

Document:-
A/CN.4/411 and Corr.1 & 2

**Sixth report on the Draft Code of Crimes 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:-
1988, vol. II(1)

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**DRAFT CODE OF CRIMES AGAINST THE PEACE
AND SECURITY OF MANKIND**

[Agenda item 5]

DOCUMENT A/CN.4/411*

**Sixth report on the draft Code of Crimes against the Peace and Security of Mankind,
by Mr. Doudou Thiam, Special Rapporteur**

[Original: French]
[19 February 1988]

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* Incorporating documents A/CN.4/411/Corr.1 and 2.

Introduction

1. This sixth report is devoted to crimes against peace.
2. It will be recalled that crimes against the peace and security of mankind are subdivided into three categories:
 - (a) Crimes against peace;
 - (b) War crimes;
 - (c) Crimes against humanity.
3. Crimes in the first category, namely crimes against peace, are, as their name indicates, acts which threaten

international peace and security, either because they constitute a *breach* of the peace or because they constitute a *threat* to it. As the Special Rapporteur explained in his third report,¹ they are crimes that threaten the sovereignty or territorial integrity of a State. They differ from crimes against humanity, which threaten not State entities but human entities.

¹ *Yearbook . . . 1985*, vol. II (Part One), p. 71, document A/CN.4/387, paras. 68 *et seq.*

I. Crimes against peace in the 1954 draft code

A. Enumeration of crimes in the 1954 draft code

4. The 1954 draft code² had already characterized certain acts as crimes against peace. They are enumerated in article 2, paragraphs (1) to (9), of the draft code.³

² The full text of the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission at its sixth session, in 1954, is reproduced in *Yearbook . . . 1985*, vol. II (Part Two) p. 8, para. 18.

³ Article 2 of the 1954 draft code provided:

"Article 2

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

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

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

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

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

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

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

"(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.

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

"(9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind.

" . . ."

B. Revision of the 1954 draft code

5. An attempt will be made here to revise and supplement the provisions of the 1954 draft code relating to crimes against peace. At the same time, definitions will be proposed of certain concepts which the draft code did not define: for example, aggression and terrorism.

6. The Commission will have to decide whether certain offences mentioned in the 1954 draft code should be retained as offences distinct from aggression. These offences are the preparation of aggression, annexation and the sending of armed bands into the territory of a State.

1. PREPARATION OF AGGRESSION

7. With regard to the preparation of aggression, it should be pointed out that this concept was taken from the Charter of the Nürnberg International Military Tribunal⁴ (art. 6 (a)) and from the Charter of the International Military Tribunal for the Far East⁵ (art. 5 (a)). It was also used by the Commission in "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" (principle VI (a) (i)).⁶

8. The question may arise, however, of the precise content of this concept. When does the preparation of aggression begin? How is it distinguishable from the preparation of a defence against possible aggression? When aggression has occurred, should the perpetrator be prosecuted both for the crime of preparation and for the crime of aggression? If aggression has not occurred, how can criminal intent be established?⁷

2. ANNEXATION

9. Annexation was mentioned in article 2, paragraph 8, of the 1954 draft code. There is no longer any justification

⁴ Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London on 8 August 1945 (United Nations, *Treaty Series*, vol. 82, p. 279).

⁵ Referred to as the "Tokyo Tribunal"; see *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

⁶ Referred to as the "Nürnberg Principles"; reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45 and footnote 39.

⁷ For the differences of opinion regarding the concept "preparation of aggression", see the Special Rapporteur's third report (*Yearbook . . . 1985*, vol. II (Part One), pp. 73 *et seq.*, document A/CN.4/387), paras. 93-105.

for this provision, since annexation is expressly mentioned in the Definition of Aggression adopted by the General Assembly.⁸

3. SENDING OF ARMED BANDS INTO THE TERRITORY OF ANOTHER STATE

10. This provision, included in article 2, paragraph 4, of the 1954 draft code, has also been deleted. This offence is covered in the definition of aggression proposed by the Special Rapporteur in draft article 11, paragraph 1 (b) (vii) (see sect. III below).

11. On the other hand, intervention in the internal affairs of a State must be considered.

4. INTERVENTION IN THE INTERNAL OR EXTERNAL AFFAIRS OF A STATE

(a) *The concept of intervention*

12. The concept of intervention is elusive as regards both its nature and its manifestations. It may be military, political or economic. It may be inspired by the most varied motives. Military intervention, which is covered in the 1974 Definition of Aggression, will not be dealt with here.

13. When the intervention is political, the problem is to determine from what point in time it becomes wrongful. It is, of course, difficult to exclude from international relations the influence which certain States exert on other States and which is sometimes mutual. This influence creates between them a kind of privileged relationship authorizing certain forms of intervention which are acceptable to those concerned. This type of intervention—which often takes the form of advice or friendly pressure to calm matters during a period of crisis or tension and to prevent outbursts—is not at issue here.

14. But not all pressure is friendly. Beyond certain limits, it becomes coercion.

15. It is necessary to determine the legal basis and then the content of the principle of non-intervention.

(b) *Legal basis of the principle of non-intervention*

16. Apart from the reference in the Charter of the United Nations (Art. 2, para. 4), this principle has been recalled in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty⁹ and in the Declara-

⁸ The Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex) provides, in article 3 (a):

"Article 3

"Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

"(a) 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;

" . . . "

See also in sect. III below, the definition proposed by the Special Rapporteur (draft article 11, para. 1 (b) (i)).

⁹ General Assembly resolution 2131 (XX) of 21 December 1965.

tion on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,¹⁰ which devotes five paragraphs to this principle.

17. In addition, the judgment of 27 June 1986 of the ICJ on the *Nicaragua* case is most instructive. According to the Court, the rules of non-use of force and non-intervention are part of international customary law. The judgment emphasizes:

In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. . . .¹¹

18. The Court also stated that

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.¹²

19. In its final draft articles on the law of treaties, the Commission also noted that

the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force.¹³

20. The Commission went still further by stating that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*".¹⁴ The term "force" must be understood here in the broad sense: the use not only of armed force but also of all forms of pressure of a coercive nature. It therefore covers all forms of intervention.

21. The conventions and declarations concerning the principle of non-intervention are merely the application of an existing principle.

(c) *Legal content of the concept of intervention*

22. In view of the nuances and degrees involved, is the notion of intervention not too general and too varied in its manifestations to constitute a legal concept? Some advocate an extensive content for the concept of intervention, while others favour a more restrictive content.

23. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations¹⁵ of 24 October 1970 gives a very broad definition of intervention. It may be "direct" or "indirect"; it covers

¹⁰ General Assembly resolution 2625 (XXV) of 24 October 1970, annex; see the third principle.

¹¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 98, para. 185.

¹² *Ibid.*, p. 106, para. 202.

¹³ *Yearbook . . . 1966*, vol. II, p. 247, document A/6309/Rev. I, part II, para. (8) of the commentary to article 49.

¹⁴ *Ibid.*, para. (1) of the commentary to article 50.

¹⁵ See footnote 10 above.

the area of internal affairs as well as external affairs. It not only concerns the use of armed force but covers "all other forms of interference or attempted threats" against another State.

24. This declaration is based on the Charter¹⁶ of OAS (Bogotá Charter) which states:

Article 18

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

25. This very broad content is also found in resolution 78, adopted on 21 April 1972 by the General Assembly of OAS,¹⁷ which reaffirmed in paragraph 2,

the obligation of [member States] to refrain from applying economic, political, or any other type of measures to coerce another State and obtain from it advantages of any kind.

This provision, which concerns coercive measures, is supplemented by another provision, which refers to acts of subversion and relates to the obligation

to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another State and from intervening in a civil war in another State or in its internal struggles.

26. The Court was called upon to consider the problem of the content of the concept of intervention, but only with reference to the elements which it considered relevant to the dispute before it. It noted that

. . . A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. . . .¹⁸

27. It is thus the element of coercion which constitutes the dividing line between lawful intervention and wrongful intervention.

28. That being so, the problem arises as to whether there may not be exceptions to the principle of non-intervention. For example, the so-called "colonialism exception" has been cited. It concerns intervention designed to support or assist the colonial peoples struggling for independence. Intervention on the basis of the attributes of the United Nations has also been mentioned. It has also been asked whether intervention is lawful when it occurs at the request of the Government in whose territory it is occurring or if it is effected in pursuance of a treaty. On these

various points, the positions of States reveal an infinite number of nuances reflecting their particular positions.

29. The Court had to consider the following question: "if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs?"¹⁹ This would in fact amount to the exercise of a right of collective self-defence, applied not to the case of aggression but to the case of violation of the principle of non-intervention. According to the Court, the use of force by a State in response to a wrongful act of which it was not the victim is not allowed when the wrongful act does not constitute an act of aggression.

30. These considerations indicate that the concept of intervention is very complex and involves several types and degrees.

31. However, the 1954 draft code invokes the concept of intervention only in connection with "coercive measures of an economic or political character" (art. 2, para. 9). Yet intervention is clearly not limited to such measures alone. It also covers, in addition to coercive measures, acts of subversion which are dealt with in separate provisions in the draft: organization of armed bands with a view to incursions into the territory of another State (art. 2, para. 4); activities to undertake or encourage civil strife in another State (art. 2, para. 5); terrorist activities in another State (art. 2, para. 6).

32. It is not clear why the 1954 draft code uses the expression "intervention . . . in the internal or external affairs of another State" only in connection with coercive acts of an economic or political character. It will be noted, moreover, that the forms of intervention enumerated in the text do not cover the whole subject. Many other forms of intervention deserve mention. Terrorism and the organization or encouragement of civil strife are not the only forms. The modern world has experienced many other means of subversion, such as, for example: training at special camps, provision of arms and equipment, financing of internal movements whatever their tendency, etc. The ICJ enumerated the most typical of these in its judgment in the *Nicaragua* case.

33. How, then, can the code cover all forms of intervention? This is a problem of method.

(d) *Problems of methodology*

34. Here, as in other instances, there are two courses open to the Commission: either to adopt a general definition of intervention, leaving the judge to decide in each case whether the impugned act constitutes an act of intervention; or to enumerate the acts of intervention punishable under the code, although such an enumeration must be exhaustive, since this is the realm of criminal law.

35. The Special Rapporteur therefore submits a draft article 11 in which two alternative texts are presented for paragraph 3 (one proposing a general definition and the other an enumerative definition) and for paragraph 6.

¹⁶ Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (*ibid.*, vol. 721, p. 324) and by the "Cartagena Protocol" of 5 December 1985 (OAS, *Serie sobre Tratados*, No. 66 (Washington (D.C.), 1986), p. 23).

¹⁷ Cited by the ICJ in its judgment in the *Nicaragua* case (*I.C.J. Reports 1986*, p. 102, para. 192).

¹⁸ *Ibid.*, p. 108, para. 205.

¹⁹ *Ibid.*, p. 110, para. 210.

II. New characterizations of acts as crimes against peace

A. Colonial domination

36. Colonial domination as an international crime is expressly referred to in article 19, paragraph 3 (b), of part 1 of the draft articles on State responsibility.²⁰

37. The principle contained therein is derived from Article 1, paragraph 2, of the Charter of the United Nations, which proclaims the right of peoples to self-determination. It finds its application in Article 76 of the Charter (Chap. XII. International trusteeship system), subparagraph (b) of which includes among the objectives of the trusteeship system the promotion of the progressive development of the inhabitants of the trust territories towards self-government or independence.

38. Reference may also be made to Article 73 of the Charter (Chap. XI. Declaration regarding non-self-governing territories), which states that Members of the United Nations administering non-self-governing territories "accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the . . . Charter, the well-being of the inhabitants of these territories, and, to this end: . . . to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions".

39. There is no need to retrace here all the stages on the long road which led to the adoption, in 1960, of the Declaration on the Granting of Independence to Colonial Countries and Peoples²¹ or to recall all the subsequent resolutions of the General Assembly dealing with the implementation of that declaration.²²

40. The subjection of a people to colonial domination is thus now considered, albeit very belatedly, as a crime against the peace and security of mankind. The only problem that arises is a problem of formulation.

41. During the discussion in the Commission, some members had objected that the word "colonialism" was a pol-

itical term which described a historical phenomenon. That was why the Special Rapporteur had taken the wording from article 19, paragraph 3 (b), of part 1 of the draft articles on State responsibility, which uses the expression "colonial domination".

42. This formula did not satisfy other members, who considered that it too referred to an old and increasingly obsolescent phenomenon. The Special Rapporteur therefore proposes, as an alternative, the wording used in the Declaration on the Granting of Independence to Colonial Countries and Peoples (para. 1) and 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 (fifth principle), which condemn the "subjection of peoples to alien subjugation, domination and exploitation".

B. Mercenarism

43. Two remarks are called for on the subject of mercenarism. The first is that this phenomenon is already covered in the Definition of Aggression.²³ The question is whether, in view of this fact, it is necessary to have a separate provision on mercenarism.

44. The second remark is that the study of mercenarism has been entrusted to an *ad hoc* committee of the General Assembly, which has not yet completed its work.

45. In these circumstances, any definition of the phenomenon within the framework of this draft code can only be provisional. It will be noted that the definition proposed is that contained in article 47 of Additional Protocol I to the Geneva Conventions of 12 August 1949.

*
* *

Final remarks

46. These are the comments, at this stage, on the draft articles on crimes against peace. Further details will be found in the Special Rapporteur's third report,²⁴ which was devoted to the general problems posed by such crimes.

47. The above comments are supplemented by specific comments following the different provisions of draft article 11, recalling the discussions held on them and the problems raised.

²³ The Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex) provides, in article 3 (g):

Article 3

"Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

". . .

"(g) 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."

See also, in part III below, the definition proposed by the Special Rapporteur in draft article 11, para. 1 (b) (vii).

²⁴ *Yearbook . . . 1985*, vol. II (Part One), p. 63, document A/CN.4/387.

²⁰ The relevant provisions of article 19 read as follows:

"Article 19. International crimes and international delicts

"1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

"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.

"3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

". . .

"(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

". . ."

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

²¹ General Assembly resolution 1514 (XV) of 14 December 1960.

²² See United Nations, *The Right to Self-determination: Historical and Current Development on the Basis of United Nations Instruments*, study prepared by Aureliu Cristescu (Sales No. E.80.XIV.3).

III. Draft articles

CHAPTER II

ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

PART I. CRIMES AGAINST PEACE

Article 11. Acts constituting crimes against peace

The following constitute crimes against peace:

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

(a) *Definition of aggression*

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

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

- a. is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;
- b. includes the concept of a "group of States", where appropriate.

(b) *Acts constituting aggression*

Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression:

- (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 the authorities of a State in allowing its territory, which it has placed at the dis-

posal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

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

(c) *Scope of this definition*

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

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

Comments

(1) This definition is taken from General Assembly resolution 3314 (XXIX) of 14 December 1974, but the provisions relating to evidence and the consequences of aggression and to interpretation have not been reproduced. This is because interpretation and evidence are matters within the competence of the judge.

(2) The differences of opinion which have arisen concerning the various methods of defining aggression were described in the Special Rapporteur's third report.²⁵

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

3 (FIRST ALTERNATIVE). Interference by the authorities of a State in the internal or external affairs of another State. The term "interference" means any act or any measure, whatever its nature or form, amounting to coercion of a State.

3 (SECOND ALTERNATIVE). Interference by the authorities of a State in the internal or external affairs of another State:

- (i) by fomenting, encouraging or tolerating the fomenting of civil strife or any other form of internal disturbance or unrest in another State;

²⁵ *Ibid.*, pp. 72-73, paras. 75-84.

- (ii) **by organizing, training, arming, assisting, financing or otherwise encouraging activities against another State, in particular terrorist activities.**

(a) *Definition of terrorist acts*

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

(b) *Terrorist acts*

The following constitute terrorist acts:

- (i) **Any act causing death or grievous bodily harm or loss of liberty to a head of State, persons exercising the prerogatives of the head of State, their hereditary or designated successors, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;**
- (ii) **Acts calculated to destroy or damage public property or property devoted to a public purpose;**
- (iii) **Any act likely to imperil human lives through the creation of a public danger, in particular the seizure of aircraft, the taking of hostages and any 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.**

Comments

(1) This text reproduces, for the definition of terrorism, the 1937 Convention for the Prevention and Punishment of Terrorism²⁶ but also refers to some new forms of terrorism, such as the seizure of aircraft and violence against diplomats.

(2) The following conventions are particularly relevant:

Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970);²⁷

Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (Washington (D.C.), 2 February 1971);²⁸

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (14 December 1973);²⁹

European Convention on the Suppression of Terrorism (27 January 1977).³⁰

4. **A breach of the obligations of a State under a treaty designed to ensure international peace and security, in particular by means of:**

- (i) **prohibition of armaments, disarmament, or restriction or limitation of armaments;**
- (ii) **restrictions on military training or on strategic structures or any other restrictions of the same character.**

5. **A breach of the obligations of a State under a treaty prohibiting the emplacement or testing of weapons in certain territories or in outer space.**

Comments

(1) This text supplements the 1954 draft code by including certain acts covered by subsequent conventions on the emplacement or testing of weapons.

(2) The prohibition of the emplacement of weapons in internationally protected environments is the subject of various international conventions. The main ones are the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water of 5 August 1963³¹ and the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof of 11 February 1971.³²

(3) It may be asked whether such violations constitute crimes against peace or crimes against humanity. It is true, however, that the distinction between the two concepts is not always watertight and that certain crimes constitute both crimes against peace and crimes against humanity. This dual characterization will be studied in connection with crimes against humanity.

6 (FIRST ALTERNATIVE). **The forcible establishment or maintenance of colonial domination.**

6 (SECOND ALTERNATIVE). **The subjection of a people to alien subjugation, domination or exploitation.**

Comments

On the subject of colonial domination, see the Special Rapporteur's third report³³ and paragraphs 36 to 42 of the present report.

7. **The recruitment, organization, equipment and training of mercenaries or the provision of facilities to them in order to threaten the independence or security of States or to impede national liberation struggles.**

A mercenary is any person who:

(a) **is specially recruited locally or abroad in order to fight in an armed conflict;**

²⁶ League of Nations, document C.546.M.383.1937.V.

²⁷ United Nations, *Treaty Series*, vol. 860, p. 105.

²⁸ OAS, *Serie sobre Tratados*, No. 37 (Washington (D.C.), 1971).

²⁹ United Nations, *Treaty Series*, vol. 1035, p. 167.

³⁰ Council of Europe, European Treaty Series, No. 90 (Strasbourg, 1977).

³¹ United Nations, *Treaty Series*, vol. 480, p. 43.

³² *Ibid.*, vol. 955, p. 115.

³³ *Yearbook . . . 1985*, vol. II (Part One), p. 80, document A/CN.4/387, paras. 157-158.

(b) does, in fact, take a direct part in the hostilities;

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

(d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(e) is not a member of the armed forces of a party to the conflict;

(f) 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.

Comments

This definition is taken from article 47 of Additional Protocol I to the Geneva Conventions of 12 August 1949.³⁴

³⁴ Regarding the problems of mercenarism, see the Special Rapporteur's third report (*ibid.*, pp. 80-81, paras. 159-164).