, religious intolerance, the penitentiary system, the right of asylum, the status of refugees, medical

ethics and so forth. But although violations of the obligations deriving from these conventions constitute violations of human rights in the broad sense of the term, they are not necessarily “crimes against humanity” for the purposes of this code.

39. The debate which has just been started is not purely theoretical. The point at issue is whether, aside from “crimes against humanity”, which will be the subject of a separate chapter in the draft articles, it would also be advisable, with respect to the instruments just mentioned, and in particular the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966, to draw up provisions relating to the protection of human rights, these rights being envisaged from the standpoint just described.

40. The matter dealt with here is one in which it is difficult to draw distinctions, and it would be hazardous to try to do so. Violations of human rights may at one time fall within the scope of internal law and at another within that of international law, depending on their seriousness. If the violation goes beyond a certain point, it falls within the category of international crimes and, depending on its seriousness, it may be at the top of the scale, in other words it may be a crime against humanity. There is strictly speaking no difference of nature between the two concepts, only a difference of degree. Once they exceed a certain degree of seriousness, violations of human rights are indistinguishable from “crimes against humanity.” It is equally difficult to distinguish crimes against humanity from war crimes. Often a single deed constitutes both a crime against humanity and a war crime; as already noted, it was only when sufficient time had elapsed after the Nürnberg trials that the concept of a crime against humanity finally acquired its own autonomy and became detached from the state of war.

41. With the above-mentioned reservations, it would seem that, subject to the wording of the articles, the list of offences that were classified as offences against the peace and security of mankind in 1954 should be maintained. Not only does it have a sound basis in custom but it has also been strengthened and consolidated by numerous later instruments.

42. The next step is to consider, in the light of the new conventions and declarations subsequently drawn up, what offences should be included to complete the list established in 1954.

CHAPTER II

Offences classified since the 1954 draft code

43. The scope of international law has been broadened since the Second World War, and such law is therefore becoming increasingly concerned with reprehensible acts and practices that formerly fell within the sphere of the exclusive sovereignty of States.

A. Relevant instruments

44. The vigour with which these practices and these acts

are denounced is reflected in resolutions, declarations and conventions, the most important of which are the following:

(1) Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960);

(2) Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of

³⁰ See *The New York Times*, 25 October 1949, p. 7.

³¹ Address made at the American Civil Liberties Union, New York, 22 February 1950.

³² *Le Monde dimanche* (Paris), 15 January 1984, p. xiii.

³³ See footnote 29 above.

Their Independence and Sovereignty (General Assembly resolution 2131 (XX) of 21 December 1965);

(3) The various resolutions on *apartheid*, the abundance of which shows that *apartheid* has been a matter of great concern;³⁴

(4) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex);

(5) Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (General Assembly resolution 3020 (XXVII) of 18 December 1972).

(6) The two Additional Protocols to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977;³⁵

(7) Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes (General Assembly resolution 3103 (XXVIII) of 12 December 1973);

(8) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973;³⁶

(9) Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 3452 (XXX) of 9 December 1975, annex);

(10) Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 10 December 1976;³⁷

(11) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, of 26 November 1968;³⁸

(12) Convention for the Suppression of Unlawful Seizure of Aircraft, of 16 December 1970³⁹ and Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, of 23 September 1971;⁴⁰

(13) International Convention against the Taking of Hostages, of 17 December 1979;⁴¹

(14) Supplementary Convention on the Abolition of

Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 7 September 1956;⁴²

(15) International Covenant on Civil and Political Rights, of 16 December 1966;⁴³

(16) International Covenant on Economic, Social and Cultural Rights, of 16 December 1966;⁴⁴

(17) Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, of 10 October 1980;⁴⁵

(18) Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, of 11 February 1971;⁴⁶

(19) Declaration on the Prevention of Nuclear Catastrophe (General Assembly resolution 36/100 of 9 December 1981);

(20) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, of 5 December 1979;⁴⁷

(21) Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, of 5 August 1963;⁴⁸

(22) Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, of 27 January 1967;⁴⁹

(23) Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

45. This list is not exhaustive, but it contains the most important instruments, some of which strengthen or supplement existing provisions, as in the case of the Definition of Aggression. Other instruments, on the other hand, constitute innovations, as in the case of those relating to colonialism, *apartheid* and the environment. The same is true of those relating to the taking of hostages, torture and acts of violence against internationally protected persons, although in the case of the last-named acts customary law preceded written law to a great extent. This even constitutes a typical example of instances in which customary law has paved the way for written law.

46. It is a question of identifying, through these various instruments and in the light of article 19 of part 1 of the draft articles on State responsibility, which offences are to be regarded as offences against the peace and security of mankind and should therefore be added to the 1954 list. The combination of two methods—deductive and inductive—will thus make it possible to avoid the pitfalls inher-

³⁴ See the following General Assembly resolutions: 2775 E (XXVI) of 29 November 1971, 3151 G (XXVIII) of 14 December 1973, 3324 E (XXIX) of 16 December 1974, 3411 G (XXX) of 10 December 1975, 31/6 I and 31/6 J of 9 November 1976, 32/105 M of 14 December 1977, 33/183 B and 33/183 L of 24 January 1979, 34/93 A and 34/93 O of 12 December 1979, 35/206 A of 16 December 1980, 36/172 A of 17 December 1981, 37/69 A of 9 December 1982 and 38/39 A of 5 December 1983.

³⁵ See footnote 13 above.

³⁶ United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 74.

³⁷ *Ibid.* 1976 (Sales No. E.78.V.5), p. 125.

³⁸ United Nations, *Treaty Series*, vol. 754, p. 73.

³⁹ *Ibid.*, vol. 860, p. 105.

⁴⁰ *Ibid.*, vol. 974, p. 177.

⁴¹ United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 124.

⁴² United Nations, *Treaty Series*, vol. 226, p. 3.

⁴³ *Ibid.*, vol. 999, p. 171.

⁴⁴ *Ibid.*, vol. 993, p. 3.

⁴⁵ United Nations, *Juridical Yearbook 1980* (Sales No. E.83.V.1), p. 113.

⁴⁶ United Nations, *Treaty Series*, vol. 995, p. 115.

⁴⁷ United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 109.

⁴⁸ United Nations, *Treaty Series*, vol. 480, p. 43.

⁴⁹ *Ibid.*, vol. 610, p. 205.

ent in a subject that lends itself too much to generalities. Some offences automatically have a place in this new list, whereas others, as will be seen, cannot be included without reservations.

B. Minimum content

47. In the case of offences in the former category, there is wide international agreement that they should be placed at the head of the parade of the hideous monstrosities that constitute international crimes. Some of the crimes that fall into this category are colonialism, *apartheid* and serious damage to the environment. The taking of hostages, violation of the international protection afforded to diplomats and certain other groups of people, as well as mercenarism, should be added to this category.

48. The condemnation of colonialism falls within the sphere of *jus cogens*, and it is surprising that no reference should have been made to this phenomenon in a draft code drawn up in 1954. It was necessary to wait until 1960 for the adoption of the well-known Declaration on the Granting of Independence to Colonial Countries and Peoples, outlawing colonialism. However, the Charter of the United Nations itself already contained the principle of the condemnation of colonialism.

49. According to paragraph 1 of the 1960 Declaration:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an *impediment to the promotion of world peace** and co-operation.

This offence is once again classified as a crime in article 19 of part 1 of the draft articles on State responsibility, in which colonialism is regarded as a serious breach of an obligation that is essential for safeguarding the dignity of peoples and their right to self-determination.

50. *Apartheid* falls within the same category, and here again the same lacuna may be noted in the 1954 draft code. Now, article 1 of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination⁵⁰ states:

Article 1

Discrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a *fact capable of disturbing peace and security among peoples.**

Similarly, article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966⁵¹ requires States parties to condemn racial segregation and *apartheid* and to eradicate all racist practices from their territories. Article 1 of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, of 30 November 1973,⁵² states that: "The States parties to the present Convention declare that

apartheid is a *crime** against humanity", and that inhuman acts resulting from the policies and practices of *apartheid* constitute "a *serious threat to international peace and security**". Lastly, article 19 of part 1 of the draft articles on State responsibility lists *apartheid* as an international crime.

51. It is now necessary to proceed to consideration of damage to the environment. A number of conventions deal with protection of the environment, including the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof;⁵³ the Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water;⁵⁴ the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies;⁵⁵ and the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.⁵⁶ Lastly, article 19 of part 1 of the draft articles on State responsibility also cites serious damage to the environment as an international crime.

52. The problems to which the use of nuclear weapons give rise would appear, on the other hand, to constitute the squaring of the circle. Many delegations at the United Nations have expressed the wish to have the fact that a State is the first to use nuclear weapons regarded as a crime against humanity. A resolution to that effect has even been adopted.⁵⁷ It is true that the prohibition of the use of nuclear weapons is based on impeccable logic, since it fits into the general framework of the prohibition of weapons of mass destruction, of which nuclear weapons are the prototype. The devastating effects of these weapons are immeasurable, and the horror they evoke is without parallel. However, there is also an element of ambiguity as to the purpose of these weapons: although they are capable of destruction, they are supposed to provide protection, in other words to safeguard peace and security. It is concluded, on the basis of that reasoning, that their prohibition would nullify their deterrent effect and therefore be counterproductive.

53. It is for the Commission to take a decision in this matter and to establish whether a special reference should be made in the code to the use of nuclear weapons. The truth is that, given the current state of affairs, the use of nuclear weapons, unlike that of certain other weapons, which is prohibited by a convention, has not yet been dealt with at all in positive law. The Commission must distinguish between what is desirable and what is possible and maintain a reasonably realistic stance. Moreover, the problems to which nuclear weapons give rise do not appear to be as specific as they might look. Any type of weapon generally gives rise to two sets of problems, relating either to its limitation or to its prohibition. If they are considered from these two angles, the provisions concerning the violation of the prohibitions, limitations and restrictions on

⁵³ See footnote 46 above.

⁵⁴ See footnote 48 above.

⁵⁵ See footnote 49 above.

⁵⁶ See footnote 37 above.

⁵⁷ General Assembly resolution 36/100 of 9 December 1981.

⁵⁰ General Assembly resolution 1904 (XVIII) of 20 November 1963.

⁵¹ United Nations, *Treaty Series*, vol. 660, p. 195.

⁵² *Ibid.*, vol. 1015, p. 243.

weapons that are to be included in the code should cover the hypothesis of a prohibition of nuclear weapons, should such a prohibition be laid down at some stage in special conventions.

54. To turn to an entirely different question, particular attention should today be paid to the taking of hostages. The practice of taking hostages is an unacceptable way of exerting pressure on States in order to force them to act or not to act, and to prevail on them to take action that is not in keeping with their wishes. The most disturbing aspect of this issue is that the taking of hostages is sometimes a method of implementing national policy used by States, either directly, or indirectly through protection of or provision of assistance to the perpetrators of this crime. Moreover, hostage-taking is often accompanied by another offence, namely, the offence of committing acts of violence against internationally protected persons. In fact, such persons are often the very target of those who take hostages. During the Second World War, the Nazis engaged extensively in the practice of hostage-taking, but in that particular context the taking of hostages was regarded as a violation of the laws and customs of war, because it was the civilian population that was often the victim of such measures. The offence in question was therefore linked with armed conflict. The matter was also considered from that standpoint in the Fourth Geneva Convention of 1949⁵⁸ (arts. 3 and 34). Today, hostages are taken in the context of terrorist activities in peacetime. In 1979, the General Assembly adopted the International Convention against the Taking of Hostages.⁵⁹ The phenomenon in question has become so widespread that it is now necessary that hostage-taking be dealt with in a special provision in the draft code, in cases where it involves an international element.

55. For the same reasons, acts of violence against internationally protected persons should now be covered by the code. Very often the real target of such acts of violence is not so much the protected persons as the State which they represent. Moreover, it is an easy means of attaining political objectives or settling disputes without using the means that exist for the peaceful settlement of such disputes. Pella, in his study on the codification of international criminal law,⁶⁰ recommended that such an offence should be considered as an international offence. In 1954, the Commission did not deem it necessary to include it in the list of offences. Those who prepared the 1954 draft code cannot be faulted for not having anticipated the tremendous upsurge that would take place in such acts of violence, which are shaking even the most solidly established traditions. Kidnappings, illegal confinements, summary executions of diplomats are everyday occurrences and, as has been pointed out, the motive is often purely political.

56. Charges in respect of such acts would now be based not only on custom but also on sound treaty bases, in particular on the 1961 Vienna Convention on Diplomatic Relations⁶¹ (arts. 29 *et seq.*), the 1963 Vienna Convention

on Consular Relations⁶² (arts. 40-41), the 1969 Convention on Special Missions⁶³ (art. 29) and, above all, the 1975 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.⁶⁴ Provisions are also being envisaged in the draft articles on the status of the diplomatic courier.

57. The obligation incumbent upon an internationally protected person to respect the laws and regulations of the receiving or host State is set forth in the Vienna Convention on Diplomatic Relations (art. 41), the Vienna Convention on Consular Relations (art. 55), and the Convention on Special Missions (art. 47). Any breach of that obligation that might pose a threat to public order in the receiving country is an international offence. If the breach is organized by a State, then it is likely to be a threat to peace.

58. It would therefore appear that the above-mentioned offences certainly fall within the scope of the codification. Under article XII of the draft international penal code drawn up by the International Association of Penal Law, such offences are considered international offences and there is no doubt as to their impact on the peace and security of mankind.⁶⁵ On those grounds it would appear that they should be covered by the code.

59. Mercenarism is another equally blameworthy practice. Mercenarism is of concern to the international community. It is above all a source of grave concern for young States. Before the adoption, in 1977, of the Protocols⁶⁶ additional to the 1949 Geneva Conventions, mercenarism had been of interest to jurists and diplomats only from the standpoint of humanitarian law. The question then was whether a mercenary could be considered a combatant and as such enjoy the protection granted to combatants under humanitarian law. The 1977 Protocols broadened the notion of combatant; that term is no longer limited to members of a regular army but also covers guerrillas and, generally speaking, a new category, namely, persons struggling against colonial domination. As the Third Geneva Convention of 1949⁶⁷ had already extended the status of combatant to "partisans", that is to say to members of resistance movements, this provision was adopted in order to protect combatants in national liberation struggles also; this posed the problem of the status of mercenaries. But what is a mercenary?

60. Mercenarism is characterized by two main elements:

(a) A mercenary is motivated primarily by gain. He provides his services in exchange for remuneration;

(b) A mercenary is not a national of and has no ties to the country for which he is fighting other than a contract of service with the group or entity for which he is fighting.

The problem which arises in this report is different from

⁶² *Ibid.*, vol. 596, p. 261.

⁶³ United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125.

⁶⁴ See footnote 36 above.

⁶⁵ See footnote 22 above.

⁶⁶ See footnote 13 above.

⁶⁷ See footnote 12 above.

⁵⁸ See footnote 12 above.

⁵⁹ See footnote 41 above.

⁶⁰ Pella, "La codification du droit pénal international", *loc. cit.*, p. 378.

⁶¹ United Nations, *Treaty Series*, vol. 500, p. 95.

that which concerned those who drafted the 1977 Protocols. The point at issue then was to determine what guarantees a mercenary could be given if he was wounded or captured, for example. It was decided that, since a mercenary was not a *combatant* in the sense of the Geneva Conventions and Protocols, he could not invoke the guarantees accorded to such combatants. The most he could be given was the minimum status, that is to say the fundamental guarantees accorded to all human beings.

61. The problem here is different in nature. The point at issue now is to determine whether mercenarism is an offence against the peace and security of mankind. Some delegations in the United Nations have expressed the hope that the use of mercenaries would be condemned as an offence against the peace and security of mankind. In paragraph 5 of its resolution on the basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes,⁶⁸ the General Assembly provides:

5. The use of mercenaries by colonial and racist régimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.

62. In this resolution the problem was tackled from the standpoint of national liberation struggles; however, States that have since become independent now find that their existence is threatened by the phenomenon of mercenarism. At their meeting in Libreville, Gabon, from 23 to 30 June 1977, the African States adopted a Convention for the Elimination of Mercenarism in Africa.⁶⁹ They emphasized in the preamble the "grave threat which the activities of mercenaries present to the independence, sovereignty, security, territorial integrity and harmonious development of member States of the Organization of African Unity."

63. After defining mercenarism in article 1, paragraph 1, the Convention goes on to state, in paragraph 2:

2. *The crime of mercenarism is committed** by the individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State, practises any of the following acts:

(a) Shelters, organizes, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;

(b) Enlists, enrolls or tries to enrol in the said bands;

(c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above-mentioned forces.

64. In paragraph 3, the Convention provides:

3. Any person, natural or juridical, who commits the crime of mercenarism as defined in paragraph 1 of this article, commits an offence considered as a *crime against peace and security in Africa and shall be punished as such.**

65. In article 7, the Convention further provides that each contracting State shall make *the crime of mercenarism** punishable by the severest penalties under its laws. This recognized jurisdiction of States does not exclude a possible future international jurisdiction.

66. This point at issue is therefore to determine whether mercenarism, recognized as a crime by the African States and condemned by a resolution of the General Assembly (see para. 61 above) should be included in the present draft code. There seems to be no reason why it should not. Mercenarism is a crime which, by reason of its objective (threatening the sovereignty and integrity of a State), constitutes an offence against the peace and security of mankind.

67. Apart from these offences, the classification of which does not seem to involve any difficulties, there are others which are controversial.

C. Maximum content

68. It is at this stage that the difficulty in drawing a line between offences against the peace and security of mankind and other international offences becomes apparent. Everything depends on the prevailing circumstances, current trends and sensitivities. Pella, whose comprehensive approach to this subject is well known, tended to broaden the scope of offences against the peace and security of mankind. In borderline cases, the two concepts were almost completely identical. In his work on the codification of international criminal law,⁷⁰ he proposed a list much longer than that adopted by the Commission in 1954. He considered it regrettable that the Commission had not included offences such as the dissemination of false or distorted news or forged documents in the knowledge that they were harmful to international public order, insulting behaviour towards a foreign State, abusive exercise of police powers on the high seas, and counterfeiting of money or banknotes, committed, connived at or tolerated by the authorities of one State to the detriment of the credit of another State. The approach taken by Pella is logical. It corresponds exactly to his conception of an international offence. In the memorandum to which reference has been made (para. 34 above), he observed that the expression "offences against the peace and security of mankind" was a generic term which covered all *international offences*, in other words, "any action or omission violating the fundamental requirements for the maintenance of international order."⁷¹

69. The Commission did not adopt this broad concept of an offence against the peace and security of mankind. No doubt the scope of offences against international peace and security will become broader with the expansion of *jus cogens* and the conclusion of additional international conventions, but it would seem that at the current stage it would be prudent to avoid taking an excessively comprehensive approach in this area. Furthermore, it is difficult to argue that all international offences are crimes, since article

⁶⁸ General Assembly resolution 3103 (XXVIII) of 12 December 1973.

⁶⁹ OAU, document CM/817 (XXIX). See also A/CN.4/368, p. 64.

⁷⁰ Pella, "La codification du droit pénal international" *loc. cit.*, p. 377-379.

⁷¹ *Yearbook . . . 1950*, vol. II, pp. 296 and 295, document A/CN.4/39, paras. 41 and 40 respectively.

19, paragraph 4, part 1 of the draft articles on State responsibility recognizes the existence of international delicts. Nevertheless, it would seem worth while to reconsider the proposed list.

70. Pella proposed that the following acts should be considered offences against the peace and security of mankind:

1. Counterfeiting of money or banknotes committed, connived at or tolerated by one State to the detriment of the credit of another State;
2. Forgery of passports or equivalent documents;
3. Abusive exercise of police powers on the high seas;
4. Dissemination of false or distorted news or forged documents in the knowledge that they are harmful to international relations;
5. Insulting behaviour towards a foreign State.⁷²

71. With regard to the first of these acts, Pella based his comments on his memorandum submitted in 1927 to the Mixed Committee for the Suppression of Counterfeiting Currency which the Council of the League of Nations had established following a case in which a State had been involved because it had permitted or connived at the counterfeiting of bank notes. This memorandum stated:

... it may however happen that that very State is compromised in such acts by having encouraged them, or at least tolerated them. In such a case, counterfeiting becomes an inter-State offence.

...

These offences should not be confused either with ordinary crimes or with political offences properly so-called, since they violate *the elementary principles considered to be absolutely indispensable for the maintenance of world order and international peace.*

Such cases may raise the problem of State responsibility. Thus the following principle, extracted from an opinion contained in a United States Supreme Court judgment, has been operative in the United States since 1887: "The law of nations requires *every national Government* to use due diligence to prevent a wrong being done within its own territory to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation, has long been recognized...*" (*United States v. Arjona*, 120 U.S.479.499 (1887)).⁷³

In 1925, the Inter-Parliamentary Conference, meeting in Washington, had already included in a list of international offences "the counterfeiting of money and banknotes, and any other disloyal acts committed or connived at by one State for the purpose of injuring the financial credit of another State."⁷⁴

72. With regard to the second point, concerning the forgery of passports or other diplomatic documents, Pella based his comments on article 14 of the Convention for

⁷² Pella, "La codification du droit pénal international", *loc. cit.*, p. 378; and *Yearbook* ... 1950, vol. II, pp. 343-346 and 354-355, document A/CN.4/39, paras. 129-136 and 151-154.

⁷³ League of Nations, document [C] F. M. 4 of 23 June 1927, p. 36, paras. 102 and 104.

⁷⁴ Resolution III of the criminality of wars of aggression and the organization of international repressive measures, annex (Inter-Parliamentary Union, *XXIIIrd Conference* (see footnote 6 above), p. 49).

the Prevention and Punishment of Terrorism (Geneva, 16 November 1937)⁷⁵ and on a draft text adopted by the Seventh International Conference for the Unification of Criminal law, held at Cairo in January 1939.⁷⁶

73. Pella likewise considered that the abusive exercise of police powers on the high sea should be included among the acts "likely to lead to international disputes" to be condemned in the code.⁷⁷ It is true that, apart from certain derogations that entitle a State, in suspicious circumstances, to determine the identity of a ship, the principle of the freedom of the high seas prohibits interference with navigation, and violation of that freedom constitutes an internationally wrongful act. However, every internationally wrongful act is not a crime against the peace and security of mankind.

74. With regard to the dissemination of false news, this can certainly disturb international public order, but it is doubtful whether, given the current state of international awareness and the opportunities for immediate corrective reaction and denial, it could be a source of armed conflict.

75. As regards insulting behaviour towards a foreign State, it is common knowledge that under national legislation insulting behaviour towards foreign Heads of State is often punished by correctional penalties, and it seems probable that States have become less sensitive and no longer attach to such behaviour the importance accorded to it in earlier centuries, when the State was often identified with the sacred person of the sovereign.

76. Generally speaking, although the offences mentioned above are undoubtedly international offences, the question remains whether they should be included in a code of offences against the peace and security of mankind.

77. The General Assembly certainly did not intend the Commission to prepare a text too broad in scope, in which the essential elements might be overlooked. A careful review of the records of the Sixth Committee shows that at no time during its debates was it suggested that any of these offences should be covered by the codification. Furthermore, these offences are not mentioned in the relevant resolutions. An offence against the peace and security of mankind is distinguished from other international offences by the horror and cruelty, savagery and barbarity involved. Basically, such an offence attacks the very foundations of contemporary civilization and the values on which it is based. That is what gives it its special character, its tone, its consistency, and its unusual dimensions.

78. It would therefore seem that the list reviewed above should not be covered by the codification. There are many other international offences which are undoubtedly hateful or degrading in character (drug trafficking, international trafficking in obscene publications, etc.), but it would be more appropriate to deal with such offences in an international penal code than in a instrument limited to offences against the peace and security of mankind.

⁷⁵ League of Nations, document C.546.M.383.1937.V.

⁷⁶ *Actes de la VII^e Conférence internationale pour l'unification du droit pénal*, Cairo, 12-18 January 1939 (Paris, Pedone, 1939), pp. 473-474.

⁷⁷ *Yearbook* ... 1950, vol. II, p. 355, document A/CN.4/39, para. 154.

CHAPTER II

Conclusion

79. Consequently, a new draft code of offences against the peace and security of mankind should include:

A. *Offences covered by the 1954 draft code, namely:*

1. Aggression, and the threat of and preparation for aggression;
2. The organization of armed bands by a State for incursions into the territory of another State;
3. The undertaking or encouragement by a State of activities calculated to foment civil strife in the territory of another State;
4. The violation of restrictions or limitations on armaments, on military training, or on fortifications;
5. The annexation of the territory of a State by another State;
6. Intervention in the internal or external affairs of a State by another State;
7. War crimes;
8. Genocide;
9. Crimes against humanity;

B. *Certain violations of international law recognized by the international community since 1954, namely:*

10. Colonialism;
11. *Apartheid*;
12. The taking of hostages;
13. Mercenarism;
14. The threat or use of violence against internationally protected persons;
15. Serious disturbance of the public order of the receiving country by a diplomat or an internationally protected person;
16. The taking of hostages organized or encouraged by a State;
17. Acts causing serious damage to the environment.

With regard to damage to the environment, the Commission could consider whether such damage involves the entire area covered by the prohibition of testing or the emplacement of weapons in certain territories. The relevant conventions have already been mentioned. In other words, it will be for the Commission to determine whether it intends to make the unlawful emplacement of weapons an offence distinct from acts causing damage to the environment.

80. Lastly, in the view of many delegations in the Sixth Committee, "economic aggression" should be considered as a specific offence. They believe that independence is theoretical, and has no real meaning, if it is not combined with economic independence. They base their views on the International Covenant on Economic, Social and Cultural Rights⁷⁸ the Declaration on the Inadmissibility of Inter-

vention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty,⁷⁹ and above all on the declaration on permanent sovereignty over natural resources.⁸⁰ This problem will have to be discussed. The aggression covered by the draft code and subsequently defined in 1974 is primarily military aggression. That is different from the aggression which the sponsors of this new proposal have in mind; they believe that there are economic measures which, in unequal relationships, take the form of aggression. The question is whether the meaning of the term "aggression" is not traditionally so linked to the use of armed force that it cannot safely be extended to cover other coercive measures of a different character. Moreover, the expression "economic aggression" is perhaps more suited to political than to legal parlance. The political vocabulary can accommodate vibrations and auras that stimulate the popular imagination, and certain political expressions are incompatible with the austere language of law; they cannot be confined within stark formulas which deprive them of their charisma. What constitutes "economic aggression"? What are its constituent elements? These questions are not easy to answer prior to a thorough debate. In any event, this is the list of acts that cause concern to the international community.

81. The Commission will decide whether it is desirable to lengthen or shorten this list. The list does not prejudice the way in which the articles might be drafted. With regard to aggression, war crimes and crimes against humanity, new instruments have been adopted, which may make it necessary to change the presentation and wording of some articles, or even to render their substance more precise. These instruments include the 1956 Supplementary Convention on the Abolition of the Slave Trade (see para. 44 above, point 14); the Definition of Aggression (*ibid.*, point 23); the 1977 Additional Protocols to the 1949 Geneva Conventions (*ibid.*, point 6); the 1979 International Convention on the Taking of Hostages (*ibid.*, point 13); and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (*ibid.*, point 17).

82. As already stated, however, the primary purpose of this report is to delimit the subject *ratione materiae* by defining the offences that might be considered to be offences against peace and security. It would have been pointless for the Special Rapporteur to submit draft articles prejudging the existence of offences that have not yet been recognized by the Commission as crimes against the peace and security of mankind.

83. Lastly, it should be noted that this report deliberately deals only with the special part of the code and therefore leaves aside for the time being the general principles and the rules applicable to international penal law as a whole, which will be examined at a later stage.

⁷⁸ See footnote 44 above.

⁷⁹ General Assembly resolution 2131 (XX) of 21 December 1965.

⁸⁰ General Assembly resolution 1803 (XVII) of 14 December 1962.