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

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DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 5]

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

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CONTENTS

Introduction

1. This seventh report deals with war crimes and crimes against humanity, the subject of draft articles 13 and 14. These draft articles are followed by comments summarizing the debates among jurists and the debates in the International Law Commission.

2. The Special Rapporteur felt that it was useful to refer to the debates in the Commission briefly, because some members were not yet on the Commission at the time when the debates took place. Sometimes, also, the comments are concerned with new points which have not yet been considered in the Commission, for example the distinction between the concept of a war crime and that of a grave breach within the meaning of the 1949 Geneva Conventions and Additional Protocol I thereto,[1] or attacks on cultural, artistic or historic property or on vital assets, such as the human environment. The comments also explain why one particular version was preferred to another appearing in the 1954 draft code,[2] and why certain new offences have been proposed.

* Incorporating document A/CN.4/419/Corr.1.

[1] See footnotes 5 and 6 below.

[2] Adopted by the Commission at its sixth session, in 1954; text reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

I. War crimes

A. Draft article 13

3. The Special Rapporteur proposes the following draft article 13:

CHAPTER II.
Acts constituting crimes against the peace and security of mankind

. . .

Article 13. War crimes

FIRST ALTERNATIVE

(*a*) Any [serious] violation of the laws or customs of war constitutes a war crime.

(*b*) Within the meaning of the present Code, the term "war" means any international or non-international armed conflict as defined in article 2 common to the Geneva Conventions of 12 August 1949 and in article 1, paragraph 4, of Additional Protocol I of 8 June 1977 to those Conventions.

SECOND ALTERNATIVE

(*a*) Within the meaning of the present Code, any [serious] violation of the rules of international law applicable in armed conflict constitutes a war crime.

(*b*) The expression "rules of international law applicable in armed conflict" means the rules laid down in the international agreements to which the parties to the conflict have subscribed and the generally recognized principles and rules of international law applicable to armed conflicts;

(*c*)[3] The following acts, in particular, constitute war crimes:

(i) Serious attacks on persons and property, including intentional homicide, torture, the taking of hostages, the deportation or transfer of civilian populations from an occupied territory, inhuman treatment, including biological experiments, the intentional infliction of great suffering or of serious harm to physical integrity or health, and the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;

(ii) The unlawful use of weapons and methods of combat, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction.

[3] The comments that follow do not refer to paragraph (*c*) as the text of that paragraph (A/CN.4/419/Add.1) was submitted after the present report (A/CN.4/419) was distributed to the members of the Commission. See *Yearbook . . . 1989*, vol. I, p. 67, 2106th meeting, para. 2.

B. Comments

1. DEFINITION OF WAR CRIMES

4. It was considered necessary to have only a general definition rather than draw up a list of acts constituting war crimes. Such a list would give rise to the problem of determining whether or not it was exhaustive. Moreover, it would be difficult, if not impossible, to reach agreement on the crimes to be included in or omitted from the list of offences. Lastly, a list would constantly be called in question because of the rapid development of methods and technologies.

5. The famous Martens clause set forth in the preamble to the 1907 Hague Convention (IV)[4] and very appropriately included in article 1, paragraph 2, of Additional Protocol I[5] to the four 1949 Geneva Conventions[6] remains fully valid.

6. Commenting on article 1, paragraph 2, of Additional Protocol I, the International Committee of the Red Cross stated:

> There were two reasons why it was considered useful to include this clause yet again in the Protocol. First, despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment; thus the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted. Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology.[7]

7. The late Jean Spiropoulos, the Special Rapporteur for the 1954 draft code, said:

> . . . To embark on such a venture now will render the attainment of our present goal, namely, the drafting and adoption by the governments of such a code in the near future, illusory. What the Commission can do, in our opinion, is to adopt a general definition of the above crimes, leaving to the judge the task of investigating whether, in the light of the recent development of the laws of war, he is in the presence of "war crimes". . . .[8]

[4] See the eighth paragraph of the preamble to Convention (IV) respecting the Laws and Customs of War on Land, of 18 October 1907 (see J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), pp. 101-102).

[5] Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, p. 3).

[6] Geneva Conventions of 12 August 1949 for the Protection of War Victims (*ibid.*, vol. 75).

[7] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 38-39, para. 55.

[8] First report by J. Spiropoulos on the draft code of offences against the peace and security of mankind, *Yearbook . . . 1950*, vol. II, document A/CN.4/25, pp. 266-267, para. 82.

8. This opinion is particularly worthy of note because the various breaches of the law of armed conflicts are mentioned in the relevant conventions, such as the 1907 Hague Conventions and the 1949 Geneva Conventions (Convention I, art. 50; Convention II, art. 51; Convention III, art. 130; Convention IV, art. 147) and Additional Protocol I thereto (arts. 11 and 85). It would be pointless and tedious to reproduce these texts in the code.

9. Whatever reservations one might have about the judgment rendered by the Nürnberg International Military Tribunal, one is bound to support its statement that the law of war is to be found in customs and practices which have gradually obtained universal recognition, and in the general principles of justice applied by jurists and practised by military courts; that this law is not static, but by continual adaptation follows the needs of a changing world; and that in many cases treaties do no more than express and define the principles of law already existing.[9]

10. Jurists themselves have come to support the idea that an exhaustive list of war crimes is impossible. Sir David Maxwell Fyfe, in his reply to a questionnaire from the International Association of Penal Law and the International Bar Association, said: "I do not think it practicable to produce a code of elaborate and detailed definitions". Vespasien V. Pella, at that time President of the International Association of Penal Law, expressed the following opinion:

> It is impossible in the present circumstances to draw up a complete list.
>
> It should be noted that the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties, established in 1919 by the Preliminary Peace Conference, had compiled a list of 32 categories of breaches of the laws and customs of war. Even with the addition of other categories included in various national laws during or after the Second World War and by the United Nations War Crimes Commission, the list cannot be regarded as up to date.
>
> ...
>
> ... we feel that it is preferable to abide by the formula of article 2, paragraph (11), of the draft code of the International Law Commission.[10]

11. It is this formula which became article 2, paragraph (12), of the 1954 draft code.

2. Terminology

12. There had been some discussion as to whether the term "war" and the expression "war crime" were outmoded, and whether it would be better to use the expression "armed conflict". It seemed preferable—and there was strong support for that course in the Commission—to retain the word "war" and the expression "laws or customs of war", which have become established in many international conventions that are still in force, and also in national laws.

13. The 1907 Hague Convention (IV) is concerned with the "laws or customs of war", and this expression appears in article 6 (*b*) of the Charter of the International Military Tribunal[11] (Nürnberg Tribunal) and article 5 (*b*) of the Charter of the International Military Tribunal for the Far East[12] (Tokyo Tribunal). It also appears in the British Warrant of 14 June 1945 (regulation 1),[13] the French Ordinance of 28 August 1944 (art. 1, para. 1),[14] the Australian War Crimes Act, 1945 (art. 3),[15] the Chinese Act of 24 October 1946 (art. III, item 38) and other texts.[16]

14. These brief examples may reassure those who believe that defining a war crime simply as a "violation of the laws or customs of war" would be contrary to the principle *nullum crimen sine lege*. The States mentioned and many others which use this expression are all committed to the principle of non-retroactivity of criminal law.

3. Degree of gravity of war crimes, and distinction between war crimes and grave breaches

15. It may be noted that both alternatives for draft article 13 introduce the concept of degree of gravity in the definition of a war crime. This is something new. Neither the Hague Conventions, nor the Charters of the International Military Tribunals, nor Law No. 10 of the Allied Control Council[17] made a distinction between acts regarded as war crimes on the basis of their degree of gravity. The word "crime" in the expression "war crime" was not used in its technical and legal sense applying to the gravest breaches, but in the general sense of a breach, regardless of the degree of gravity.

16. The distinction between grave breaches and other breaches, or ordinary breaches, appeared only later, in the 1949 Geneva Conventions and Additional Protocol I thereto. Under those instruments legal consequences derive from that distinction, since only grave breaches of the instruments give rise to an obligation on the part of States to impose penal sanctions.

17. The Commission, for its part, had made no distinction between acts constituting war crimes on the basis of their degree of gravity. There is thus a difference of approach between the 1949 Geneva Conventions and the conventions which the Commission used as a basis for its 1954 draft code. This difference emerged in 1976 at the third session of the Diplomatic Conference on the reaffirmation and development of international humanitarian

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[9] See United Nations, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7), p. 64.

[10] V. V. Pella, "La codification du droit pénal international", *Revue générale de droit international public* (Paris), vol. 56 (1952), pp. 411-413.

[11] Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

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

[13] For a detailed commentary on this instrument, see *Law Reports of Trials of War Criminals* (15-volume series, prepared by the United Nations War Crimes Commission) (London, H.M. Stationery Office, 1947-1949), vol. I, p. 105.

[14] *Ibid.*, vol. III, p. 93.

[15] *Ibid.*, vol. V, p. 94.

[16] *Ibid.*, vol. XIV, p. 152.

[17] 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)).

law applicable in armed conflicts. Mr. Roucounas, recalling the difficult debate which took place on the subject at that conference, noted:

> ... certain delegations have constantly argued either that grave breaches of humanitarian law and war crimes are qualitatively identical, or that grave breaches form part of the broader category of war crimes, while other delegations have put forward many arguments to reject the idea that there could be any confusion between the two concepts.[18]

In reality this debate, which is basically theoretical in nature, is liable to create an antagonism between two concepts which are intimately linked—indeed, inseparable.

18. War crimes and grave breaches have certain aspects in common. They are two concepts which overlap in part. They overlap in all matters relating to the protection of persons and property envisaged in the Geneva Conventions and Additional Protocol I; thus article 85, paragraph 5, of the Protocol expressly provides that grave breaches of the Protocol are war crimes.

19. Yet war crimes and grave breaches overlap only in part. The concept of a war crime is broader than that of a "grave breach" because it applies not only to grave breaches of the Geneva Conventions and Additional Protocol I but also to other breaches, particularly those relating to the conduct of hostilities and the unlawful use of weapons. For that reason the present draft code defines a war crime as a "serious violation" of the laws or customs of war, in preference to the expression "grave breach", attributing to the latter term the limited technical sense given to it in the Geneva instruments.

20. In the present draft article 13, however, the adjective "serious" is provisionally in brackets, because it will be up to the Commission to make its choice: either to call any violation of the law of war a war crime, or to regard as war crimes only serious violations which are criminal in nature, as distinct from those which fall into the category of correctional offences.

21. This problem did not escape the attention of the Commission. At its second session a debate took place, on 4 July 1950, about the proposal made by a member of the Commission, the late Manley O. Hudson, to include in the definition of a war crime only acts of a certain gravity.[19] This proposal was based on the 1949 Geneva Conventions, which had included the concept of degree of gravity in their definition of certain breaches. The Special Rapporteur, Jean Spiropoulos, said that he regarded "every violation of the laws of war as a crime".[20]

22. In the course of more recent debates, however, during the consideration of the fourth report of the present Special Rapporteur, some members said that only serious violations should be included. In their view, since the Commission had defined crimes against the peace and security of mankind as very serious offences, only war crimes of a very serious nature should be included. War crimes would then come within the purview of, and become part of, a broader concept—that of crimes against the peace and security of mankind; and it is hard to imagine how acts which are not highly serious could be considered as crimes against the peace and security of mankind.

23. Among the actions currently termed "war crimes", some are merely correctional offences: grievous bodily harm, for example. Some of the military tribunals, particularly those of the British Zone, have been criticized for sometimes applying Law No. 10 to trifling offences. One explanation for this situation was the desire of those tribunals to cast a wide net so as not to allow reprehensible acts to go unpunished, even if they did not fall into the category of crimes *stricto sensu*. Moreover, it should be borne in mind that Law No. 10, unlike the Charters of the Nürnberg and Tokyo Tribunals, had defined war crimes as atrocities or offences (art. II, para. 1 (*b*)). The word "crime" did not have its technical meaning, but its general meaning of a breach.

24. Today, for the sake of greater legal accuracy, it might be appropriate to restore to the word "crime" its meaning of grave breach. It is hard to see how petty offences, or correctional offences, could be brought before an international criminal court, unless they were related to criminal actions brought before the same court. Minor incidents cannot be regarded as crimes against the peace and security of mankind. The act prosecuted must have a certain degree of criminality; not all the acts characterized as war crimes are equally horrific.

25. Even when limited to acts constituting a serious violation of the law of war, the concept of a war crime would always be broader than that of a grave breach, particularly since the list of these breaches in the Geneva instruments is limitative. There is an area where the concept of a war crime prevails, where the concept of a "grave breach" will not apply: that is the area concerning the conduct of hostilities and the unlawful use of weapons. There are already many international instruments on these subjects.[21] Independently of these instruments, there are the complex and as yet unresolved problems of weapons of mass destruction: chemical weapons, nuclear weapons, etc. It does not seem necessary to provide a list of these weapons in the code. The drawbacks of the enumerative method have already been indicated above, and that method will not be reverted to.

26. In short, the concept of "grave breach" within the meaning of the 1949 Geneva Conventions and of Additional Protocol I is narrower than that of a "war crime" within the meaning of the present draft code, which covers not only the grave breaches envisaged in those instruments but also other violations of the law of

[18] E. J. Roucounas, "Les infractions graves au droit humanitaire", *Revue hellénique de droit international* (Athens), vol. 31 (1978), p. 70.

[19] See *Yearbook ... 1950*, vol. I, pp. 148-149, 60th meeting, paras. 12 and 21.

[20] *Ibid.*, para. 15.

[21] For example: Declaration renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, signed at St. Petersburg on 11 December 1868 (*British and Foreign State Papers, 1867-1868*, vol. LVIII (1876), p. 16); Declaration concerning expanding (dumdum) bullets, signed at The Hague on 29 July 1899 (J. B. Scott, *op. cit.* (footnote 4 above), p. 227); Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, signed at The Hague on 18 October 1907 (*ibid.*, p. 151); Treaty relating to the Use of Submarines and Noxious Gases in Warfare, signed at Washington on 6 February 1922 (M. O. Hudson, ed., *International Legislation*, vol. II (1922-1924) (Washington, D.C., 1931), p. 794); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 (League of Nations, *Treaty Series*, vol. XCIV, p. 65).

armed conflicts. It is true that article 1, paragraph 2, of Additional Protocol I uses the famous Martens clause of the preamble to the Hague Convention (IV) of 1907. Yet it can hardly be assumed on that basis that the enumeration of grave breaches in the Geneva instruments is not limitative. It would seem that the intention of the authors of those instruments was, instead, to draw up an exhaustive list. Therefore the concept of a grave breach has a content which is not only limited but to some extent established, while the concept of a war crime has a content which will expand as new prohibitions add to the arsenal of prohibited weapons.

27. These differences should not be used as a justification for establishing a division between war crimes and grave breaches of humanitarian law, however. A distinction has sometimes been made between what was known as the law of The Hague and the law of Geneva, the latter referring more particularly to the fate of persons and property protected by the Geneva Conventions, and the law of The Hague relating more particularly to the conduct of hostilities or the regulation and prohibition of the use of certain weapons. This distinction would be all the less valid today because article 35 of Additional Protocol I reproduces article 22 of the Hague Convention (IV) of 1907 and develops it further. The distinction between a war crime and a grave breach is therefore less clear-cut today. However, there are differences which should be stressed.

4. Drafting comments on the two alternatives for draft article 13

28. The first alternative retains the expression "laws or customs of war", on the understanding that the word "war" is to be taken in its material sense, not in its traditional and formal sense. As such it applies to any armed conflict, not only armed conflicts between States.

29. The second alternative uses the expression "rules of international law applicable in armed conflict" in preference to "laws or customs of war".

II. Crimes against humanity

A. Draft article 14

30. The Special Rapporteur proposes the following draft article 14:

Article 14. Crimes against humanity

The following constitute crimes against humanity:

1. Genocide, in other words any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

(i) killing members of the group;

(ii) causing serious bodily or mental harm to members of the group;

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) imposing measures intended to prevent births within the group;

(v) forcibly transferring children from one group to another group.

2 (FIRST ALTERNATIVE). *Apartheid*, in other words the acts defined in article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and, in general, the institution of any system of government based on racial, ethnic or religious discrimination.

2 (SECOND ALTERNATIVE). *Apartheid*, which shall include policies and practices of racial segregation and discrimination [as practised in southern Africa] and shall apply to the following inhuman acts committed for the purpose of establishing or maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(*a*) denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) by murder of members of a racial group or groups;

(ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(*b*) deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(*c*) any legislative measures and other measures calculated to prevent a racial group or groups from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(*d*) any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of marriages among members of various racial groups, and the expropriation of landed property belonging to a racial group or groups or to members thereof;

(*e*) exploitation of the labour of the members of a racial

group or groups, in particular by submitting them to forced labour;

(*f*) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*.

3. Slavery and all other forms of bondage, including forced labour.

4. (*a*) Expulsion or forcible transfer of populations from their territory;

(*b*) Establishment of settlers in an occupied territory;

(*c*) Changes to the demographic composition of a foreign territory.

5. All other inhuman acts committed against any population or against individuals on social, political, racial, religious or cultural grounds, including murder, deportation, extermination, persecution and the mass destruction of their property.

6. Any serious and intentional harm to a vital human asset, such as the human environment.

B. Comments

31. Crimes against humanity were dealt with in article 2, paragraphs (10) and (11), of the 1954 draft code. Paragraph (10) is devoted to acts constituting the crime of genocide, and paragraph (11) to so-called "inhuman acts". Nevertheless, the 1954 draft contains neither the expression "crimes against humanity" nor the word "genocide", and it seems useful to give them their rightful place, for the reasons stated below. Further, although the 1954 draft makes a distinction between acts of genocide and inhuman acts, it does not offer any definition of an inhuman act but simply provides an enumeration based solely on the motives of the act (political, racial, religious, cultural motives, etc.).

32. The new draft article 14 takes up the concept of crimes against humanity, which is reflected in its title. This concept must not be abandoned, since it is this which endows such crimes with their specific characteristics, that is, as crimes of particular infamy and horror, and which emphasizes their status as crimes under international law.

1. The concepts of crimes against humanity and genocide

33. It was not by chance that the expression "crimes against humanity" was included in the Charters of the International Military Tribunals created following the Second World War; it was included only after thorough consideration. The question dates back to the work of the United Nations War Crimes Commission, established on 20 October 1943 in London.[22] Let there be no confusion, here, as to the meaning of "United Nations", which is not related to the organization of that name which came into being two years later at San Francisco; the reference is only to the Allied nations at war with the Axis Powers. The question quickly arose within that Commission as to whether the investigations should be restricted to war crimes in the traditional sense of the expression or whether they should be extended to include other offences. The 1943 Commission first attempted to extend the list of offences that had been drawn up by the 1919 Commission on Responsibilities on the basis of the Martens clause in the preamble to the 1907 Hague Convention (IV).[23]

34. However, it soon became apparent to the 1943 Commission that recourse to that clause would not allow for coverage of all the categories of crimes committed during the Second World War. In fact, some breaches, however broad the concept of war crime, could not be included in such a category. That applied particularly to crimes where the perpetrators and victims were of the same nationality, or where the victims had the nationality of a State allied to that of the perpetrator. This was true of Nazi crimes against German, Austrian and other nationals, and crimes against stateless persons and against other persons on the basis of racial, religious, political or other motives.

35. The 1943 Commission then proposed to term such breaches "crimes against humanity", considering that they represented breaches of a particular kind which, even though committed during the war, had original characteristics which set them apart, in certain respects, from war crimes.

36. The 1943 Commission extended its competence to such crimes "committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed".[24] The British Government, on being consulted, supported that argument as early as 1944 but emphasized that such crimes should be taken into account only if they were linked to a state of war.

37. With the signing of the London Agreement, on 8 August 1945,[25] the concept of "crimes against humanity" was definitively incorporated in the Charter of the Nürnberg Tribunal (art. 6 (*c*)), in the Charter of the Tokyo Tribunal (art. 5 (*c*)) and in Law No. 10 of the Allied Control Council (art. II, para. 1 (*c*)).

38. First linked to a state of belligerency, as stated above, the concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes. Thus, not only the 1954 draft code but even conventions which have entered into force (on genocide and *apartheid*) no longer link that concept to a state of war.

39. The question thus arises of why the 1954 draft code failed to use the expression "crimes against humanity" in article 2, paragraphs (10) and (11). Nevertheless, in the "Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal",[26] the International Law Commission gave the expression its rightful place. The omission should here

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

[23] See footnote 4 above.

[24] *History of the United Nations War Crimes Commission* . . ., p. 176.

[25] See footnote 11 above.

[26] Hereinafter referred to as the "Nürnberg Principles"; for the text, see *Yearbook* . . . *1985*, vol. II (Part Two), p. 12, para. 45.

be made good and the concept restored once and for all. It is one of the tenets of international law, evolved through its progressive development. Crimes against humanity have their own specific characteristics which differentiate them from war crimes.

40. It is true that a single act may be both a war crime and a crime against humanity if committed in time of war (thus article 85, paragraph 4 (*c*), of Additional Protocol I to the 1949 Geneva Conventions includes the practice of *apartheid* among war crimes). But this fact, while justifying dual categorization, should not lead to any confusion of the two concepts. The concept of crimes against humanity is broader than that of war crimes from at least two standpoints:

(*a*) Crimes against humanity may be committed in time of war or in time of peace; war crimes can be committed only in time of war;

(*b*) War crimes can be committed only between belligerents, between perpetrators and victims who are adversaries; crimes against humanity may be committed between nationals or between belligerents.

41. Thus the concept again has its own content and specific characteristics which justify retaining the expression "crimes against humanity".

42. The same is true of the term "genocide". The acts listed in article 2, paragraph (10), of the 1954 draft code are those which constitute the crime of genocide. The list was taken from the Convention of 9 December 1948.[27] Paragraph 1 of the new draft article 15 thus applies the term "genocide" to such acts in general.

2. The concept of inhuman acts

43. The concept of inhuman acts may be applied both to attacks on persons and to attacks on property.

(a) *Attacks on persons*

44. Two comments are necessary in this regard. First, the acts listed in article 2, paragraph (11), of the 1954 draft code may all constitute common crimes and appear in nearly all internal criminal codes. Next, they may be either physical ill-treatment or humiliating or degrading acts.

45. The thing that distinguishes inhuman acts from common crimes is the motive. They are acts that are prompted by ideological, political, racial, religious or cultural intolerance and strike at a person's innermost being, i.e. his convictions, beliefs or dignity. It is worth mentioning in this regard the decisions of the Supreme Court of the British Zone, which stated, in one of its first rulings:

> . . . all sorts of attacks which cause injury to persons may constitute or cause crimes against humanity: any type of interference in a person's existence, growth and development or sphere of action, any alteration in his relations with his environment, any attack on his property or his values by which he is indirectly affected . . .[28]

46. Accordingly, humiliating or degrading acts which cannot be considered physical atrocities, such as inflicting flagrant public humiliations or forcing individuals to act against their conscience and, in general, ridiculing them or forcing them to perform degrading acts, may constitute crimes against humanity. For this reason, draft article 14 is specifically concerned with any humiliating or degrading treatment meted out to population groups or groups of persons on political grounds or because of their race, religion, etc.

(b) *Attacks on property*

47. The 1954 draft code did not include attacks on property within the definition of crimes against humanity. They were, however, included in the list of war crimes provided in Principle VI (*b*) of the Nürnberg Principles, as well as in the Charters of the International Military Tribunals, which mentioned the "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity".[29] The controversy aroused by the phrase "not justified by military necessity" will not be dealt with here. That issue relates to the laws of war and is not part of the present discussion.

48. The question which arises here is whether attacks on property may constitute crimes against humanity. The existing instruments relating to crimes against humanity do not specifically mention attacks on property. It may be asked whether they are of a sufficiently serious nature to be treated as crimes against humanity.

49. Judicial opinion had tended to favour the treatment of mass attacks on property as criminal. The matter of the collective fine of 1 billion marks imposed on German Jews by the decree of 12 November 1938, following the assassination of a German diplomat in Paris by a Jew of Polish origin, is illustrative. A United States military tribunal, in the judgment it rendered against certain ministers of the Third Reich,[30] had seen in this fine a typical example of "the persecution to which German Jews were subjected", falling into the category of "persecutions on political, racial or religious grounds" included in the definition of crimes against humanity in the Charter of the Nürnberg Tribunal (art. 6 (*c*)). According to the judgment, the confiscation and liquidation for the benefit of the Reich of property belonging to German Jews were a "part of the Jewish persecutions carried on in the Reich and constitute[d] violations of international law and agreements and crimes under count five" of the indictment. According to count five, the German authorities' appropriation and liquidation of the possessions of concentration-camp prisoners, among other things, were considered to be crimes against humanity. One may also cite the decision of 4 July 1946 of the Court of Appeal of Freiburg im Breisgau on the subject: "The illegal confiscation of Jewish property in 1940 by govern-

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[27] Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, *Treaty Series*, vol. 78, p. 277).

[28] *Entscheidungen des Obersten Gerichtshofs für die Britische Zone in Strafsachen*, vol. 1 (Berlin, 1949), p. 13; cited in Meyrowitz, *op. cit.* (footnote 30 below), p. 274.

[29] Article 6 (*b*) of the Charter of the Nürnberg Tribunal; see also article II, para. 1 (*b*), of Law No. 10 of the Allied Control Council.

[30] See *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Nuernberg, October 1946-April 1949)* (Washington, D.C., U.S. Government Printing Office, 1952), case No. 11 (*The Ministries Case*), vol. XIV, in particular pp. 676 and 678; cited in H. Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 267.

ing bodies of the State constitutes a crime against humanity".[31]

50. It therefore follows from such judicial precedents that attacks on property may constitute crimes against humanity if they display the dual characteristics of being inspired by political, racial or religious motives and of being mass actions.[32]

51. Such precedents remain fully valid today, not only because prejudices are still deeply rooted but especially because, in addition to national property, a new category of property has appeared which is increasingly considered to be the heritage of mankind. Many monuments throughout the world have a historical, architectural or artistic significance which places them in that category.

52. In the past, many monuments were destroyed because they were not protected. That resulted in a great loss to mankind, as in the case of the fire which destroyed the Alexandria Library at the beginning of the Christian era. In recent years, UNESCO has classified certain sites and monuments as belonging to the heritage of mankind. An example is the island of Gorée in Senegal, which for centuries was a major centre of the slave-trade and the farthest point in Africa from which the slave-ships departed for the Americas. The former trading-posts which have been preserved there for centuries symbolize that wretched period of human history and constitute a place of contemplation and pilgrimage.

53. Furthermore, it should be noted that attacks on property of cultural value were already prohibited by conventions still in force. The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, signed at Washington on 15 April 1935[33] (reinforcing the Roerich Pact), was already a step in that direction. It should be noted that the Treaty was concerned both with wartime and with peacetime. After the Second World War, the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May 1954, under the auspices of UNESCO,[34] also aimed, despite its title, at the protection of cultural property in peacetime; article 3 stipulated that such protection was incumbent upon the parties in time of peace. This Convention gave the following very broad definition of cultural property:

Article 1. Definition of cultural property

...

(*a*) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(*b*) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (*a*) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (*a*);

...

54. It should also be noted that the 1954 Hague Convention provided for penal or disciplinary sanctions against persons committing an offence against the property to which it referred.

55. Even more recently, the provisions of article 85, paragraph 4 (*d*), of Additional Protocol I to the Geneva Conventions of 12 August 1949 classified as a grave breach

(*d*) Making the clearly recognized historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof . . .[35]

56. It is true that in this case the destruction of property may not constitute a war crime if the property so destroyed is located in immediate proximity to military targets, but this does not undermine the principle. Moreover, when it is a question of crimes against humanity, this restriction does not apply, for such crimes are incited by different motives and may be committed irrespective of any state of war.

57. Vital human assets, such as the environment, should also be mentioned.

58. The reasons outlined above therefore led the Special Rapporteur to include attacks on property in draft article 14, paragraph 5.

3. Mass or systematic nature

59. The Charters of the International Military Tribunals are concerned with inhuman acts committed against the "civilian population".

60. Does an act need to affect a mass of people in order to constitute a crime against humanity? The mass nature of an act is one criterion of a crime against humanity, but it is not the only one. On occasion, an inhuman act committed against a single person may also constitute a crime against humanity if it is part of a system, or is carried out according to a plan, or has a repetitive nature which leaves no doubt as to the intentions of the author.

61. The mass nature of the crime obviously implies a plurality of victims, which is often made possible only by the plurality of authors and the mass nature of the means employed. Crimes against humanity are often committed by individuals making use of a State apparatus or means placed at their disposal by major financial groups. In the case of *apartheid*, it is the State apparatus; in the case of genocide or mercenarism, it is either or both of these means.

62. As stated above, however, an individual act may constitute a crime against humanity if it is part of a coherent system and of a series of repeated acts incited by the same political, racial, religious or cultural motive.

63. In reality, the conflict between supporters of the "mass crime" position and supporters of the "individual crime" position seems to be a non-debate.

[31] *Deutsche Rechts-Zeitschrift* (Tübingen), vol. 1 (1946), p. 93; cited in Meyrowitz, pp. 267 and 268.

[32] Meyrowitz, p. 269.

[33] League of Nations, *Treaty Series*, vol. CLXVII, p. 289.

[34] United Nations, *Treaty Series*, vol. 249, p. 215.

[35] See footnote 5 above.

64. An examination of the Charters of the International Military Tribunals (Charter of the Nürnberg Tribunal, art. 6 (*c*); Charter of the Tokyo Tribunal, art. 5 (*c*); Law No. 10 of the Allied Control Council (art. II, para. 1 (*c*)) shows that they are concerned with mass crimes (extermination, enslavement, deportation) and with cases involving individual victims (murder, imprisonment, torture, rape).

65. The Legal Committee of the United Nations War Crimes Commission expressed its views in these terms:

> . . . As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.[36]

66. Meyrowitz, for his part, wrote that:

> Crimes against humanity must in fact be interpreted as comprising not only acts directed against individual victims but also acts of participation in mass crimes, according to one of the methods specified in article II (2) [of Law No. 10].[37]

The author cites a memorandum dated 15 October 1948 by the British military government (Zonal Office of the Legal Adviser) stating that it was neither the number of victims nor who they were that allowed an act to be characterized as a crime against humanity, but rather the fact that the act was linked

> to systematic persecution of a community or a part thereof. An inhuman act committed against a single person might thus constitute a crime against humanity "if the motive for that act resides wholly or partly in such systematic persecution" directed against a specific group of persons. . . .[38]

67. In summary, where the mass element is absent, an individual act should constitute a link in a chain and be part of a system or plan. The notion of system, plan and repetitiveness is necessary in order to categorize an act committed against an individual victim as a crime against humanity.

4. Other crimes

68. In addition to attacks on property, other offences have also been included: *apartheid*, the practice of slavery, the expulsion or forcible transfer of indigenous peoples from their territory, the establishment of settlers in an occupied territory, and changes in the demographic composition of a foreign territory, by force or by any other means.

69. There is no need to go over again the controversies generated by the mention of *apartheid*. Some members of the Commission preferred that it should not be specifically mentioned and that the Commission should confine itself to the more general term "racial discrimination". However, a very large group held an opposing view based on the specific features of that crime which put it in a class of its own. It should merely be noted that two alternatives have been proposed for paragraph 2 of draft article 14, one referring to the 1973 Convention on *apartheid*,[39] the other reprinting the entire text of article II of the Convention in the body of the draft.

70. With regard to slavery, article 1, paragraph 1, of the Slavery Convention of 25 September 1926[40] defined it as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". Article 1, paragraph 2, defined the slave-trade as including

> all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

The slave-trade was already considered a crime in this Convention, for the contracting States undertook to bring about its abolition (art. 2). Later, the Universal Declaration of Human Rights[41] of 10 December 1948 (art. 4) and the International Covenant on Civil and Political Rights[42] of 19 December 1966 (art. 8) condemned the practice of slavery in the strongest terms.

71. Similarly, the International Covenant on Civil and Political Rights (art. 8, paras. 2 and 3) referred to servitude and forced labour. The Covenant thus took as its model the provisions of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 7 September 1956,[43] which states in its preamble that "no one shall be held in slavery or servitude".

72. It should be noted that the 1954 draft code had already classified enslavement as an inhuman act. However, some members of the Commission deemed it preferable to devote a special provision to the subject.

5. Drafting comments on draft article 14

73. Acts constituting the crime of genocide and acts constituting "inhuman acts" were dealt with in two separate paragraphs in the 1954 draft code. Though it had been pointed out at a previous session of the Commission that the distinction between acts constituting genocide and so-called inhuman acts did not appear to be warranted, as genocide was also an inhuman act (it is, in fact, the prototype of an inhuman act), the present report has retained this distinction owing to the differing degrees of gravity of the various inhuman acts and the specific features which characterize some of them.

74. The second comment concerns the listing of acts which may constitute inhuman acts within the meaning of the draft code. As stated earlier, certain acts listed in

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[36] *History of the United Nations War Crimes Commission . . ., op. cit.* (footnote 22 above), p. 179; cited Meyrowitz, *op. cit.* (footnote 30 above), p. 253.

[37] Meyrowitz, p. 255.

[38] Meyrowitz, p. 281, citing an excerpt from the British note published in *Zentral-Justizblatt für die Britische Zone* (Hamburg), vol. 2 (1948), pp. 250-251. See also the Special Rapporteur's fourth report (*Yearbook . . . 1986*, vol. II (Part One), pp. 58 *et seq.*, document A/CN.4/398), paras. 31-51.

[39] International Convention on the Suppression and Punishment of the Crime of *Apartheid* (United Nations, *Treaty Series*, vol. 1015, p. 243).

[40] League of Nations, *Treaty Series*, vol. LX, p. 253.

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

[42] United Nations, *Treaty Series*, vol. 999, p. 171.

[43] *Ibid.*, vol. 266, p. 3.

the 1954 draft (murder, imprisonment) may also constitute common crimes. Murder as such does not constitute a crime against humanity, nor does arbitrary imprisonment. These acts become crimes against humanity only by virtue of the surrounding circumstances. They do not in and of themselves constitute crimes against humanity. Accordingly, this was taken into account in the drafting of article 14, with emphasis being placed on the moral aspects of the act and on its motives, rather than on its material aspects, for the same act may be characterized differently depending on the circumstances in which it was committed.