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Twelfth 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

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DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 4]

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

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	Source
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	Ibid., vol. 213, p. 221.
International Pact on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968)	Ibid., vol. 754, p. 73.
American Convention on Human Rights (San José, 22 November 1969)	Ibid., vol. 1144, p. 123.

Introduction

1. This report for the second reading of the draft Code of Crimes against the Peace and Security of Mankind will focus, this year, on the general part of the draft—definition, characterization and general principles.

2. Part II of the draft Code, concerning the crimes themselves, will be dealt with in the next report.

3. The Special Rapporteur intends to limit the list of such crimes to offences whose characterization as crimes against the peace and security of mankind is hard to challenge.

4. This report on part I of the draft reproduces, article by article, the draft adopted on first reading,[1] each article being followed by comments from Governments, then by the Special Rapporteur's comments. The observations of Governments are presented sometimes in full and sometimes partially, depending on their significance; more often than not, they are presented in full. With one or two exceptions, all the observations are reflected. When they are not, that is because, in the opinion of the Special Rapporteur, they seemed unrelated to the topic.[2]

5. Since most of the questions raised in the observations of Governments have already been dealt with at length in the Special Rapporteur's earlier reports and in a discussion in plenary meeting, the Special Rapporteur sees no point in restating the arguments and discussions for the second reading, and is content to refer back to earlier reports and to the Commission's discussions.

[1] For the text, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94-107.

[2] The replies from Governments are reproduced *in extenso* in document A/CN.4/448 and Add.1. (*Yearbook . . . 1993, vol. II (Part One)*, pp. 59 et seq.) In the present report, paragraphs indicated in parentheses are the relevant paragraphs of Government observations as they appear in document A/CN.4/448 and Add.1.

Draft articles

CHAPTER I. DEFINITION AND CHARACTERIZATION

Article 1

6. Article 1 adopted on first reading is as follows:

Article 1 (Definition)

The crimes [under international law] defined in this code constitute crimes against the peace and security of mankind.

(a) *Observations of Governments*

Belgium

7. The Belgian Government points out (para. 9) that:

> it is not really necessary to choose between a conceptual definition and an enumerative list of crimes, since the two approaches are complementary. It is regrettable that no conceptual definition is given, since, whatever the difficulties involved in establishing such a definition, it remains true that the list of crimes must inevitably be based on it.

Bulgaria

8. Bulgaria proposes (para. 3) a general definition followed by an enumeration. The text would read as follows:

"*Article 1 (Definition)*

1. For the purposes of this Code, a crime against the peace and security of mankind is any act or omission committed by an individual, which is in itself a serious and immediate threat to the peace and/or security of mankind or results in violation thereof.

2. In particular the crimes defined in this Code constitute crimes against the peace and/or security of mankind."

(b) *Comments of the Special Rapporteur*

9. The observations of Governments on this article have focused essentially on whether a definition by enumeration would suffice or whether there should be a general definition instead.

10. These observations show that there is no agreement on any one method.

11. The compromise formula proposed by the Bulgarian Government might be adopted, subject to drafting improvements. Many penal codes contain no general definition of the concept of crime. They merely enumerate the acts regarded as crimes, on the basis of the criterion of seriousness.

12. Another topic of discussion raised by article 1 has to do with the words in square brackets "under international law". Ultimately, the Special Rapporteur has no objection to their deletion. This is a purely theoretical debate. Once the Code becomes an international instrument, the crimes defined therein would automatically come under international criminal law derived from treaties.

Article 2

13. Article 2 adopted on first reading is as follows:

Article 2 (Characterization)

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

(a) *Observations of Governments*

Austria

14. The Austrian Government takes the view (para. 3) that the idea expressed in the second sentence is not strictly necessary. It is "understood from the first sentence, according to which the characterization is independent of internal law".

Brazil

15. To the Government of Brazil (para. 4) there appears to be a contradiction between articles 2 and 3, inasmuch as article 2 envisages an act or omission, whereas article 3 refers only to the commission of an act, not to an omission.

Costa Rica

16. The Government of Costa Rica fears that the draft article, by providing for the complete autonomy of international law with regard to internal law, might permit a situation in which an accused person is tried twice for the same act, once under internal law and a second time under international law (para. 12).

Nordic countries

17. The Governments of the Nordic countries take the view that the provision in article 2 should be made less categorical, since the draft Code includes crimes normally punishable under internal law (para. 13).

United Kingdom of Great Britain and Northern Ireland

18. According to the Government of the United Kingdom (para. 6):

> it is hardly conceivable that acts should be punishable pursuant to an international code which are not in general of a type punishable under national criminal law. It would appear that the drafters of the article had in mind that the perpetrator of an offence under a code may not be exonerated by virtue of the act not being criminal by the law of the place in which it was committed at the time of its commission.

(b) *Comments of the Special Rapporteur*

19. Article 2 establishes the autonomy of international criminal law with regard to internal law.

20. Thus the fact that a crime is characterized as murder by the internal law of a State would not preclude the characterization of the same act as genocide on the basis of the Code, if the constituent elements of genocide are present.

21. Some governments take the view that the second sentence of draft article 2 is redundant and therefore propose its deletion.

22. The Special Rapporteur has no objection to such deletion.

CHAPTER II. GENERAL PRINCIPLES

Article 3

23. Article 3 adopted on first reading is as follows:

Article 3 (Responsibility and punishment)

1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.

3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in arts. . . .] is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.

Comments of the Special Rapporteur

1. EXPLANATORY REMARKS

24. Article 3 sets forth the principle of international criminal responsibility of the individual, a principle now accepted in international criminal law since the Judgment of the Tribunal at Nürnberg.[3]

25. Paragraph 3 of this article prompted reservations on the part of some members of the Commission, who noted—and quite pertinently—that the concept of attempt is not applicable to all crimes against the peace and security of mankind. It is difficult to imagine, for example, how there can be an attempted threat of aggression.

26. Nevertheless, there are cases where attempt is expressly covered by existing conventions, e.g. the Convention on the Prevention and Punishment of the Crime of Genocide (art. III, para. (*d*)).

27. That is why members of the Commission had proposed a case-by-case determination of the relevant crimes to which the concept of attempt might apply. Such an exercise is impossible and pointless. As the Government of Belarus remarks (para. 6), it is not advisable

> to consider every crime with a view to determining whether the characterization of attempt is applicable to it; the competent courts should have the right to decide for themselves whether this characterization is applicable to the specific content of cases before them.

[3] United Nations, *Statute and Judgment of the Nürnberg Tribunal, History and Analysis, memorandum of the Secretary-General* (Sales No. 1949.V.7).

2. PROPOSAL OF THE SPECIAL RAPPORTEUR

28. The Special Rapporteur agrees. He proposes, however, a rewording of the first sentence of paragraph 3. The words "a crime against the peace and security of mankind" should be replaced by "one of the acts defined in this Code". The paragraph would therefore read as follows:

> "An individual who commits an act constituting an attempt to commit one of the acts defined in this Code is responsible therefor and is liable to punishment."

29. In this way, the act is punishable only if the court considers that it actually constitutes an attempt.

Article 4

30. Article 4 adopted on first reading is as follows:

Article 4 (Motives)

Responsibility for a crime against the peace and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime.

(a) *Observations of Governments*

31. For some governments, it would be more appropriate to include this provision in article 14, which deals with defences and extenuating circumstances.

Austria

32. The Austrian Government thinks (para. 7) that motives should be taken into account as aggravating or extenuating circumstances.

Costa Rica

33. According to the Government of Costa Rica (para. 21), this provision goes too far. "Respect for justice begins with respect for the accused. It is therefore essential not to hinder the defence but instead to pave the way for solutions."

Netherlands

34. In the opinion of the Government of the Netherlands (para. 35), this article is redundant, as the same points are covered in article 14, which deals with extenuating circumstances.

United Kingdom

35. The Government of the United Kingdom (para. 9) thinks that "this provision would be more appropriately located as part of article 14".

(b) *Comments of the Special Rapporteur*

1. EXPLANATORY REMARKS

36. This article has prompted many reservations.

37. For some Governments, it interferes with the rights of the defence, in so far as it prohibits the accused from invoking his own motives in his defence. That is the opinion of the Government of Costa Rica.

38. For the Government of the United Kingdom, the text would be better placed in the draft article on extenuating circumstances. That is also the opinion of the Government of the Netherlands.

2. PROPOSAL OF THE SPECIAL RAPPORTEUR

39. The Special Rapporteur thinks that this article should be deleted. It is not clear. Sometimes the motive is part of the definition of an offence, sometimes it is not. In the case of genocide, for example, the motive is an element of the offence. Indeed, with the crime of genocide, the perpetrator is prompted by racial, political or religious motives. In the absence of such motives, that offence does not exist. There are, however, cases where the motive is not an integral part of the definition of the offence.

40. In the opinion of the Special Rapporteur, this article should simply be deleted.

Article 5

41. Article 5 adopted on first reading is as follows:

Article 5 (Responsibility of States)

Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

(a) *Observations of Governments*

Belgium

42. According to the Belgian Government (paras. 15 and 16):

> There ought to be an article in the Code dealing with the question of the international responsibility of States. The State as such is inevitably involved in any crime against the peace and security of mankind, either directly as the active and, in some cases, the sole agent, or indirectly because of its failure to act or its own improvidence. It therefore seems unusual that State responsibility should not have been dealt with in the Code. It should also be noted that inclusion of State responsibility in the Code would make it possible to provide a sound juridical basis for the granting of compensation to the victims of crimes and other eligible parties.
>
> Moreover, holding the State responsible for crimes, independently of the responsibility of the Government and agents of the State, would mean that the nation would feel some collective involvement in the act in question, thereby making it difficult for the nation to lay all the blame on the Government, on which it has conferred political power.

Costa Rica

43. The Government of Costa Rica (para. 22) finds this draft article necessary in terms of "damages in connection with the crimes under consideration".

Nordic countries

44. The Nordic countries express the same opinion (para. 16) and refer to the need to "ensure that States are not relieved of responsibility for war reparations, and the like".

Poland

45. That is also the opinion of the Polish Government (para. 28):

Prosecution, conviction and punishment of individuals under the provisions of the Code for the crimes described therein are in no way a substitute for the State's responsibility.

(b) *Comments of the Special Rapporteur*

46. Article 5 sets forth the principle of the international responsibility of a State for damage caused by its agents as a result of a criminal act committed by them. The text has elicited no unfavourable comments. Governments all agree that a State should be held internationally liable for damage caused by its agents as a result of a criminal act committed by them.

47. A single criminal act often has dual consequences: criminal consequences, namely the penalty imposed on the perpetrator, and civil consequences, namely the obligation to compensate for the damage. Very often, the perpetrators of the crimes under consideration here are agents of a State acting in an official capacity. In such cases, State responsibility must be determined, especially as the scope and extent of the damage far exceed the resources for reparation available to the agents of the State who committed the crimes.

48. Accordingly, article 5 is useful and should be retained.

Article 6

49. Article 6 adopted on first reading is as follows:

*Article 6 (Obligation to try or extradite)**

1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court.

* This article will be reviewed if an international criminal court is established.

(a) *Observations of Governments*

Australia

50. The Australian Government notes (para. 9 and 10) that:

The obligation to "try or extradite" is to be found in many multilateral conventions dealing with crimes in international law and is of fundamental importance to the enforcement of these conventions. The need to incorporate it in the Code is unquestionable.

51. That Government considers, however, that it might be necessary to specify the grounds on which extradition could be sought and to establish procedural rules.

52. The Government also takes the view that the draft does not solve the problem of priority when there is more than one request for extradition.

Brazil

53. The Brazilian Government stresses the need for sufficient evidence to support the request for extradition (para. 8).

Costa Rica

54. The Government of Costa Rica also stresses the need for adequate guarantees in support of the request for extradition (para. 25).

Netherlands

55. The Government of the Netherlands takes the view (para. 37) that it is essential to provide sufficient guarantees that the suspect will be treated in accordance with the provisions of article 8 of the Code. The Government indicates that this could be achieved either by adding a clause which explicitly prohibits extradition if the requesting State fails to provide the guarantees described in article 8, or by adding to article 6 the phrase "subject to the guarantees provided for in article 8".

United Kingdom

56. The Government of the United Kingdom also notes that the principle set forth in article 6, paragraph 1, is found in many international conventions. According to that Government, however, the principle should be limited to States parties to the Code (para. 12).

57. With regard to paragraph 2, the Government refers to the difficulty encountered by the Commission in allocating priorities when extradition is sought by a number of States. According to that Government, priority is usually given to the State in whose territory the crime was committed.

58. It notes, however, that

realistically, the likelihood of any provision proving workable where extradition is sought for senior government or military figures from the State in which they have carried out their official acts is remote.

59. Lastly, the Government of the United Kingdom draws attention to the problem that arises where extradition is sought with no real intention to prosecute.

Switzerland

60. In common with the Government of the United Kingdom, the Swiss Government is concerned at the situation created when there are several extradition requests (para. 8).

Uruguay

61. The Government of Uruguay links the application of article 6 to the establishment of an international criminal jurisdiction (para. 3).

(b) *Comments of the Special Rapporteur*

62. Governments do not challenge the principle set forth in article 6, but are concerned at how it might be applied.

63. One point relates to the guarantees to be provided to the accused whose extradition is being requested. That point was dealt with carefully in the Commission's report on the establishment of an international criminal jurisdiction.[4] In this connection, the formula adopted in the draft statute for an international criminal court should be used in the Code.

64. A second point has to do with the scope of the rule set out in article 6. According to some States, the rule should apply only to States parties to the Code. That view deserves favourable consideration.

65. A third point concerns the order of priority when there are several requests for extradition.

66. The principle of territoriality of criminal law is unanimously accepted and, accordingly, the request of the State where the crime was committed must have priority; nevertheless, this rule should not be considered absolute. As pointed out by some Governments, including the British and Swiss Governments, the rule gives rise to reservations when the State where the crime was committed bears some responsibility in its commission.

67. That rule might also prompt reservations if an international criminal court existed.

68. Can a request by a State in whose territory the crime was committed have priority over a request by an international criminal jurisdiction?

69. The answer must be in the negative.

Article 7

70. Article 7 adopted on first reading is as follows:

[4] *Yearbook... 1993*, vol. II (Part Two), document (A/48/10), annex.

Article 7 (Non-applicability of statutory limitations)

No statutory limitation shall apply to crimes against the peace and security of mankind.

(a) *Observations of Governments*

Costa Rica

71. According to the Government of Costa Rica (paras. 27 and 28), "the issue of statutory limitations is one of policy regarding crime, and... States do not follow uniform rules in this respect; . . . the monstrousness of these types of crimes would 'morally' justify the non-applicability of statutory limitations; however, the contemporary legal trend is towards short statutory-limitation periods". For the Government of Costa Rica, however, the solution would be the establishment of a "statutory-limitation period to be negotiated with countries on the basis of the longest such limitation periods for ordinary crimes in internal law".

Netherlands

72. For the Government of the Netherlands, the acceptability of the provision depends largely on the crimes to be included in the Code; the rule on non-applicability of statutory limitations can be accepted only if the crimes are serious enough to justify that provision (para. 39).

Nordic countries

73. The Nordic countries also take the view (para. 18) that non-applicability of statutory limitations might be acceptable in regard to the most serious crimes, but is "much more doubtful in those cases where conflicting national criminal laws prescribe statutory limitation after a certain period of time".

Paraguay

74. The Government of Paraguay proposes, in place of non-applicability of statutory limitations, the establishment of a time limit longer than that applicable to common crimes.

Poland

75. For the Polish Government (para. 30):

the provision providing that no statutory limitation shall apply to crimes against the peace and security of mankind is direct evidence that these crimes are primarily crimes of international law, determined and constituted by this law.

Turkey

76. The Government of Turkey proposes "perhaps a relatively extensive" statute of limitations (para. 5).

United Kingdom

77. For the Government of the United Kingdom, "the suggested rule could hamper attempts at national reconciliation and the granting of amnesty for crimes".

(b) *Comments of the Special Rapporteur*

1. Explanatory remarks

78. The foregoing observations demonstrate that the rule of non-applicability of statutory limitations is not universally accepted by States.

79. This rule is of recent date. It emerged after the Second World War, on the initiative of the United Nations, in the form of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and General Assembly resolution 3074 (XXVIII), concerning the principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. Paragraph 1 of the resolution states that such crimes must be prosecuted "whenever committed".

80. However, those instruments are limited in scope, since they cover only war crimes and crimes against humanity. It would seem difficult to extend the rule to all other crimes covered by the Code.

2. Proposal of the Special Rapporteur

81. In the circumstances, the Special Rapporteur considers that article 7 of the draft Code should be deleted. Only general rules applicable to all crimes against the peace and security of mankind should be included in the Code. The rule set forth in draft article 7 does not appear to be applicable to all the crimes listed in the Code, at least according to the terms of existing conventions.

Article 8

82. Article 8 adopted on first reading is as follows:

Article 8 (Judicial guarantees)

An individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to both the law and the facts. In particular: he shall be presumed innocent until proven guilty. and he has the right:

(*a*) in the determination of any charge against him, to have a fair and public hearing before a competent, independent and impartial tribunal duly established by law or by treaty;

(*b*) to be informed promptly and in detail, in a language that he understands, of the nature and cause of the charge against him;

(*c*) to have sufficient time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(*d*) to be tried without undue delay;

(*e*) to be present at his trial and to defend himself in person or through legal assistance of his own choosing; to be informed if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(*f*) to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(*g*) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(*h*) not to be compelled to testify against himself or to confess guilt.

(a) *Observations of Governments*

Australia

83. Australia believes that this article "provides the minimum guarantees necessary to ensure that an alleged offender would receive a fair trial" (para. 12).

Austria

84. The Government of Austria is "in general agreement with the substance of this provision, which essentially corresponds to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms" (para. 8).

Brazil

85. The Government of Brazil suggests (para. 10) that:

subparagraphs (c) and (g) of this article should be improved. In fact, the right of an individual charged with a crime to communicate with counsel of his own choosing should be extended to the counsel assigned to him . . .

Costa Rica

86. The Government of Costa Rica, invoking the American Convention on Human Rights, asserts that "in Costa Rica, even if draft article 8 did not exist, the Convention and the constitutional rules of due process would be applied" (para. 29).

Netherlands

87. The Government of the Netherlands also ascribes great importance to the guarantees set forth in article 8.

(b) *Comments of the Special Rapporteur*

88. Article 8 has garnered a broad consensus. It conforms to the provisions of the Universal Declaration of Human Rights[5] and the International Covenant on Civil and Political Rights.

Article 9

89. Article 9 adopted on first reading is as follows:

[5] General Assembly resolution 217 A (III).

Article 9 (**Non bis in idem**)

1. No one shall be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.*

2. Subject to paragraphs 3, 4 and 5, no one shall be tried or punished for a crime under this Code in respect of an act for which he has already been finally acquitted or convicted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by an international criminal court or by a national court for a crime under this Code if the act which was the subject of a trial and judgement as an ordinary crime corresponds to one of the crimes characterized in this Code.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:

(*a*) if the act which was the subject of the previous judgement took place in the territory of that State; or

(*b*) if that State has been the main victim of the crime.

5. In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty imposed and implemented as a result of a previous conviction for the same act.

* The reference to an international criminal court does not prejudge the question of the establishment of such a court.

(a) *Observations of Governments*

Australia

90. In the view of the Government of Australia (paras. 14-16), paragraph 1 provides for full protection against prosecution for crimes under the Code where persons have already been finally acquitted or convicted by an international criminal court.

91. Paragraph 2, however, provides for a more limited protection against "double jeopardy" in the case where a person has already been finally acquitted or convicted by a national court. However, the protection offered in paragraph 2 is made subject to exceptions contained in paragraphs 3 and 4.

92. Paragraph 3 envisages that a person can be tried both under the Code and under the domestic criminal law of a State. Although such cases may not be common, they certainly would weaken the concept of "double jeopardy", which is a fundamental principle of the criminal law of many countries.

Costa Rica

93. In the view of the Government of Costa Rica (para. 32), paragraph 3 "directly violates the *non bis in idem* principle and should be deleted". Paragraph 5 "should also be eliminated, since it allows for a second conviction for acts already punished as ordinary crimes" (para. 34).

Netherlands

94. The Government of the Netherlands (para. 42) considers paragraph 3 of the draft article incompatible with the principle of *non bis in idem.*

95. Furthermore, it considers (para. 44) that:

problems relating to the principle of *non bis in idem* can only be prevented by granting exclusive competence to an international criminal court. In any other circumstances, this principle would raise problems.

United Kingdom

96. The Government of the United Kingdom (para. 15)

reserves its position on this proposal, which at first sight conflicts with the corresponding provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.

(b) *Comments of the Special Rapporteur*

1. General comments

97. The foregoing observations by governments indicate that they have entered many reservations to article 9.

98. In view of the objections it raised in the Drafting Committee, the article represents a compromise between two opposing schools of thought.

99. One school of thought endorses the principle of *non bis in idem* and supports its incorporation in the draft Code, while the other opposes its incorporation. It then becomes evident that there are many exceptions to the principle set forth in paragraph 1. Two assumptions can be made: (*a*) the decision is rendered by an international criminal jurisdiction, or (*b*) it is rendered by a national jurisdiction.

2. First assumption: an international criminal court is in existence

(a) *Explanatory remarks*

100. The assumption under which the *non bis in idem* principle is most likely to be accepted is that of the existence of an international criminal tribunal.

101. In the event that this tribunal has exclusive jurisdiction, the question of the applicability of the *non bis in idem* principle would not arise since in that case—purely hypothetical at this point—no other court would be competent to hear a case that falls within the competence of an international criminal court.

102. If, on the contrary, the international jurisdiction has concurrent jurisdiction with national jurisdictions, the *non bis in idem* rule would be relevant since it might raise the question whether a national court has jurisdiction over a case that has already been tried by the international criminal court.

103. The answer has to be no; it would destroy the authority of the international court if national courts had jurisdiction over cases already tried under that international jurisdiction.

(b) *New text of article 9 proposed by the Special Rapporteur*

104. Article 9 might be modelled after draft article 10 of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991[6] and would read as follows:

"1. No person shall be tried before a national court for acts constituting crimes against the peace and security of mankind for which he or she has already been tried by an international tribunal.

2. A person who has been tried by a national court for acts constituting crimes against the peace and security of mankind may be subsequently tried by the International Tribunal only if:

(*a*) The act for which he or she was tried was characterized as an ordinary crime and not as a crime against the peace and security of mankind;

(*b*) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not vigorously prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Code, the Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."

3. SECOND ASSUMPTION: AN INTERNATIONAL CRIMINAL TRIBUNAL DOES NOT EXIST

105. If there is no international criminal tribunal, it becomes much more difficult to apply the *non bis in idem* principle to decisions already handed down by a national court. Consequently, paragraph 2 allows for many exceptions to the application of the *non bis in idem* principle.

106. The first exception is the case of incorrect characterization of the crime. This exception is not merely theoretical; an act might be characterized as an ordinary crime—homicide, for example—whereas it actually constituted a crime against the peace and security of humanity, such as genocide.

107. This incorrect characterization might be voluntary and prompted by sympathy for the alleged perpetrator of the crime. This might occur where an individual who is being prosecuted takes refuge in a friendly State or one he finds politically compatible. That State may then agree to bring him to trial and the *non bis in idem* principle will prevent him from being tried under any other national jurisdiction. In that case, application of this principle would open the door to manipulation and create loopholes, making it difficult to apply the *non bis in idem* principle fairly and faithfully.

108. But the most important exceptions are those provided for in paragraph 4 because they uphold the authority of the State in whose territory the crime was committed or the State that was the victim or whose nationals were victims. Being subject to these exceptions, the scope of applicability of the *non bis in idem* principle can be expected progressively to shrink. Moreover there is no guarantee that those States would demonstrate greater objectivity or impartiality than the ones whose ruling they question.

109. It is the view of the Special Rapporteur that if exceptions are to be made in support of the State in whose territory the crime was committed or the State whose nationals were victims, those States should not be empowered to try a case in their own courts which has already been tried by another national court. Such cases should be retried in the court of a neutral State.

110. On the other hand, that solution would be difficult to carry out. That is why the Special Rapporteur finds that the *non bis in idem* principle appears to be applicable only under the first of the above assumptions, that is, provided an international criminal tribunal exists.

Article 10

111. Article 10 adopted on first reading is as follows:

Article 10 (Non-retroactivity)

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

(a) *Observations of Governments*

Netherlands

112. In the view of the Government of the Netherlands, the expression "in conformity with international law" should be deleted (para. 45).

Paraguay

113. The Government of Paraguay states (para. 10) that non-retroactivity

is a cardinal principle of the legal order and it is dangerous to permit exceptions to it. Paraguay believes, therefore, that paragraph 2 of this article should be deleted.

The Government of Paraguay is also concerned that the commentary on the article gives the word "lex" a very broad meaning, encompassing not only written law but also custom and general principles of law.

[6] S/25704, annex.

Turkey

114. The Turkish Government believes that paragraph 2 sets forth a principle which is "among the basic principles of criminal law and should be made use of in the draft" (para. 6).

(b) *Comments of the Special Rapporteur*

115. Paragraph 1 has not given rise to any objections on the part of Governments. It reaffirms a basic principle of criminal law.

116. Only one Government objected to paragraph 2. It should be recalled that this paragraph merely reproduces the text of article 11 of the Universal Declaration of Human Rights and article 15, paragraph 2, of the International Covenant on Civil and Political Rights. It would be desirable to retain the text in its entirety.

Article 11

117. Article 11 adopted on first reading is as follows:

Article 11 (Order of a Government or a superior)

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order.

(a) *Observations of Governments*

Austria

118. The Austrian Government proposes (para. 13) inserting the following words after the word "if" in the third line: " . . . he knew or should have known of the illegality of the order and if . . . ".

Belarus

119. The Government of Belarus proposes (para. 12) that the words "if, in the circumstances at the time, it was possible for him not to comply with that order" should be replaced by the words "if, in that situation, he had a genuine possibility of not carrying out the order".

Costa Rica

120. The Government of Costa Rica notes (para. 37) that under the article,

> the possibility of punishment arises only where an order which is blatantly illegal or in violation of human rights has been carried out by a subordinate agent of the State.

The Government proposes that the draft penal code for Spain (1992) should be used as a model.

Nordic countries

121. In the view of the Nordic countries (para. 21), the word "possible" must be more clearly defined.

Poland

122. The Polish Government also has doubts (para. 36) about the meaning of the expression "if, in the circumstances at the time, it was possible for him not to comply with that order".

(b) *Comments of the Special Rapporteur*

123. This principle has already been affirmed in the Principles of International Law Recognized in the Charter and Judgement of the Nürnberg Tribunal (Principle IV).[7] The Commission has merely replaced the expression "provided a moral choice was in fact possible to him" by the expression "if, in the circumstances at the time, it was possible for him not to comply with that order".

124. This principle, which was elaborated by ILC and adopted by the General Assembly, should not be called into question without good reason.

Article 12

125. Article 12 adopted on first reading is as follows:

Article 12 (Responsibility of the superior)

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

(a) *Observations of Governments*

Nordic countries

126. In the view of the Nordic countries (para. 22):

> This provision, which concerns a superior's failure to attempt to prevent a criminal act, goes further in terms of criminalizing such failure than is acceptable in the Nordic countries. In order for such responsibility to exist, it is generally required that the substantive provisions give rise to an obligation to act on the part of the person who has omitted to act. Moreover, it may be difficult to reconcile the provision with the definition of individual responsibility set out in article 3.

(b) *Comments of the Special Rapporteur*

127. Article 12 establishes a presumption of responsibility on the part of the superior for crimes committed by his subordinates. This presumption of responsibility

[7] *Official Records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316), pp. 12 et seq. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

derives from the jurisprudence of the international military tribunals established after the Second World War to deal with crimes committed during the war and to which the Special Rapporteur referred at some length in his fourth report.[8] This jurisprudence is based on a presumption of responsibility on the part of the superior owing to negligence, failure to supervise or tacit consent, all of which are offences that make the superior criminally responsible for crimes committed by his subordinates.[9]

Article 13

128. Article 13 adopted on first reading is as follows:

Article 13 (Official position and responsibility)

The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.

(a) *Observations of Governments*

Costa Rica

129. The Costa Rican Government believes (para. 39) that:

all systems of immunity appear to be excluded by this article; however, account should be taken, as a rule of penal procedure, of the various cases in which these types of government officials can be prosecuted, rather than leaving it as a rule in principle which, as such, could be inapplicable.

Nordic countries

130. The Nordic countries consider (para. 23) that:

it must be presumed that even heads of State cannot be absolved of international responsibility for their acts if these acts constitute a crime against the peace and security of mankind. This must apply even if the constitution of a particular State provides otherwise.

Poland

131. In the view of the Polish Government (para. 37):

the provisions [of article 13] do not recognize any kind of immunity with respect to the position or office of an individual who commits a crime, including persons that are heads of State or Government. It is a serious but logical and reasonable limitation of the full immunity of heads of State. Such immunity cannot be a measure which would allow them to be over and outside criminal responsibility for crimes against the peace and security of mankind.

United Kingdom

132. The Government feels (para. 17) that

it is obviously important for the effective implementation of the Code that officials, including heads of State or Government, are not relieved of criminal responsibility by virtue of their official position. However, the Commission has failed to address here, and in article 9, the possible immunity of such officials from judicial process. The Commission should consider the immunity from jurisdiction to which officials may be entitled under international law, and to consider the relationship of this draft with existing rules on the subject.

(b) *Comments of the Special Rapporteur*

133. The opinion of the Government of Costa Rica does not appear to be acceptable.

134. It is difficult to provide in detail for the various cases in which heads of State or Government should be prosecuted. What can be said is that whenever a head of State or Government commits a crime against the peace and security of mankind, he should be prosecuted. Article 13 should be retained as it stands.

Article 14

135. Article 14 adopted on first reading is as follows:

Article 14 (Defences and extenuating circumstances)

1. The competent court shall determine the admissibility of defences under the general principles of law in the light of the character of each crime.

2. In passing sentence, the court shall, where appropriate, take into account extenuating circumstances.

(a) *Observations of Governments*

Australia

136. The Government of Australia believes (para. 18) that:

an effort should be made to elucidate the reference to "defences under general principles of law" in paragraph 1 of article 14. If the Code is to deal with some essential ingredients of a crime—penalties for example—then it should also deal with other necessary incidents such as defences. In systems with constitutional guarantees of due process, draft article 14 may well be held to be unconstitutionally vague.

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[8] See *Yearbook... 1986*, vol. II (Part One), pp. 53 et seq., document A/CN.4/398.

[9] In the *Yamashita Case*, it is stated, *inter alia*, that:

"the question then is whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the Law of War ..."

(*Law Reports of Trials of War Criminals* (15-volume series prepared by United Nations War Crimes Commission) (London, H.M. Stationery Office, 1947-1949), vol. IV, p. 43).

In the *High Command Case*, it is stated that responsibility does not automatically attach to a commander for all acts of his subordinates; there must be an unlawful act on his part or a failure to supervise his subordinates constituting criminal negligence on his part.

The commander must have had knowledge of these offences and must have acquiesced or participated or have criminally neglected to interfere in their commission (ibid., vol. XV, p. 70).

Likewise, the judgement delivered in the Tokyo Trial includes an interesting passage on responsibility for offences against prisoners of war, which shows that the International Military Tribunal for the Far East also was willing to postulate a duty on the part of a superior to find out whether offences were being committed by his subordinates.

"It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes" (ibid., vol. XV, p. 73).

137. The Government of Australia also believes (para. 19) that:

consideration should be given to separating article 14 into two articles, one dealing with defences and the other dealing with extenuating circumstances. As noted by some members of the Commission, defences and extenuating circumstances are two different concepts best treated separately.

Austria

138. The Austrian Government points out (para. 14) that:

This article deals with two different principles: the need to take into account circumstances excluding criminal responsibility (para. 1) and extenuating circumstances (para. 2). The latter principle (as well as aggravating circumstances) comes into play by determining the extent of the penalty applicable to the perpetrator of a crime but has nothing to do with criminal responsibility.

139. The Austrian Government (paras. 15 and 16)

does not share the negative attitude of some members of the Commission towards taking into account reasons for exemption from punishment (i.e. plea of insanity) with regard to crimes against the peace and security of mankind. Paragraph 2 should be completed by mentioning aggravating circumstances, which are also to be taken into account in determining the extent of penalty. It shares the view of some members of the Commission regarding the insertion of a descriptive enumeration of possible extenuating (and aggravating) circumstances.

Belarus

140. The Government of Belarus points out (para. 13) that:

the Russian version of article 14 should refer to circumstances attenuating responsibility rather than circumstances attenuating guilt. Moreover, this article should be divided into separate articles, since paragraphs 1 and 2 refer to different legal concepts. In the article referring to the grounds which would allow for adjustability of the penalty, these grounds should be specified and should include self-defence, state of necessity, coercion and bona fide confusion. The possibility of applying them to each type of crime could be left for the court to consider.

141. The Belarusian Government states (paras. 14 and 15) that:

the question of extenuating circumstances can be considered in conjunction with the question of penalties. It would be preferable to formulate a general article on penalties for all crimes, establishing the minimum and maximum penalties and listing the extenuating circumstances. An alternative to including a scale of penalties, in the event that the provisions of the Code are applied by national courts, could be to require that the crimes should be punished in a manner commensurate with their extreme danger and gravity.

The list of extenuating circumstances could be indicative in nature and could include, in particular, the commission of a crime under duress, on the order of a superior; and sincere remorse or acknowledgement of guilt.

142. The Government of Belarus finds it commendable (para. 16) that:

the draft Code refrains from drawing a distinction between crimes against peace, war crimes and crimes against humanity . . . care should be taken to avoid distinguishing between crimes on the basis of State participation at the stage of formulating substantive legal provisions. The criterion of State participation will be of crucial importance at a later stage when the mechanism for implementing the Code is worked out.

Belgium

143. According to the Belgian Government (paras. 17 and 18),

the concept of defences, as provided for under draft article 14, would appear difficult to apply to crimes against the peace and security of mankind. The question thus arises whether it would be preferable to delete article 14. Hypothetically, a judge could invoke the general principles of criminal law, such as extenuating circumstances, when having to assess the situation in which the crime* was perpetrated*.

Brazil

144. The Government of Brazil notes (para. 12) that:

as far as article 14 is concerned, what is stated about "defences and extenuating circumstances under the general principles of law" seems to be insufficient. The provisions are somewhat vague since it is difficult, based only upon "the general principles of law", to indicate which circumstances should be taken into account. As a matter of fact, the great number of provisions of a broad scope seems to be one of the most difficult problems hampering the Commission's effort to codify. As far as the draft is concerned, criminal law, by its own nature and the values involved, requires a greater level of definition and demands a more detailed regulation.

Costa Rica

145. According to the Government of Costa Rica (para. 40),

if a more technical formulation of the need for judges to evaluate such circumstances is desired, it is necessary to draft a generic rule concerning the aspects which should be taken into account in apportioning blame, as is done in article 71 of the Costa Rican Penal Code.* In any case, even though this article takes many defences and extenuating circumstances into account for this purpose, while penal characterization can take into account the existence of qualifying aspects which influence the extent of the penalty on the basis of the same indictment, thereby reducing the extent of the judge's discretion, it is a decision relating to policy regarding crime which needs to be evaluated.

Nordic countries

146. The Nordic countries consider (paras. 24 to 26) that:

paragraphs 1 and 2 should be placed in separate articles because there is a fundamental difference between circumstances that absolve a perpetrator of responsibility for an act and circumstances that have a bearing on the sentence.

As the article is currently worded, it gives no indication of the circumstances to be taken into account when trying a crime. Thus, any court is free to interpret the provision, which is hardly in conformity with the rule of law. The Nordic countries deem it appropriate to determine the significance of self-defence and state of necessity. The problem of consent may also arise in various contexts.

Furthermore the draft Code includes two other articles (arts. 11 and 13) that deal with grounds on which a perpetrator may be relieved of responsibility. These should be combined with article 14. One way of doing this could be to enumerate the circumstances that exempt an individual from accountability, and those that do not. The circumstances set out in articles 11 and 13 of the current draft would then be among those that do not in any case relieve of accountability.

147. The Nordic countries note further (para. 27) that:

another problem with the draft is that it does not include any provisions that govern cases in which a perpetrator is insane or otherwise unaccountable for his actions at the time of committing the act.

148. It is the view of the Nordic Governments (para. 28) that article 14, paragraph 2

should also govern aggravating circumstances. Moreover, it is necessary to define and exemplify what is meant by the terms "extenuating" and "aggravating" circumstances, as the provision in its present wording is practically without substance.

Poland

149. With regard to paragraph 1, the Government of Poland would like to underscore (para. 38) that:

this paragraph includes traditional criminal law defences such as self-defence, coercion, state of necessity, *vis maior* and error—all related to the existence or non-existence of responsibility. Extenuating and maybe other kinds of circumstances, which might be taken into account by the Commission in the second reading, determine only the increasing or the lowering of the penalty.

150. In the opinion of the Polish Government (para. 39):

paragraph 2 should be supplemented by adding "aggravating circumstances" and also "other circumstances" such as, for example, the personality of the offender, the gravity of the effects of the crime and others, as the case may be.

Paraguay

151. The Government of Paraguay notes (para. 11) that article 14, paragraph 1, provides that:

the competent court shall determine the admissibility of defences under the general principles of law in the light of the character of each crime.

152. It is that Government's opinion that:

defences (justifications, grounds for inculpability and for non-imputability) are so important a matter in penal law that to refer to "general principles of law", thereby leaving a great deal to the judge's discretion, seems inappropriate. It would be wiser, if we do not wish to spell out the grounds for the defence, to refer to the laws of the country in which the crime was committed.

Switzerland

153. The Swiss Government (para. 9) is of the view that:

the notion of combining in a single article two basic concepts of penal law which are as alien to each other as defences and extenuating circumstances would appear to be questionable. The effect of a defence is to strip the act of its unlawful character on the ground that the perpetrator did not act knowingly and wilfully. In short, responsibility, which is the prerequisite for punishment, is lacking. Extenuating circumstances, by contrast, do not strip the act of its unlawful character; they simply moderate its penal consequences. It would therefore be advisable to envisage two separate provisions.

United Kingdom

154. The Government of the United Kingdom notes (para. 18) that:

it is clearly undesirable to leave vague a provision so vital both to the conceptualization of a crime against the peace and security of mankind and to the rights of the defendant. The more grave the crime, the less likely it is that a wide panoply of defences and extenuating circumstances will be permitted. If, as currently envisaged under article 6, it is national courts which will have jurisdiction under the Code, article 14 needs to be redrafted. National courts cannot be left to delineate defences and extenuating circumstances which will be admitted under the Code. Fairness and consistency would be entirely lost. It is symptomatic of the haste and lack of precision with which these articles have been drafted that paragraph 1 leaves open the possibility of defences to match specific crimes without any attempt at enumeration. Separate enumeration would be the better approach; although certain general defences will apply to all crimes, it is difficult to conceive of "blanket defences" which will adequately cover the circumstances of each and every crime set out in part II.

(b) *Comments of the Special Rapporteur*

1. Explanatory remarks

155. The Special Rapporteur agrees with those governments that believe that the concept of defences and that of extenuating circumstances should be dealt with separately. The two concepts are not in the same category. While defences strip an act of its criminal character, extenuating circumstances do not remove this criminal character, but merely reduce the offender's criminal responsibility. In other words, defences relate to the existence or non-existence of a crime, extenuating circumstances relate to the penalty.

156. The Special Rapporteur shares the view that defences, because they seek to prove that no crime exists, should be defined in the Code in the same way that crimes are defined in the Code according to the *nullum crimen sine lege* principle.

157. The Special Rapporteur has therefore proposed a new article 14 to deal with the issue of defences, namely, *self-defence, coercion* and *state of necessity.*

2. New text proposed by the Special Rapporteur

158. The Special Rapporteur proposes a new text for article 14 which reads as follows:

"*Article 14 (Self-defence, coercion and state of necessity)*

There is no crime when the acts committed were motivated by self-defence, coercion or state of necessity."

3. Comments on the proposed new draft article 14

159. The self-defence referred to here is not related to the international responsibility of the State provided for in Article 51 of the Charter of the United Nations, which exempts the State from international responsibility for an act committed by that State in response to an aggression. However, because it makes that exception to the international responsibility of the State, self-defence also relieves the leaders of that State of international criminal responsibility for that act. As for the concepts of coercion and state of necessity, the juridical precedents of the International Military Tribunals established by the Charter of the Nürnberg Tribunal [10] and by law No. 10 of the Allied

[10] 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).

Control Council,[11] had admitted these concepts with the following reservations and conditions:

(*a*) Coercion and state of necessity must constitute a present or imminent danger.[12]

(*b*) An accused person who invokes coercion or state of necessity must not have helped, by his own behaviour, to bring about coercion or the state of necessity.[13]

(*c*) There should be no disproportion between what was preserved and what was sacrificed in order to avert the danger.[14]

160. Finally, it must be noted that judicial practice, which has its origins in Anglo-American law, makes no distinction between coercion and state of necessity.[15]

New article 15

161. The Special Rapporteur proposes a new article 15, as follows:

"Article 15 (Extenuating circumstances)

When passing applicable sentences, extenuating circumstances may be taken into account by the court hearing the case."

Comments of the Special Rapporteur

162. It is generally admitted in criminal law that any court hearing a criminal case is entitled to examine the circumstances in which an offence was committed and to determine whether there are any circumstances that diminish the responsibility of the accused.

163. Furthermore, the Special Rapporteur did not believe it appropriate to discuss aggravating circumstances since the crimes considered here were deemed to be the most serious of the most serious crimes. However, the question was one for the Commission to decide.

[11] 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)).

[12] The requirement regarding the imminence of danger was affirmed by the German Federal Court, which stated that "the order of a superior may constitute the moral coercion provided for in paragraph 52 of the German penal code, but that presupposes that the perpetrator was coerced to commit the act under the threat of imminent danger. The meaning of paragraph 52 is not that all those who served crime and terror under the national socialist regime for many years of their own volition can escape responsibility by simply claiming that they feared for their physical integrity and their life had they refused to continue to participate in criminal acts" (*Bundesgerichtshof*, 14 October 1952, *Neue Juristische Wochenschrift*, 1953, p. 112). See also Henri Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi No. 10 du Conseil de controle allié* (Paris, Librairie général de droit et de jurisprudence, 1962), p. 406.

[13] The requirement that an accused person who invokes the defence of coercion or of necessity may not have participated, by his own behaviour, in bringing about the coercion or state of necessity was emphasized in the *I.G. Farben* case. The American Military Tribunal declared that the excuse of necessity is not admissible when the accused person who invokes it has himself been responsible for the existence or non-existence of such an order or when his participation has gone beyond that which was required or was the result of his own initiative (See *Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10 (Nürnberg, October 1946-April 1949)* (Washington, D.C., United States Government Printing Office, 1949-1953, case No. 6, vol. VIII, p. 1179).

[14] The requirement of proportionality between the good or preserved interest and the good or sacrificed interest was emphasized, in particular in the *Krupp* case and others. The accused, out of fear that they would be dismissed as company executives if they failed to follow general and specific instructions, had subjected prisoners to forced labour. That fear, according to the Tribunal, could not justify a choice which benefited them but went against the unfortunate victims who, in this case, had no choice at all.

Furthermore, it was only fair to say, in the light of the evidence, that in a concentration camp, the accused would not have found themselves in a worse situation than the thousands of defenceless victims whom they exposed daily to the danger of death, to serious physical suffering due to privation and to the relentless aerial bombings of weapons factories, not to mention the forced servitude and other outrages they had to endure. The disproportion between the number of actual victims and the number of possible victims is equally shocking (ibid., case No. 10, vol. IX , p. 1446).

[15] Henri Meyrowitz, op. cit.