Document:-

A/CN.4/387 and Corr.1 and Corr.2 (Spanish only)

Third report on the draft code of offences against the peace and security of mankind, by Mr. Doudou 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

Extract from the Yearbook of the International Law Commission:-

1985, vol. II(1)

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 6]

DOCUMENT A/CN.4/387*

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

[*Original: French*]
[*8 April 1985*]

CONTENTS

* Incorporating document A/CN.4/387/Corr.1.

Introduction

1. By its resolution 39/80 of 13 December 1984, the General Assembly requested the Commission to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind.

2. The general view which emerged from the debate in the Sixth Committee of the General Assembly was that, in the current circumstances, the draft should be limited to offences committed by individuals.

3. It should also be recalled that the Commission took the 1954 draft code[1] as the basis for its work, subject to certain adjustments and additions. Some of those additions are more generally accepted than others, which remain controversial. They will be considered in the course of the elaboration of the draft. In any event there is a general tendency to favour the minimum content which had been proposed.[2]

4. On the basis of these guidelines, it now seems feasible to present a possible outline for the future code, which would consist of two parts:

A. The first part would deal with:

(*a*) the scope of the draft articles;

(*b*) the definition of an offence against the peace and security of mankind;

(*c*) the general principles governing the subject.

B. The second part would deal with the acts constituting an offence against the peace and security of mankind. In that context, the traditional division of such offences into crimes against peace, war crimes and crimes against humanity will be reviewed.

5. As already noted in the second report,[3] the general principles will be included in the final draft in the place indicated in the aforementioned outline. It seems difficult to list them at the current stage. Reference can, of course, be made to the principles which the Commission formulated on the basis of the Charter and the Judgment of the Nürnberg Tribunal.[4] However, those principles will have to be reviewed.

6. Some of those principles go beyond the simple formulation of a general rule or a basic proposition. That is so in the case of Principle VI, which contains a list of acts defined as offences against the peace and security of mankind. Moreover, subparagraph (*c*) of this principle linked crimes against humanity to so-called "war" crimes, and this is no longer valid today.

7. Some of these principles do not seem applicable to the subject-matter as a whole. An examination of the judicial precedents, especially the decisions of the tribunals which rendered judgment in application of

[1] See *Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54; text reproduced in *Yearbook ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] *Yearbook ... 1984*, vol. II (Part Two), pp. 15 *et seq.*, paras. 52-62.

[3] *Yearbook ... 1984*, vol. II (Part One), p. 100, document A/CN.4/377, para. 83.

[4] The "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal", formulated by the Commission at its second session, in 1950 (see *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127), read as follows:

"*Principle I*

"Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

"*Principle II*

"The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

"*Principle III*

"The fact that a person who committed an act which constitutes a crime under international law acted as head of State or responsible government official does not relieve him from responsibility under international law.

"*Principle IV*

"The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Law No. 10 of the Allied Control Council,[5] shows that the *moral* element (criminal intent, mental condition of the perpetrator) or the *intellectual* element (error regarding the wrongful character of the act) was taken into consideration when culpability with regard to crimes against humanity was evaluated, and that the various courts evaluated them in different ways.

8. On the other hand, it would seem difficult to take these elements into consideration in the case of colonialism, *apartheid* or aggression, for example. Generally speaking, all the part of the draft relating to justifying facts, exculpatory excuses, extenuating circumstances and so on should be considered with the greatest care, for the principles flowing therefrom do not all have the same scope. It will be necessary to delve deeper in order to ascertain the precise limits to be assigned to these concepts and determine in which cases they could or could not be applied.

9. All these considerations make it necessary to defer until a later stage the formulation of the general principles governing the subject. In effect, although, as noted above, some of these principles seem to be universally applicable, such as the principle of the non-applicability of statutory limitations, or the principle of universal competence for the punishment of the offences in question, or its corollary, the obligation of every State to prosecute and punish the offenders unless they are extradited, others seem to be more limited in their application.

10. These general observations having been made, this report seeks to specify the category of individuals to be covered by the draft and to define an offence against the peace and security of mankind. Next, it studies the offences mentioned in article 2, paragraphs (1) to (9), of the 1954 draft code and possible additions to those paragraphs. Lastly, it proposes a number of draft articles relating to those offences. The report comprises three chapters: chapter I delimits the scope of the subject *ratione personae* and defines an offence against the peace and security of mankind; chapter II deals with the acts constituting offences against the peace and security of mankind (paras. (1) to (9) of article 2 of the 1954 draft code); chapter III presents the draft articles.

"*Principle V*

"Any person charged with a crime under international law has the right to a fair trial on the facts and law.

"*Principle VI*

"The crimes hereinafter set out are punishable as crimes under international law:

"(*a*) Crimes against peace:

"(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

"(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

"(*b*) War crimes:

"Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

"(*c*) Crimes against humanity:

"Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

"*Principle VII*

"Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

[5] Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

CHAPTER I

Delimitation of scope *ratione personae* and definition of an offence against the peace and security of mankind

A. Delimitation of scope *ratione personae*: authorities of a State or individuals?

11. As already indicated, the draft code under consideration deals only with the criminal responsibility of individuals. But which individuals are involved? The problem is to determine whether individuals can be the principal perpetrators of offences against the peace and security of mankind. Complicity is left aside for the time being. The question deserves to be asked, for the 1954 draft code refers in article 2, paragraph (10), to "private individuals" and in paragraph (11) of the same article to "private individuals acting at the instigation or with the toleration of ... [the] authorities [of a State]".

12. There seems to be no doubt that the answer is negative in the case of all offences jeopardizing the in-

dependence, safety or territorial integrity of a State. In effect, these offences involve means whose magnitude is such that they can be applied only by State entities. Moreover, it is difficult to see how aggression, the annexation of a territory, or colonial domination could be the acts of private individuals. These offences can be committed only by individuals invested with a power of *command*, in other words the *authorities* of a *State*, persons of high rank in a political, administrative or military hierarchy who give or receive orders, who execute government decisions or have them executed. These are *individuals-organs,* and the offences they commit are often analysed in terms of abuse of sovereignty or misuse of power. Consequently, individuals cannot be the perpetrators of these offences.

13. What about the category of offences mentioned in paragraphs (10) and (11) of article 2 of the 1954 draft code? These paragraphs deal with crimes against humanity, that is, genocide and other inhuman acts. In these cases, the participation of individuals, which is unimaginable in theory, seems to be impossible in practice. Genocide is the outcome of a systematic large-scale effort to destroy an ethnic, national or religious group. In the modern world, private individuals would find it difficult to carry out such an undertaking single-handed. The same is true, moreover, of all crimes against humanity, which require the mobilization of means of destruction which the perpetrators can obtain only through the exercise of power. Some of these crimes—*apartheid,* for example—can only be the acts of a State. In short, it seems questionable whether individuals can be the principal perpetrators of offences against the peace and security of mankind.

14. What about complicity? This question deserves closer consideration. When individuals are the tools used by a State to commit an international offence, what is the legal nature of the acts they have committed? For example, mercenaries invade the territory of a State. The offence committed by these mercenaries is not, strictly speaking, an act of complicity. It is an autonomous offence, which does not have the same legal basis as the offence committed by the State authorities which used them. A man assassinates a head of State in exchange for a sum of money paid by the authorities of another State. Is this an act of complicity? The offences committed do not have the same basis.

15. In the case of the assassin, what is involved is a criminal offence, a violation of the provisions of the national legislation of the country where the crime was committed or of the country of which the victim was a national. But for the status of the victim, the murder might have been no more than a news item. In the case of the authorities which instigated the offence, what is involved is a serious breach of an international obligation. In fact, the two offences fall within the ambit of two different legal systems, one internal, the other international. Moreover, the motives for the two offences are quite different: political in the one case, criminal in the other. It would be inappropriate here to consider in depth the problem of complicity. That will be discussed at length later. The criminality of groups is complex. In any event, the massiveness which often characterizes crimes against humanity makes it unlikely that private individuals will be the principal perpetrators of offences in this category.

16. In studying this subject, it must never be forgotten that the aim is also—and indeed primarily—to erect a barrier against the irrational and lawless acts to which the exercise of power may give rise, and that what must be prevented are the crimes and exactions of those who possess the formidable means of destruction and annihilation that threaten mankind today. Even if the subject of law, in the case of offences against the peace and security of mankind, is the individual, it must always be remembered that the individual in question is, first and foremost, an authority of a State.

17. It is for that reason that two alternative versions of article 2 of the draft code have been proposed. The first poses the general principle of the responsibility of individuals, without drawing a distinction between authorities and private individuals. The second poses the principle of the responsibility of the authorities of a State, the case of the complicity of individuals being reserved for the chapter dealing with that subject. It is true that the distinction between "authorities of a State" and "individuals" does not always seem to be absolutely necessary. Both can be categorized as individuals. However, it seems that the idea behind the draft code is to highlight the primordial responsibility of those who wield power in the commission of acts constituting offences against the peace and security of mankind. In any event, the question deserves to be debated.

B. Definition of an offence against the peace and security of mankind

18. The 1954 code confined itself to stating, in the relevant part of article 1, that "offences against the peace and security of mankind, as defined in this Code, are crimes under international law". As can be seen, this is not strictly speaking a definition. To state that offences against the peace and security of mankind are crimes under international law is simply to refer to the category in which they belong, without stating what distinguishes them from other similar notions. It is as if a naturalist were to say that tigers were wild animals without stating what distinguishes them from other wild animals.

19. The Commission wished to study this notion in more depth. The first question that comes to mind is whether "offences against peace" and "offences against the security of mankind" constitute one and the same concept, or whether they are separate concepts. If the answer is in the affirmative, an attempt will be made to give a general definition of an offence against the peace and security of mankind.

1. Do offences against peace and offences against mankind constitute one and the same concept?

20. To reply to this question, it is necessary first to go back to the origin of this expression and to consider the controversies to which it has given rise.

(a) *Origin of the expression*

21. The expression originated in a report of 9 November 1946 addressed by Justice Francis Biddle to President Truman in which he suggested that the time seemed to have come to "reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind". He saw in such a measure a means of perpetuating the principle that war of aggression was the supreme crime. But going beyond war of aggression, Justice Biddle was also thinking of sanctions against what he called "lesser violations of international law".[6]

22. Justice Biddle understood the word "lesser" not in an absolute sense, but clearly in a relative sense, that is to say, compared with aggression. But such offences nevertheless constituted very serious violations of international law.

23. President Truman endorsed Justice Biddle's recommendation and, at his initiative, on 15 November 1946, the delegation of the United States of America submitted to the General Assembly of the United Nations a proposal directing the United Nations "to treat as a matter of primary importance the formulation of the principles of the Charter of the Nürnberg Tribunal and of the Tribunal's judgment in the context of a general codification of offences against the peace and security of mankind or in an international criminal code".[7] The United States proposal already foresaw the possibility of two codes: "the code of offences against the peace and security of mankind" and "the international criminal code". However, it did not indicate any criteria for distinguishing between the two.

24. A discussion on this important problem therefore began in the Committee on the Progressive Development of International Law and its Codification. The representative of France, H. Donnedieu de Vabres, maintained that the code of offences against the peace and security of mankind would concern what he called *crimes interétatiques*, as opposed to crimes connected with ordinary lawlessness, the international nature of which lay only in the problems of conflicting laws or competence between States to which they sometimes gave rise.[8]

25. The distinction made by the eminent jurist between international crimes proper, which he called *crimes interétatiques*, and other crimes, which concern international order only because of the conflicts to which they give rise, is correct. However, it does not suffice to throw light on the subject. While no one doubts that offences against the peace and security of mankind come within the category of international crimes, what is their specific nature? What are their particular characteristics? What is the justification for the special place that they occupy within this category? That is the problem that will be dealt with. But first a question arises: do the concepts of "offences against peace" and "offences against the security of mankind" have a different content? Are they distinct or identical?

(b) *Unity of the concept of offences against the peace and security of mankind*

26. The problem has already been raised by certain members of the Commission, and it is important to dwell on it for a moment.

27. It may be noted that the Commission was already concerned with this problem as long ago as 1954; the late Jean Spiropoulos, the first Special Rapporteur to whom the draft code of offences against the peace and security of mankind was entrusted, attempted to deal with it, saying:

> ... we should dispose of the question of whether under this term we are to understand two separate categories of offences, namely, acts affecting the "peace" and acts affecting the "security of mankind". In our view ... both terms express the same idea. The term "peace and security of mankind" is a correlative to the expression "international peace and security" contained in the Charter of the United Nations. Both expressions refer to the same offences, i.e. to offences against peace. The contrary view would overlook the fact that any offence against "peace" is necessarily also an offence against the "security of mankind".[9]

28. As will be seen below, the two expressions "international peace and security" and "peace and security of mankind" do not coincide exactly. However, the conclusion of the previous Special Rapporteur cannot be rejected. The vast majority of jurists who have voiced an opinion on this question have fully endorsed it.

29. Justice Biddle, who had originated the United States initiative, declared, in his reply to a questionnaire on this topic[10] from the International Association for Penal Law and the International Bar Association: "I think the phrase 'peace and security of mankind' is indivisible and should not be split". H. Donnedieu de Vabres replied to the same questionnaire: "I consider that the term 'offences against the peace and security of mankind' covers, on the one hand, war of aggression and, on the other, war crimes and offences against humanity".

30. The German jurist, Adolf Schönke, for his part, said: "I am inclined to regard these two types of acts as forming a unity; they should not be separated." Justice Joseph Y. Dautricourt of Belgium affirmed: "It is impossible to distinguish clearly between offences against peace and offences against the security of mankind. This is why the two notions which in practice cover the same acts are indivisible and should be replaced by the unified concept of universal public order."

[6] United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XV, No. 386 (24 November 1946), pp. 956-957; see also the first report of the first Special Rapporteur, J. Spiropoulos, on the draft code of offences against the peace and security of mankind (*Yearbook ... 1950*, vol. II, p. 255, document A/CN.4/25, para. 9).

[7] That proposal was endorsed in substance in General Assembly resolution 95 (I) of 11 December 1946 (see *Yearbook ... 1950*, vol. II, p. 256, document A/CN.4/25, paras. 11-13).

[8] *Ibid.*, p. 257, paras. 29-32.

[9] *Ibid.*, p. 258, para. 34.

[10] The replies to the questionnaire cited in the present report are taken from the memorandum of V. V. Pella, document A/CN.4/39, para. 41 (see footnote 11 below).

31. Vespasien V. Pella, in an important memorandum which he had prepared at the request of the United Nations Secretariat,[11] also took a stand on the question:

It has been asked whether the expression "offences against the peace and security of mankind" is generic and denotes an *indivisible concept* or whether, on the contrary, it should be held to refer to *two distinct types of offences*: on the one hand, offences against peace and, on the other hand, offences against ... mankind. The first would seem to be the correct interpretation.[12]

To support his line of thinking, Pella cited the fact that the terms *peace* and *security* were linked and constituted a single expression in the Yalta Agreements of 11 February 1945[13] and in several Articles of the Charter of the United Nations. According to Pella, it was an expression *sui generis* covering one and the same reality and applying to any clear breach of international public order.

32. Only two dissenting voices were raised amid this general agreement, those of Sir David Maxwell Fyfe and the Swiss jurist, Jean Graven.

33. According to the former, the concept was not an indivisible whole:

... It appears to me possible to threaten or disturb the security of mankind without war. For instance, the German Anschluss with Austria in 1937, and perhaps some more recent examples, could be cited. But the question must depend on the meaning attributed to the words "peace" and "security".[14]

34. According to the latter:

It seems ... necessary to distinguish between *the two values* which are to be protected, by trying to define them in legal terms, or at least by determining and defining *separately* the offences against each which are to be punishable ... Offences against the *peace* of mankind ... are likely to or in fact lead to "aggression" or "hostilities" within the meaning of international law. This is also in conformity with popular feeling and with language, in which "peace" in the true sense is "the position of a State which has no war to wage or to carry on" and which lives in a state of "concord" with the rest of the world. Offences against the *security* of mankind are more particularly those which are likely to or in fact lead to "disorders" or "disturbances" and impair public "tranquillity"; the term "security" is also, in its usual meaning, synonymous with such "peace of mind" and ... with an internal feeling of "confidence", on the part of an individual, a community, or a State.[15]

35. In fact, an analysis of the two opinions makes it clear that they are only apparently discordant. The two last-mentioned writers seem to have wanted to demonstrate that behind the general concept of peace and security of mankind there is necessarily a diversity resulting from the specific nature of each violation included in the category of offences against the peace and security of mankind. This was clearly expressed by Brigadier-General Telford Taylor of the United States and by the Argentine jurist, L. A. Podesta Costa.

36. For Taylor, the unity of the concept

does not prevent the recognition of various categories of offences within the scope of the concept. Just as murder, rape, arson and robbery can be distinguished within the concept "law and order", so can (and must) various categories be recognized within the concept "peace and security of mankind". Thus some acts may be criminal because they are committed with the deliberate intention of instigating war ("offences against the peace"), whereas other acts may be criminal because of their atrocious character (genocide, etc.), even though not committed with intention to precipitate war.[16]

37. According to Podesta Costa:

The expression "the peace and security of mankind" is indivisible. In practice, it may happen that certain specified concrete acts impair peace or security in a given case; however, it is not possible to specify in advance that these acts will, in a general way, produce a particular effect. Nevertheless, it is beyond doubt that the consequences are the same, because peace is conditioned by security.[17]

38. To sum up, the expression "peace and security of mankind" has a certain unity, a certain comprehensiveness, linking the various offences. Although each offence has its own special characteristics, they all belong to the same category, and are marked by the same degree of extreme seriousness.

39. These considerations on the unity of the concept do not exhaust the subject.[18] They make it possible, however, now that this fact has been established, to approach the problem of definition. Is it possible to define an offence against the peace and security of mankind? Is is possible to go further than the Commission did in 1954?

2. Meaning of the concept of an offence against the peace and security of mankind

40. Nothing is more difficult to define than the concept of crime. Many criminal codes have abandoned the attempt. The fact is that this conceptual entity is characterized by the variability of the criteria to which it is connected. What makes "the concept of crime hard to pin down is the mobility and inconstancy of the legislative criteria, the judicial criteria and the popular criteria which cover its definition".[19] Anti-crime legislation is subject to variations in time and space. Judicial criteria are subject to the deep-rooted convictions and tendencies of the men who dispense justice, popular criteria to the impulses of the inconstant and fluctuating masses. As Merle and Vitu put it: "the focal points of concern move". It is a challenge indeed to discover behind all this the traits of the concept of crime that are constant.

41. Many penal codes have abandoned the attempt. They rate criminal transgressions by the severity of the punishment imposed on transgressors. Article 1 of the French Penal Code establishes a three-tier hierarchy of transgressions in order of seriousness, simply determined by the severity of the punishment imposed: *contraventions* (petty offences), *délits* (correctional offences) and *crimes* (criminal offences).

42. But the passage from the least serious to the most serious is often imperceptible. At what moment is the

[11] Reproduced in the original French version in *Yearbook ... 1950*, vol. II, p. 278, document A/CN.4/39.

[12] *Ibid.*, p. 296, para. 41.

[13] See *The Department of State Bulletin* (Washington, D.C.), vol. XII, No. 295 (18 February 1945), p. 213.

[14] See *Yearbook ... 1950*, vol. II, p. 297, document A/CN.4/39, para. 41.

[15] *Ibid.*

[16] *Ibid.*, p. 298.

[17] *Ibid.*

[18] On the question of the unity or diversity of the concept, see Pella (*ibid.*, pp. 296-298).

[19] R. Merle and A. Vitu, *Traité de droit criminel*, vol. I: *Problèmes généraux de la science criminelle, droit pénal général*, 4th ed. (Paris, Editions Cujas, 1981).

borderline crossed? Some correctional offences are punished as petty offences, and criminal offences are sometimes liable to a correctional penalty. It is to be noted, moreover, that this tripartite distinction is not unanimously accepted. The Spanish, Italian and Portuguese penal codes, to take only countries with a Roman-law tradition, have preferred a two-tier division into correctional and criminal offences. It is not intended to linger unduly over this aspect of the problem.

43. If the concept of crime is not easy to define in domestic law, the task is even more difficult in international law. This is because criminal law has only recently been of interest in matters of public international law. The discipline which has been of most interest to jurists and which has been applied in a good number of cases is that which has as its frame of reference conflicts of laws and jurisdictions. However, this discipline, wrongly termed international criminal law, is international in name only. The rules applicable to conflicts are defined by domestic legislation, and those rules have effect at the international level only through the channel of agreements or treaties.

44. International crime, as a concept peculiar to international law and relating exclusively thereto, is a concept that is still imprecisely defined and that has been applied in few cases. The Nürnberg and Tokyo trials appear as accidents of history and, even today, odious and monstrous acts remain unsanctioned at the international level. However, serious efforts are being made to bring international criminal law into the arena of events. This development will not be referred to again; it was described in detail in the Special Rapporteur's first report.[20] It should merely be pointed out that the progress achieved in the codification of international responsibility has provided a better standpoint from which to view the concept of international crime (article 19 of part 1 of the draft articles on State responsibility).[21]

45. The task now is to try to define this special category of international crimes known as "offences against the peace and security of mankind". On what criterion is it based?

46. In the early stages of its work, the Commission used the criterion of extreme seriousness as a characteristic of an offence against the peace and security of mankind.[22] The comment was made, not without cause, that that criterion was too subjective and too vague.

47. But such criticism appears to be unavoidable. Criminal law—whether domestic or international—is steeped in subjectivity. The seriousness of a transgression is gauged according to the public conscience, that is to say the disapproval it gives rise to, the shock it provokes, the degree of horror it arouses within the national or international community. Thus paragraph 2 of article 19 of part I of the draft articles on State responsibility reads as follows:

> 2. An internationally wrongful act which results from the breach by a State 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 that community as a whole constitutes an international crime.

Such recognition rests essentially on subjective considerations.

48. As for the vagueness of the criterion, an attempt can be made to correct it in part. But in reality a criterion, because of its general and synoptic nature, can unite or group together only the general aspects of a given concept. Care must be taken not to confuse *criterion* and *definition*. The value of the latter is measured by its precision. It is more analytical than synthetic, and it seeks to incorporate all the particular aspects of a concept. Murder, assassination, arson, etc. are included, in domestic law, in the concept of crime, but each of these transgressions has its own particular aspect, its distinctive constituent elements, and it is impossible to define the concept of crime in general by enumerating all the aspects of the individual crimes of which it is composed.

49. That being so, it is nevertheless possible to attempt to improve the criterion of seriousness and to state how it can be recognized. First of all, it should be noted that seriousness can be measured by several elements, some subjective, others objective. With regard to subjective elements, seriousness is measured by the intention or motive, by the transgressor's degree of awareness, by his personality, etc. But alongside these moral elements there exist other elements which have a more objective content. Seriousness may, in fact, also be measured in relation to the interests or the property protected by law. In that case, it may be a matter of transgressions against *rights, physical persons* or *property*. In respect of persons, what is at stake is the life and physical well-being of individuals and groups. As for property, public or private property, a cultural heritage, historical interests, etc., may be affected.

50. A thorough review will be made in due course of the judicial precedents established by the Nürnberg judgments and by those handed down in the occupied zones of Germany, by virtue of Law No. 10 of the Allied Control Council.[23] Of course, the field covered by the Charter and the Judgment of the Nürnberg International Military Tribunal and by the judgments of the tribunals in the occupied zones is today too limited in view of developments subsequent to the Second World War. There are those who say, when they look at these developments, that Nürnberg is out of date. The term is inappropriate. Rather, the field of application of Nürnberg has been broadened by the appearance of new transgressions, new international crimes which were not envisaged by the Charter of the Nürnberg Tribunal, but which are today reprehensible to the universal conscience. This, moreover, explains why the task of bringing the 1954 draft code up to date is being undertaken.

51. The subjective element and the objective element are therefore inextricably linked in the definition of any criminal act. This is true for domestic law as it is for

[20] *Yearbook ... 1983,* vol. II (Part One), p. 137, document A/CN.4/364, chap. I.

[21] *Yearbook ... 1976,* vol. II (Part Two), p. 95.

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

[23] See footnote 5 above.

international law, and acts considered as crimes under international law are often also indictable under national legislation, on the basis of the same criteria and the same definitions. In both cases, the subjective element (intention to commit an offence) is accompanied by a material element (an attempt on a life, an act affecting physical well-being or intellectual and material possessions). It is the combination of these two elements that characterizes a transgression.

52. Without at this point going into the dispute whether an offence can or cannot be committed by a State, the present report being limited to the criminal responsibility of individuals, it must be agreed that the approach taken in article 19 is correct in principle. It measures the seriousness of a transgression according to both a subjective element (the fact that the transgression is *recognized* as a crime by the international community) and an objective element (the *subject-matter of the obligation* breached); the subject-matter in question must be one whose protection is essential for the international community.

53. These general considerations make it possible to ask the following question: is it possible to define an offence against the peace and security of mankind and, if so, what definition should be proposed?

54. The search for the specific elements of an offence against the peace and security of mankind must proceed from the definition of an international crime contained in article 19. A concern for logic and coherence makes such a procedure obligatory, to the extent that it is desirable to maintain a certain unity of approach and a single guiding theme in the Commission's work.

55. Not surprisingly, the doctrinal approach in the search for the specific characteristics of an offence against the peace and security of mankind is relatively new, for the expression itself dates back only to the end of the Second World War. It was after 1945 that a development in this area began, marked first by the search for the specific characteristics of international crime. That development was authoritatively described in the Commission's report on the work of its twenty-eighth session, in 1976. In paragraph (15) of the commentary to article 19 of part 1 of the draft articles on State responsibility, the Commission made the point that:

> The need to distinguish, in the general category of internationally wrongful acts ... a separate category comprising exceptionally serious wrongs has in any case become more and more evident since the end of the Second World War.[24]

And the Commission noted further:

> It was in the 1960s and 1970s that the idea took shape, and was formulated academically, in the writings of international jurists, that different kinds of internationally wrongful acts should be distinguished according to the *importance of the subject-matter** of the breached obligation.[25]

There is no need to reproduce here the abundant doctrinal sources quoted in that commentary. It is sufficient to refer to the text.

56. Generally speaking, significant developments are to be noted in the period following the Second World War, marked by:

(*a*) The emergence of the individual as a subject of international criminal law;

(*b*) The recognition of *jus cogens* as a source of obligations of a special nature;

(*c*) The appearance of a new category of internationally wrongful acts for which mere material compensation is not sufficient redress, but which, in addition, involve penal consequences.

57. Until recently the difficulty has been to find a synoptic formula sufficiently broad to encompass these transgressions. The Charter of the International Military Tribunal[26] simply differentiated them in three distinct categories and classified them within those categories. Article 6 of that Charter considered the following to be crimes against the peace and security of mankind:

(*a*) Crimes against peace;

(*b*) War crimes;

(*c*) Crimes against humanity.

58. The same classification was used in Principle VI of the "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" formulated by the Commission at its second session, in 1950.[27]

59. Finally, the draft code elaborated in 1954 uses this same classification, without indicating the general criterion common to these different transgressions.

60. Is it possible to go any further in the present state of affairs? It is not easy, but it is worth trying.

61. Because of its generality, the definition of an international crime given in article 19 of part 1 of the draft articles on State responsibility encompasses offences against the peace and security of mankind; these form only a category of international crimes characterized by their extreme seriousness, and seriousness is measured according to the subject-matter of the obligation breached. Thus it is in relation to this subject-matter that it appears possible to characterize an offence against the peace and security of mankind. *The more important the subject-matter, the more serious the transgression.* An offence against the peace and security of mankind covers transgressions arising from the breach of an obligation the subject-matter of which is of special importance to the international community. It is true that all international crimes are characterized by the breach of an international obligation that is essential for safeguarding the fundamental interests of mankind. But some interests should be placed at the top of the hierarchical list. These are international peace and security, the right of self-determination of peoples, the safeguarding of the human being and the preservation of the human environment. Those are the four cardinal points round which the most essential concerns revolve, and these concerns constitute the summit of the pyramid on

[24] *Yearbook ... 1976*, vol. II (Part Two), p. 101.

[25] *Ibid.*, p. 115, para. (47) of the commentary to article 19.

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

[27] See footnote 4 above.

account of their primordial importance. It will be noted, moreover, that because of this primordial importance, article 19 cites them as examples in subparagraphs (*a*) to (*d*) of paragraph 3. Offences against the peace and security of mankind might also have been defined in article 19, which might have included a subcategory consisting of the breaches referred to in those four subparagraphs. But that was not the purpose of the article.

62. However, if article 19 cites these breaches as examples, it is because they constitute the most serious violations of international law. The commentary to article 19 in the Commission's report leaves no doubt on this point:

> The four spheres mentioned respectively in subparagraphs (*a*), (*b*), (*c*) and (*d*) of paragraph 3 are those corresponding to the pursuit of the *four fundamental aims** of the maintenance of international peace and security, the safeguarding of the right of self-determination of peoples, the safeguarding of the human being, and the safeguarding and preservation of the human environment ... The rules of international law which are now of greater importance than others for safeguarding the fundamental interests of the international community *are to a large extent those which give rise to the obligations comprised within the four main categories mentioned.**[28]

63. Offences against the peace and security of mankind might therefore be defined in the following way:

> Offences against the peace and security of mankind are international crimes which result from:
>
> (*a*) a serious breach of an international obligation of essential importance for the maintenance of international peace and security;
>
> (*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples;
>
> (*c*) a serious breach on an extensive scale of an obligation of essential importance for safeguarding the human being;
>
> (*d*) a serious breach on an extensive scale of an obligation of essential importance for the safeguarding and preservation of the human environment.

64. It will be noted that the provisional list of offences against the peace and security of mankind, established by the Commission at its thirty-sixth session,[29] can fit perfectly into any subparagraph of this definition.

65. Of course, a more synoptic definition might be proposed along the following lines:

> Any breach of an international obligation recognized as such by the international community as a whole is an offence against the peace and security of mankind.

66. This second definition has the advantage of being brief and concise, but it does not sufficiently emphasize the various subject-matters to which a breach of the obligation in question may apply. The first definition, although long, has the merit of being coherent. It takes as its starting-point the same approach and formulation as article 19. It emphasizes the two elements that are at the basis of a criminal transgression: the subjective element (the opinion of the international community) and the objective element (the subject-matter of the obligation violated). In this respect, it is more analytical. It will be for the Commission to assess the respective merits of the two formulas and make a choice.

67. Now that an offence against the peace and security of mankind has been defined, it is necessary to proceed to an examination of the acts constituting such an offence.

[28] *Yearbook ... 1976*, vol. II (Part Two), p. 120, paragraph (67) of the commentary to article 19.

[29] *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65 (*c*).

CHAPTER II

Acts constituting an offence against the peace and security of mankind

68. The present report will be confined to the crimes envisaged in subparagraphs (*a*) and (*b*) of the definition given above (para. 63), that is to say crimes resulting from a breach of an international obligation of essential importance for the maintenance of international peace and security.

69. The crimes envisaged in subparagraph (*a*) were the subject of paragraphs (1) to (9) of article 2 of the 1954 draft code. They have the common characteristic of constituting a group of offences which directly threaten the independence, sovereignty or territorial integrity of a State and are, as a consequence, serious threats to its status. Moreover, they are offences which come within the framework of inter-State relations, whereas war crimes or crimes against humanity may involve the direct responsibility of individuals, independently of that of the State. Sometimes there are crimes for which only the responsibility of individuals is involved, even if they acted as agents of a State. For example, most national military codes prohibit war crimes. But there are times when soldiers infringe the provisions of such codes in circumstances which in no way involve the responsibility of their State or of their superiors. There will be an opportunity of considering such situations at leisure.

70. However, the cases envisaged here have nothing to do with the category of personal transgressions that can be divorced from official functions, since the acts emanate from authorities whose actions are inseparable from those of the State. Moreover, in such cases the injured party can only be a State. It follows that such offences endanger international peace and security.

71. The time has now come to stress the difference between the two concepts of "international peace and security" and "peace and security of mankind". The first expression is synonymous with non-belligerence. It refers to peaceful relations between States, each of

which avoids behaviour likely to endanger international peace and security.

72. The expression "peace and security of mankind", for its part, encompasses a wider terrain. It goes beyond relations between States. It covers not only acts committed by one State against another, but also acts committed against peoples (violations of the right of self-determination, systematic violations of human rights), against populations (violations of humanitarian law) or against ethnic groups (acts of genocide), etc.

73. Only offences of the first type, namely those committed against a State, which are the subject of the paragraphs of article 2 of the 1954 draft referred to above (para. 69), will be dealt with here. A number of general remarks may be formulated concerning them. First of all, it should be noted that the acts envisaged in some of those paragraphs are now covered by the Definition of Aggression.[30] This will be seen later on. The paragraphs in question are paragraph (4) of article 2, relating to "armed bands", and paragraph (8) of the same article. The paragraphs relating to armed bands and to the annexation of territory are covered, respectively, by paragraphs (*g*) and (*a*) of article 3 of the Definition of Aggression.

74. It does not appear necessary, therefore, to retain paragraphs (4) and (8) of article 2 of the 1954 draft code. The other paragraphs are open to discussion and have been the subject of criticism in the Commission, in particular paragraph (3), relating to the preparation of aggression, paragraph (7), concerning the violation of treaties which are designed to ensure peace by means of restrictions or limitations on armaments, and paragraph (9), relating to intervention in the internal or external affairs of another State. Those paragraphs will be discussed later. For the time being, the focus will be upon aggression, which is the subject of section A of draft article 4 submitted in this report.

A. Aggression

75. Much has been written about this concept, which has created controversy. But some aspects of the controversy are now only of historical interest. In fact, the debate surrounding the concept of aggression took on a certain importance mainly after the Kellogg-Briand Pact.[31] Previously, war had been legal, in principle; only the means and methods of warfare could be controlled or limited. Similarly, rules were imposed on belligerents, in particular to protect prisoners, the sick or wounded, civilians or certain public property that did not come within the category of military means. All this is the subject of humanitarian law, which will be considered in a future report.

76. The prohibition of war, affirmed even more clearly by the Charter of the United Nations, sparked renewed interest in the concept of aggression. The Kellogg-Briand Pact was limited to a general prohibition of war and left it to each State to determine unilaterally and exclusively what constituted self-defence. This gap was filled by the Charter, which provides that action for the purpose of self-defence is legitimate only until such time as the Security Council has taken measures necessary to maintain international peace and security. The right of self-defence is therefore no longer unlimited in time. Moreover, the Security Council may also determine whether the operation in question was appropriate and really constituted an act of self-defence. Of course, these principles should not obscure the real state of affairs, which is much more complex. The Dean Acheson resolution, also known as the "resolution on the maintenance of peace",[32] was one of the developments emphasizing the difficulties encountered in implementing the principles set forth above.

77. The debate to which the concept of aggression gave rise centred in the first place on the appropriateness of the definition itself. Was the definition of aggression possible and opportune?

78. According to some, the definition of aggression required the availability of some procedure for identifying with certainty which party was the aggressor. However, both antagonists would declare that they were waging a defensive war, and thus each would claim that it was acting in self-defence.

79. Others took the view, on the other hand, that the most serious of international crimes could not remain without definition. According to that view, a control system, albeit imperfect, existed for self-defence, linked to the Charter of the United Nations (Article 51). Under that system, a State could exercise the right of self-defence only until such time as the Security Council had taken measures necessary to maintain peace. After such time, the act of self-defence was comparable to aggression.

80. The disadvantage of this definition, derived *a contrario* from Article 51 of the Charter, is that it ultimately left the field wide open to the use of armed force, because the Security Council is often paralysed by the use of the veto.

81. However, those who considered that there was need for a definition carried the day. But among them there existed two schools of thought.

1. Definition based on enumeration

82. One group was in favour of a rigid definition, consisting of an exhaustive list of acts of aggression. That method had been adopted in the definition of aggression prepared by the Committee for Security Questions of the Disarmament Conference in 1933. It was also adopted by the Convention for the Definition of Aggression signed in London in that year.[33] It was the text put forward as a basis for discussion at the 1945 London Conference that led to the Charter of the Nürnberg Tribunal, article 6 of which refers to the "planning,

[30] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[31] General Treaty for Renunciation of War as an Instrument of National Policy of 27 August 1928 (League of Nations, *Treaty Series*, vol. XCIV, p. 57).

[32] General Assembly resolution 377 (V) of 3 November 1950.

[33] League of Nations, *Treaty Series*, vol. CXLVII, p. 67.

preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances". The questionable aspects of these formulas will be examined later.

2. DEFINITION BASED ON A GENERAL CRITERION

83. Those who favoured a flexible definition considered that the exhaustive list did not fit in with the way the world was evolving. They wished to have a flexible law, with less precise outlines, that would be capable of responding to new and unforeseen situations. They took the view that it was the responsibility of the competent body—jurisdiction or political entity—to assess the circumstances surrounding the outbreak of an armed conflict, circumstances that were too varied and delicate to be provided for in a list, however exhaustive it might aspire to be.

84. They also stressed that Article 51 of the Charter of the United Nations, by not defining self-defence, made an *a contrario* definition of aggression itself difficult. It can be noted, today, that this argument was not decisive, since the lack of precision did not prevent a definition of aggression from being adopted. The Commission itself, although in part 1 of the draft articles on State responsibility it devoted article 34 to the concept of self-defence, also and deliberately took care not to define that concept. It stated in the commentary to article 34 that:

> ... this article does not seek to define a concept that, as such, goes beyond the framework of State responsibility. There is no intention of entering into the continuing controversy regarding the scope of the concept of self-defence and, above all, no intention of replacing or even simply interpreting the rule of the Charter that specifically refers to this concept.[34]

3. AGGRESSION AS DEFINED BY THE GENERAL ASSEMBLY (RESOLUTION 3314 (XXIX) OF 14 DECEMBER 1974)

85. The existing Definition of Aggression takes a middle path between those two schools of thought. It is a general definition of aggression as being "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations" (art. 1). But it also uses the enumerative method, and cites a number of acts which constitute cases of aggression. However, it specifies that the acts enumerated are "not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter" (art. 4).

86. That, then, was the method chosen by the General Assembly in its Definition of Aggression. It should be noted that that Definition itself limits its innovatory scope. Its point of reference is strictly the Charter and the principles set forth therein. Article 6 states:

> Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

87. This definition of aggression must be taken into account in the elaboration of the new draft code. It is therefore proposed that article 2, paragraph (1), of the 1954 draft should be replaced by the complete text of the Definition adopted on 14 December 1974.

B. The threat of aggression

88. Article 2, paragraph (2), of the 1954 draft code concerns the threat of aggression. It refers to "any threat by the authorities of a State to resort to an act of aggression against another State".

89. The term "threat" may be understood in two ways. It sometimes means a "sign" or "presage" of something that may constitute a danger or a source of fear, a risk. It may also mean words, gestures or acts whereby one person warns another of his intention to do him wrong or cause him harm. The Charter uses the word "threat" in both senses.

90. The word has the first meaning in all the provisions of the Charter in which the danger results from "disputes" or "situations" such as those to which Chapters VI and VII refer, in particular Article 33 (any dispute, the continuance of which is likely to endanger the maintenance of international peace and security), Article 34 (any dispute or any situation likely to endanger international peace and security) and Article 39 (the existence of any threat to the peace).

91. The term "threat" as used in this draft must be understood as having the second meaning. It does not result from a dispute or a situation which, in itself, constitutes a danger to peace. Rather it is the intention expressed or manifested by a State to commit an act of aggression. The concrete evidence of this intention is blackmail or intimidation, either oral or written. The threat may also consist of material deeds: the concentration of troops near a State's borders, a mobilization effort widely publicized by the media, etc. It is in this second sense that the term is used in Article 2, paragraph 4, of the Charter, in accordance with which Member States "shall refrain in their international relations from the *threat** or use of force". In this sense, there seems to be no doubt that the threat of aggression constitutes an offence against peace, as does aggression itself.

92. It has sometimes been asked whether a threat of itself, not followed up, could be comparable with aggression. Certainly, the threat is not the act of aggression, but the use of threats is designed to bring pressure to bear on States and to disrupt international relations.

C. The preparation of aggression

93. The preparation of aggression is referred to in article 2, paragraph (3), of the 1954 draft code, according to which "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" constitutes an offence against the peace and security of mankind.

94. The problem here is to determine what constitutes preparation. The term "preparation" was used in

[34] *Yearbook ... 1980*, vol. II (Part Two), p. 52, para. (1) of the commentary.

article 6 of the Charter of the Nürnberg International Military Tribunal. It was used again by the Commission in Principle VI[35] of the "Principles of international law" which it formulated on the basis of the Charter and Judgment of the Nürnberg Tribunal. That principle refers to the "planning, *preparation,** initiation or waging" of a war of aggression. The expression "preparation of aggression" has in fact often been used in conventions or draft conventions.

95. As early as 1924, the preparation of aggression was referred to in a draft treaty on disarmament and security prepared by an American group. Article IV of that draft read:

> The High Contracting Parties solemnly declare that acts of aggression, even when not resulting in war, and *preparations** for such acts of aggression, are hereafter to be deemed forbidden by international law.[36]

96. But if the term "preparation" is often used, what it covers is not easy to define. What is meant by "preparation"? At what point can the existence of preparations for aggression be determined? What are the indisputable signs of preparation? What are its constituent factors? The territory is uncharted. The question had been raised whether preparation should not be distinguished from *préparatifs* (preparatory measures). Preparation can have a more abstract content than preparatory measures. It is sometimes more difficult to notice preparation than preparatory measures. To prepare oneself is "to make oneself fit for", "to make oneself capable of". This can be a purely intellectual operation: thinking about how to proceed, establishing a plan, a method of action. It often involves abstract operations that are hard to discern. As for preparatory measures, these can entail a host of practical operations, arrangements, movement of objects (*matériel,* arms, etc.). However, in the final analysis, only nuances of meaning separate the two terms, and the above distinction between them is far from definitive. In any case, the question is whether the preparation of aggression should be retained among the offences against the peace and security of mankind.

97. The concept of "preparation of a war of aggression" is to be found in the Charter of the Nürnberg Tribunal. Its inclusion in the code was defended by writers who wished to broaden the scope of the concept of offences against the peace and security of mankind. Pella, in the memorandum already referred to (para. 31), had raised the problem in the following terms:

> An important question in connection with offences against peace, in the strict sense of the term, is whether acts preparatory to international aggression and acts likely to lead to a breach of the peace ought to be defined separately.
>
> In the light of Article 1, paragraph 1, of the Charter of the United Nations, it is our view that the reply should be in the affirmative.[37]

Pella recalled further that, in 1925, the Inter-Parliamentary Conference at Washington had annexed to its resolution III, relating to the criminality of a war of aggression and the organization of international repression, the "Fundamental principles of an international legal code for the repression of international crimes". Paragraph 2 of that text provided:

> 2. Measures of repression should apply not only to the act of declaring a war of aggression, but also to all acts on the part of individuals or of bodies of persons with a view to the preparation or the setting in motion of a war of aggression.[38]

Pella also said that Hjalmar Hammarskjöld, Chairman of the League of Nations Committee of Experts for the progressive codification of international law, had taken the same view, saying that, "if no war imitates peace, one sometimes finds oneself faced with situations, acts and gestures that claim to be peaceful, but that bear a singular resemblance to war".[39]

98. After the Second World War, this trend of thinking was reinforced because of the methods of blackmail and intimidation of which Hitler had been a master. Barcikowski, the first President of the Supreme Court of Poland, considered that "proceedings should also be instituted in respect of the preparations connected with the attempt to carry them out and with the armed blackmail with which almost all wars begin".[40] According to Donnedieu de Vabres, "the other violations of international law which are likely to disturb peace"[41] should be taken into consideration.

99. This trend towards extending the scope of the concept of offences against the peace and security of mankind finds its basis in article 9 of the Commission's draft declaration on rights and duties of States,[42] which provides:

> Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the *threat** or use of force against the territorial integrity or ... independence of another State, or in *any other manner** inconsistent with international law and order.

100. Taking the opposite view are those who think that an excessive extension of the scope of the concept of offences against peace gives rise to confusion. Francis Biddle, for example, although he had been a judge at Nürnberg, was in favour of deleting the words "preparation" and "waging" used in the Charter of the Nürnberg Tribunal. He considered that the object was to declare criminal

> the country which, and the men who, start aggressive war ... Why then all the talk about planning, preparation and waging? Doesn't every country plan for aggressive action in case of war, and how does this differ from planning an aggressive war? Why also add the words 'in violation of international treaties'? If this is a war of aggression, how do the words add anything to the definition? If not, what is the crime?[43]

---

[35] See footnote 4 above.

[36] See "A practical plan for disarmament: Draft treaty of disarmament and security, prepared by an American group", *International Conciliation* (Greenwich, Conn.), No. 201 (August 1924), p. 343.

[37] *Yearbook ... 1950,* vol. II, p. 298, document A/CN.4/39, para. 42.

[38] See the report of the Twenty-third Conference of the Inter-Parliamentary Union, *Compte rendu de la XXIII^e Conférence,* Washington and Ottawa, 1925, p. 47.

[39] See footnote 37 above.

[40] "Les Nations Unies et l'organisation de la répression des crimes de guerre", *Revue internationale de droit pénal* (Paris), vol. 17, Nos. 3-4 (1946), p. 304.

[41] "De l'organisation d'une juridiction pénale internationale" (*ibid.,* vol. 20, No. 1 (1949), p. 3).

[42] *Yearbook ... 1949,* p. 286, document A/925, para. 46.

[43] See *Yearbook ... 1950,* vol. II, p. 332, document A/CN.4/39, para. 97.

101. Those, then, are the two schools of thought. The definition of a crime against peace given in the Charter of the Nürnberg Tribunal was over-influenced by Hitlerism. In stressing the "planning, preparation, initiation or waging of a war of aggression" (art. 6 (*a*)), in emphasizing those different operations, the bill of indictment sought to underline in a special way the responsibility of the Nazi leaders. But such an accumulation of nouns does not seem relevant from the legal point of view. Any war initiated in violation of international law constitutes aggression. The concept of preparation does not appear to add much, apart from an element of confusion, and it could be eliminated.

102. The choice is between two possibilities: either preparation was not followed by implementation, in which case it cannot be seen specifically what the consequences are; or else it was followed up, in which case there is an example of aggression. Aggression is always, by its very nature, premeditated, that is to say prepared.

103. It must also be borne in mind that preparing is not the same as attempting, and that to exclude *preparation* of aggression from offences against the peace and security of mankind leaves untouched the problem of attempted action, which will be studied in due course.

104. As an argument in favour of characterizing the preparation of aggression as an offence, it may be noted that, in some cases, it would allow preventive measures to be taken as soon as there was serious presumptive evidence that a State was preparing aggression. What, however, constitutes presumptive evidence of such preparation? Would the door not then be opened to abuse, or simply to errors of judgment in a particularly delicate area?

105. Moreover, preventive measures, consisting of recommendations and enforcement of action of varying scope, are provided for in Chapters VI and VII of the Charter of the United Nations. Criminal law, for its part, sanctions offences and does not authorize preventive measures designed to prevent an offence. Such measures belong in the political arena, and to consider preparation as a distinct offence, without being able to determine what characterizes it or what are its constituent elements, is to give this concept disproportionate or even dangerous legal import and consequences.

D. Interference in internal or external affairs

106. A phenomenon that is more and more in evidence today is interference in the internal or external affairs of countries, an offence covered by article 2, paragraph (9), of the 1954 draft code.

107. Internal affairs relate to a country's particular form of government and institutions. They also cover economic and social life, and the activities of individuals or groups. External affairs should similarly be understood in the broad sense. These involve the fundamental choices that guide international relations as well as specific decisions based on those choices, or diplomatic action giving practical effect to such decisions. In both areas—internal and external affairs—each State's competence is based on its independence and sovereignty.

108. The condemnation of interference by one State in the internal or external affairs of another had already been formulated by the Seventh International Conference of American States, in 1933, by the Inter-American Conference for the Maintenance of Peace, in 1936, by the Yalta Agreements,[44] and by article 18 of the Charter of OAS,[45] which provides:

Article 18

No State or group of States has the right to intervene, directly or indirectly, ... in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

109. The affirmation of this principle constantly features in the work of the United Nations and its organs; witness the call in General Assembly resolution 290 (IV) of 1 December 1949 to refrain from "fomenting civil strife and subverting the will of the people in any State", or article 4 of the draft declaration on rights and duties of States,[46] which provides:

Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.

110. Today, the problem of interference is of particular relevance. The emergence of a multitude of small States on the international scene, the fragility of many of them, and greed for their resources, sometimes tempt powerful States to seek ways of challenging their independence—not at the formal level, of course, since colonialism has officially been buried, but by devious and insidious routes. Using mercenaries, fomenting civil strife and exerting pressure on States, for various reasons, especially political or economic pressure, are forms of interference sometimes aimed at destabilizing young States. Likewise, all practices that can be grouped under the general term "subversion" and that take various forms (financing of political parties and covert supply of arms or ammunition, trainers, instructors and the like), are well-known aspects of the phenomenon of interference.

111. The forms of interference are very varied. The 1954 draft code envisaged two situations in particular:

(*a*) The fomenting of civil strife (art. 2, para. (5));

(*b*) Intervention in internal or external affairs by means of coercive measures of an economic or political character (art. 2, para. (9)).

112. However, consideration of these two situations gives rise to a number of questions. First, it may be asked why the fomenting of civil strife in a State and interference in the internal or external affairs of that State should be the subject of two separate provisions. After all, the fomenting of civil strife in a State is only one

[44] See footnote 13 above.

[45] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3), as amended by the Protocol of Buenos Aires of 27 February 1967 (*ibid.*, vol. 721, p. 324).

[46] See footnote 42 above.

among many forms of interference. Furthermore, it may be asked whether the distinction between internal affairs and external affairs is always justified.

113. Concerning the first point, it is somewhat surprising to see that the fomenting of civil strife constitutes an offence that is separate and distinct from other forms of interference. Presumably civil strife still draws attention because it is a convenient way of weakening a State by setting its nationals against one another; and it is also a simple device to use, no doubt, inasmuch as political life in most countries always involves rival tendencies (whether in the pluralistic democracies or in one-party régimes, where rivalries more often occur within the party). It is easy to play on these rivalries. But it must also be remembered that there are historical reasons for fearing civil strife as a means of undermining the integrity of the State.

114. For a long time, the metropolitan countries refused to consider wars of national liberation as wars, regarding them simply as internal conflicts in areas within their own sovereignty. Likewise, dictatorships have often tried, and today still try, to put down opposition movements, particularly through bloody repression, in the name of so-called exclusive sovereignty. In all such cases, it has been claimed that internal disturbances were no more than civil strife in areas within the exclusive sovereignty of the States concerned. It so happens that in 1954, at the time when the first draft code was elaborated, the uprisings which had broken out in many colonial territories revived interest in the problem of civil strife. No doubt this is one explanation for the importance which the problem took on at the time. It should be said, however, that even today the question has not lost its interest, especially in view of the emergence of newly independent States. These, as has already been said, have been subjected to all kinds of schemes aimed at their destabilization. And civil strife, for such purposes, is an ideal weapon. The plurality of ethnic groups and the rivalries which they generate in many young States make them a perfect target for subversion.

115. But the most difficult problem is to distinguish between civil strife and certain related concepts. It has just been said that it has sometimes been difficult to distinguish between such strife and certain international conflicts. Wars of national liberation have been mentioned in this regard, and there are also partisan movements, especially resistance movements opposing alien occupation, etc. As is known, wars of national liberation have been recognized as international conflicts by Additional Protocol I to the 1949 Geneva Conventions,[47] under article 1, paragraph 4, of which the situations referred to in article 2 common to the Geneva Conventions are taken to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination ...".

116. But if civil strife is difficult to distinguish from certain international conflicts, it is also difficult to distinguish from some internal conflicts, at least for the purposes of the present draft. What distinguishes civil strife from a number of related phenomena? In principle, civil strife sets factions within the same national population against each other. But the definition of civil strife leaves certain grey areas where no easy distinction can be made.

117. For the purposes of the present draft, the question is where the offence of fomenting civil strife begins and ends. Would the authorities which provoked disturbances other than civil strife be exempt from all responsibility only if such disturbances did not constitute civil strife? What about other forms of popular unrest, ranging from simple disturbances to riots or insurrection? Is incitement to commit or help to commit such acts less grave than fomenting civil strife? Should only this latter act be regarded as punishable? What is the dividing line between these various kinds of breach of the public order of a State? What, for the purposes of the present draft, are the merits of such a distinction? They are not readily apparent.

118. Thus, rather than considering civil strife in isolation, it seemed preferable to deal in the draft code with interference in the internal or external affairs of a State, civil strife, riots or insurrection provoked by the authorities of one State in another State being only individual aspects of such interference.

119. The other question that was raised concerned the distinction between the "internal affairs" and "external affairs" of a State. This distinction nowadays seems rather antiquated. In any case, it is not an easy one to make. The concept of State sovereignty is crumbling in some areas. The example of human rights is typical in this respect. Independently of the Universal Declaration of Human Rights,[48] the draft declaration on rights and duties of States[49] stipulates, in article 6, that:

> Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion.

The same draft stipulates further, in article 14, that "the sovereignty of each State is subject to the supremacy of international law". Lastly, reference should be made to the role of *jus cogens* in international law.

120. Considering all these factors, the distinction between internal affairs and external affairs becomes increasingly blurred. As far as South Africa is concerned, *apartheid* is a purely internal matter. In the eyes of many dictatorships, as has just been said, massive and systematic violations of human rights are internal matters. The competence of a State in its internal affairs is often limited by its membership of international organizations. For example, the fixing of milk or meat prices, although by nature an internal matter, is at times subject to decisions or directives originating from outside organizations. The example of oil prices need hardly be mentioned.

121. This would seem to be a good time to reflect on the vocabulary of international law, in which certain expressions now appear outdated or at least questionable.

[47] United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), p. 95.

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

[49] See footnote 42 above.

The present report makes no claim, of course, to offer a new vocabulary in a field where respect for conventions and their essential stability require considerable continuity. It aims only to provide food for thought and, where possible, to establish whether the vocabulary corresponds exactly to the norm that is being proposed.

122. The scope of the "external affairs of the State", already limited by international law, tends also to be circumscribed for other reasons. Many more areas are emerging in which the State has less and less exclusive competence, for example areas which are covered by treaties or in which such competence is exercised within multilateral organizations. In short, the State is increasingly being drawn into an orbit of shared competence, and at times of delegated or even transferred competence. The distinction between internal affairs and external affairs is therefore hard to make. But there is a growing tendency for external affairs themselves to go beyond the bounds of what was until only recently considered the exclusive competence of the State.

123. Assuming that, for want of anything better, the distinction between internal and external affairs is retained, the relative value of these concepts must nevertheless be taken into account. A country's domestic and foreign policies are in many respects two sides of an indivisible reality, two pans of the same scales, and the various forms of interference are all directed against a single reality: the personality of the State. This holds true for interference as it does for terrorism, which will now be discussed.

E. Terrorism

124. Terrorism is a far from new phenomenon, but it has gained renewed topical interest in recent years. The first, and the most significant, effort to combat terrorism was made at the initiative of the League of Nations. Following the attack on King Alexander I of Yugoslavia at Marseilles, in 1934, a convention was drafted under the auspices of the League of Nations; it was signed at Geneva on 16 November 1937.[50] The problem has acquired renewed significance today primarily because of the activities of various political movements (minorities demanding autonomy or independence, ideological or political disputes, regional conflicts, etc.).

125. Terrorism takes on various forms depending on the perspective from which it is viewed. There is terrorism under ordinary law and there is political terrorism. There is domestic terrorism and there is international terrorism. Terrorism under ordinary law, practised by criminals, is simple lawlessness and is outside the scope of the draft under consideration. Domestic terrorism is practised within a State and undermines the relationship between that State and its nationals. This type of terrorism is equally irrelevant to the draft.

126. The kind of terrorism dealt with here is that which is liable to endanger international peace and security. Such terrorism may be practised either by an individual or by a group. It is characterized and given an international dimension by State participation in its conception, inspiration or execution. There is also the fact that it is directed against another State. When these two elements are combined, terrorism falls within the scope of the draft. Nevertheless, it should be distinguished from a kind of terrorism known as "terrorism in armed conflicts", which falls within the purview of humanitarian law. That form of terrorism does not concern the draft either.

127. Terrorism manifests itself in various ways. Terrorist acts may be aimed at objects, or persons, or both. With reference to objects, terrorists have their preferred targets. These may be aircraft and trains, or they may be certain strategic points (surface communications, bridges, tunnels, railways, etc.). Terrorism involves violence (destruction, fires, explosions, etc.). With reference to persons, the victims selected are more often than not prominent figures (heads of State, members of Government, diplomats, and the like). Where they are not, the desired psychological effect is sought in the number of victims. The heavy toll then creates the impact: planting of explosives in public auditoriums, airports, aircraft, trains, etc.

128. The terrorist approach is to impress, to create a climate of fear through spectacular acts. The weapon is intimidation. The chosen terrain is the collective psyche.

129. The phenomenon of terrorism has long been of concern to jurists, Governments and international organizations.[51] But it is particularly since the Second World War, and more especially over the past two decades, that terrorism and counter-terrorism have become the favourite weapons of a number of movements of various persuasions, which have revived interest in the phenomenon.

130. The Organization of American States drafted a Convention, signed at Washington on 2 February 1971,[52] aimed at preventing and punishing terrorism. The Convention is concerned more particularly with acts against "persons to whom the State has the duty according to international law to give special protection" (art. 1). For its part, the Council of Europe, in accordance with recommendation 703 (1973) of the Consultative Assembly, providing that "international terrorist acts ..., regardless of their cause, should be

[50] Convention for the Prevention and Punishment of Terrorism (League of Nations, document C.546.M.383.1937.V.).

[51] The 1937 Geneva Convention for the Prevention and Punishment of Terrorism (see footnote 50 above) inspired a number of writers, including the following: Q. Saldaña, "Le terrorisme", *Revue internationale de droit pénal* (Paris), vol. 13 (1936), p. 26; A. Sottile, "Le terrorisme international", *Recueil des cours de l'Académie de droit international de La Haye, 1938-III* (Paris, Sirey), vol. 65, p. 91; H. Donnedieu de Vabres, "La répression internationale du terrorisme. Les Conventions de Genève (16 Novembre 1937)", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XIX (1938), p. 37; V. V. Pella, "La répression du terrorisme et la création d'une cour internationale", *Nouvelle Revue de droit international privé* (Paris), vol. V (1938), p. 785, and vol. VI (1939), p. 120; J. Waciórski, *Le terrorisme politique* [thesis] (Paris, Pedone, 1939), preface by H. Donnedieu de Vabres; G. Levasseur, "Les aspects répressifs du terrorisme international", *Terrorisme international* (Paris, Pedone, 1977), p. 59.

[52] Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (OAS, Treaty Series, No. 37 (Washington, D.C.), 1971).

punished as serious criminal offences involving the killing, kidnapping or endangering of the lives of innocent people",[53] adopted, on 27 January 1977, the European Convention on the Suppression of Terrorism.[54]

131. International terrorism thus concerns the legal as much as the political world. The 1954 draft code confines itself to referring to "terrorist activities", without defining terrorism. But criminal law, by reason of its coercive and punitive nature, should be able to bear strict interpretation, in the very interests of those liable to punishment, and in principle every offence must be so defined as to enable the judge to identify it.

132. In that respect, an interesting debate arose concerning the definition of terrorism. A draft convention introduced by the United States of America on 25 September 1972, at the twenty-seventh session of the General Assembly,[55] was not adopted. Third-world delegations considered that it was necessary first to study the underlying causes of terrorism. The draft attempted to define the phenomenon, but it offered too broad a definition, which included terrorism by individuals as well as State-sponsored terrorism.

133. Legal associations too have long been concerned with terrorism. The 1935 Copenhagen Conference for the Unification of Criminal Law adopted a strong statement on terrorism, probably as a result of the Marseilles assassination in 1934. The statement referred to acts that created "a general danger or a state of terror, aimed either at changing or disrupting the functioning of government or at disturbing international relations".[56]

134. An examination of the various resolutions and conventions reveals a number of elements involved in the definition of terrorism. Some relate to means, others to methods, others again to objectives. It will be noted that terrorism, whether domestic or international, whether practised by States or by individuals, whether motivated by politics or by mere villainy, has a number of common characteristics in terms of the *effect* sought (to cause shock, fear, dread or panic within a community), in terms of *means* (violence), and in terms of *methods* (the preferred targets are always those of major human or material interest: attacks on prominent figures, on targets of strategic interest, on places where crowds gather, etc.).

135. But these common characteristics are outweighed by differences concerning the goal, the perpetrators, or the victims. As far as motivation is concerned, acts of terrorism organized by a national liberation movement have nothing in common with terrorism under ordinary law. Acts of terrorism organized by the authorities of a State differ from those organized by individuals in terms of their juridical character.

136. What this draft is concerned with is State-sponsored terrorism, which is differentiated from the other forms of terrorism by the status of the perpetrators and of the victims. It involves the participation of the authorities of one State, and it must be directed against another State. These are the two elements that give it its international dimension. It must be distinguished from another form of terrorism, which is also known as State terrorism, but which has nothing to do with the subject treated here; this brand of terrorism is reflected in the relations between a State and its nationals when that State uses terror as an instrument of government, as dictatorships often do.

137. Given these specific features, how can terrorism be defined for the purposes of the draft code? And above all, is it necessary to give a general definition of terrorism or simply to enumerate the various acts that constitute the crime of terrorism?

138. The Rapporteur who had prepared the draft which led to the 1937 Geneva Convention[57] recommended the enumerative method to the League of Nations Committee of Experts:[58] "between the method involving an *initial definition of terrorism* and the method of simply *enumerating the various acts which constitute such terrorism*, I opted for the latter. In fact," he said,

> ... far from manifesting itself in a single and immutable form, terrorism appears rather in a series of heinous acts of cruelty or vandalism which frighten and demoralize a community by rendering it powerless to react and by eliminating its leaders.

139. Sottile, in his lectures at the Academy of International Law, said:

> ... in addition to their vagueness, the definitions proposed were all tautological because of the need to resort to the word *terror*. Attempts were indeed made to use the terms *intimidation* or *fear*, but, as we have seen, they do not convey the idea of *terror* ... On the other hand, even if a legal and precise definition could be easily formulated, ... such a definition would be quite appropriate in treatises on criminal law intended for experts, but not in a convention to which all the participants in an international conference would be expected to accede ...[59]

140. The approach taken in the 1937 Geneva Convention in the end represented a middle course, a general definition being combined with an exhaustive list of offences deemed to be terrorist.

141. The general definition contained in article 1, paragraph 2, of the Convention characterizes as terrorist "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public". The problem with that definition is that it can apply to any form of terrorism, whether domestic or international, whether in violation of ordinary law or political in nature; moreover, the *purpose* of terrorism is not to spread terror. Terror is a means, not an end. The purpose of terrorism, depending upon its form, is either political, ideological or villainous.

142. For the purposes of the present draft, any definition of terrorism must highlight its international

---

[53] See *European Yearbook*, vol. XXI (1973) (The Hague, Martinus Nijhoff, 1975), p. 374.

[54] Council of Europe, European Treaty Series No. 90 (Strasbourg), 1977.

[55] A/CN.6/L.850.

[56] See *Actes de la VI^e Conférence internationale pour l'unification du droit pénal* (Paris, Pedone, 1938), p. 420, annex A.III, "Terrorisme", art. 1.

[57] See footnote 50 above.

[58] Pella, "La répression du terrorisme et la création d'une cour internationale", *Nouvelle Revue de droit international privé* (Paris), vol. V (1938), pp. 788-789.

[59] Sottile, *loc. cit.* (footnote 51 above), p. 123.

character, which is linked to the nature of the targets, in this case States. But what about international organizations? There have sometimes been attacks directed against organizations. The PLO, not long ago, and UNESCO, more recently, have been the targets of attacks in the form of the taking of hostages or arson. It should be noted that, by agreement, the safety of an international organization is the responsibility of the State in which the organization has its headquarters. Hence any attack on the safety of an organization is an attack on that State.

143. In the enumerative method used in the 1937 Geneva Convention, five categories of acts considered to be terrorist are listed in article 2:

(1) Any wilful act causing death or grievous bodily harm or loss of liberty to:

(*a*) Heads of States, persons exercising the prerogatives of the head of the State, their hereditary or designated successors;

(*b*) The wives or husbands of the above-mentioned persons;

(*c*) Persons charged with public functions or holding public positions when the act is directed against them in their public capacity.

(2) Wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party.

(3) Any wilful act calculated to endanger the lives of members of the public.

(4) Any attempt to commit an offence falling within the foregoing provisions of the present article.

(5) The manufacture, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present article.

144. The above categories call for some comments. In paragraph (2), it is provided that the property must belong to a State other than the one in whose territory the act has been committed. This provision is surprising because the State in which the act was committed is also directly concerned, its public order having been disturbed by the terrorist action; but the drafters of the Convention were undoubtedly influenced by the assassination of King Alexander of Yugoslavia, which had taken place in France, i.e. outside Yugoslav territory.

145. Paragraph (3) raises the question: when is a common injury sustained? Does shooting at a head of State constitute an isolated danger or a common danger? It is difficult to reply in the negative to the second term of that question because the head of State embodies the nation. Also, the head of State is very often surrounded by a large entourage of bodyguards, who face the same danger.

146. Article 3 of the 1937 Convention deals with complicity. Under that article, the following are to be considered acts of complicity:

(1) Conspiracy to commit any such act [of terrorism];

(2) Any incitement to any such act, if successful;

(3) Direct public incitement to any act mentioned under heads (1), (2) or (3) of article 2, whether the incitement be successful or not;

(4) Wilful participation in any such act;

(5) Assistance, knowingly given, towards the commission of any such act.

147. Several questions arise regarding this definition. The first concerns the victim. Under article 1, the act must be directed against a State. Some writers have maintained that "throwing a bomb at a bus is not a terrorist act unless a State-operated public service is involved".[60] Nothing could be more debatable. What is really at stake here is not a public service, but the public order of the State in which the terrorist act took place—the public order for which the State is directly responsible.

148. Another problem has to do with the exhaustiveness of the proposed list. Of course criminal law, as has been said, is subject to restrictive interpretation, but the range of offences is so broad that it may be asked whether anything may have been omitted from the proposed list and whether it can cover all the new developments resulting from technological progress and changing customs. The seizure of aircraft, for example, is a recent phenomenon in terms of the 1937 Convention; attacks on diplomats are the order of the day; and hostages are being taken on an unprecedented scale. It is true that article 2, paragraph (3), refers to wilful acts calculated to endanger the lives of members of the public; and acts directed against aircraft undoubtedly belong in this category, as does the taking of hostages, particularly when the personnel of a diplomatic mission in involved. Sometimes, however, one person taken as a hostage is enough (for example, the head of the mission); in such cases, there does not seem to be a danger to the public.

149. In the light of these observations, consideration might be given to adding the words *inter alia* to certain paragraphs and referring to certain acts which today preoccupy international public opinion. It is in that spirit that some articles of the 1937 Convention have been included in amended form in the new draft submitted to the Commission.

150. Another important question arises which involves both substance and form. Why devote a separate article to terrorism? Should not terrorism be included among the category of acts constituting interference in the affairs of another State? Why treat it differently from civil strife?

151. Terrorism is close to civil strife in some respects, but different in others. Civil strife and terrorism often have the same causes. It may be a case of friction between the members of the same national community. Dissidents often attack established régimes by fomenting civil strife as well as by practising terrorism. Hence they are two combined means to the same end.

152. But acts of terrorism, as understood in the draft, are organized from outside and involve elements that are not always domestic, such as hired killers who are not nationals of the State concerned. Moreover, terrorism—and this is the problem with which the draft is concerned—may find support in a foreign State which makes its territory and resources available to the terrorist enterprise. Above all, however, a State may be the direct author of an act of terrorism through orders given to agents directly under its authority, which is impossible in the case of civil strife.

[60] *Ibid.*, p. 124.

153. Still in the matter of the distinction between civil strife and terrorism, it may be said that civil strife is the preferred weapon against weak States, whereas terrorism is more often used against well-organized States with great national unity. But obviously this distinction is not at all absolute. It is quite relative. Lastly, terrorism sometimes has goals that transcend mere interference in the affairs of another State. It is sometimes aimed against the State itself in terms of its individual identity and in its capacity as a juridical person, whereas civil strife is caused, in principle, by internal friction, and only régimes or Governments are attacked.

154. For all these reasons, it seems advisable to keep terrorism in a separate category.

F. Violations of the obligations assumed under certain treaties

155. This offence is covered by article 2, paragraph (7), of the 1954 draft code, which reads as follows:

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

This text is intended to cover:

(*a*) The strength of land, sea and air forces;

(*b*) Armaments, munitions and war material in general;

(*c*) Presence of land, sea and air forces, armaments, munitions and war material;

(*d*) Recruiting and military training;

(*e*) Fortifications.

156. This list, which was the one submitted by the first Special Rapporteur, J. Spiropoulos,[61] gave rise to some objections with regard to the use of the word "fortifications", which was considered outdated and no longer relevant to present-day realities. Actually, in its earlier meaning, the word "fortification" referred to a specific type of military structure around a town or castle. Remains of fortifications from the Middle Ages to the eighteenth century can still be seen all across Europe. Today, although boiling oil and molten lead have vanished together with the fortifications from behind which they were employed, and although drawbridges are nothing more than curiosities, strategic military structures have in fact lost none of their interest. They have, however, been adapted to the specifications of modern times. The word "fortifications" might be replaced by the term "strategic structures".

G. Colonial domination

157. The unanimity with which colonialism is condemned today makes it unnecessary to discuss the subject at any length in the present report. The fundamental Declaration of the General Assembly of 1960 on the granting of independence to colonial countries and peoples[62] was already referred to in the second report.[63]

158. The criticism voiced in the Commission related to terminology. It was argued that the word "colonialism" tended to describe an historical phenomenon and a political development, and that it was not relevant to the juridical context. Some members of the Commission proposed that the word "colonialism" should be replaced by "violation of the right to self-determination". It was pointed out, however, that the term "self-determination" was at times ambiguous and could have different meanings, depending on the context. Thus its meaning when the reference was to minorities seeking to separate themselves from the national community—in which case it was synonymous with "secession"—was different from its meaning when the reference was to colonized peoples struggling for their independence. That is why it is preferable, for the sake of terminological consistency, to use the same expression as in article 19, paragraph 3 (*b*), of part 1 of the draft articles on State responsibility: "the establishment or maintenance by force of colonial domination".

H. Mercenarism

159. The subject of mercenarism gave rise to lengthy debates during the thirty-sixth session of the Commission. It was pointed out that mercenarism was an ancient phenomenon and that it was not reprehensible in all cases. For a very long time, States had been using foreigners to make up a part of their army, which was not reprehensible in the least.

160. However, this is clearly not the type of mercenarism that is meant. What is meant here is the use of foreigners who have no connection with a national army, but who have been specially recruited for the purpose of attacking a country in order to destabilize or overthrow the established authorities, for any number of reasons, generally of an economic or political nature. Viewed from this perspective, mercenarism ranks among the means of subversion used against small and newly independent States, or among the means of hampering the action of national liberation movements.

161. The Commission had asked that this phenomenon should be studied in the light of the work of the United Nations *Ad Hoc* Committee on the question of mercenarism. It should be noted, however, that the problem of mercenarism comprises several aspects, which are not of equal relevance to the topic under study.

162. From the perspective of humanitarian law, the problem lies in deciding whether or not mercenaries should be considered as combatants, and so be entitled to the guarantees accorded to combatants under the 1949 Geneva Conventions. Additional Protocol I[64] to the Geneva Conventions seeks to define the term

[61] See *Yearbook ... 1950*, vol. II, p. 263, document A/CN.4/25, para. 64.

[62] General Assembly resolution 1514 (XV) of 14 December 1960.

[63] *Yearbook ... 1984*, vol. II (Part One), p. 96, document A/CN.4/377, paras. 48-49.

[64] See footnote 47 above.

"mercenary" in its article 47. Among the conditions required for a person to be considered a mercenary, it is provided in article 47, paragraph 2 (*e*) and (*f*), that such a person "is not a member of the armed forces of a party to the conflict" and "has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces".

163. However, this definition does not eliminate all ambiguity. In the General Assembly, some delegations remarked that it failed to emphasize the fact that the goal of mercenarism was to oppose national liberation movements through the use of armed force. They also pointed out that the text did not refer to the responsibility of States which organized, equipped and trained mercenaries and provided them with transit facilities. Yet it is precisely this aspect of the problem that concerns the draft, and not the individual criminal responsibility of the mercenary himself.

164. The discussion in the Commission made it possible to raise several other questions, the most important being whether the reference to "armed bands" in article 2, paragraph (4), of the 1954 draft code applied also to mercenaries. According to that provision, the use of armed bands to violate the territorial integrity of another State constituted an act of aggression. The whole problem was whether the term "armed bands" could be construed as applying also to mercenaries. However, the problem was settled by the Definition of Aggression, which in article 3, paragraph (*g*), refers specifically to mercenaries as well as to armed bands.

I. Economic aggression

165. This phenomenon was described during the thirty-ninth session of the General Assembly as being characterized by attacks on the principle of permanent sovereignty over natural resources, which can appear in two forms: military intervention in the name of vital interests, or coercion exerted on a Government to compel it to take or to refrain from taking economic decisions, as in the case of a nationalization. The former instance is covered by the Definition of Aggression. The latter is covered by article 2, paragraph (9), of the 1954 draft code, which condemns coercive measures of an economic or political character designed to force the will of a State and thereby obtain advantages of any kind. Thus what is actually involved is a form of interference in the internal affairs of another State, and it is in this category that the phenomenon in question has been placed in the new draft articles.

CHAPTER III

Draft articles

PART I

SCOPE OF THE PRESENT ARTICLES

Article 1

The present articles apply to offences against the peace and security of mankind.

PART II

PERSONS COVERED BY THE PRESENT ARTICLES

Article 2

FIRST ALTERNATIVE

Individuals who commit an offence against the peace and security of mankind are liable to punishment.

SECOND ALTERNATIVE

State authorities which commit an offence against the peace and security of mankind are liable to punishment.

PART III

DEFINITION OF AN OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND

Article 3

FIRST ALTERNATIVE

Any internationally wrongful act which results from any of the following is an offence against the peace and security of mankind:

(*a*) a serious breach of an international obligation of essential importance for safeguarding international peace and security;

(*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples;

(*c*) a serious breach of an international obligation of essential importance for safeguarding the human being;

(*d*) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

SECOND ALTERNATIVE

Any internationally wrongful act recognized as such by the international community as a whole is an offence against the peace and security of mankind.

PART IV

GENERAL PRINCIPLES (PENDING)

PART V

ACTS CONSTITUTING AN OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND

Article 4

The following acts constitute offences against the peace and security of mankind.

A (FIRST ALTERNATIVE). **The commission [by the authorities of a State] of an act of aggression.**

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

Explanatory note. In this definition, the term "State"

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

(ii) includes the concept of a "group of States", where appropriate.

(*b*) Evidence of aggression and competence of the Security Council

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

(*c*) Acts constituting aggression

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of subparagraph (*b*), qualify as an act of aggression:

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

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

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

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

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

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

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

(viii) the acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

(*d*) Consequences of aggression

(i) No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression;

(ii) A war of aggression is a crime against international peace and security. Aggression gives rise to international responsibility;

(iii) No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

(*e*) Scope of this definition

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

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

(*f*) Interpretation of the present articles

In their interpretation and application, the above provisions are interrelated and each provision should be construed in the context of the other provisions.

A (SECOND ALTERNATIVE). **The commission [by the authorities of a State] of an act of aggression as defined in General Assembly resolution 3314 (XXIX) of 14 December 1974.**

B. Recourse [by the authorities of a State] to the threat of aggression against another State.

C. Interference [by the authorities of a State] in the internal or external affairs of another State.

The following, *inter alia,* constitute interference in the internal or external affairs of a State:

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

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

D. The undertaking or encouragement [by the authorities of a State] of terrorist acts in another State, or the toleration by such authorities of activities organized for the purpose of carrying out terrorist acts in another State.

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

(*b*) The following constitute terrorist acts:

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

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

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

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

E. A breach [by the authorities of a State] of 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 strategic structures, or of other restrictions of the same character.

F. The forcible establishment or maintenance of *colonial domination* [by the authorities of a State].